

# TB LAW

NEWSLETTER

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# It pays to plan

Estate Planning Aspects of  
The Tax Relief, Unemployment  
Insurance Reauthorization, and  
Job Creation Act of 2010

PAGE 4

## Inside

- 2 Firm News and Announcements
- 6 Professional Service  
Clients Beware!
- 7 Broken Priority May  
Cause Delay in Construction
- 7 Are You Protecting Your  
Business Assets?
- 8 Attorney Directory

# ANNOUNCEMENTS

## ACCOLADES

### Shareholders recognized as leading attorneys

Super Lawyers, which is a listing of outstanding attorneys who have attained a high degree of peer recognition and professional achievement, selected the following shareholders for 2011: **David L. Case** (Estate Planning & Probate, Business/Corporate, and Tax); **Richard G. Himelrick** (Securities and Business Litigation); **Leonard J. Mark** (Family Law, Personal Injury, and Medical Malpractice); **Richard E. Oney** (Intellectual Property, Intellectual Property Litigation, and Information Technology/Outsourcing); **Robert A. Royal** (Business Litigation); and **Michael E. Tiffany** (Real Estate and Business/Corporate).

## NEW FACES

### Newest associates at Tiffany & Bosco

**PAUL D. CARDON** having been a 2009 summer law clerk with the firm, returned in August 2010 to become an associate attorney. His areas of concentration include civil and commercial litigation, real estate, and automotive law. Paul was born and raised in the Phoenix area. Paul attended Brigham Young University for his undergraduate studies, where he received his bachelor's degree in Financial Services with an emphasis in real estate. He received his law degree from the Sandra Day O'Connor College of Law at Arizona State University. During law school, Paul externed for the Honorable Philip Hall of the Arizona Court of Appeals and clerked for a firm in Rome, Italy analyzing Italian tax provisions. Paul was also the Technology Editor of the *Arizona State Law Journal* and was the Rocky Mountain Regional Representative for the J. Reuben Clark Law Society.



Paul D. Cardon

**AARON T. LLOYD** joined the firm as an associate attorney in January 2011 and practices in the area of Business Litigation. Aaron was born and raised in Phoenix and attended the University of Arizona for his undergraduate studies, where he received a Bachelor of Science in Business



Aaron T. Lloyd

Administration. Aaron received his law degree, *magna cum laude*, in May 2010 from Michigan State University College of Law, where he graduated in the top 12% of his class. While in law school, Aaron was an Articles Editor of the *Law Review*. Prior to joining Tiffany & Bosco, P.A., Aaron worked as an attorney and law clerk at two small firms concentrating in various areas of civil and commercial litigation. Aaron is admitted to practice in the State of Arizona and the U.S. District Court for the District of Arizona.

**BEN THINNES** joined the firm in February 2011 as an associate attorney. Ben's practice is focused on commercial real estate transactions and finance, including purchase and sale transactions, HUD insured loans for multi-housing projects, leasing, master-planned communities, and golf course and private club matters. Prior to joining Tiffany & Bosco, P.A., Ben served as general counsel for one of the country's preeminent private golf-community developers, during which time he acted as counsel in all facets of the law relating to the planning, development, and operation of private golf communities, both in the U.S. and abroad. Ben began his legal career at Snell & Wilmer L.L.P. in Phoenix, where he focused his practice on complex commercial real estate transactions.



Ben Thinnes

## PERSONAL ACHIEVEMENT



David L. Case

**David L. Case** will be chairing a three-day seminar for the State Bar of Arizona on estate planning and probate at the Hotel del Coronado in San Diego July 14 to July 16, 2011 as part of the annual CLE By The Sea program. He will also be a presenter regarding the new federal legislation passed in December 2010, and in particular on gift, estate, and generation-skipping transfer tax, and related planning and reporting issues.



Michael A. Bosco, Jr.

**Michael A. Bosco, Jr. and Kevin P. Nelson** will be part of the faculty for the Short Sales, Foreclosure, Taxes & Bankruptcy seminar that is also part of the annual CLE By The Sea program.



Kevin P. Nelson

**Leonard J. McDonald** was recently appointed to the Board of Directors of the National Kidney Foundation of Arizona. The Foundation has been



Leonard J. McDonald

in operation since 1963 as a charitable, non-profit agency dedicated to improving the quality of life of Arizonans challenged by chronic kidney disease.



J. Daryl Dorsey

**J. Daryl Dorsey** has been appointed to the board of directors of Rosie's House, which gives low-income children the chance to experience music.

## ANNOUNCEMENTS



### Tiffany & Bosco Continues Phoenix Open Tradition

Tiffany & Bosco continued its proud tradition of participating at the “Greatest Show on Grass.” The Thunderbirds once again hosted this great event at the TPC Scottsdale. The tournament, known as the Waste Management Phoenix Open, was held from January 31 through February 6, 2011. The Phoenix Open began in 1932, making it one of the five oldest tournaments on the PGA Tour.

This annual event always brings the largest crowds on the PGA Tour and this year was no exception. At the 2011 event, fans were fortunate to see players such as Phil Mickelson, Vijay Singh, Geoff Ogilvy, Aaron Baddeley, and Rickie Fowler. In the end, Mark Wilson took home the \$1,098,000 first place check, part of the \$6.1 million purse, scoring an overall 18 under par.

A major focus of this popular event is the charitable fundraising for The Thunderbirds Charities, an affiliate of The Thunderbirds. Once again, Tiffany & Bosco underwrote a two-story skybox on the 18<sup>th</sup> hole to enjoy the event. With its contribution, Tiffany & Bosco helped make the 2011 Waste Management Phoenix Open another successful year for the tournament. Tiffany & Bosco is honored to be a long-time supporter of this event and The Thunderbirds Charities.

## TB Law Expands Adds Nevada practice to firm

On February 1, 2011, Tiffany & Bosco, P.A. increased its geographic footprint by expanding into Nevada. It did so through formally joining forces with the Las Vegas law firm, Wilde & Associates.

Gregory L. Wilde is the founder of Wilde & Associates and has practiced law in Nevada for twenty years. Prior to attending law school at Brigham Young University, Greg graduated from the University of Utah with a bachelor's degree in Finance. That has served him well in his creditor-based bankruptcy and real estate practice. Greg has operated one of the largest creditor bankruptcy practices in Nevada for several years.

“Our firm has been successfully working with Greg and his firm in Nevada for several years. He and his lawyers have always done an excellent job representing our clients in Nevada during this time. When the Shareholders at Tiffany & Bosco decided to expand the firm's geographic footprint into Nevada, joining forces with Greg and his firm was clearly the right decision,” Mark Bosco said.

Wilde & Associates has been handling Nevada matters for Tiffany & Bosco for over a decade and this formal arrangement was a natural step for both firms.

“It allows us to offer a wide range of legal services, gives us access to greater resources, and helps us better meet the needs of our clients here in Nevada. The entrepreneurial spirit and comradery at Tiffany & Bosco are addicting, and I realized over the years that it was the best place for me

and my practice,” Greg Wilde said.

Entering Tiffany & Bosco as an equity shareholder, Greg is the managing attorney for the Nevada office. Mark Bosco serves as the department head. The associate attorneys added to the ranks of Tiffany & Bosco are Michael W. McKelleb, Matthew K. Schriever, and Kevin S. Soderstrom. Greg and this group of attorneys are well-known and respected in the Nevada legal community. They are a first-rate addition to the Tiffany & Bosco family.

“We have always been a small firm with a big case load. Joining

Tiffany & Bosco maintains the favorable small firm atmosphere, and yet provides the backing of a larger multi-state firm in the competitive arena of default servicing,” Kevin Soderstrom said.

“Besides practicing law, I am interested in both marketing and community involvement. Becoming part of a well-renowned firm makes these endeavors both easier and all the more rewarding,” Michael W. McKelleb added.

The Nevada office of Tiffany & Bosco will continue to provide services in the area of foreclosure mediation, bankruptcy, eviction, and related litigation. This complementary agreement between the firms brings Tiffany & Bosco to a total of 40 lawyers with a support staff of over 170. This addition also exemplifies Tiffany & Bosco's continued commitment to provide its clients a wide range of legal services both locally and throughout the Southwest.

**MEET THE ATTORNEYS**  
Look for new attorney profiles in our Autumn 2011 Newsletter.



# THE GIFT of planning

Estate Planning Aspects  
of The Tax Relief,  
Unemployment Insurance  
Reauthorization, and Job  
Creation Act of 2010

## IN FOCUS

BY DAVID L. CASE

Last December, the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 (the “Act”) was signed into law. In addition to extending the “Bush Income Tax Cuts” of 2001, a part of this new law contains new wealth transfer tax rules for 2010, 2011, and 2012. This article provides a very brief overview of the wealth transfer tax portion of the Act.

### HIGHLIGHTS

The highlights of the new law are a new unified maximum tax rate of 35% and lifetime exemption level of \$5 million for all three wealth transfer taxes — gift, estate, and generation-skipping transfer tax (“GST tax”) — retroactive to January 1, 2010 and applicable through 2012. This compares to the 2009 law, which had a maximum transfer tax rate of 45%, a lifetime

exemption for gift tax of \$1 million, and a lifetime exemption for estate tax and GST tax of \$3.5 million. And part and parcel to re-enactment of the estate tax is re-institution of the I.R.C. §1014 “step up” (or step down) of income tax basis for assets received from a decedent’s estate, from January 1, 2010 forward, to date of death value. Carryover basis is repealed. This is, of course, very important because income tax basis is subtracted from the sale price of assets to determine taxable gain upon sale. These basis adjustment rules apply even if there is no estate tax liability.

Though in the grand scheme of things the new rules are reasonable and beneficial, planning long term is made very difficult because the Act is effective for only two more years. Unless Congress extends the new Act or passes other new legislation, the 2001 Act is reinstated, where the maximum transfer tax rate is 55% and the lifetime exemption is \$1 million for all three types of tax, though the GST tax exemption is adjusted for inflation.

One hopes the Act will be made permanent, but if it is not, there are still many estate planning opportunities available until 2012. And note that the current administration’s 2012 Budget Proposal *presumes* that the 2009 rules will be re-enacted, with a 45% rate for gift, estate, and GST tax, a \$1 million lifetime exemption for gifts, and a \$3.5 million exemption for estate tax and GST tax.

#### RETROACTIVITY ASPECTS

As stated, part of the new law re-enacted retroactively to January 1, 2010 the estate tax and GST tax. The GST tax is applied to certain transfers of wealth to persons who are two or more generations below that of the transferor. Though the gift tax remained for all of 2010, the estate tax and GST tax expired for 2010 until re-enacted. To avoid the harsh and arguably unfair result of retroactivity of the estate tax, (and possibly constitutional legal challenges), the blow of this retroactivity

is offset by allowing estates to elect to have the carryover basis rules apply for 2010 decedents instead of the estate tax. The solution to avoid the harshness of retroactivity for the GST tax was to provide for a 2010 tax rate of zero, which provided several short-fused tax planning opportunities, such as making outright gifts in 2010 to skip persons such as grandchildren.

#### PLANNING OPPORTUNITIES

The Act did not, as once feared, eliminate or reduce the benefits of many of the advanced estate planning techniques that have been popular in recent years. For example, the various proposed limitations on GRATs (grantor retained annuity trusts) and QPRTs (qualified personal residence trusts), and use of minority interest valuation discounts for gifts and sales of interests in family entities and other assets, were not covered in this legislation. Thus, as with the last couple years, with



David L. Case

**With most assets still having depressed values, gifting now also allows the expected rebound in value to occur outside the estate of the donor.**

depressed values and interest rates, and a further planning window, these techniques should be taken advantage of now where appropriate.

And of course, the new lifetime exemption for 2010, 2011, and 2012 for each individual for gift, estate, and GST tax are all \$5 million (except that gift tax exemption for 2010 remains \$1 million), which also provide for huge planning potential for those who want to reduce future tax liability for family and other heirs.

Many clients are already planning on making substantial gift transfers prior to 2013, either outright or in trust for family and other beneficiaries in order to take advantage of the new exemption levels. This not only gets the future appreciation of these assets out

of the donor’s estate for estate tax purposes, it also allows any taxable income accruing after the gift to accumulate in the donee’s estate and perhaps at a lesser income tax rate.

With most assets still having depressed values, gifting now also allows the expected rebound in value to occur outside the estate of the donor. If the unlikely occurs and the \$5 million gift tax exemption is only available for two years, or worse yet Congress does not act further and in 2013, a \$1 million exemption for gift tax and estate tax and a 55% tax rate apply, missing this window of opportunity could be disastrous from a tax planning perspective.

#### GIFT TAX ANNUAL EXCLUSION CONTINUES

The changes in the gift tax lifetime exemptions do not change the annual exclusion for gift tax, where every individual may gift up to \$13,000 per year to any other person (\$26,000 in the

case of a married couple) free from any gift tax. (This amount also is indexed for inflation.) This renews every year and should be considered annually by all clients with large estates in order to take advantage of the resultant reduction in future estate tax liability.

There are numerous other aspects of the Act that are not covered here. Our firm can assist clients in navigating the ramifications of the Act in order to plan effectively.

#### TAKE CHARGE

For more information about Tiffany & Bosco’s resources in this area, please contact David L. Case at (602) 255-6097 or [dlc@tblaw.com](mailto:dlc@tblaw.com).

## BUILDING & CONTRACTING



# Professional Service Clients BEWARE!

BY DOW GLENN OSTLUND

In two comparatively recent Arizona Supreme Court Opinions, contracts between licensed professionals and their clients have become very interesting — and very troubling.

First, the *1800 Ocotillo* court<sup>1</sup> held that a design professional (architect, engineer, surveyor, etc.) could legally limit its liability to its client for damages suffered by the client as a result of the professional's breach of the contract and/or professional negligence/malpractice by including such a provision in its contract with its client.

Next, the *Flagstaff Affordable Housing* court,<sup>2</sup> for the first time in Arizona, expanded the "economic loss rule" to include claims against design professionals (and by implication, possibly

1. *1800 Ocotillo v. The WLB Group, Inc.*, 219 Ariz. 200, 196 P.3d 292 (2008).

2. *Flagstaff Affordable Housing v. Design Alliance*, 223 Ariz. 320, 223 P.3d 664 (2010).

other professionals). Over-simplified, this rule limits a client to only contract remedies for the recovery of damages if the design professional's failure to properly do its work does not cause physical injury to the person or property (building) of the client but causes only economic damages, AND the



Dow Glenn Ostlund

parties' contract does not include a provision that expressly retains the client's ability to sue the design professional under traditional tort theories — such as professional negligence.

What is troubling about *Flagstaff* is the broad and sweeping spin counsel for design professionals are attempting to establish using the *Flagstaff* opinion. Their argument is as follows:

### ASSUMPTIONS:

Assume the contract does not contain a provision that expressly reserves tort remedies for the client. Also assume that the design professional's malpractice/negligence causes only "economic damages."

### RESULT:

If the design professional contracts to perform work — but does not do the work at all — the client has a claim for breach of contract and can sue the design professional in contract to recover the damages caused by the failure to do the work required by the contract.

However, if the design professional does the work, but does not do it right (and all mistakes in performance are either negligent or intentional — both torts — according to defense counsel), the client does not have a breach of contract claim against the design professional, only a tort claim. But since your contract did not reserve tort claims against the design professional and your damages are only economic — you have no ability to sue the design professional to recover any damages caused by his improper work.

If you are a (design) professional, this is a great result for you and your malpractice insurance carrier, BUT you must be sure to limit your liability to the client AND not allow your client to

What is troubling about *Flagstaff* is the broad and sweeping spin counsel for design professionals are attempting to establish using the *Flagstaff* opinion.

reserve any tort claims in the contract.

If you are a client, the results are not so good. These two cases place the burden of protecting the client from the malpractice of the design professional on you. You must not allow the design professional to limit his liability to you AND you must expressly retain all tort theories of recovery against the design professional in the contract.



## Broken Priority May Cause Delay in Construction

BY MICHAEL E. TIFFANY

**S**ometimes, construction will begin on a project before the construction loan is in place. When this happens and the deed of trust securing the construction loan has not been recorded, it is called “a broken priority.”

In the past, a title insurance company was willing to insure over a broken priority when it had a sufficient comfort level and a person or entity with substance would indemnify the title insurance company against liability. This has changed.



Michael E. Tiffany

Because of the current market downturn, there have been a substantial number of projects with broken priorities, unexpectedly requiring title companies to come up with funds that they have had to pay to remove mechanics' and materialmen's liens filed by contractors, subcontractors, and material suppliers that were in a senior position to the lender's lien.

As a result, a developer may not be able to close a construction loan for a project if the title insurance company determines that construction has in fact started or materials and equipment have been moved on to the construction site before the closing. If that occurs, the developer will be required to delay the closing of the loan until the statutory period for the filing of mechanics' and materialmen's liens has expired.

## BUSINESS FOCUS

### Are You Protecting Your Business Assets?

BY SHAHPAR SHAHPAR

**D**id you know that inventions, business procedures, client lists, and branding are considered business assets? If so, do you know how to protect those assets? The field of intellectual property can protect these intangible aspects of your business, which may give you a competitive edge.

#### 1. TRADEMARK PROTECTION

There are four considerations for a business considering trademark protection for branding a product or service it offers. First, avoid selecting descriptive marks, such as marks descriptive of the



Shahpar Shahpar

goods or services or the geographic location of the business. Second, consider trademark protection in addition to trade name protection.

Third, consider trademark clearance or availability searching in the selection of a trademark. Fourth, plan time and a budget for obtaining a federal trademark registration. It can take at least 9-12 months from the application date to get a federal trademark registration. Costs for obtaining a federal trademark registration vary significantly, but a starting point is about \$2000 to \$3000.

#### 2. PROTECTION OF CONFIDENTIAL INFORMATION

Often, it is client lists, business procedures, or business “know-how” that gives a business its competitive edge. Such proprietary information, confidential information, and trade secrets should be kept confidential. First, a business could limit access to such information to select individuals within the business. Second, a Non-Disclosure and Confidentiality Agreement may be used for any necessary disclosures outside the business. Third, employment agreements can include provisions for

handling of confidential information during employment and after termination. Confidentiality is key. Once a disclosure is made, it may be impossible to prohibit the dissemination of the once-trade-secret information.

#### 3. INVENTION PROTECTION

A business should investigate whether it has any inventions that need protection. Patent protection is a special case. Failure to meet certain time requirements may cause a business to lose its patent rights. For example, once a business offers an invention for sale or discloses an invention at a trade show, it must file a patent application within 12 months or it may lose its patent rights. As soon as a business identifies a valuable invention, a patent attorney should be consulted.

#### 4. COPYRIGHT PROTECTION

A business should consider copyright protection for its website, software, manuals, publications, architectural plans, or other items depending on its industry. A copyright registration is required to bring a lawsuit for copyright infringement in federal court. Instead of actual damages and profits, a copyright owner can elect statutory damages. Also, the court may award costs and attorneys' fees. Generally, copyright registration can be fairly straightforward and inexpensive, while providing substantial protection.

#### 5. CONSULT AN ATTORNEY

Intellectual property covers various assets of a business including patent, trademark, copyright, and trade secret rights. An attorney experienced in these areas can work with a business to formulate a strategy, which works in conjunction with the particular business's goals. Successful businesses take the time and effort to protect their assets and reap the rewards of their intellectual property rights.

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**TIFFANY  
& BOSCO**  
P.A.

Tiffany & Bosco, P.A. has provided a wide range of legal services to the business community since 1967. The firm's experienced attorneys represent 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. Tiffany & Bosco, P.A. is also a member of the USFN, and the FNMA and FHLMC designated counsel programs.

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