Black & LoBello Newsletter

You Have Been Served!

Volume 2.1 2010

Strategic Defaults

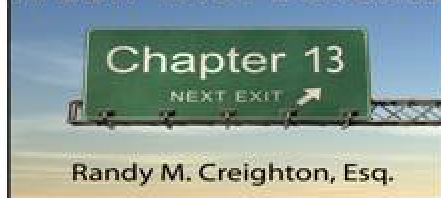
Tisha Black Chernine, Esq.

Strategic defaults will cause a further deterioration of the already battered housing market. A strategic default occurs when the borrower decides to stop making payments, or defaults on a home mortgage despite having the financial ability to make the payments. Usually, this occurs after a substantial drop in the house's estimated value, making the debt owed considerably greater than the value of the property. Strategic defaults are a new phenomenon. Americans would do almost anything to pay their mortgage; even forgoing a new car or putting a younger family member to work. However, the recent housing collapse left nearly 11 million families owing more than the worth of their homes. Consequently some of these homeowners are making calculated decisions to hang onto their money and letting their homes go. Is this irresponsible?

Businesses make such calculations routinely. For example, Morgan Stanley recently decided to stop making payments on five San Francisco office buildings which it purchased at the height of the boom and their value had plunged. Big businesses have routinely made calculated decisions to no longer make debt payments because they would never be able to recover the initial investment price.

No one has accused Morgan Stanley of immorality. The average American would be considered dishonest for not honoring his debts according to some in the mortgage industry and government. Former Treasury Secretary Henry M. Paulson Jr. declared that "any homeowner who can afford his mortgage payment but chooses to walk away from an underwater property is simply a speculator … and one who is not honoring his obligation." Ironically, Paulson did not seem so censorious of speculation during his 32-year career at Goldman Sachs.

[To view this article in its entirety, please visit *www.blacklobellolaw.com*]



Many debtors choose not to file for Chapter 13 bankruptcy because it requires repayment of at least a portion of their debts. Chapter 7 bankruptcy, another option, wipes out many debts entirely. In some cases, however, Chapter 13 bankruptcy IS the better bankruptcy option. Furthermore, certain debtors don't get to choose because not everyone is eligible for Chapter 7 bankruptcy, leaving Chapter 13 as the only option available. Here are some good reasons to file for Chapter 13:

When You Cannot File for Chapter 7

You will not be allowed to file for Chapter 7 if you do not meet some new requirements imposed by the 2005 revisions to the bankruptcy laws. Under these new rules, you cannot file for Chapter 7 if both of the following are true:

- your current monthly income over the six months prior to your filing date is more than the median income for a household of your size in your state (go to the website of the United States Trustee, www.usdoj.gov/ust, and click "Means Testing Information" to see the median figures for your state; and
- your disposable income, after subtracting certain expenses and monthly payments for debts you would have to repay in Chapter 13, exceeds certain limits set by law.

These calculations are commonly referred to as the "means test." If you have the means to repay a certain amount of your debt through a Chapter 13 repayment plan, you fail the test and are ineligible for Chapter 7 bankruptcy. The means test can get fairly complex and, to make matters worse, Congress has its own definitions of "disposable income," "current monthly income," "expenses," and other important terms which, in some cases, can make your income seem higher than it actually is. In addition, if you have received a Chapter 7 bankruptcy discharge within the last eight (8) years or a Chapter 13 discharge within the last six (6) years, you may not file for Chapter 7 bankruptcy.

Continued on Page 3

In This Issue

Strategic Defaults	*1*
A Law with Benefits	*1,3*
Foreclosure Deficiency	*2*
Loan Modification	*2,3*
Attorney Spotlight	*3*
Principal Reductions	*3*
New Additions	*4*
About Us	*4*

Join Our (BL)og

Our web address is *www.blacklobellolawblog.com*. Be sure to bookmark us and subscribe to view our latest updates on legal news and concerns. Subscribing is easy! Just click the green button in the left-hand corner of the site to get e-mail updates on legal news!

For instant updates on all posts, social events, and seminars, follow us on Twitter at *www.twitter.com/blacklobellolaw*.

BLACK & LOBELLO
10777 WEST TWAIN AVENUE
THIRD FLOOR
LAS VEGAS, NEVADA 89135
PH. (702) 869-8801
FAX (702) 869-2669
www.blacklobellolaw.com
www.blacklobellolawblog.com

Foreclosure Deficiency Judgments James E. Herbe, Esq.

A foreclosure in Nevada is completed when a home is sold at a trustee sale. In almost all residential foreclosures, the purchase price for the home at auction is not enough to pay off the mortgage balances owed by the homeowner to their lenders. The remaining deficits owed to the bank from the mortgage balance and expenses due are called a "deficiency." In Nevada, a lender has the option to file for a Court judgment against the borrower called a "deficiency judgment". A lender has six months from the date of a trustee sale to bring such an action against a homeowner in Nevada.

The ability to collect on a deficiency judgment for a lender can take several forms. A lender can collect on a judgment against a homeowner through garnishment. A garnishment is a Court order that allows a creditor to collect a percentage of a debtor's wages. A creditor can typically collect up to one-fourth of a debtor's wages. Another common collection method for deficiency judgments occurs by placing liens on other real estate owned by the debtor. The ability to lien a debtor's real estate extends across state lines since judgments are enforceable in adjoining states. If the homeowner has a co-signer on the mortgage notes, the co-signer is equally co-signer is equally responsible to pay back the deficit.

The homeowner is responsible for the amount of the unpaid loan balance as well as legal fees, accelerated interest payments, back principal payments, and often pre-payment penalties. These additional costs are frequently governed by the terms of the original mortgage note. In other words, a homeowner could end up owing more than originally borrowed which often happens with homeowners who are paying on interest-only mortgages.

When considering whether to pursue a deficiency judgment, lenders must consider whether they can collect the judgment along with the costs to collect it. The lender will often check the debtor's credit report to review other outstanding bills and whether they are timely paid. Lenders may also check public records to search for any additional debtor assets, reviewing both paystubs and tax records.

Due to the current economic recession, many lenders often decline to pursue deficiency judgments against homeowners. A lender who chooses not to pursue a deficiency judgment may report the loan deficiency amount on an IRS Form 1099. Unless there is suspicion of fraud in the original loan or the homeowner is unable to pay the mortgage, the lender may issue a 1099-C Form to the homeowner. A homeowner who receives such a 1099-C Form from a lender must consult with a tax attorney to discuss potential tax consequences. &

Is Loan Modification Right For You And How Does This Relate to the Home Affordable Foreclosure Alternative Plan?

Robert B. Noggle, Esq.

Loan modifications continue to be a popular form of mortgage relief for troubled borrowers. Most lenders participate in the Home Affordable Mortgage Program (HAMP) introduced in March 2009, also known as the Making Homes Affordable Plan or the Obama Plan. In addition, many lenders have their own in-house programs separate from HAMP for those who are not HAMP-eligible.

Borrowers seeking short sale pre-approval under the new Home Affordable Foreclosure Alternative (HAFA) program recently announced by the Treasury

The Treasury Department recently announced that borrowers seeking short sale pre-approval under the new Home Affordable Foreclosure Alternative (HAFA) program also need to know about loan modifications. A pre-approved short sale under HAFA with the satisfaction of the borrower's liability requires that the borrower be considered for HAMP.

HAMP eligibility requires that the property be a primary residence, a first mortgage, a default or imminent risk of default on payments, a housing ratio that exceeds 31% of gross income, and a mortgage balance that cannot exceed $729,750. The lender will also require a hardship letter from the borrower prior to reviewing a loan modification package. A hardship can be financial, medical or family related.

A loan modification application is a math problem. Ultimately, the lender is concerned that the borrower has some positive cash flow at the end of a month and can assure the lender that modified payments can be made in the future.

The borrower must show that their housing expenses exceed 31% of the monthly gross income.

The most important part of the application is the income/expense worksheet. It is important that the borrower accurately set forth all expenses. A good suggestion is to track all expenses to ensure accuracy prior to completing the worksheet. While accuracy is important, it is even more important to verify to the lender that household expenses are not excessive.

The lender will also require a financial disclosure of assets and liabilities. All financial information and documents requested must meet the lender's requirements precisely to avoid unnecessary delay in the process.

Some of the many horror stories surrounding loan modifications are that they can take extremely long periods of time to process and receive a response. Many of the stories are true. The process can take many months. Patience is the watchword. Regular calls to the lender on a twice-weekly basis are crucial to prevent a modification application being lost in the lender's system.

Assuming the borrower is eligible for a loan modification, the lender will offer a three-month trial period prior to determining whether the modification should become permanent. The trial payment must be made on time without exception. At the end of the trial, the borrower must produce current financial information to the lender. The trial payment is generally a fixed amount without details as to how it was determined such as the interest rate and loan terms. The paperwork for the permanent modification, however, will include these details.

Most lenders will not consider a principal reduction. There are many reasons for this from a lender's perspective. The real question for the borrower, given this fact, is whether modification makes financial sense. A borrower who does not anticipate residing in the property for many years may find that a modification simply does not make sense because the value of the property will not equal the balance of the loan in that time. For example, a borrower anticipating relocation in the near future will most likely be forced into a short sale. It is a question the borrowers must answer for themselves.

In Nevada, borrowers seeking a loan modification have an advantage because of the Foreclosure Mediation Program. A borrower is eligible for

Continued on Page 3

A Principle That Won't Affect Your Principal

Ronald E. Gillette, Esq.

As the economy remains sluggish and foreclosures and other defaults remain at all time highs, pressure is being placed on the Obama Administration to sponsor laws to provide principal reductions to homeowners. The pressure is mounting as homeowners witness banks and other financial institutions rebounding from the bailout provided by TARP as evidenced by the eight-figure bonuses being paid to banking executives.

Most Americans realize that TARP failed in its goal to re-ignite lending at affordable rates. As has been previously reported in this newsletter, TARP programs aimed at loan modifications for homeowners were not mandatory and had qualifying criteria that 99% of homeowners could never qualify for in order to obtain relief.

Do not expect TARP's failure to provide politicians any lessons in taking more aggressive action toward providing relief to homeowners. In an election year, a politician would not do anything that poses such a high risk to a campaign. The potential for supporting such a program could backfire and cost several Democratic seats in Congress which would effectively kill the Obama Administration's main goal – health care reform.

This is not to suggest that the Obama Administration is happy with TARP's results. It certainly will not, however, make a priority of principal reductions over health care reform even though such a program could have dramatic results on home affordability.

There are other obstacles to such a program other than election-year politics. Legal constraints, such as the Contracts Clause of the U.S. Constitution, present a very high hurdle to overcome in effecting such a change. Although the U.S. Treasury could mandate such a program for U.S. guaranteed loans issued by Fannie Mae or Freddie Mac, the results would be marginal. Also, the disparity in principal reductions could be perceived as unfair when compared to other forms of financing that most homeowners have taken against their homes. &

Is Loan Modification Right for You?

Continued from Page 2

mediation once a Notice of Default is filed. The borrower has the option of electing mediation. Once the borrower elects this option, it is mandatory for the lender to participate. This program has been very beneficial for Nevada borrowers since many mediations result in trial modifications being offered. The mediation, however, cannot be held open pending the results of the trial and the lender's determination as to whether to extend the mediation period. &

Attorney Spotlight with

Stephanie B. MacKeen, Esq.

Abe Geller, Editor for Black & LoBello, sits down with Stephanie B. MacKeen, Esq., for an exclusive interview.

AG: Stephanie, what are your primary practice areas?

SBM: I work primarily in the area of family law and juvenile dependency. When I first became licensed, I worked in the areas of land use and business licensure – liquor and gaming. I still very much enjoy working on land use and licensing projects.

AG: How many years have you been practicing law?

SBM: I have been practicing for nearly four years.

AG: What would your best advice be to our readers?

SBM: My best advice would be to remain reasonable. Resolution to any matter requires some degree of compromise on both sides.

AG: In all of the cases you have been involved in, which is the one that has affected you the most? And why?

SBM: Working primarily with court-appointed cases in the field of juvenile dependency, I believe that the most rewarding case I have worked on was a matter our office was involved in for nearly two years. We worked alongside a highly motivated mother to reunify her with her five children. Closing that case made for a very rewarding day.

AG: When have you been most satisfied in your career as an attorney?

SBM: My most satisfying moment was helping a client to understand the differences between our legal system and what he learned from a combination of Law & Order, and a program about Animal Police, in preparation for a contested hearing in a juvenile dependency proceeding. &

A Law with Benefits

Continued from Page 1

When You Are Behind On Your Mortgage or Car Loan

If you want to make up the missed payments over time and reinstate the original agreement, you can in Chapter 13 bankruptcy. You cannot do this in Chapter 7 bankruptcy.

When You Have a Debt That Cannot be Discharged in Chapter 7

Tax obligations, student loans, or other debts that cannot be discharged in Chapter 7 can be included in your Chapter 13 plan and paid off over time.

When You Have a Sincere Desire to Repay Your Debts

You can benefit from the protection of the Bankruptcy Court if creditors are coming after you. The Chapter 13 process also provides the formal structure and deadlines you might find helpful in order to follow through on your good intentions.

When You Have Non-exempt Property You Want to Keep

When you file for Chapter 7 bankruptcy, you may keep only exempt property defined as property protected from creditors under state or federal law. You must give your nonexempt property to the bankruptcy trustee who can sell it and distribute the proceeds to your creditors. In Chapter 13, however, you do not have to give up any property. Instead, you repay your debts out of your income. Therefore, if you have non-exempt property that you do not want to part with, Chapter 13 might be the better choice.

When You Have a Co-Debtor on a Personal Debt

If you file for Chapter 7 bankruptcy, your co-debtor will still be on the hook, which means your creditor will undoubtedly go after the co-debtor for payment. If you file for Chapter 13 bankruptcy, the creditor will leave your co-debtor alone, as long as you keep up with your bankruptcy plan payments. &

Black & LoBello Welcomes
Amy M. Friedlander, Esq. and Randy M. Creighton, Esq.

Amy M. Friedlander joined Black & LoBello in 2009. Prior to joining the firm, she served as a judicial law clerk to the Honorable Robert W. Teuton of the Eighth Judicial District Court – Family Division.

Ms. Friedlander graduated cum laude from California State University, Long Beach in 2004, with a bachelor's degree in Political Science and a minor in Psychology. As an undergraduate, Ms. Friedlander received the Pi Sigma Alpha Political Science Scholarship for Academic Excellence in September 2003 and the Outstanding Undergraduate Student Award in Political Science in May 2004.

Ms. Friedlander received her Juris Doctorate from the William S. Boyd School of Law at the University of Nevada, Las Vegas in May 2008. While in law school, she served as an extern to the Honorable Kent J. Dawson of the United States District Court, District of Nevada. She also participated in the William S. Boyd School of Law's Child Welfare Clinic, where she represented numerous foster children and successfully conducted a trial on a Petition to Terminate Parental Rights.

Ms. Friedlander was admitted to the State Bar of Nevada in October 2008. She is currently a member of the American Bar Association and the Clark County Bar Association. &

Randy M. Creighton joined Black & LoBello in 2009. Prior to joining the firm, he was an associate at a prestigious bankruptcy firm where he practiced corporate restructuring, bankruptcy, and insolvency issues.

Mr. Creighton has extensive experience representing large corporate debtors, individual debtors, creditors, unsecured creditors committees, liquidating trustees, and trustees in every facet of bankruptcy cases.

Recently, Mr. Creighton was awarded a Certificate of Commendations from Nevada Senator Harry Reid and Congresswoman Barbara Buckley for his volunteer work with the Legal Aid Society of Southern Nevada Pro Bono Project. During the 2009 calendar year, Mr. Creighton was one of a few attorneys to reach the Legal Aid Center 50 Hour Club for time spent assisting low-income clients with pro bono legal services in the area of child abuse and neglect.

While obtaining his Juris Doctorate degree from the University of Denver Sturm College of Law, Mr. Creighton served as a legal extern for Chief Judge Randolph Baxter of the United States Bankruptcy Court, Northern District of Ohio. He also interned for Coors Brewing Company where he played an active role in the merger of Coors Brewing Company and Miller Brewing Company.

Mr. Creighton was admitted to the State Bar of Nevada in October of 2008. He is currently a member of the American Bar Association and National Association of Consumer Bankruptcy Attorneys. &

BLACK & LOBELLO

10777 WEST TWAIN AVENUE
THIRD FLOOR
LAS VEGAS, NEVADA 89135
PH. (702) 869-8801
FAX (702) 869-2669
WWW.BLACKLOBELLOLAW.COM
WWW.BLACKLOBELLOLAWBLOG.COM

Do you have a question to ask the attorney? Submit you question to the editor at *editor@blacklobellolaw.com* and your question may be featured in our next issue!

You Have Been Served! is a periodic publication of Black & LoBello and should not be construed as legal advice or opinion in regard to any particular set of facts of circumstances. The content of this newsletter is intended for general information purposes only. You are urged to seek counsel concerning your specific situation including any legal questions you may have. The attorneys at Black & LoBello are available for representation on a wide variety of legal issues.

We're interested in your opinion. If you have suggestions regarding how we can better improve *You Have Been Served!*, please let us know by contacting your Black & LoBello attorney or emailing us at *editor@blacklobellolaw.com*. &