

Winter
2015

MONROE McDONOUGH
BRENT & MORALES, PLLC
ATTORNEYS AT LAW

MONROE McDONOUGH BRENT & MORALES, PLLC
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SOUTHERN ARIZONA'S REAL ESTATE LAW FIRM

Welcome to the MMB&M Newsletter

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Welcome!

Welcome to our first newsletter! After opening our new office on November 1st, we have been fully operational for four months. We are located at 2500 North Tucson Boulevard, just a few blocks north of Grant Road, in Suite 140, which you enter from the east side of the building. If you have not yet visited our office, please make an appointment to come see us. We each are ready to assist you with your legal needs relating to real estate, business, estate planning and probate and litigation arising therefrom. Our website is up and running at <http://tucsonazrealestateattorneys.com>. The next milestone was this newsletter.

For those of you who don't know us, Larry McDonough has practiced law for 47 years, including some 15 years with Mike

Monroe, and brings to the firm exceptional experience in corporate and business structuring and transactions, commercial and real estate transactions, commercial litigation and probate. Heidi Rib Brent and Anne Terry Morales met the first day of law school at the University of Arizona over 33 years ago. They are fulfilling their law school dream of practicing together. Heidi succeeds Mike Monroe in representing the Tucson Association of REALTORS as well as several other associations of REALTORS in southern Arizona, and, in furtherance thereof, attended the National Association of REALTORS Convention in November. Her practice in real estate, business law, estate planning and probate currently features advising clients on Dodd-Frank seller carry back issues.



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Anne brings her experience representing various businesses, individuals, non-profit entities, housing issuers, and developers and has earned her recent title as our “easement queen.” Anne was honored to be selected as a member of the 2015 Arizona College of Trial Advocacy and was the 2014 Attorney Honoree at the St. Thomas More Society’s Annual Red Mass.

We all miss working with Mike and Nancy Monroe and send them a shout out in their retirement with our fondest regards. A shout out as well to Mike’s former legal assistant Barbara Lasky Wilson, who prepared Mike’s much-acclaimed newsletter, with good wishes for her real estate sales and personal endeavors.

We want to acknowledge the efforts of our wonderful legal assistant Alison Nevil in keeping us all organized, functional and still making time to assemble this newsletter. We hope you enjoy it, grant you all permission to share it and, if you were not on our distribution list and want to be, please email Alison and she will add you for future issues.

We look forward to serving your legal needs.

Sincerely,

Larry McDonough, Heidi Rib Brent and Anne Terry Morales

Arizona New Entity Restructuring Act – Easily Convert a Corporation to an LLC!

By: Heidi Rib Brent hbrent@mmbmazlaw.com



Effective January 1, 2015, under Arizona’s new Entity Restructuring Act, you can easily convert a corporation to a limited liability company or visa versa, merge multiple entities or divide one entity into several entities, have one entity become a wholly owned subsidiary of another entity or domesticate a foreign entity. Previously, conversion of an entity essentially involved dissolving one entity and forming a new one, including resolving all of entity debts, assigning the assets and was a time-consuming process. Now, Arizona’s new act, A.R.S. Sections 29-2101 et. seq., based on the multi-state Model Entity Transactions Act, simplifies the process. The Arizona Corporation Commission has developed standard forms for each of the processes with instructions of the necessary actions and attachments.

What difference does this make to a small business? Many small businesses were formed as corporations with corporate formalities, including the need to file annual reports with the Corporation Commission, with annual fees, and the corporation will be dissolved for failure to timely file. A limited liability company (“LLC”) does not file annual reports and the members of the LLC can choose whether to be taxed as a partnership or corporation. An annual meeting is recommended, but there is no annual filing and the LLC will not be administratively dissolved for

continued from page 2... missing an annual deadline. An LLC can either be managed by a manager or by its members and the manner in which it operates should be set forth in an Operating Agreement, similar to a corporation's bylaws, on terms the members agree upon formation. So, for example, a single owner entity or a mom and pop shop, formed as a corporation, may be subject to unnecessary annual forms and formalities. Now, for a \$100 filing fee, a Statement of Conversion, new Articles of Organization and an Operating Agreement, the corporation can convert to an LLC!

And when an LLC expands to the extent that the corporate structure becomes more appropriate, the LLC can similarly convert to a corporation. A for-profit entity may convert to a non-profit entity if it satisfies the appropriate statutory requirements. Between Arizona Revised Statutes Title 10, governing corporations and Arizona Revised Statutes Title 29, governing partnerships and limited liability companies, there are over 22 types of entities that can exist in Arizona. The new Arizona Entity Restructuring Act provides procedures to any of those entities to perform all of the five "entity level transactions" – conversion (A.R.S. Section 29-2401 et. seq.), merger (A.R.S. Section 29-2201 et. seq.), division (A.R.S. Section 29-2601 et. seq.), interest exchange (A.R.S. Section 29-2301 et. seq.) and domestication (A.R.S. Section 29-2501 et. seq.).

We are experienced at forming LLCs and corporations and already have processed our first conversion under the Arizona Entity Restructuring Act. Contact us to consider having an entity formed, converted, merged, divided, or domesticated. (WC 477)

Anti-deficiency Statutes Amended

By: Lawrence McDonough lmcdonough@mmbmazlaw.com

Arizona provides protection to homeowners who lose their homes through foreclosure, A. R. S. Section 33-729(A), or trustee's sale, A. R. S. Section 33-814(G). These protections are known as anti-deficiency statutes and limit the homeowner's loss to the property. When the sale of the property produces less revenue than the outstanding balance of the loan, the lender cannot seek to recover the balance – deficiency – against other assets of the homeowner. These statutes apply only to a one-family or two-family dwelling on property of 2 ½ acres or less. Further, the statute relating to judicial foreclosures apply only to "purchase money loans," meaning loans used only to purchase the property, excluding loans or refinances involving pulling out funds for other purposes. The statute precluding deficiencies from trustee sale proceedings is not restricted to purchase money mortgages.



This year the Arizona Legislature amended the anti-deficiency statutes in a compromise between lenders and homebuilders. Effective beginning with loans originating in 2015, the anti-deficiency statutes no longer apply to commercial developers and spec home builders except for their personal homes. In addition, the protections only apply if the dwelling is "substantially completed" and actually used as a dwelling; intended use as a dwelling will be insufficient for anti-deficiency protection.

Most importantly, the changes do not reduce the protections to the majority of Arizona homeowners, including second homes, investments homes and vacation properties. Through the worst of the housing crisis, Arizona homeowner's do not risk more than their homes, while others in neighboring states, such as New Mexico, risked deficiency judgments as well.

If you have any questions regarding a trustee's sale, foreclosure or short sale, and whether you will be subject to a deficiency action, contact us!

Take Me Home Country Road

By: *Anne Terry Morales - amorales@mmbmazlaw.com*



As a young up and coming realtor, you just found the perfect home for your clients. It is located on a 3.3 acre parcel nestled at the end of a dirt road that serves 5 other homes. Each of the 6 homes along the road has an express 30 foot wide easement for ingress and egress. Your clients love the home, but are a concerned about the easement. Before they decide to buy, they want to know who is responsible for the cost of repairs and maintenance of the road.

As with many legal questions, the answer is: “it depends.” First, is there a recorded Road Maintenance and Repair Agreement? If there is and it was drafted correctly, you are in luck because it will spell out your clients’ and the other easement holders’ ongoing rights and obligations regarding the maintenance of the road.

Unfortunately you discover that there is no such agreement. What next? Once again, the answer is: “it depends.” Under the doctrine of equitable contribution as applied to easements/roadways in the case of *Freeman v. Sorchych*, 245 P.3d 927, 226 Ariz. 242 (Ariz. App. 2011) the Court found that parties who share a road each have an obligation to contribute "to the necessary repair and maintenance of an easement...." The court also found that the contribution obligation did not apply to “improvements” of the road.

What constitutes necessary repair and maintenance? A recent Arizona opinion stated that ““Maintaining” an easement involves general repair and upkeep, and caring for the appearance.” Activities such as filling holes with dirt from the surrounding area, grading the road and other actions that keep the roadway in good repair, but do not alter or enhance the value of the road, will require contribution by your clients. The amount and character of the contribution will depend on several factors such as: each party’s proportionate use of the road, the benefits derived from the use, whether each party received proper notice and a reasonable opportunity to participate in the decisions regarding repairs and maintenance, whether the completed work was reasonable and necessary, whether the repairs and maintenance were performed adequately, properly, and at a reasonable price, the value of any other contributions (monetary or in kind) by the parties to repairs and maintenance; and other relevant factors. The review of these factors is usually done retrospectively by a court when resolving a conflict between the easement holders.

Improvements to an easement don’t fall within the doctrine of equitable contribution. The party or parties who undertake improvements are responsible to pay for them. So what is an “improvement” to an easement? By definition, an improvement enhances the value or quality of the easement or makes it more useful. Paving a road with asphalt, concrete or other material has consistently been found to “improve” a roadway. Again, the determination of whether something is an improvement usually involves judicial review.

Your clients don’t like the uncertainty regarding any obligations they may have under the *Freeman* case’s Doctrine of Equitable Contribution and are about to walk. Thankfully, you were able to get the other easement holders to agree to the terms of a Road Maintenance and Repair Agreement which had been expertly drafted by the attorneys at Monroe McDonough Brent & Morales, PLLC. Your clients are thrilled, sign the Agreement and close the purchase! Satisfied, you go home, open a bottle of wine and put on John Denver’s album “Poems, Prayers and Promises” to celebrate!

U.S. Supreme Court Rules for Consumer Rescission in Truth in Lending Act Rights

By: Heidi Rib Brent hbrent@mmbmazlaw.com

For lenders' violations of the Truth in Lending Act ("TILA") the borrower has the right to rescind the transaction, meaning cancel the loan, by notifying the lender in writing within three years of the transaction. In *Jesinoski v. Countrywide Home Loans, Inc.*, decided January 13, 2015, the borrower sent the lender a letter to rescind the loan exactly three years after the loan transaction closed, and Bank of America responded, refusing to rescind. Over a year later, the borrower filed suit to rescind the loan. The District Court ruled in favor of the lender, saying the lawsuit was too late and the Eighth Circuit Court of Appeals agreed. The U.S. Supreme Court reversed, holding that the borrower had timely exercised the right to rescind by writing the letter, and did not need to initiate judicial enforcement action within the three years. While borrowers should be diligent in exercising their statutory protections, the Court extended the manner in which those rights are enforced. Lenders must take the TILA requirements seriously, especially with the new TILA-RESPA estimate and disclosure forms, which must be used beginning August 1, 2015.



Arizona Supreme Court Prohibits Waiver of Anti-Deficiency Protections

By: Heidi Rib Brent hbrent@mmbmazlaw.com

When borrowers cannot make payments on their deed of trust or mortgage and the property is sold, generally the lender is limited in recovery to the sale of the property when the property is a one-family or two-family dwelling on land of 2 ½ acres or less. However, on other circumstances, including vacant land, dwellings for more than two families and commercial properties, lenders are entitled to judgments beyond the trustee sale price or forced sale price up to the outstanding loan balance, called a deficiency judgment. Arizona statutes provide that, in circumstances where deficiency judgments are permitted, the borrowers receive a credit against the loan balance not only for the amount of the sale, but also for the fair market value of the property if it is greater than the sales price. This protects the borrower "against artificially inflated deficiencies by preventing windfalls resulting from below-market credit bids" or from forced sales. The fair market value provision protects borrowers or their guarantors.

In *CSA 13-101 Loop, LLC v. Loop 101, LLC*, decided December 31, 2014, the Arizona Supreme Court ruled that lenders cannot require borrowers to waive the fair market value provision before the sale, finding the borrower protections from artificial deficiencies to be in the public interest. Thus any such waivers in the loan documents or otherwise prior to the sale are unenforceable.

What's Happening in Tucson

Art Glass Exhibition: Glass Reimagined – Now through April 25, 2015 - Philabaum Gallery 711 S. 6th Ave., Tucson, AZ

Tucson Festival of Books, March 12 – 15, 2015, University of Arizona Campus

Wild West Days at Old Tucson – March 20 – 22, 2015 – Old Tucson

17th Annual Komen So. Arizona Race for the Cure – March 22, 2014 – University of Arizona Mall

SAHBA 2015 Spring Home & Patio Show – March 27 – 29, 2015 – Tucson Convention Center



Monroe McDonough Brent & Morales is a small firm with extensive experience and capabilities. The firm's knowledgeable and accomplished attorneys have passion for the practice of law coupled with outstanding commitment to meeting the needs of their clients. Our reputation for extraordinary service, attention to detail, in depth legal knowledge and practical business experience insures lasting relationships between Monroe McDonough Brent & Morales and its clients.

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