

# TB LAW

NEWSLETTER

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## Are Your Employees Exempt? Are You Sure?

It's not just the NLRB you need to fear as employees increasingly turn to courts to collect unpaid wages

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# ANNOUNCEMENTS

## FIRM NEWS

### Tiffany & Bosco Has Moved Up

To serve you better, Tiffany & Bosco is proud to announce its Phoenix offices have moved up to the seventh floor of the Camelback Esplanade II. Our new space is designed with our clients in mind, offering more offices and meeting rooms, as well as 21st century virtual communications and conferencing.

With great appreciation, we all recognize the immeasurable contributions by the law firm's coordination team: attorneys **Michael E. Tiffany**, **Mark S. Bosco**, and **J. Larry McCormley**; Chief Operating Officer **Kevin J. Newell**; and IT Administrator **Kevin Wiese**. We also give special thanks to Brad Krause and Alexandra Ayres of Krause Interiors, Holder Construction Company, CBRE, and MetLife for their special vision, hard work, and implementation of Tiffany & Bosco's goals in helping to create our spectacular new home.

### Shareholders, Firm Recognized by *Best Lawyers*

The *Best Lawyers in America* is a listing of outstanding attorneys who have attained a high degree of peer recognition and professional achievement. The 2014 listing has recognized: **Michael A. Bosco, Jr.** (Real Estate Law); **Mark S. Bosco** (Litigation – Banking & Finance and Mortgage Banking Foreclosure Law); **David L. Case** (Trusts and Estates and Litigation – Trust & Estates); **James A. Fassold** (Litigation – Trusts and Estates); **Alisa J. Gray** (Litigation – Trusts and Estates); **Richard G. Himelrick** (Litigation – Securities); **Christopher R. Kaup** (Litigation – Bankruptcy and Bankruptcy and Creditor Debtor Rights/Insolvency and Reorganization Law); **Leonard J. Mark** (Family Law); **James P. O'Sullivan** (Closely Held Companies and Family Business Law); and **Michael E. Tiffany** (Real Estate Law – Finance). *Best Lawyers* also recognized Tiffany & Bosco as a firm, nationally for Litigation – Securities, and locally for Real Estate Law, Litigation – Securities, Closely Held Companies and Family Business Law, Litigation – Bankruptcy, Trusts & Estates Law, Bankruptcy and Creditor Debtor Rights/Insolvency and Reorganization law, Litigation – Banking & Finance, and Litigation – Trusts & Estates.

## PROFESSIONAL AND PERSONAL ACHIEVEMENT

**EDWARD J. FETZER** served on the local forms committee for the U. S. Bankruptcy Court for the Southern District of California. The committee's phase one project, the "Individual Chapter 11 Combined Plan of Reorganization and Disclosure Statement and Instruction Sheet" for use in individual Chapter 11 bankruptcy cases, was made available via the court's website in July. Edward will continue to serve on the CASB local forms committee during the second phase of its project to prepare form motions and other documents for use in individual Chapter 11 bankruptcy cases.



William M. Fischbach

**WILLIAM M. FISCHBACH** has been appointed by the Phoenix City Council to serve on the Camelback East Village Planning Committee.



Alisa Gray



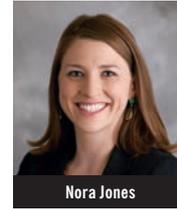
Jim Fassold

**ALISA GRAY** and **JIM FASSOLD** presented at the Maricopa County Bar Association. The topic of their presentation was "Ethics and Mindfulness for the Probate Practitioner." Alisa is a certified yoga instructor and Jim is a certified meditation instructor. Alisa also presented at the State Bar of Arizona Convention for the Probate and Trust Law Section. The topic of her presentation was "Challenges and Tools in Estate Planning" with a particular emphasis on risk management and ethics.



Hamid Jabbar

**HAMID JABBAR** was appointed to serve as a Judge *Pro Tempore* for the Superior Court in Maricopa County for the 2014-2015 term.



Nora Jones

**NORA JONES** has been selected to serve on the Executive Council of the State Bar of Arizona's Elder Law, Mental Health and Special Needs Planning Section.

**PAMELA L. KINGSLEY** is co-chair of the State Bar Employment & Labor Section's annual program in Sedona mid-October. The event is well-attended by attorneys from all parts of Arizona, who come to see and hear outstanding jurists, agency heads, attorneys, and other professionals from the entire nation.



May Lu

**MAY LU** presented at the National Business Institute's "LLC Workshop: Choose, Draft and Maintain" on September 15, 2014.

**MATTHEW K. SCHRIEVER** has been named chairman of the 2015 Great Strides for Cystic Fibrosis walk in Las Vegas. Great Strides is the Cystic Fibrosis Foundation's largest fundraiser, raising more than \$40 million in 2013 at nearly 600 walk sites across the country. Matthew has supported the Foundation since 2005.



Matthew K. Schriever

**GREGORY L. WILDE** has been reappointed for a second-year term as a creditor representative to the State of Nevada Foreclosure Mediation Program Advisory Committee. The committee reviews the happenings of the state's Foreclosure Mediation Program and reports to the Nevada Supreme Court.

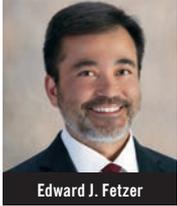


Gregory L. Wilde

# ANNOUNCEMENTS

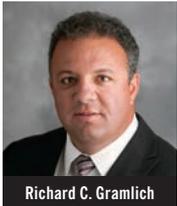
## NEW FACES

### NEW SHAREHOLDERS



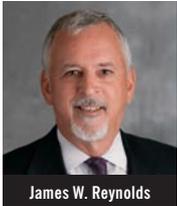
Edward J. Fetzer

**EDWARD J. FETZER** joined the firm in June 2014 as managing partner for the firm's California branch office in San Diego. Edward received his undergraduate degree from the Johns Hopkins University, his law degree from Southwestern University, and his LL.M. in International Law from the University of San Diego School of Law. He is licensed to practice law in California and Hawaii. Edward is a California State Bar Certified Specialist in Bankruptcy Law and is in his 16th year of practicing primarily bankruptcy law. He speaks Spanish, French, and Japanese. Edward is a U.S. Army veteran who served with the 101st Airborne Division at Fort Campbell, Kentucky and is a member of the San Diego Aikikai, where he recently received his first-degree black belt in Aikido.



Richard C. Gramlich

**RICHARD C. GRAMLICH** joined Tiffany & Bosco's Phoenix office as a shareholder in March 2014. Richard is an experienced litigation attorney who focuses his practice in the areas of construction, commercial, and business litigation. Prior to joining Tiffany & Bosco, Richard was the senior litigator at Carmichael & Powell, P.C., where he practiced in the same areas including personal injury, wrongful death, and product liability. Richard graduated from the University of Arizona in business administration and real estate, *cum laude*, in 1989 and from Arizona State University College of Law, in the top of his class, in 1992. He is licensed to practice in both state and federal courts, and is a member of the Arizona Trial Lawyers Association.



James W. Reynolds

**JAMES W. REYNOLDS** joined the firm as a shareholder in May 2014. Jim's legal practice focuses on business formations and acquisitions, real estate, equity and debt financing transactions, and related income tax issues for owner-managed businesses of all kinds and sizes. During the last 25 years, Jim has been actively involved in many American Bar Association and State Bar of Arizona committees that have drafted legislation governing limited liability companies. He currently co-chairs the State Bar committee engaged in a comprehensive review and revision of the Arizona LLC Act. Jim is a frequent speaker at professional conferences and seminars on the subject of limited liability companies. He is a graduate of Harvard Law School and the University of Pennsylvania.

### NEW ASSOCIATE



Theron S. Covey

**THERON S. COVEY** joined the firm in July 2014. Theron graduated from Oregon State University in 2002 with his degree in Business Administration and his minor in Economics. Theron then graduated *cum laude* from California Western School of Law in San Diego, California. He is licensed to practice law in California and Oregon, and is admitted to all district courts in the two states. Theron has focused his legal career in the areas of bankruptcy, real estate, business law, and creditors' rights. In his free time he enjoys off-shore fishing and spending time with his family. Theron is a sports enthusiast and a supporter of Oregon State University athletics.

## FIRM NEWS

### T&B Expands Its Footprint Into California

On June 1, 2014, Tiffany & Bosco opened a California branch to better serve its clients' needs in the State of California. This was made possible by bringing into Tiffany & Bosco attorneys Edward J. Fetzer and Theron S. Covey III. Edward is a shareholder at Tiffany & Bosco and serves as the onsite managing shareholder for the San Diego Branch and Theron is an associate. Mark S. Bosco serves as the Department Head for the California default practice group.

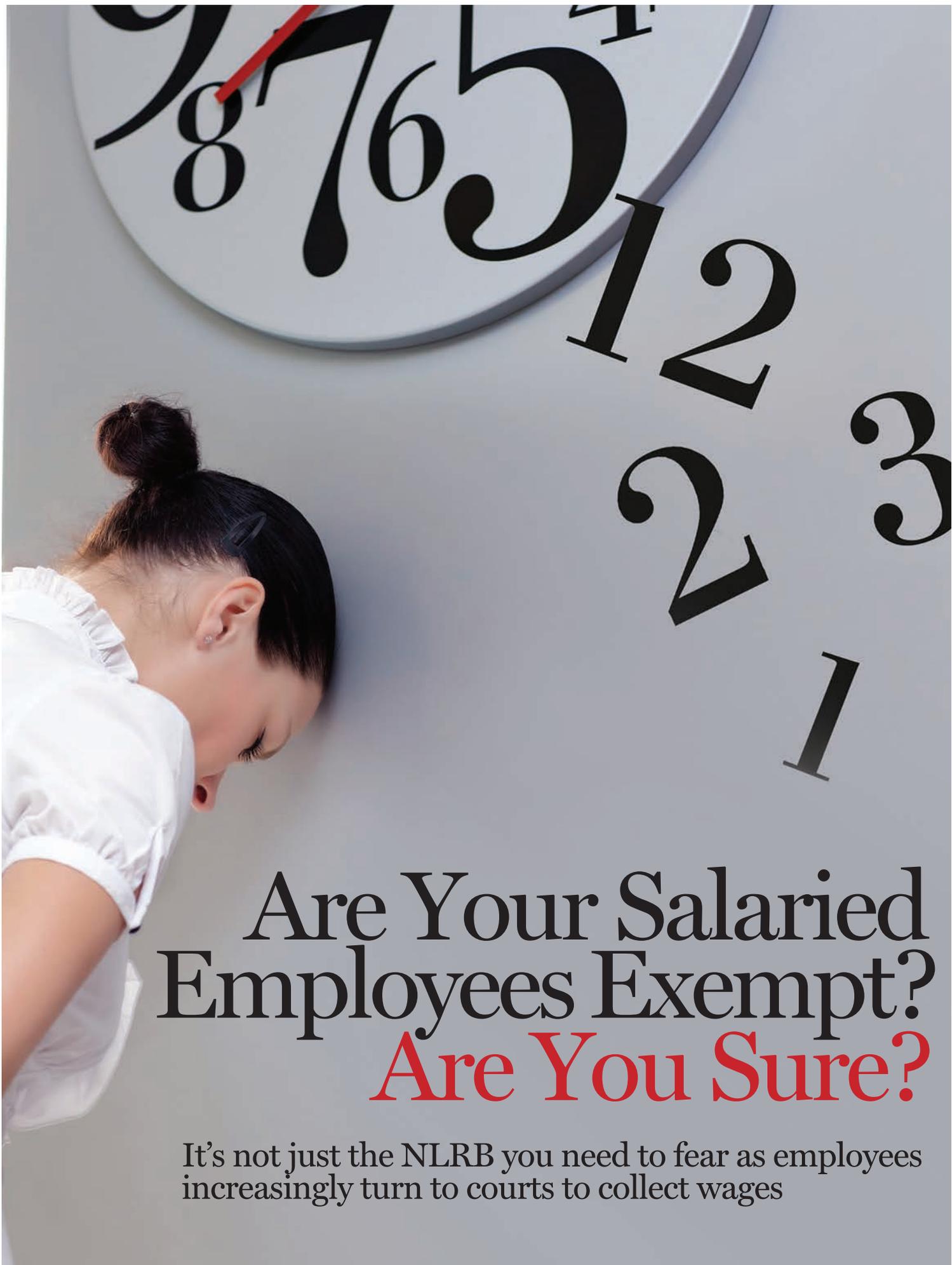
This complementary agreement between the attorneys brings Tiffany & Bosco to a total of 47 lawyers and a support staff of more than 125. This addition also exemplifies Tiffany & Bosco's continued commitment to providing its clients a wide range of legal services, both locally and throughout the Southwest. As observed by Mark Bosco, "With the rapid advancement of technology, the continuous business and real estate related issues impacting the Southwestern states, and the multi-jurisdictional litigation linking Arizona, California, and Nevada, having offices in these states for the convenience of clients makes perfect sense."

The California office of Tiffany & Bosco provides services primarily in the areas of foreclosure, creditor bankruptcy representation, eviction, and real estate and banking-related litigation in both state and federal courts. Along with the additional benefit of having the backing of the firm's main office in Phoenix, the California office has the inherent capability for expanding its reach even further into other areas of law and toward a wider client base.

### T&B Sponsors Golf Outing

Tiffany & Bosco was a law firm sponsor of the Michigan State University College of Law Alumni Association's 17th Annual Golf Outing in East Lansing, Michigan on August 8, 2014. **Aaron T. Lloyd** serves on the Board of Directors of the Alumni Association and is a 2010 graduate of the Law College.



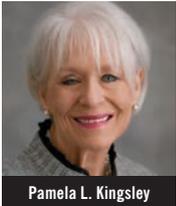


# Are Your Salaried Employees Exempt? *Are You Sure?*

It's not just the NLRB you need to fear as employees increasingly turn to courts to collect wages

# EMPLOYMENT LAW

By PAMELA L. KINGSLEY



Pamela L. Kingsley

“Low hanging fruit.” That is what local attorneys are calling their pickings when their clients have not been paid in strict accordance with the Fair Labor Standards Act. If you think your company is safe, think again.

## ***Minimum wage and overtime pay for more than a 40-hour workweek.***

These are the basic requirements. Unless a statutory exception applies, persons must be paid minimum wage and, if employed for a workweek longer than 40 hours, must be paid for the excess time “at a rate not less than one and one-half times the regular rate at which he is employed.” 29 U.S.C.A. § 207.

***Salaried does not mean exempt.*** Whenever a group of business owners is discussing exempt employees, probably more than one will identify all salaried employees as exempt. While salaried employees may be exempt, exemption requires more than just being salaried. Someone making a salary of \$60,000 a year, unless specifically exempt, earns that annual sum in five to 15 minute increments.

***To qualify as an exempt employee, specific tests must be met.*** The statute provides exemptions for bona fide executive, administrative, professional (learned and creative), computer, and outside sales employees if they are paid at least \$455 per week. If you are unsure about one or more of your employee designations, visit the Fact Sheets from the Department of Labor (“DOL”) at [www.dol.gov/elaws/esa/flsa/screen75.asp](http://www.dol.gov/elaws/esa/flsa/screen75.asp).



## **WHAT TO DO IF YOUR EMPLOYEES ARE NOT EXEMPT**

Assuming your company pays above minimum wage and your employees work close to 40 hours a week, make sure your employees accurately report their actual hours worked. You can round off to the nearest five minutes or even quarter of an hour, as long as it happens both ways, and does “not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked.” 29 C.F.R. § 785.48(b).

***Implement what you know is the law.*** Unless your company is going to pay time and a half, do not look the other way when your non-exempt

employee takes work home or works through lunch without having him later leaving early or coming in late. And stop permitting him to go full steam logging 50 hours one week and then giving him “comp” time of 10 hours the next. All time spent by an employee in a single work week must be accounted for in that week.

***The law allows recovery of up to double the amount of two to three years of back pay.*** It is bad enough when the DOL comes knocking. But the law allows an employee to “sue for back pay and an additional sum, up to the amount of back pay, as liquidated damages, plus attorney’s fees and court costs.” 29 C.F.R. § 1620.33. The employee can go back two years under normal circumstances, and three years if the violation is willful.

## **THE SHARKS WILL CIRCLE FOR BLOOD**

More and more, employees are bypassing the government and going straight to law firms with reputations for prosecuting wage and hour claims. Once an occasional occurrence, handfuls of lawsuits are filed weekly in Maricopa County, with judges ordering companies to turn over their time and payroll records, allowing wholesale depositions of employees and, when the plaintiff’s co-workers are added to the lawsuit, awarding not just damages for all (up to a sum equal to six years of “under pay” for

each), but all fees and costs incurred by the filing attorneys. The law firms have learned that the majority of defendant companies will plead for a settlement just to stop the pain. If you do not want your company to be one of them, heed this cautionary message.

### **GET ANSWERS**

Please contact Tiffany & Bosco if you need assistance in, or have any questions regarding, this practice area.

## LEGAL REVIEW

### Cracks In Your Walls – Expansive Soils May Be To Blame

By RICHARD C. GRAMLICH

Those annoying cracks in your home's walls may be caused by something more than the extreme heat we encounter in Arizona. The ground underneath many Arizona homes contains expansive clay soil, especially in the outlying areas of the greater Phoenix metro area. That soil typically expands when it gets wet and contracts when it dries. The soil movement causes your home's foundation to move in the same way and, in many instances, causes cracking in your home's concrete, drywall, and stucco.

As a technical matter, the "differential foundation movement" described above typically occurs when the edge of the foundation system heaves, lifting the exterior walls and roof up and away from the adjoining interior walls. That movement results in telltale angular cracking in the corners of a home's windows, doors, and arches. Such angular cracking also occurs where interior walls meet exterior walls or the ceiling.

Fortunately, there is a remedy available to new homebuyers and even subsequent homebuyers in Arizona. Specifically, Arizona law requires all builders to construct a home's foundation system and the home in a good and workmanlike manner so that it is fit for its intended use. This



is referred to as a warranty of good workmanship, which is implied by Arizona law.

You should also note that a homebuyer's ability to bring a claim for a builder's violation of the implied warranty of good workmanship is not limited by the one or two-year warranty limitations found in most Arizona construction contracts. Arizona law allows claims for a violation of the implied warranty of good workmanship to be brought for up to eight years after substantial completion of the home. The eight-

year time limitation is typically measured from the date a Certificate of Occupancy is issued, if the applicable Arizona county issues a Certificate of Occupancy.

Upon investigation of claims for violations of the implied warranty of good workmanship, it is often the case that builders knew about the expansive clay soil conditions underneath the home and knew how to construct the home in a manner that would avoid, or at least lessen, cracking caused by the soil. Unfortunately, some builders choose to save some money rather than take the additional steps to protect the home from unnecessary cracking, and those builders can be held liable for the damage occurring in the home.

The damage a homeowner may be able to recover includes the cost to repair the home, loss of use and enjoyment of the home, and any resulting decrease in the value of the home, even after repairs are made. Original homeowners, and even subsequent homeowners under Arizona's Purchaser Dwelling Act, may also be entitled to recover their attorneys' fees and costs.

The attorneys at Tiffany & Bosco, P.A. are available to discuss your options if you think your home is experiencing damage due to expansive soil, and it has been less than eight years since your home was built.

NIKKI BIDGOOD/STOCKPHOTO

## WHEN DIMINISHED CAPACITY COMES HOME

By JAMES A. FASSOLD

Your mother always prided herself on her ability to take care of herself and her home. Now, you are seeing changes. Bills not being paid. Clutter in a formerly immaculate home. It may be time to have that difficult conversation. But where do you start, and what assistance does the law provide?

Court intervention may be avoided if valid powers of attorney are in place.<sup>1</sup> A Health Care Power of Attorney permits you to make health care decisions for your mother. A General Power of Attorney

permits you to make financial decisions for her. Arizona law is strict about what powers of attorney permit you to do, and their authority ends when the principal dies.

If you need court intervention, you can petition for the appointment of a guardian or conservator.<sup>2</sup> A guardian makes decisions about a person's care, living arrangements, health, etc. A conservator makes financial decisions. Trained, licensed professionals (known as private fiduciaries) can be appointed as guardian and conservator if no one in the family is

## LEGAL REVIEW

## Tell Me Your Duty

By LANCE R. BROBERG

Directors of an Arizona corporation, whether they like it or not, are subject to a fiduciary duty that requires them to put the interest of the company first.<sup>1</sup> Officers of an Arizona corporation are subject to similar, though not necessarily identical, fiduciary duties.<sup>2</sup> Partners owe their partners and the partnership a fiduciary duty limited to concepts of care and loyalty.<sup>3</sup> But what about members in a limited liability company?



Lance R. Broberg

Arizona's Limited Liability Company Act (the "LLC Act") is newer, relatively, having been enacted in 1992. Yet, the LLC Act omits any provision for a fiduciary obligation that would set a default standard of conduct for members and managers in a limited liability company. Our appellate courts have been slow to provide guidance regarding this omission.

The first effort by our appellate courts was in the unpublished and therefore advisory-only decision in *Sports Imaging of Arizona, L.L.C. v. 1993 CKC Trust*, 1 CA-CV 05-0205, 2008 WL 4448063 (Ariz. Ct. App. Sept. 30, 2008) — a case decided a full 13 years after the LLC Act had been adopted. When attempting to address the fiduciary duties of members, the Court curiously used the following language: "shareholders that have the ability to control a corporation owe a fiduciary duty to the corporation and other shareholders."<sup>4</sup> Without acknowledging the change in terminology — member to controlling shareholder — it appears that the Court imposed the duties of a controlling shareholder to members in a limited liability company. Many attorneys have taken this suggestion, coupled with extra-jurisdictional authority, to argue in favor of a common law

fiduciary duty. That position has rarely been challenged.

The second effort to provide guidance has finally come in the form of a newly published opinion, *TM2008 Investments, Inc. v. Procon Capital Corp.*, 234 Ariz. 421, 323 P.3d 704, 707 (Ct. App. 2014). The appellant argued that the legislature's omission of a fiduciary duty from the LLC Act means that members owe no duty to the company or other members.<sup>5</sup> The Court addressed the statutory omission stating that it will "decline in this case to mechanically apply fiduciary duty principles from the law of closely-held corporations or partnerships to a limited liability company created under Arizona law."<sup>6</sup> The Court then stated that the "legislature did not explicitly outline

any such duties for members of an LLC;

instead, the LLC Act allows the members of an LLC" to delineate "the duties of the members" in an operating agreement.<sup>7</sup> Though it limited the holding to the facts of the case before it, the refusal to apply fiduciary duty principles applicable to other forms of businesses brings the presumed obligations owed by members into question.

So what are a member's duties? The LLC Act expressly permits members to define their obligations to each other and to the company in the operating agreement. *TM2008* confirms that the courts will follow what the operating agreement says. And it suggests that the failure to include such duties in the operating agreement, or worse, not preparing an operating agreement, may leave members free to act without regard to the best interests of the other members or the company.

- |   |                          |   |                     |
|---|--------------------------|---|---------------------|
| 1 | A.R.S. § 10-830(A).      | 5 | <i>Id.</i> at ¶ 14. |
| 2 | A.R.S. § 10-842(A).      | 6 | <i>Id.</i> at ¶ 15. |
| 3 | A.R.S. § 29-1034(A)-(C). | 7 | <i>Id.</i>          |
| 4 | <i>Id.</i> at 19, ¶ 91.  |   |                     |



able or willing to serve.

The legal process begins by filing a petition and obtaining a hearing date. The court automatically appoints a court investigator to visit your mother, an attorney to represent her, and a physician to examine her. At the initial hearing, if your mother does not object, a guardian or conservator is appointed for her. If she objects, she is entitled to an evidentiary hearing. Because the probate court takes great pains to avoid the cost and pain of protracted litigation, the parties will likely

be encouraged (or ordered) to attend a settlement conference with an experienced judicial officer or elder law attorney.

Concerned someone is taking financial advantage of your mother? Arizona has strong protections for elderly victims of scam artists. The victim or her conservator can bring an action for financial exploitation of a vulnerable adult.<sup>3</sup> If no conservator has been appointed, anyone can petition for the right to bring suit on the victim's behalf. The penalties for exploitation are harsh: triple damages,

attorneys' fees, and forfeiture of any interest in the victim's estate.

When these difficult conversations become necessary, Tiffany & Bosco, P.A. is here to help. Our experienced elder law attorneys will guide you through these processes to ensure that your mother is cared for and protected.

- 1 A.R.S. §§ 14-5501 *et seq.*, 36-3221, 36-3281.  
 2 A.R.S. § 14-5301 *et seq.*; A.R.S. § 14-5401 *et seq.*  
 3 A.R.S. § 46-451 *et seq.*



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Established in 1967, Tiffany & Bosco, P.A. provides legal services to the business community, representing domestic and foreign clients on a local, national, and international basis. Tiffany & Bosco, P.A. is the Arizona law firm member of MSI, a worldwide network of independent legal and accounting firms, and a member of the USFN, and the FNMA and FHLMC designated counsel programs.

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This newsletter is published as a service to clients and friends. It is intended to give general information only and not to provide advice on specific legal issues. For information, change of address, or copies, please contact our Editors, Pamela L. Kingsley or Robert A. Royal at (602) 255-6000. ©2014 Tiffany & Bosco, P.A.

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