

TB  
LAW

NEWSLETTER



# COMMERCIAL REAL ESTATE

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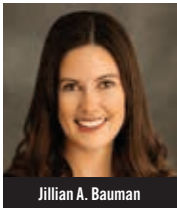
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# ANNOUNCEMENTS

## PROFESSIONAL & PERSONAL ACHIEVEMENT

**ELISE B. ADAMS** was recently appointed to the State Bar of Arizona Probate and Trust Executive Council. As a board member, she will be involved in commenting on improvements and reforms in trust and estate legislation, as well as educating members of the Bar and the public regarding probate and trust law. Also, Elise was recognized as a Rising Star in *Phoenix Magazine's* list of Top Lawyers.



Jillian A. Bauman

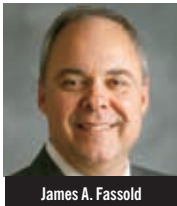
**JILLIAN A. BAUMAN** has been recognized as a Rising Star in *Phoenix Magazine's* list of Top Lawyers.

**JODI R. BOHR** was selected again as one of *Phoenix Magazine's* Top Lawyers (Employment Law). Jodi also presented at a CBIZ and MHM seminar on legal considerations for non-profits. Additionally, Jodi was featured in a video on Navigating Employment Laws; a link can be found in her bio on the firm's website.



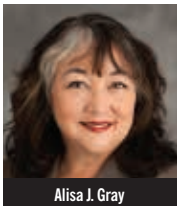
Jodi R. Bohr

**JAMES A. FASSOLD** has been named as the 2024 "Lawyer of the Year" for Litigation - Trusts and Estates by *The Best Lawyers in America*. This is the second time he has won the award.

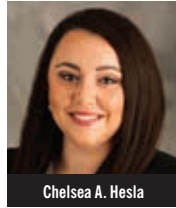


James A. Fassold

**ALISA J. GRAY** has been invited to join the Board of Directors of Mindfulness First, an Arizona non-profit whose mission is to teach children and adults practical skills and knowledge for lifelong mental health and wellbeing. Mindfulness First offers evidence-based and trauma-responsive programs. A shareholder at Tiffany & Bosco, Alisa has been teaching yoga and mindfulness for over 10 years, including providing instruction to lawyers and other legal professionals to manage stress and reduce burnout.

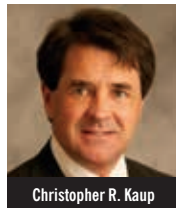


Alisa J. Gray



Chelsea A. Hesla

**CHELSEA A. HESLA** was honored to present for the National Business Institute on the topics of probate ethics, post-death distributions of real property, and probate litigation strategies. The course provided attendees with practical tips for administering probate estates while mitigating conflict and ensuring smooth administrations. Chelsea's experience as a trust and estate litigator also recently earned her the honor of being named a Top Lawyer by *Phoenix Magazine*.



Christopher R. Kaup

**CHRISTOPHER R. KAUP** was appointed to the State Bar of Arizona's Council on Minorities & Women in the Law. The Council on Minorities & Women in the Law encourages and facilitates the active and effective participation of minorities and women in the legal profession and promotes the professional development of minority and women attorneys.



May Lu

**MAY LU** presented on LLCs at the Business Law Seminar at the State Bar of Arizona's Annual Convention and on "Managing Legal Issues for a Successful Closing" for the Arizona Business Brokers Association in June 2023. She also has been appointed to chair the State Bar of Arizona's Bar Leadership Institute Selection Panel for a 2-year term. May was recognized again as one of *Phoenix Magazine's* Top Lawyers for mergers & acquisitions and corporate counsel law.

**MAY LU** and **JAMES P. O'SULLIVAN** presented a CLE co-sponsored by the State Bar of Arizona and its Business Law Section titled "Breaking Up Is Hard to Do: Business Divorce/Dissociation" on October 6, 2023.

**ROBERT D. MITCHELL** was recognized by *Phoenix Magazine* as a Top Lawyer in commercial litigation, civil law litigation, and securities law. The publication included a two-page spread about Robert and his practice.



Robert D. Mitchell

**JAMES P. O'SULLIVAN** was recognized by *The Best Lawyers in America* as the 2024 Lawyer of the Year for Closely Held Companies and Family Businesses Law in Phoenix. This is the second time he has won the award. Jim was also recognized again as one of *Phoenix Magazine's* Top Lawyers for mergers & acquisitions, corporate counsel, and transactional law.

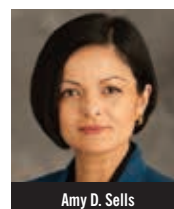


James P. O'Sullivan



Robert A. Royal

In a case taking place in Oregon, **ROBERT A. ROYAL** obtained on behalf of his clients the largest attorneys' fee award reported in Oregon history for civil litigation in state court. In addition to the already \$1 million plus award received, Rob has pending an additional fee application under the dissenters' rights statutes. When his clients, as dissenting shareholders to a sale of company assets, gave notice, the company did not follow statutory procedures as required. This subjected the company to another award of attorneys' fees, as decided by the judge in this lengthy litigation matter against a billion-dollar company.



Amy D. Sells

Appellate attorney **AMY D. SELLS** was peer-selected for *Phoenix Magazine's* list of Top Lawyers 2023, and she is one of only six featured attorneys. Amy was also nominated by the Arizona Appellate Practice Section's Executive Council, and elected by her peers, to serve as Treasurer for the 2023-2024 term.

## ANNOUNCEMENTS

### GOOD WORKS

# Inspiring Community Engagement

## *Firm drives support Brambley Hedge Rabbit Rescue and Goodwill*

Throughout the spring and summer of 2023, Tiffany & Bosco remained committed to its tradition of supporting charitable causes throughout the Valley. The firm's attorneys and staff are united in their desire to give back to the community and make the Phoenix area a better place to live. In recent months, for example, the firm focused its efforts on initiatives benefitting such diverse causes as the Brambley Hedge Rabbit Rescue and Goodwill Industries International. Through these efforts and others, the firm hopes to inspire a spirit of community engagement not only in its attorneys and staff, but in others as well.

### DONATION DRIVE FOR BRAMBLEY HEDGE RABBIT RESCUE

In April, Tiffany & Bosco held a seasonally appropriate drive focused on collecting items for a local rabbit shelter, Brambley Hedge Rabbit Rescue. Founded in Phoenix in 1986, Brambley Hedge Rabbit Rescue is a nonprofit, no-kill shelter that can house over 100



rabbits at any given time. Since its founding, the shelter has assisted with the adoption of over 3,500 rabbits to their forever homes. Items donated by the firm included wipes, towels, trash bags, pet bowls, and pet potty training supplies, as well as cash donations. All of those items, for which the shelter was very grateful, will be useful to the shelter as it cares for its furry residents.

### PROFESSIONAL CLOTHING DRIVE BENEFITTING GOODWILL

During September, the firm coordinated a clothing drive to collect gently-used professional attire including suits, sport coats, blazers, dresses, slacks, skirts, ties, belts, and shoes. All donations went to Goodwill Industries International. Commonly referred to simply as Goodwill, the nonprofit organization's mission is to enhance people's dignity and quality of life by strengthening their communities, eliminating their barriers to opportunity, and helping them reach their full potential through learning and the power of work. Goodwill provides job training, employment placement services, and other community-based programs, with a particular focus on people who have barriers to their employment. In 2022, Goodwill impacted over 2.1 million individuals worldwide, helped more than 128,998 people train for careers in industries such as banking, IT, and healthcare, and obtained for them the supportive services they needed to be successful, such as English language training, education, and access to transportation and child care. Tiffany & Bosco is proud to contribute to Goodwill's community-building efforts.

### RECOGNITION

## The 'Best' & 'Ones to Watch'

*The Best Lawyers in America*® is a listing of outstanding attorneys who have attained a high degree of peer recognition and professional achievement. The 2024 listing recognized: **Shaine Alleman** (Real Estate Law), **Jodi R. Bohr** (Commercial Litigation; Litigation-Labor and Employment), **Mark S. Bosco** (Litigation-Banking and Finance; Mortgage Banking Foreclosure Law), **David L. Case** (Litigation-Trusts and Estates; Tax Law; Trusts and Estates), **Enslin Crowe** (Bankruptcy and Creditor Debtor Rights/Insolvency and Reorganization Law), **Sarah K. Deutsch** (Commercial Litigation), **James A. Fassold** (Litigation-Trusts and Estates), **Alisa J. Gray** (Litigation-Trusts and Estates), **John A. Hink** (Real Estate Law), **Christopher R. Kaup** (Bankruptcy and Creditor Debtor Rights/Insolvency and Reorganization Law; Litigation-Bankruptcy), **Jacob Kiser** (Litigation-Real Estate), **May Lu** (Business

Organizations (including LLCs and Partnerships); Closely Held Companies and Family Business; Corporate Governance; Corporate Law; Mergers and Acquisitions Law), **Robert D. Mitchell** (Commercial Litigation; Litigation-Securities), **Diane Murray** (Litigation-Bankruptcy), **Kevin P. Nelson** (Litigation-Construction), **James P. O'Sullivan** (Business Organizations (including LLCs and Partnerships); Closely Held Companies and Family Businesses Law; Mergers and Acquisitions Law), **Robert A. Royal** (Business Organizations (including LLCs and Partnerships), **Anthony R. Smith** (Mortgage Banking Foreclosure Law), **Michael E. Tiffany** (Real Estate Law), and **Donald M. Wright** (Bankruptcy and Creditor Debtor Rights/Insolvency and Reorganization Law; Litigation-Bankruptcy).

*The Best Lawyers in America* listed the following attorneys as *Ones to Watch* in 2024: **Chelsea A. Hesla** (Real Estate Law) and **Elizabeth Loeffgren** (Real Estate Law).

# ANNOUNCEMENTS

## NEW FACES

## Tiffany & Bosco Welcomes New Attorneys

**ALEXA W. LARSON** joined the firm in September 2023. Prior to joining Tiffany & Bosco, Alexa practiced Estate Planning for two years at another well-respected local law firm. Alexa is currently attending New York University School of Law, where she will receive her LL.M. in Taxation. In 2021, she received her law degree from the Sandra Day O'Connor College of Law at Arizona State University, where she was recognized as a Willard H. Pedrick Scholar for academic excellence. While in law school, Alexa served as the Executive Managing Editor of the *Arizona State Corporate and Business Law Journal*. She received her undergraduate degree in Public Relations from Iowa State University in 2017, where she graduated in three years. While not at the office or studying for class, Alexa enjoys playing tennis and pickleball with her husband, James, and their dog, Chloe.



Alexa W. Larson

**LAWANDA MITCHELL** joined the firm in May 2023, and currently practices in the areas of Bankruptcy and Default Loan Servicing. LaWanda is a graduate of the University of Alabama at Birmingham and Birmingham School of Law. LaWanda was admitted to the Alabama State Bar in 2009, starting her practice in the areas of family law, criminal defense, and labor and employment law. Later, she began practicing in the areas of bankruptcy and collections, representing both creditors and debtors. LaWanda has also practiced in the area of probate law, particularly the distribution and settlement of estates. LaWanda has previously worked with the Birmingham



LaWanda Mitchell

Volunteer Lawyers Program providing pro bono legal assistance with domestic relations matters. In law school, LaWanda was a Magic City Bar Association Scholarship Recipient. After being licensed as an attorney, she served as a Director for the Birmingham Bar Association New Lawyers Mentoring Program initiated by Judge Eugene Verin. LaWanda is admitted to practice in the Northern, Middle, and Southern District Federal Courts in Alabama. In her spare time, she loves riding her spin bike, watching football, and spending time with family, which includes playing with monster trucks with her two-year-old son.

**ANTHONY D. NORDMAN** joined the firm in August 2023. He received his J.D. from the Sandra Day O'Connor College of Law at Arizona State University. Anthony co-authored an article on utility



Anthony D. Nordman

liability resulting from wildfires that was published in the *Tulane Environmental Law Journal*. During law school, Anthony interned for the Elections Director at the Arizona Secretary of State's Office, the Arizona Attorney General's Office, the Legislative Council for the Arizona Legislature, and Governor Doug Ducey's Office of General Counsel. Anthony then served as a law clerk for the Honorable Jennifer M. Perkins of the Arizona Court of Appeals and the Honorable Susan M. Brnovich of the United States District Court, District of Arizona. Outside of the office, Anthony loves golf, camping, and spending time with his family.

### { NEED AN ATTORNEY? }

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

**RAFAELLA P. SAFARIAN** joined the firm in September 2023. She received a Bachelor of Arts degree in Creative



Rafaella P. Safarian

Writing and a minor in French from Arizona State University. In 2021, she received her law degree from the University of Arizona James E. Rogers College of Law. During law school, she served as Note Editor of the *Arizona Law Review* and represented children in dependency proceedings through the Child and Family Law Clinic. Before joining the firm, Rafaella served as a law clerk for the Honorable Randall M. Howe of the Arizona Court of Appeals for two years. During her spare time, Rafaella loves to attend live theater performances, write short stories, and explore independent bookstores around the world.

**RACQUEL A. WHITE** joined the firm in June 2023. Prior to joining Tiffany & Bosco, Racquel practiced in the areas of Employment Law, Commercial Law, Collection Law, Consumer Defense Law, Administrative



Racquel A. White

Law, and Criminal Law. Racquel graduated from the University of Florida with a Bachelor's degree in History in June 1996. She graduated from the University of Florida College of Law with her Juris Doctor in December 1999. Racquel previously opened and operated Florida branch law offices for two other firms, the first in 2009 and the second in 2021. Racquel has successfully handled thousands of litigated collection, commercial, and employment matters. In her spare time, Racquel enjoys speaking to various groups and organizations regarding legal matters, traveling with family and friends, reading, and crocheting.

# PROBATE COURT



## HERE TO HELP

If you need assistance with navigating supportive decision-making agreements or other recent changes to Arizona's guardianship and conservatorship statutes, please contact the attorneys at Tiffany & Bosco, P.A.

the adult wants to work, all without impeding the adult's self-determination. Supportive decision-making agreements also encourage a group process to reach various decisions about the adult's life, rather than designating an individual to unilaterally make decisions on the adult's behalf. These agreements instead emphasize autonomy, self-determination, and independence for adults who wish to make decisions that reflect their needs, values, preferences, and desires.

Once executed, supportive decision-making agreements remain in effect until they are terminated in writing by either party, the adult becomes incapacitated, or a guardian has been appointed by a court.

Arizona is not the first state to adopt supportive decision-making legislation, with other states like Alaska, Texas, and Delaware leading the way for these types of agreements. The idea of supportive decision-making has also long been encouraged by family members of those with disabilities as a way to avoid the expense, time, and oversight of traditional court intervention.

The new law is set to go into effect on October 30, 2023.

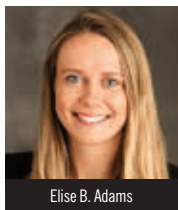
Supportive decision-making agreements, however, may not be the best fit for everyone and are not intended to serve as a replacement for guardianships over individuals that a court has determined are incapacitated. In addition, as with any new law, there are outstanding questions regarding the intended use of supportive decision-making agreements and the effect these agreements will have on existing guardianship and conservatorship proceedings.

## On the Team

*Supportive Decision-Making Agreements encourage autonomy, self-determination, and independence*

BY ELISE B. ADAMS

On June 20, 2023, Arizona Governor Katie Hobbs signed SB 1291 into law. In addition to other changes to existing guardianship and conservatorship statutes, SB 1291 permits the use of "supportive decision-making agreements" for disabled individuals over the age of eighteen.



Elise B. Adams

Intended to be a less onerous process than typical guardianship and conservatorship proceedings, supportive decision-making agreements permit adults with disabilities to voluntarily enter into an agreement with a supporter. Such agreements permit that supporter to: (1) advise the adult so that he or she understands the options,

responsibilities, and consequences of his or her life decisions, without actually making those decisions; (2) assist the adult in obtaining his or her medical, psychological, financial, education, or treatment records; (3) assist the adult in understanding those records; and (4) communicate the adult's decisions to the appropriate individual.

Unlike typical powers of attorney, supportive decision-making agreements do not authorize the supporter to sign legal documents on behalf of the adult or bind that adult to any legal contracts. Instead, these agreements are designed to create a process that supports and accommodates an adult to make decisions and choices about certain aspects of the adult's life, including decisions regarding where and with whom that adult wants to live; the services, support, and medical care the adult wants to receive; and where

## COMMERCIAL REAL ESTATE



# A Guide to Commercial Evictions: What to Do if a Tenant Defaults

BY TIMOTHY C. BODE

**T**he current economy can put a number of strains, including inflation and increased expenses, on all types of businesses. This can lead to commercial tenants either being unable to pay rent or prioritizing rent payments to the detriment of other expenses and upkeep, leading to non-monetary defaults under their leases. As a result, many commercial



Timothy C. Bode

landlords have experienced, or are likely to experience, a rise in defaults by commercial tenants.

People often focus on the impact of economic downturns on consumers or tenants. And for good reason. But if a commercial tenant is unable to pay rent or has otherwise defaulted under its lease, this negatively impacts the landlord, the landlord's employees, and potentially the landlord's ability to

pay its debts, including the mortgage on the leased real property. It may be easy for some to forget, but landlords can feel like they are in uncertain and difficult territory when faced with tenant defaults.

Unlike in the residential eviction context, commercial landlords have multiple and varied options at their disposal to address tenants that are in default. What a landlord can or cannot do in these situations is governed by Arizona statutes and the parties' lease

that a landlord must fulfill before proceeding to retake possession. It is essential to review the lease carefully before moving forward.

If the lease does not prohibit a lockout, a landlord can generally re-enter the premises and lock out a tenant when rent is more than five (5) days late or there has been a material breach of the lease. *See* A.R.S. § 33-361(A).

If rent is owed and a lockout occurs, the landlord can assert a lien over the tenant's non-exempt personal property left in the premises. After satisfying certain requirements and after the requisite passage of time, the landlord can sell the property. This process is statutory and technical. Landlords should consult a lawyer to ensure that statutory procedures are properly followed.

#### OPTION 2: EVICTION

In some cases, a landlord may not want to lock out a tenant, particularly if there are concerns over the type of business or what would remain in the space should the tenant be locked out (e.g., a medical office with medical records). Or it may be that a landlord does not want to deal with the headache of asserting a landlord's lien.

Instead, the landlord can initiate a commercial eviction action in court—referred to as a forcible detainer action or FED. A FED is intended to be a speedy mechanism for a landlord to regain possession of the premises. It is also an initial avenue for obtaining a swift judgment for past-due rent and then-accrued attorneys' fees and costs.

A FED judgment will grant possession to the landlord. After gaining possession, if the tenant fails to leave, the constable or Sheriff will remove the tenant and restore possession to the landlord. The FED process typically takes 15-30 days depending on the relevant court's schedule. In general, the judgment and FED mechanisms provide a level of comfort and shield the landlord from removing the tenant directly. In addition, a landlord can typically initiate a separate breach of contract action for damages after the landlord regains possession.

#### PREPARED FOR A DEFAULT?

If you find yourself in need of guidance on any of these issues, the attorneys at Tiffany & Bosco, P.A. are available to help.

#### RE-POSSESSED — NOW WHAT?

Regardless of whether the landlord regains possession through a lawsuit or otherwise, the landlord must be aware of additional non-contractual obligations.

Primarily, a landlord cannot let the property sit vacant and simply seek to obtain all future rent due under the lease from the tenant. Rather, a landlord has a duty to mitigate damages. In other words, a landlord must engage in reasonable efforts to market and re-let the premises at a fair rental rate (i.e., not necessarily a monthly rent or term equivalent to those included in the prior lease).

If a landlord pursues the former tenant for damages, the landlord must prove that a contract existed, the tenant breached the contract, and the landlord suffered damages. If there was a written lease, the tenant will likely concede a contract existed and the tenant breached the contract.

However, the tenant will undoubtedly argue that the landlord did not mitigate the landlord's damages. This dispute will become the primary issue in any litigation. A mitigation dispute can increase the scope and expense of litigation because it is a factual issue that usually requires a trial to resolve, and the landlord will need to present expert testimony regarding its efforts.

By engaging in efforts to mitigate damages or, ideally, if the landlord can promptly install a new tenant, the landlord will likely eliminate any factual dispute over damages and can quickly move to have a judgment entered against the former tenant.

Not every commercial lease, factual scenario, or case is the same. It is helpful to have a well-written lease and to know what steps can or must be taken when a commercial tenant is in default.

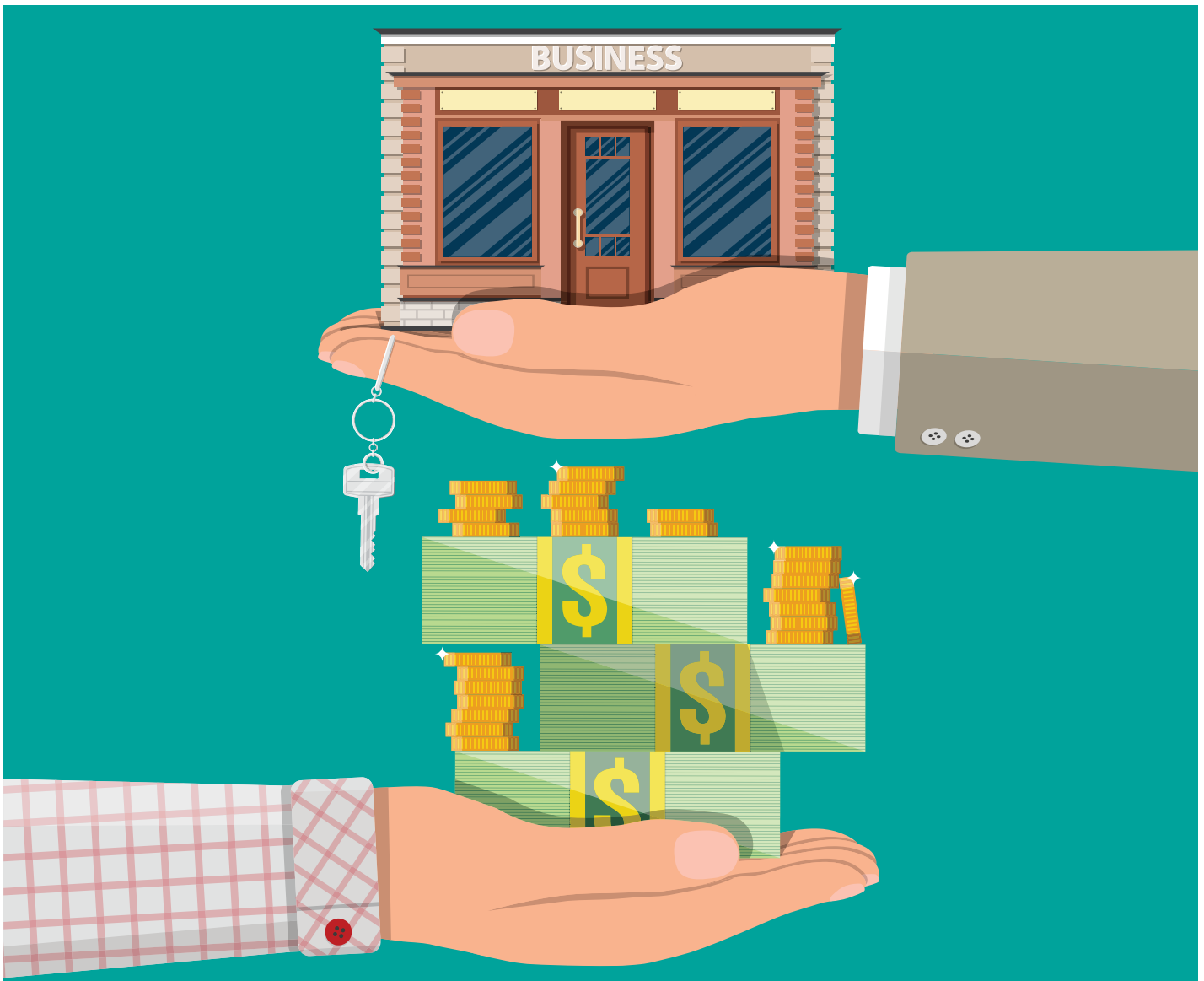
agreement. Generally, a landlord has two primary options: (1) re-enter the premises and lockout the tenant; or (2) pursue an eviction action to regain possession. *See* A.R.S. §§ 33-361(A) and (B).

#### OPTION 1: LOCKOUT

Although statutory provisions may afford the landlord various options, be aware that the applicable lease may prohibit a lockout or it may set forth more stringent notice requirements

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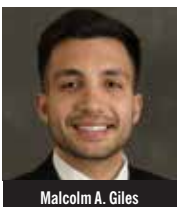
## COMMERCIAL REAL ESTATE



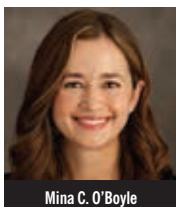
# Building Blocks for Business

*Maximizing the viability  
of commercial leases*

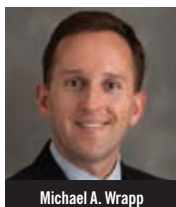
BY MALCOLM A. GILES, MINA C. O'BOYLE &  
MICHAEL A. WRAPP



Malcolm A. Giles



Mina C. O'Boyle



Michael A. Wrapp

**C**ommercial lease agreements are a foundational component of the operations of many business enterprises, not only for tenants renting commercial space, but for landlords who own it. While such leases can often be intricate and may seem daunting at first glance, related negotiations provide a wide variety of opportunities for attorneys to add value for their clients, regardless of whether they are representing landlords or tenants. This article examines just a few common, yet pivotal, points of negotiation for both landlords and tenants to keep in mind.



## 1 RENT STRUCTURE AND ADJUSTMENTS

The foundation of any lease lies in its rent structure. Beyond the base rent, commercial leases often address parties' responsibilities for other charges such as common area maintenance (CAM) fees, property taxes, and insurance. It is crucial for landlords and tenants alike to clearly delineate all base and additional rent components while including explicit terms for any rent adjustments.

*Landlord's Priorities:* To ensure that a lease continues to be economically viable through any extensions of the initial term, landlords can consider various strategies for adjusting the base rent. These strategies include fixed escalation percentages, percentage changes tied to changes in the consumer price index, or comprehensive fair market analyses of the rental value of the premises at the time of adjustment.

*Tenant's Priorities:* Prioritize clarity and predictability regarding rent throughout the lease term in order to maintain an accurate understanding of the tenant's financial obligations.

## 2 LEASE TERMINATION AND EXTENSION CLAUSES

Termination and extension clauses are also fundamental to lease agreements. Such clauses respectively define the conditions for lease termination and the procedures for any permitted extensions of the initial term.

*Landlord's Priorities:* Provide explicit guidelines for both monetary events of default, such as non-payment of rent, and non-monetary events of default, like assignment or subleasing without required consent. Specific non-monetary default clauses ensure alignment between tenants' business activities and the overarching goals of a commercial property or development. If lease extensions are permitted, landlords should anticipate future market rental rates and structure clauses accordingly, while

including provisions allowing for any necessary adjustments to stay congruent with the market.

*Tenant's Priorities:* Push for clear extension parameters, avoiding arbitrary rate hikes that could jeopardize the economic viability of a lease. Ensure that adequate notice and cure opportunities are required before a landlord may exercise its remedies in the event of a default by the tenant. When possible, incorporate terms accommodating potential business expansion or contraction, such as relocation rights. Absent expansion or contraction, clearly delineate when, or if, a landlord may exercise relocation rights to accommodate other tenants.

## 3 USE AND ALTERATION OF THE PREMISES

How a tenant is permitted to use the leased space, as well as whether and how the tenant is permitted to alter it, can often be significant points of contention.

*Landlord's Priorities:* Clearly define permitted uses while also enumerating prohibited activities, especially those that could jeopardize the value of the property or disrupt other tenants. If alterations are permitted, retain control over their structural impact and aesthetics, and require strict adherence to federal, state, and local laws and any applicable covenants, conditions, and restrictions.

*Tenant's Priorities:* Seek flexibility to accommodate potential business growth and changes. Understand any restrictions and get clarity on the process for seeking approval of alterations. Negotiate and clearly articulate responsibilities for the cost of the initial build-out and any potential alterations, as well as who retains related fixtures and personal property upon lease termination.

## 4 ASSIGNMENT AND SUBLEASING PROVISIONS

The ability of a tenant to assign its rights under the lease or sublease to a portion or the entirety

of the premises is another item that is frequently negotiated. The fluidity of business needs and unexpected changes in market dynamics can make this a very important issue for tenants, while landlords generally err on the side of caution and seek to maximize their control over who occupies their property.

*Landlord's Priorities:* Maintain control over who is using the premises, and for what purpose, in order to ensure conformity with the intended tenant mix and overall vision for a project, maximize harmony between neighboring tenants, and avoid compromising the integrity of other lease agreements. Landlords often seek sole discretion in approving assignments and require written consent for assignments or subleases. Further, related clauses may stipulate that any profits from subleasing that exceed the rental rate under the original lease must revert to the landlord.

*Tenant's Priorities:* The flexibility to assign or sublease is crucial, particularly when scaling or adjusting operations. Negotiate fair assignment and subleasing terms that offer agility without undue restrictions. Obtain clarity on any profit-sharing provisions associated with subleasing and seek to minimize any requirement for the tenant to share subleasing profits with the landlord.

Ultimately, commercial lease agreements involve complexities that will directly impact the operational and financial well being of both the landlord and the tenant. Attorneys can play a crucial role in guiding the parties' negotiations to help maximize the viability of commercial lease agreements.

### HERE TO HELP

Should you find yourself grappling with commercial lease terms, whether as a landlord or a tenant, the attorneys at Tiffany & Bosco, P.A. are available to offer guidance and advocate for your interests.

## FINANCIAL COMPLIANCE

# Lenders & Brokers Beware

*Florida Commercial Financing Disclosure Law brings rule changes, potential fines for non-compliance*



BY ANDY W. SAAG

**O**n March 2, 2023, Florida State Representative Doug Bankston introduced HB1353, the Florida Commercial Financing Disclosure Law (“FCFDL” or the “Law”). The Law would require “Providers” (a defined term under the Law) consummating commercial financing transactions to give specific written disclosures for certain transactions. The Law would also define and prohibit Brokers



Andy W. Saag

from taking certain specified actions.

Less than four months after it was introduced, on June 26, 2023, Florida Governor Ron DeSantis signed the FCFDL into law. Although the Law took effect July 1, 2023, it only applies to transactions consummated on or after January 1, 2024.

### EXEMPTIONS

The Law broadly applies to “any commercial financing transaction,” but the FCFDL has exemptions for certain transactions and entities including:

- > Federally-insured depository institutions or an affiliate or holding company of such an institution.
- > Lenders regulated under the Farm Credit Act of 1971.
- > Commercial transactions secured by real property.
- > Leases.
- > Certain purchase money obligations.
- > Transactions in which the recipient is a motor vehicle dealer or its affiliate, or a vehicle rental company or its affiliate, involving a loan of at least \$50,000.

- > Transactions with Providers who sell or lease products manufactured, licensed, or distributed by that Provider or certain related companies.
- > Licensed money transmitters.
- > Providers who consummate no more than five commercial transactions in Florida in a 12-month period.
- > Any transaction involving more than \$500,000.

### WHAT IS REQUIRED?

All required disclosures must be provided at or before origination of the relevant transaction. Only one disclosure must be provided for each transaction, and a disclosure is not required as a result of a modification, forbearance, or change in loan terms. For any covered transaction, the FCFDL requires disclosure of:

- > The total amount of funds provided to the business, and if different from the financing amount, the disbursement amount after any deductions or withholdings, which must be itemized.
- > The total amount to be paid to the Provider.
- > The total cost of the financing (calculated as the difference between the total amount of funds provided to the business and the total amount to be paid to the Provider).
- > The manner, frequency, and amount of each payment or, if payment amounts vary, the estimated amount of the initial payment, a description of the methodology for calculating any variable payment, and the circumstances under which payments may vary.
- > Whether there are any costs or discounts associated with prepayments.

### BROKER CONDUCT

Additionally, the Law prohibits Brokers from doing any of the following:

- > Assessing, collecting, or soliciting advanced fees, unless the fee covers actual services necessary to apply for the transaction, such as credit checks or appraisals.
- > Making or using any false or misleading representations or omitting any material facts in the offer or sale of services.
- > Engaging in any act that operates or would operate as fraud or deception.
- > Making or using any false or deceptive representations in their business dealings.
- > Advertising without disclosing the actual address and telephone number of its business or its forwarding service.

There is no private right of action under the FCFDL. Rather, the Florida Attorney General has exclusive enforcement authority. A violation is punishable by a fine of \$500 per incident, not to exceed \$20,000 for all aggregated violations, or, after written notice of prior violations, \$1,000 per violation, not to exceed \$50,000 for all aggregated violations.

Providers should be mindful of the FCFDL, its requirements, and whether those requirements are applicable to them in light of their business operations.

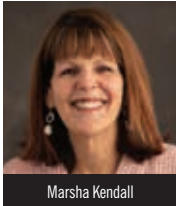


### STAY IN THE GAME

If you need assistance with navigating the new playing field established by the FCFDL, please contact the attorneys at Tiffany & Bosco, P.A.

## GET TO KNOW US

# Q&A with the Firm's New COO



Marsha Kendall

**MARSHA KENDALL** joined Tiffany & Bosco as our new Chief Operating Officer on July 31, 2023. Marsha brings over 20 years of experience working in the legal field. We look forward to utilizing this wealth of knowledge to build upon the best practices that allow Tiffany & Bosco to provide the highest quality services to its clients. In her responses to the questions below, Marsha shares insights about her passions and what drives her to succeed.

### What do you think is the most challenging part of working for a law firm?

Building consensus. I enjoy helping people and organizations achieve their best outcomes. Law firms are unique in that we work for every shareholder, not just one boss. When trying to achieve the best outcomes, it is critical to get every shareholder on board, and to really listen to what is being said. I have learned the hard way the importance of listening and have discovered that

the final outcome is much improved through that process.

### How long have you worked in the legal field?

I have worked in the legal industry for over 20 years. Interestingly enough, when I first graduated college, I went back to obtain a paralegal certificate and worked for a solo practitioner for a few years before moving into a corporate environment. I like that I have come full circle.

### What is your favorite part about working in the legal field?

I enjoy working with really smart people in a professional environment focused on helping people solve problems. The legal community is unique in that there is a willingness to share information, support each other, and perform to the best of our ability. I truly enjoy being a part of this community.

### What do you enjoy in your free time?

I enjoy being active. I play golf, snow ski, and hit the gym. I am a golfer that "looks good on paper." I played my first round at Pebble Beach, have had 2 holes in one, and play weekly. That said, I am more often lucky than good, but I greatly enjoy the game. I am also a big Disney fan and have held an annual pass for years.

All attorneys are licensed in their home state, as well as: <sup>1</sup>Alabama; <sup>2</sup>Arizona; <sup>3</sup>California; <sup>4</sup>Colorado; <sup>5</sup>Nevada; <sup>6</sup>New Mexico; <sup>7</sup>Texas; <sup>8</sup>Utah; <sup>9</sup>Washington

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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 a member of the USFN.

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