

# TB LAW

NEWSLETTER

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PAGE 4

## the party's **over**

*Cinderella cities  
cope with a  
“developers’ ball”  
gone bust*

### Inside

- 2 Firm News and Announcements
- 3 Limiting Recoverable Damages by Contract  
in Professional Malpractice Cases
- 6 Agreements Between Business Owners
- 7 The Condemnation Monster
- 8 Attorney Directory

## ANNOUNCEMENTS

### FIRM NEWS

**MATTHEW H. MCKINNEY** joined Tiffany & Bosco, P.A. in January 2009 as a litigation associate. Prior to joining the firm, Matt served as a prosecutor in Polk County, Iowa where he obtained significant trial experience. Matt graduated *cum laude* from Creighton University School of Law, where he won awards participating on national trial and moot court traveling teams. Before law school, Matt graduated from the honors program at the University of Iowa with degrees in political science and entrepreneurship.



Matthew McKinney



Dorian L. Eden

**DORIAN L. EDEN** has become a shareholder of the firm. Dori will continue her practice in family law, personal injury, and wrongful death litigation. Dori was also elected to the Board of Directors of the American Heart Association, Phoenix Metro Division. Dori organized a Tiffany & Bosco, P.A. team and participated in the American Heart Association's Start! Heart Walk on February 28, 2009, to raise money to prevent, treat, and defeat cardiovascular diseases.



Beth A. Heath

**BETH A. HEATH** has become a shareholder of the firm. Beth will continue her practice in real estate transactions, environmental law, and business formations.

### FIND AN ATTORNEY

See the directory on the back page of this newsletter or visit us online at [www.tblaw.com](http://www.tblaw.com).

## Tiffany & Bosco Continues FBR Open Tradition



Drazen Vukelic/Dreamstime

**T**PC Scottsdale once again hosted the FBR Open between January 26, 2009 and February 1, 2009. Known as the "Greatest Show on Grass," 2009 marked the 75th playing of this professional golf tournament, 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 2009 event, fans were fortunate to see players such as Phil Mickelson, Geoff Ogilvy, Camilo Villegas, Anthony Kim, Kenny Perry, and Justin Leonard. At the end, there was the added excitement of a sudden death playoff

in which Kenny Perry prevailed over Charley Hoffman.

A major focus of this superb event is the charitable giving generated for The Thunderbirds Charities, an affiliate of the promoter of the FBR Open. Tiffany & Bosco is honored to be a long-time supporter of this event and The Thunderbirds Charities.

This year, Tiffany & Bosco underwrote a two-story skybox on the 18th hole to watch the entire event. With its contribution, Tiffany & Bosco helped make the 2009 FBR Open another successful year for the Tournament and The Thunderbirds Charities.

### PROFESSIONAL ACHIEVEMENT

## Shareholders recognized as leading attorneys

**S**uper Lawyers, which is a listing of outstanding attorneys who have attained a high degree of peer recognition and professional achievement, recognized the following shareholders for 2008:

**RICHARD G. HIMELRICK** (Securities and business litigation); **LEONARD J. MARK** (Family law, personal injury, and medical malpractice); **RICHARD E. ONEY** (Intellectual property and intellectual property litigation); and **MICHAEL E. TIFFANY** (Real estate).

The Best Lawyers in America, which is a similar listing of

outstanding attorneys, recognized the following shareholders for 2009: **ROBERT V. KERRICK** (Eminent Domain/Condemnation); **RICHARD G. HIMELRICK** (Securities litigation); and **MICHAEL E. TIFFANY** (Real estate).

AZ Business Magazine, Arizona's leading monthly business publication for high-level corporate executives and business owners, recognized the following shareholders for 2008: **JAMES P. O'SULLIVAN** (Corporate transactions); and **ROBERT A. ROYAL** (Business litigation).

## APPOINTMENTS

## State Bar appointment



Jim O'Sullivan

**JIM O'SULLIVAN** recently accepted an appointment to the State Bar of Arizona's Continuing Legal Education Committee.

The Committee provides advice and recommendations to the State Bar of Arizona regarding continuing legal education curriculum, seminars and publications. Jim is a frequent speaker on business law and ethics issues to attorneys and business groups.

## Council appointment



Frank A. Mead

**FRANK A. MEAD** accepted an invitation to join the Ballet Arizona Corporate Advisory Council. The Council is a group of corporate

executives who have joined together to establish and strengthen relationships between Arizona businesses and Ballet Arizona. This council will help build awareness and appreciation of the arts, particularly ballet, in our community.

## Shareholder to Chair the 2009 Southwest Autism Research and Resource Center



Alex Poulos

**ALEX POULOS** and his wife, Shelli Poulos, will Chair the 2009 Annual Southwest Autism Research and Resource Center's (SARRC)

Breakfast in April. Over 2,000 people are expected to attend the Breakfast, including numerous business leaders. SARRC is gaining national attention, as one in 150 children born today has autism. Tiffany & Bosco is one of the event's leading sponsors.

## LEGAL REVIEW

## Caveat emptor

*Limiting recoverable damages by contract in professional malpractice cases*

BY DOW GLENN OSTLUND

In an Opinion published in November of 2008, the Arizona Supreme Court gave licensed professionals in Arizona the green light to limit their liability for damages to their clients for acts of malpractice to only fees paid.

A first time developer of a small town-home project in Phoenix (1800), negotiated with an engineering and surveying firm (WLB) for professional services. WLB



Dow Glenn Ostlund

said nothing to 1800 about wanting to limit its liability to 1800 in the event its work proved to be negligent and caused 1800 damage. Nor did WLB attach a copy of its "standard conditions"

page to any of the drafts of the contract being negotiated between the parties.

But WLB did attach a standard conditions page to the final contract and faxed the contract, along with the smaller print standard conditions page to 1800, who signed the contract and initialed the largely illegible standard conditions page. Paragraph 7 of the standard conditions said: *Client agrees that the liability of WLB, its agents and employees, in connection with services hereunder to the client and to all persons having contractual relations with them, resulting from any negligent acts, errors and/or omissions of WLB, its agents and/or employees is limited to the total fees actually paid by the client to WLB for services rendered hereunder.*

WLB's work turned out to be defective and stopped the project dead in its tracks. This resulted in significant cost increases to the project and major damages to 1800.

1800 sued WLB for malpractice. WLB claimed that its liability to 1800, assuming malpractice was proven, was limited by paragraph 7 of the standard

conditions to only the fees 1800 had paid WLB—less than 1% of the expected damages. 1800 argued to the Arizona Supreme Court that the restriction was contrary to Arizona's longstanding public policy preventing professionals from limiting their liability for their own malpractice which causes damages to their clients.

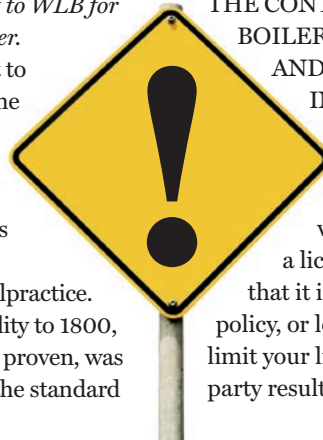
The Supreme Court sided with WLB, ruling that there is no legal reason to treat licensed professionals differently than other types of people who are free to contract for a limitation (as opposed to a total elimination) of damages they may cause others as a result of their negligently performing their side of the contract.

The Court's only expressed warning about contractual limitation of liability provisions was that the provision must satisfy traditional contract formation requirements. The Court also observed that a professional association may declare such limitations of liability provisions "unethical," and thereby prevent their use by members of that professional group.

However, ethical standards change. A few years ago, it was "unethical" for medical and legal professionals to advertise. One enterprising attorney changed all of that by persuading the United States Supreme Court that if it is not illegal, it is not unethical, and the advertising world has never been the same since.

In light of the ruling in the 1800/WLB case, the following should be carefully examined and considered: If you are negotiating with and/or obtaining the services of a licensed professional (or in any contract for that matter), **READ THE CONTRACT—INCLUDING THE BOILERPLATE—VERY CAREFULLY AND UNDERSTAND THE MEANING OF YOUR AGREEMENT.**

If you are providing work, services and/or product to someone else pursuant to a written contract, even if you are a licensed professional, consider that it is not illegal, against public policy, or legally improper for you to try to limit your liability for damages to the other party resulting from your own malpractice.



## IN FOCUS

BY DUSTIN C. JONES & JON M. PALADINI

# The Party's Over

**THE PHOENIX REAL ESTATE DEVELOPMENT** market from 2003 to 2006 was truly the largest, most festive “Developers’ Ball” in the country.

The proverbial Prince Charmings of the development community attended: headliner development players (i.e., Donald Trump); blockbuster commercial developments (i.e., Cabela’s, “W” Hotels, Bloomingtondale’s); fashionably named master planned communities (i.e., Verrado, Vistancia); glitzy high rise condo towers (i.e., 44 Monroe); mixed use projects (i.e., City North, Westgate); and major sports venues (i.e., U of P Stadium, Jobing.com Arena, and two spring-training complexes).

Every municipal Cinderella was eager to give up more than her glass

slipper to attract her very own Prince. Development agreements, fast track approvals, and economic incentives were common tools used to attract eligible suitors. Developers strutted their projects around the Ball with savvy zoning attorneys adept at fancy footing through the delicate, yet highly orchestrated entitlement dance. Ugly step-sisters, Exaction and Denial, were kept in check—relatively speaking. What a blast!

But the clock struck midnight, and many of the prospective Princes have left the scene. Cinderella cities have awakened the morning after—with massive headaches. Confused,

exhausted, and disoriented, they are distressingly curious about what really happened the night before. Perceiving they have been badly mistreated, they have closed the doors to their City Hall homes, and hung signs suggesting, “NO MORE ENTITLEMENTS!!” The ugly step-sisters are now in charge. Or so it appears.

For instance, the “Growing Smarter” statutes adopted in the 1990s promoted the idea that development “pay its own way.” This meant local governments were mandated to charge development for the impact it had on infrastructure and government services. But economic times were good. So, despite the statutes, local governments provided development with economic incentives. This came in the way of fee waivers, tax, and other rebates, and even direct payments to developers.

How times have changed! Cities that benefitted during the economic good times are now looking to the



Dustin C. Jones



Jon M. Paladini



r } Cinderella cities cope with  
a “developers’ ball” gone bust

development community to solve many of the problems of their current fiscal crises. Local governments are now reluctant to provide economic incentives to development. More noxious, however, is that many want developers to pay not only their “fair share” of infrastructure and service

Although government is prohibited from requiring development to pay for these existing inadequacies during the land use entitlement process, cities are getting more and more aggressive in making them a quid pro quo for land use approvals.

costs created by new development, but also to improve already existing infrastructure and government services deficiencies.

Although government is prohibited from requiring development to pay for these existing inadequacies during the

land use entitlement process, cities are getting more and more aggressive in making them a quid pro quo for land use approvals. And most zoning cases are now taking even longer as city planning staffs have been reduced. Elected officials are feeling ever increasing pressure from constituents to protect public services and to deal with developers as though they have NO ENTITLEMENTS.

As painful as it may appear, more than ever, it is time to engage in meaningful and strategic negotiations with City Hall. But be careful! Do not take on City Hall without help. It is imperative to have capable legal counsel experienced in the land use process and in dealing with local governments to help maneuver through tough development negotiations. The land use, zoning, and condemnation team at Tiffany & Bosco has decades of experience handling such cases.

**NEED A HAND WITH CITY HALL?**

For more information please contact Dustin Jones at (602) 288-7895, [dcj@tblaw.com](mailto:dcj@tblaw.com) or Jon Paladini at (602) 255-6040, [jmp@tblaw.com](mailto:jmp@tblaw.com).

## BUSINESS

### CONTRACTS

# The ties that bind

*The value of agreements between business owners before a problem arises*

BY JAMES P. O'SULLIVAN & KEVIN P. NELSON

When beginning a business, many co-owners prefer to spend time focusing on their common efforts rather than the risks associated with their business relationship. Some important questions are commonly (and understandably) avoided during this "honeymoon" phase. Unwillingness to focus on these issues while they are still hypothetical can leave the partnership on a shaky foundation during tough times.



James P. O'Sullivan

Business owners are well advised to take a proactive approach in addressing future risks through an owner agreement.



Kevin P. Nelson

What is an owner agreement? The name varies depending on the type of business entity, but the most common are titled "Buy/Sell Agreements," "Shareholder Agreements," "Partnership Agreements," "Operating Agreements," and "Joint Venture Agreements."

Whatever the name, there are some common provisions business owners should consider.

#### Key issues include:

**1} Working Capital** Prior to beginning any business, owners should agree how the owners will provide the company's working capital and whether the company will take on debt financing when cash needs press.

**2} Profit and Loss Allocations** When the company makes a profit, everyone will want a piece of the pie. Detailing who gets the profits,



Andres Rodriguez/Dreamstime

and when, will help avoid fights in the future or at least lessen their intensity. This can also be true for losses. For instance, who gets the potentially valuable tax benefits of a loss?

**3} Compensation for Services** How owners are paid is the most common trigger for disputes. An owner's ego can be easily bruised when other owners seek higher compensation for their services. It is imperative that the owners detail how services will be compensated at the start of the business and as the relative value of the owners' contributions change over time.

**4} Procedures for Business Decisions** Business owners should address when and where they will meet, when a vote on a business decision is required, who will be entitled to vote, and the duties and rights of the parties. Will one or more owners have a "tiebreaker" or "veto" right?

**5} Trigger of Buy-Out Rights** At some point business owners must consider what happens when an owner terminates employment, dies, becomes disabled, files bankruptcy, gets divorced, etc.

**6} Valuation of Ownership Interests** There are many methods that can be used to value an ownership interest. Regardless of the method used, we generally recommend using a single valuation method for all buy-out triggering events. We also suggest considering cash flow needs for the company by scheduling payment of the purchase price for the ownership interest over an agreed period.

**7} Dissolution** Upon dissolution, a company must consider how assets will be distributed, how debt will be satisfied, and who will be responsible for winding up the company.

**8} Dispute Resolution** Finally, and sometimes most importantly, owners should agree on how they will seek to resolve disagreements. Having an agreement to try to resolve disputes privately through informal negotiations, mediation, and arbitration can help avoid a lawsuit that is both costly and subject to public review by competitors, customers, vendors, and employees.

The bottom line is that business owners are wise to reach an agreement regarding the above-outlined issues prior to participating in substantial business dealings. However, even long standing businesses should consider adopting or updating an owner agreement. We can help address these and other important issues for new and experienced business owners.

#### WE'RE HERE TO HELP

For more information about Tiffany & Bosco's resources in this area, please contact Jim O'Sullivan or Kevin Nelson of our Business Solutions Department at (602) 255-6017, [jpo@tblaw.com](mailto:jpo@tblaw.com), or (602) 255-6028, [kpn@tblaw.com](mailto:kpn@tblaw.com).

## ARIZONA CORP. COMMISSION UPDATE: Annual Report Scam

For decades the Arizona Corporation Commission has sent corporations an Annual Report to complete and file by a specified deadline. Failure to timely file the Annual Report can lead to penalties and loss of protection from personal liability for business owners. In an important procedural change, effective Oct. 1, 2008, the commission no longer mails the Annual Report forms to corporations. Instead, corporations will receive a reminder that the Annual Report is due. Corporations can file their Annual Reports online by accessing the following link: <http://starpas.azcc.gov>. The Annual Report form can also be downloaded from this web link and mailed to the Corporation Commission, or a request can be made for the form to be mailed or faxed from the Commission to the corporation.

Finally, beware of organizations sending official-looking documents purporting to offer a service for a fee to file Annual Reports. These organizations are not sanctioned by the Corporation Commission, and corporations are not required to file with these organizations or to pay them a fee.

For more information, see [www.cc.state.az.us/Divisions/Administration/news/2\\_080722%20BBC.pdf](http://www.cc.state.az.us/Divisions/Administration/news/2_080722%20BBC.pdf) or contact Jim O'Sullivan, Director of our Business Solutions Department, at (602) 255-6017 or [jpo@tblaw.com](mailto:jpo@tblaw.com).

# LEGAL REVIEW

## EMINENT DOMAIN

# When the condemnation monster comes to visit

BY ROBERT V. KERRICK

**F**or at least the past 60 years, the entire Valley has been aware of the numerous and massive public projects constructed by a whole host of different governmental entities for a myriad of governmental public purposes. Obviously those projects required the acquisition—and in many cases, the condemnation of private property. Although often very harsh, this legal process continues today.

To the uninformed or inexperienced owner faced with the prospect of a governmental taking of his or her property, the question of what to do is often daunting. If a governmental agency and the owner can reach an agreement on the purchase price of the property designated for the project, they open an escrow and finalize the acquisition. However, if an agreement cannot be struck, the owner must prepare to defend a condemnation lawsuit. That is when the “condemnation monster” rears its ugly head and the owner is hauled into court.

What should the owner then do? Clearly, the best advice is to seek an experienced condemnation lawyer. The “condemnation game” is very specialized and controlled by a number of confusing procedural and substantive rules and concepts. Together, they can severely intimidate, and ultimately prejudice the owner’s right to receive fair compensation for the property.

Obviously the overriding issue in condemnation litigation is the value of—or sometimes damages to—the property sought to be condemned. But in pursuing “just compensation,” the owner needs to have a true understanding of many of the following:

- Date of valuation
- Highest and best use
- Larger parcel
- Methods of valuation
- Leasehold interests
- Access
- Easements
- Utilities
- Billboards
- Property taxes
- Relocation assistance
- Environmental issues
- Taxation of the condemnation award

Unless the parties can agree, the culmination of the condemnation process is a trial before a judge or jury. Even though the owner may testify as to the value of his or her property, a condemnation trial is essentially a “war of experts.” And since value is a matter of opinion, there is the ever-present risk that a judge or jury may side with the opposing party’s expert and adopt that expert’s opinion on value or damages. This risk or uncertainty is what causes most cases to settle before trial.

Once the wave of human emotion passes after the owners find out that they are going to lose (involuntarily) a portion or all of their property to some governmental project, most owners logically conclude it would be foolish not to at least investigate their legal position in a potential or pending condemnation proceeding. However, only after consulting with a lawyer can an owner truly make informed, intelligent choices. If from such consultation the owner is convinced that he or she is entitled to greater compensation than is being offered by the government, then the owner may choose to litigate. As the lawsuit proceeds, experienced counsel will continue to encourage an honest, educated evaluation of both sides’ positions.



Robert V. Kerrick

ADDRESS SERVICE REQUESTED

## ATTORNEY DIRECTORY



**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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