



NEWSLETTER

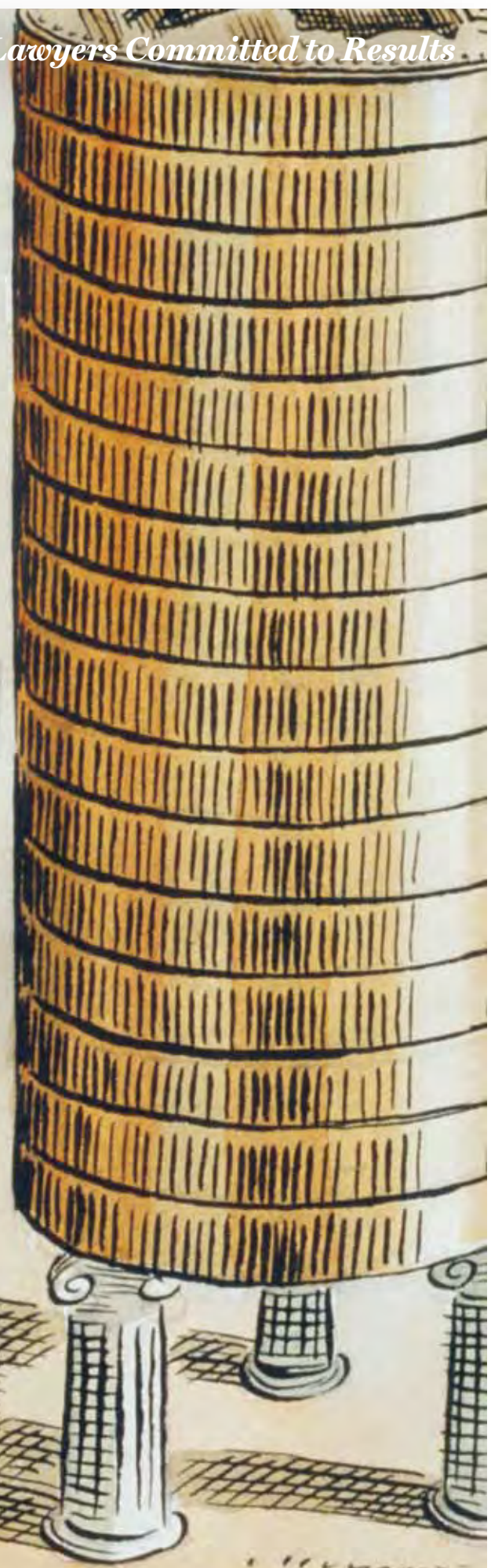
Speculative Builders Tax

*Sellers, Purchasers and
Title Companies Beware*

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ANNOUNCEMENTS

FIRM NEWS

Excellence in Financial Services

The Financial Services Department of Tiffany & Bosco, P.A. has again been awarded the highest award granted by the USFNs, the "Diamond Award of Excellence" for its excellent work in the mortgage default servicing area. **MICHAEL BOSCO, JR. and MARK BOSCO** head the Financial Services Department, which has received this award every since its inception in 1994.

PROFESSIONAL ACHIEVEMENT

T&B LAWYERS RECOGNIZED



Richard Himelrick

RICHARD HIMELRICK was recently recognized in the *Arizona Business Magazine* as one of the "Top Attorneys of Arizona" and selected for inclusion in the 2005-06 editions of *Who's Who in American Law* and *The Best Lawyers in America*, as well as *Arizona's Best Lawyers*. Rich is a civil and commercial

litigator whose practice emphasizes securities litigation.

LEONARD MARK was also recently named to *Arizona's Best Lawyers*. Len is a certified specialist in family law and personal injury and wrongful death cases.

MARK DIOGUARDI was recently named one of the top ten attorneys in Arizona by the *Business Journal*. Mark and his wife Jennifer, a partner at Snell & Wilmer, were also recently selected as one of Arizona's five "Up & Coming Couples" by the Cystic Fibrosis Foundation in honor of their volunteer work in the community.



MEDIATION

MAKE PEACE

With a success rate of more than 80 percent, mediation can save time and legal headaches.

First Line of Defense

ROB ROYAL is now providing mediation services to the firm's clients. As a mediator, Rob facilitates and helps resolve business disputes. If you or your company is involved in a dispute that you would like resolved without litigation or arbitration the disputing parties can agree to mediate. Historically mediation has a success rate of more than 80 percent.

Besides his 25 years of business and civil litigation experience, Rob is a principal author of the *Arizona Corporate Practice Guide*, has written Arizona corporate laws, is co-chairing

a committee with his partner, Tracy Morehouse, rewriting the Arizona Limited Liability Company Act and has chaired several attorney organizations concerning resolving and litigating business matters.

Rob also regularly lectures and publishes to attorneys and others. He was the lead speaker and co-chair of the 2006 "CLE By The Sea" in San Diego, and spoke about agreements involving the sale of businesses that go bad and other litigation topics. Rob's intra-corporate litigation practice involves disputes between shareholders and directors, director and officer liability issues and disputes among partners.



Rob Royal

PERSONAL ACHIEVEMENT



Michael Tiffany

Friend of the Garden

MICHAEL TIFFANY was recently presented with the Gold Saguaro Tribute Award by the Japanese American Citizens League, Arizona Chapter for his service as Chairman of the Japanese Friendship Garden of Phoenix, Inc.

ANNOUNCEMENTS

PERSONAL ACHIEVEMENT

FAMILY GUY

MARIO MICHELI was designated Arizona Foster Father of the Year during the 6th annual Arizona Fathers and Families Coalition, Inc. conference for his efforts on behalf of the foster children he and his wife, Kathryn, have and continue to care for. AZFFC, Inc. is an Arizona non-profit organization designed to assist and mentor fathers in all walks of life regarding the health, education, and other needs of their children and themselves. It is also the Arizona state affiliate of the National Practitioners Network for Fathers & Families, Inc.



Mario Micheli

COMMUNITY OUTREACH

Day On The Links



John Flynn

JOHN FLYNN and MARK DIOGUARDI, through the firm, recently sponsored a "Why I Like Golf"

essay competition. The winner, 12-year-old Derrick Moreira, was awarded first prize of watching the FBR Open from the Tiffany & Bosco skybox, five rounds of golf at Valley courses, autographed pictures of golf professionals Phil Mickelson and Mark Calcavecchia and a set of golf clubs.

FIRM NEWS

New Shareholders, Associates Join Firm

Tiffany & Bosco, P.A. is pleased to announce it has three new shareholders:



Leonard McDonald

LEONARD MCDONALD will continue to practice in the areas of bankruptcy, civil and commercial litigation, forcible entry and detainer/eviction, and foreclosures. He is also licensed to practice law in the state of Texas.



Tracy Morehouse

TRACY MOREHOUSE will continue her practice in civil and commercial litigation, such as trademark infringement, unfair competition, advertising injury, intra-corporate disputes, insurance defense, defamation, product liability, contract disputes and civil appeals.



Richard Oney

RICHARD ONEY heads the firm's intellectual property department. Rich is a registered patent attorney, with more than 20 years of experience handling intellectual property matters. His practice includes patent, copyright, trademark, trade secret, unfair competition, and Internet matters. Rich is experienced in preparation and prosecution of U.S. and international patent applications, intellectual property acquisition, transfer and licensing, due diligence review, infringement and validity analysis, and litigation.

The firm also announces that nine new associates have joined the firm.

LANCE BROBERG practices in civil and commercial litigation. **JAMES CHRISTIAN**'s practice is generally comprised of securities fraud and commercial litigation matters. **BETH HEATH** practices in the areas of real estate, commercial transactions and environmental law. **CHAD HESTER**'s practice is primarily in general civil and commercial litigation, insurance defense and intra-company disputes. **MARIO MICHELI** practices in the areas of real estate and commercial transactions. **BRENT OENNING** practices in the areas of taxation, real estate, commercial transactions, and general business law, and is also a certified public accountant. **JEFFREY SANDELL** focuses primarily on the

representation of both individuals and business entities, as creditors and debtors, in the bankruptcy and non-bankruptcy workout context and in general civil and commercial litigation. **RYAN WACKERLY** represents a variety of commercial clients, from international corporations to local businesses, as well as individuals in various commercial litigation, labor and employment, and insurance bad-faith matters.

LEARN MORE

For additional information on our newest shareholders and associates, please see the firm's Web site at www.tblaw.com.

*Sellers, Purchasers and
Title Companies Beware*

HIDDEN

REAL ESTATE TAX



IN DEPTH

BY MICHAEL E. TIFFANY

Municipalities are charging sellers of real property, and in some cases unsuspecting purchasers and successive purchasers, what is commonly called a speculative builders tax upon the sale of improved real property.

As a general rule, the tax is assessed if the real property is sold (i) before the improvements are completed, or (ii) within 24 months after substantial completion of the improvements. Improvements are not limited to structures, and can include improvements to land such as paving or landscaping.

A municipality may also charge a speculative builders tax for long-term leases of improved real property (as opposed to a sale). The rules for assessing and calculating the tax are the same.

The tax is calculated by multiplying a percentage, usually between 1 and 2 percent, against the gross sales price of the improved real property. The gross income may be reduced by a certain percentage, such as 35 percent, before the tax is calculated. The municipality will

give credit against the speculative builders tax for other taxes that are paid to the municipality in connection with personal property that is incorporated into the improvements.

A speculative builder may exclude gross income from a sale to another speculative builder upon the satisfaction of certain conditions. These conditions may include the requirement that the seller and purchaser hold privilege tax licenses within the municipality, that adequate records of the transaction are maintained, and that the purchaser assumes in writing the obligation to pay any privilege taxes that would otherwise be due to the municipality.

A sale or lease between affiliates is subject to a speculative builders tax. An affiliate is any individual or entity which controls, is controlled by, or is under the common control with the seller, or in which seller has a direct or indirect ownership interest.

If the seller does not pay the speculative builders tax, the municipality will look to the purchaser of the improved real property for the payment—and to successive purchasers until the tax is satisfied. This includes a purchaser through a foreclosure, trustee's sale, or deed in lieu of a foreclosure. For this reason, it is imperative that a purchaser obtain a certificate of compliance from the appropriate municipal office, which is a receipt showing that the tax has

been paid, or have the escrow company closing the sale withhold an amount sufficient to cover the tax. Although the purchaser may have a claim against the seller, the seller may not have the ability to pay the claim, particularly if the seller has used the sales proceeds to pay other liabilities.

The seller or purchaser may appeal the speculative builders tax if it objects to the amount of the tax. While the appeal is at the administrative level in the municipality, the municipality may be willing to negotiate a lower tax to avoid a judicial appeal.

The speculative builders tax encumbers ownership of the real property. Consequently, a purchaser may have a claim under its title insurance policy even though the lien is not of record at the time the policy is issued. The title insurance company will likely contest the validity of the claim since the relevant law in this area is not clearly established. Any claim under the policy should be timely and consistent with the requirements in the policy.

The ordinances of the various municipalities do not have the same provisions. This article is a general overview, and it does not replace a careful review of the applicable municipal ordinance.

PROTECT YOURSELF

Learn how Tiffany & Bosco can help. Contact the firm at (602) 255-6000, or online at www.tblaw.com.

LEGAL REVIEW

ESTATES

IRS Will Assist Heirs in Finding Assets of Intestate Decedents

BY WILLIAM H. FINNEGAN

Individuals who inherit from a relative, who dies intestate, i.e., without a will, may have a difficult time locating or discovering other assets held by the decedent. A recent revenue ruling may help such heirs to locate the decedent's assets by allowing them to look at the decedent's previously filed income tax returns under the conditions described in Revenue Ruling 2004-68.

Under Internal Revenue Code Section 6103(e)(3)(B), the income tax return for the year prior to death of a decedent is, upon written request, open to inspection by or disclosure to (a) any heir at law, (b) next of kin, or (c) beneficiary under the will of such decedent, if the IRS finds that such an individual has a material interest that will be affected by information contained therein. The IRS generally has interpreted "material interest" to be an important interest that is financial in nature. The recent ruling treats an heir at law or next of kin who is, under state law, a distributee of the estate of a decedent who dies intestate, as having a "material interest" that will be affected by information contained in such return.

A person requesting access to a decedent's tax return must provide the IRS with:

- Proof of the date of death, place of death, and state of decedent's residence;
- Proof of his or her relationship to the decedent, such as a copy of a birth certificate, baptismal cer-



William Finnegan

ARIZONA COURTS

Judicial Merit Selection in Arizona Works Well

BY JAMES E. PADISH

Arizona voters amended the State Constitution in 1974 to create a "merit selection and retention" system. Now, Arizona law requires the Governor to appoint appellate court judges, including judges of the Supreme Court, as well as Superior Court judges in Maricopa and Pima counties, from a list of nominees submitted by judicial nominating commissions.



James Padish

But, the Arizona legislature has indicated it intends to ask the voters to consider repealing merit selection of judges by causing a proposition to appear on the next general election



ballot. Judges would no longer be selected based upon legal ability and personal integrity. Instead, politicians posing as judges will pass judgment in our courts. If this happens, neither the people of Arizona nor its businesses will like the results.

Judicial merit selection preserves the impartiality and integrity of judges. Without it, judges would be forced to solicit campaign contributions from attorneys and those who might expect a favor in the future. More importantly, it selects judges based on legal abilities rather than political attractiveness.

The nominating commissions in

tificate, school record, or insurance designation; and

- A written statement, along with supporting documents, to demonstrate that he or she has a material interest that will be affected by information contained in each requested return.

Evidence sufficient to establish the nature and extent of the requestor's material interest may include, but is not limited to, a copy of the petition for probate or other comparable pleading required to institute the proceeding for the administration of the decedent's estate.

While this recent procedure may make the process of closing the estate of a relative substantially easier, the best way to avoid this issue is to have estate-planning documents prepared. In addition, lists or letters should be kept detailing accounts, holdings, insurance,

and other investments so that assets can be readily located after death.

BUSINESS

Arizona "Fiduciary Duties In LLCs"

BY ROBERT A. ROYAL AND TRACY S. MOREHOUSE

With the growing popularity of limited liability companies (LLCs) as the business entity of choice, the question arises as to what fiduciary duties exist within the LLC. Black's Law Dictionary defines a fiduciary duty as "a duty to act for someone else's benefit, while subordinating one's personal interests to that of the other person. It is the highest standard of duty implied in law." In the LLC setting, fiduciary duties arise from the relationships of

LEGAL REVIEW

Arizona—the Commission on Appellate Court Appointments, the Maricopa County Commission on Trial Court Appointments, and the Pima County Commission on Trial Court Appointments—are made up mostly by non-lawyers. Each commission has 16 members: 10 public members and five attorneys, plus the Chief Justice of the Arizona Supreme Court, who serves as a voting chairperson.

The nominating commissions accept applications when a vacancy occurs. They investigate the applicant's qualifications, determine whom to interview, and ultimately make recommendations to the Governor. Their meetings and interviews are open to the public and comments are welcomed.

The commissions must submit at least three names to the Governor for each appointment with no more than sixty percent being of the same political party. The primary consideration for nominations is merit, that is, professional competence, experience, and knowledge of the law.

Merit-selected judges undergo periodic review of their performance by the

Commission on Judicial Performance Review (JPR). Their review includes surveys of jurors, witnesses, litigants, staff, and attorneys. The JPR commission's reports on each judge are provided to the public before each general election, along with its recommendation regarding whether each merit-selected judge should remain in office.

A merit-selected judge initially holds office for two years before facing a non-partisan retention election in which he or she must receive a majority of votes indicating "yes" as to whether the judge should remain in office. After the first retention election, the term of office is four years for the Superior Court and six years for the Court of Appeals and Supreme Court. Today, thirty-four states use commission plans to aid the governor in selecting judges.

Arizona's judiciary is considered to be a model justice system, especially the Superior Court in Maricopa County. It is a leader in innovations in our jury trial system. Merit selection doesn't just sift out unqualified candidates; it searches out the best and the brightest to serve as judges for the people of Arizona.

legislature likened duties of members and managers to those of directors, officers and shareholders in a corporation and those between partners in a partnership.

Presently, no Arizona case addresses fiduciary duties in LLCs. If the analogy to limited liability partnership (LLP) law is persuasive, LLC members will owe each other the fiduciary duties of care and loyalty as would a general partner of an LLP. In a member-managed LLC, each member is the LLC's agent for the purposes of its business. Under the ULLCA, a member of a member-manager company owes both the company and the other members the duty of loyalty and the duty of care.

Under the ULLCA, a member of a manager-managed LLC "owes no duties to the company nor to the other members solely by being a member" of the LLC. Non-managing members may act in their own self-interest as long as the member adheres to fundamental good faith duties. The duty to conduct affairs of the LLC in good faith is incumbent on all members of the LLC.

If a member acts as a manager, the member will most likely owe fiduciary duties to the company and the other members. Under the ULLCA, a member-manager will owe the LLC and the other members the duty of care and the duty of loyalty. Member-managers also must fulfill the obligation of good faith and fair dealing under the ULLCA.

In sum, an Arizona Court will likely find that the same fiduciary duties exist between managers, members and the LLC as exist in regular business corporations and partnerships.

members and managers in the LLC.

The Arizona Limited Liability Company Act permits flexibility in structuring an LLC. The Arizona Act does not state whether any fiduciary duties exist in an LLC, instead bestowing the utmost flexibility on the LLC in defining the duties. The Arizona Act did not adopt the fiduciary duty language of either the Uniform Partnership Act (UPA) or Uniform Limited Liability Company Act (ULLCA). Consequently, LLCs may possibly be allowed to fully insulate members from liability by the freedom bestowed by the Arizona legislature. Even if the Arizona Act permits LLCs to define fiduciary duties of members and managers, it is doubtful parties to an LLC agreement may agree to eliminate all fiduciary duties. Public policy dictates that some fiduciary duty exists in an LLC despite the

Arizona Act's silence on the matter.

Because Arizona does not have an express statutory provision on a fiduciary relationship, two possible conclusions as to the status of a fiduciary relationship in an LLC may exist. One possible conclusion is that the legislature intended for LLCs to be governed solely by the operating agreement and thus if the articles or operating agreement did not provide for a fiduciary relationship, then none exists. The other possible conclusion is that a fiduciary duty is implied in the statute and exists as stated in the corporation and partnership statutes or common law unless the operating agreement decreases or changes a duty. Public policy requires that the second conclusion be adopted.

When examining the legislative intent related to the passage of the Arizona Act, the Arizona

KNOW YOUR RESPONSIBILITIES

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Tiffany & Bosco, P.A. has provided a wide range of legal services to the business community since 1967. The firm is comprised of experienced attorneys, each of whom concentrates in specific areas of law. The firm represents 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.

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, Dorian L. Eden, Esq., Mario A. Micheli, Esq., or Salvador Ongaro, Esq. at (602) 255-6000 or by fax at (602) 255-0103.

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CHANGE SERVICE REQUESTED