A Message from the FBA Website Developer
By Deena Mayne

MEMBER REMINDER:

FOOTHILLS BAR ASSOCIATION’S ON-LINE DIRECTORY PROCEDURE

The Foothills Bar Association’s website includes an on-line member directory.

The online directory offers online selections for your area(s) of practice, as well as an additional selection if you are a Certified Specialist in an area of practice. If you haven’t yet taken the opportunity to submit for a directory page, please do so. This is a great opportunity to have a web presence especially for those of you still without a website. The online directory can include: your photo (if submitted), your area of practice and contact information. You will be cross-indexed online by 1: name, 2: area(s) of practice, 3: specialty (if you have one), 4: languages spoken and 5: additional states licensed to practice outside California. Also, Countries you are licensed to practice if applicable. Your Bio can also include your headshot and a bio in paragraph form. (Listed emails are listed as yourname [at] domain.com to save you from receiving spam.)

Please don’t miss this FREE opportunity for current Foothills Bar members to have an online presence.

If you have an existing online attorney directory page and would like your information updated, please follow the same process as for a new submission. You can fill in boxes you don’t want to change with “same”; so the website developer knows certain information is unchanged.

Upcoming Events Calendar

September 5 – Labor Day
State and Federal Courts Closed

September 8
Estate Planning and Probate Section
12:15 - 1:15 p.m.
Law Offices of Nancy Kaupp Ewin, Esq.
8166 La Mesa Blvd., La Mesa
Topic: TBA
Speaker: TBA

September 13
Civil Litigation Section
12:00 - 1:15 p.m.
BJ’s Restaurant, Grossmont Center, La Mesa
Topic: Candid Comments from the Bench: How to Impress Your Judge
Speakers: Hon. Eddie Sturgeon and Hon. Joan Lewis, San Diego Superior Court

September 20
Family Law Section
12:00 - 1:15 p.m.
East County Court, Dept. 5
250 E. Main Street, El Cajon
Topic: Determining Income Available for Support: Games People Play
Speaker: Marc Kaplan, CFLS and Special Master

October 26
Civil Litigation Section
12:00 - 1:15 p.m.
BJ’S Restaurant, Grossmont Center, La Mesa
Topic: 1031 Tax-Deferred Exchanges
Speaker: William L. Exeter, President and CEO for The Exeter Group of Companies
Continued from Page 1 . . .

If you have an existing online attorney directory page and would like your information updated, please follow the same process as for a new submission. You can fill in boxes you don’t want to change with “same”; so the website developer knows certain information is unchanged.

Reminder of the process to submit the Online Attorney Directory:
1) Go to the online directory page: http://foothillsbar.org/membership/directory-submission/
2) Fill out the form, upload your headshot, and click “submit”. Your directory listing is created using the content information you submit. Generally, new or updated attorney directory posts will be updated 3-5 business days after your submission. Please note: only information submitted through this form is accessible to the website developer, so if you would like something added, please submit it on the form.

HAVE A QUESTION? Or, forget all the above when you’re ready to submit?
No worries, just remember that the website has a FAQ page, always. Here it is … http://foothillsbar.org/faq/ …and, if there is a standard question that you think should be added to the FAQ, please let us know!

Notice to Members

If you have not renewed your membership for the 2016 – 2017 year, your membership has now lapsed. We are in the process of preparing the Foothills Bar Association’s 2017 Attorney Directory, which will include all current members. The directory is a valuable resource for our members and potential clients. In addition to the Attorney Directory, Foothills Bar member benefits include the on-line member directory on the Association’s website. The online directory includes your area of practice and contact information, a short biography and photo (if submitted). To maintain your membership standing and be included in the Attorney Directory book and the on-line directory, you must renew your membership by October 9, 2016. Membership renewal or sign up for new members may be done on-line at http://foothillsbar.org/membership/.
To Indemnify or to Not Indemnify

By Keith A. Jones, Esq.

Landlords and tenants typically sign residential and commercial leases without reading the fine print, let alone understanding how the various clauses interact in their real worlds. They rely on their legal counsel and real estate professionals to provide the lease form, yet sometimes raise questions like: "Does the lease really need so many pages?" and "Do I really have to read this?"

Experienced attorneys desire that their landlord clients sign leases providing a broad range of protections for the landlord's benefit. However, even seemingly broad terms do not always have the intended effect as a commercial landlord found out the hard way in a recent California appellate decision.

The tenant rented an upstairs office and retained a company to clean the carpets. An employee for the carpet cleaning company spilled water while climbing the common area stairs leading to the tenant's premises and then fell sustaining injuries. The employee sued the tenant's landlord and the landlord's management company claiming that the stairs did not conform to the applicable building codes or industry standards.

The landlord and management company filed a cross-complaint against the tenant, contending the tenant agreed in the lease to indemnify for claims and liabilities arising out of or involving tenant's use and occupancy of the premises. The tenant filed a motion for summary judgment contending it had no duty to indemnify because the incident occurred outside of the premises. In opposition, the landlord argued that the employee was present in connection with tenant's use and occupancy of the premises, that the tenant was required to give prior notice before having its contractors do work but didn't do so, that the employee as tenant's agent created the unsafe condition making the tenant liable, and several other contentions.

The trial court granted the tenant's motion for summary judgment based on the express indemnity provision in the lease, finding that the stairs were not part of the premises but rather were part of the common area under the landlord's exclusive management and control. The appellate court affirmed the trial court's decision, concluding that the employee's injury which occurred outside of the premises and in an area controlled exclusively by the landlord did not arise out of the tenant's use of the premises. Thus, the lease's indemnification provision did not apply.

The appellate court found that the indemnity provision resembled an insurance contract, but that California law which broadly construes "arising out of" and "arising from" in interpreting insurance policies to find coverage does not apply to lease contracts. As to noninsurance contracts, public policy dictates that the contract's language "must be particularly clear and explicit, and will be construed strictly against the indemnitee." The appellate court concluded that the employee's injury which occurred outside of the premises and in an area controlled exclusively by the landlord did not "arise out of" the tenant's use of the premises.

The landlord also sought equitable indemnity. The appellate court rejected this argument too, reasoning that the parties' written indemnity controlled and that the doctrine of equitable indemnity did not apply. After the unsuccessful appeal, the landlord probably harkened back to those initial questions: "Does the lease really need so many pages?" and "Do I really have to read this?"
Civil Litigation Section MCLE Update

By Cheryl L. Stengel, Esq., section co-chair

On Wednesday, October 26, 2016, the Foothills Bar Association will present an informative CLE program on 1031 tax-deferred exchanges with speaker William “Bill” L. Exeter. The program will be from 12:00 to 1:15 p.m. at BJ’s Restaurant in Grossmont Center in La Mesa.

Bill Exeter is the President and Chief Executive Officer for The Exeter Group of Companies. Mr. Exeter has been in the fiduciary services industry since 1980. He began specializing in real estate tax strategies in 1985 with a specialty emphasis in 1031 and 1033 Exchanges as well as self-directed IRAs. He earned his B.S. in Accounting from California State University, Los Angeles. He is certified as a National Certified Guardian (“NDG”) by the Center for Guardianship Certification and is licensed by the State of California's Professional Fiduciaries Bureau as a California Professional Fiduciary. Mr. Exeter has written and lectured extensively and has frequently appeared as a host and guest expert on local radio talk shows to discuss financial and real estate topics. He has also served as an industry consultant, advisor and expert witness.

Mr. Exeter’s presentation will explore investment strategies such as deferring taxes on the sale of investment real estate and other assets through the use of a 1031 exchange and more. Topics will include:

- What is a 1031 Exchange?
- Deferring Capital Gains Taxes
- Various types of Exchanges
- Timelines and Rules Involved
- Exchange Strategies and Tips

The seminar is free to members of the FBA and $10.00 for nonmembers. The cost of your lunch will be whatever you choose from BJ’s menu, although you are not obligated to order lunch. Please RSVP to Cheryl Stengel at clstengel@outlook.com. This program has been approved for 1.0 hour of MCLE general credit by the State Bar of California.
Ninth Circuit Holds Automatic Stay Inapplicable to Protect Debtor’s Mere Physical Possession Post-Foreclosure

By Cheryl L. Stengel, Esq.

Most attorneys have encountered the magical effects of a bankruptcy filing by an opposing party (or a client). To summarize, the filing of a bankruptcy petition creates an “estate”, which is comprised of “all legal and equitable interests of the debtor in property as of the commencement of the case”. 11 U.S.C. §541. Immediately upon case filing, the “automatic stay” goes into effect. The stay stops all collection actions against the debtor and against property of the estate. The stay prohibits the continuation or commencement of lawsuits, foreclosures, repossessions, the enforcement of judgments, the creation or enforcement of liens and other adverse actions. 11 U.S.C. §362.

Recently, the Ninth Circuit Court of Appeals held that “mere possession” of real property by the debtor, a holdover occupant, was not a property interest protected by the automatic stay. See, Eden Place LLC v. Perl (In re Perl), 811 F.3d 1120 (9th Cir. 2016).

The saga began with the debtor’s default on the mortgage payments on his residence in Los Angeles. The lender commenced a foreclosure proceeding and Eden Place purchased the debtor’s residence at a trustee’s sale. Then, Eden Place recorded the deed and served the debtor with a 3 day notice to quit. The debtor refused to vacate the property and filed suit in state court alleging wrongful foreclosure. The state court, under the unlawful detainer process, issued a writ of possession in favor of Eden Place and a “lock-out” proceeding commenced. The debtor then filed a Chapter 13 bankruptcy petition. Eden Place promptly filed a motion for relief from stay, but before the motion was decided, the sheriff went forward with lock-out against the debtor. The debtor asserted that the automatic stay was violated - the Bankruptcy Court agreed, finding that the debtor’s continued occupancy, although illegal under California law, still constituted an equitable interest protected by the automatic stay. The decision was affirmed by the Bankruptcy Appellate Panel. But … the Ninth Circuit ultimately disagreed.

The Ninth Circuit focused on whether the debtor had “any protectable legal, equitable, or possessory interest,” in the property after Eden Place recorded the deed and the state court fully adjudicated the unlawful detainer proceeding, resulting in the writ of possession. Unlawful detainer actions are generally to adjudicate the immediate right of possession between a landlord and tenant who is in violation of the lease. But here, the action was not between a landlord and tenant, but under California C.C.P. §1161a, for determination of the rights of a person in possession and a person who has obtained title in a nonjudicial foreclosure proceeding. Thus, the state court’s unlawful detainer adjudication effectively determined the issue of ownership of title in favor of Eden Place. The Court reasoned that the “unlawful detainer judgment and writ of possession entered pursuant to California Code Civil Procedure § 415.46 bestowed legal title and all rights of possession upon Eden Place. Thus, at the time of the filing of the bankruptcy petition, the debtor had been completely divested of all legal and equitable possessory rights that would otherwise be protected by the automatic stay.” Consequently, the bankruptcy estate had no cognizable rights in the property.

The Ninth Circuit’s holding effectively overrules a long line of prior Bankruptcy Court and Bankruptcy Appellate Panel decisions. Additionally, the holding may have broad consequences as it was not limited to the specific facts of the case. But, as always, landlords and property owners must always be cautious in taking action in matters involving a bankruptcy filing. Any acts taken in violation of the automatic stay are void and a creditor’s violation of the stay is contempt and may result in sanctions, even if the creditor was acting with a subjective good faith belief in the legality and propriety of its conduct. In re Taylor, 884 F.2d 478 (9th Cir. 1989). If any doubt as to the applicability or extent of the automatic stay, seek a Bankruptcy Court order – it’s better to request permission than forgiveness.
Notices

Looking for Speakers for Future FBA Civil Litigation Section Meetings:

If you have a litigation topic you would like to present at an upcoming Civil Litigation Section MCLE meeting, please contact Section Co-Chairs Mark Raftery at mark@markrafterylaw.com or Elizabeth Smith-Chavez at liz@smithchavezlaw.com.

Foothills Bar Association Notice of Board Meeting:

The Foothills Bar Association Board of Directors meets on the third Tuesday of each month. The next meeting will be on September 20, 2016 at the Kriger Law Firm, 8220 University Avenue, 2nd Floor conference room, La Mesa, CA. The meeting will begin at 4:45 p.m. If you want your voice to be heard in policy discussion and upcoming events planning or would simply like to learn more about the organization, your attendance is welcome.

The Family Court needs settlement conference judges. Please volunteer and share your expertise. Contact Kelly Fabros at 619-456-4065 or Kelly.Fabros@SDCourt.CA.Gov.
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mschlissel.consultant@gmail.com

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La Mesa, California 91942
Tel. (619) 464-1200  WLF@LaMesaLaw.com
Fax (619) 464-6471  RHO@LaMesaLaw.com

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Immediate Past President: Cheryl Stengel    cistengel@outlook.com   619-269-2126

DIRECTORS

Keith Jones    kjones9001@gmail.com   619-462-6220
Kim Marie Staron    kstaron@lawinsandiego.com   619-574-8000
Dan Cohen    cohencohenlaw@gmail.com   619-697-0333
Garrison Klueck    Garrison@FamilyLawSanDiego.com   619-448-6500
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Your submissions are welcome! Send articles, letters, flyers, and other non-advertising submissions to Cheryl Stengel at cistengel@outlook.com.

ADDRESS CHANGES
Send change of address or telephone number to Bradley Schuber at bschuber@krigerlawfirm.com

Foothills Bar Association
P.O. Box 1077
El Cajon, CA 92022

Addressee Name
4321 First Street
Anytown, State 54321