



**Nevada Continues to Lead The Nation in Bankruptcy Filings**

Randy M. Creighton, Esq.

Bankruptcy filings and credit card delinquencies across the country are skyrocketing as businesses and individuals reel from the effects of the recession. However, Nevada is feeling the pinch worse than any other jurisdiction.

Two recent reports found that Nevada has the highest rate of bankruptcy filings per capita as well as the highest rate of delinquent credit card payments.

According to the U.S. Courts report, bankruptcy filings are up 34.5 percent across the country for the year ending September 30, 2009, meaning 4.52 bankruptcies filed for every 1,000 people.

Currently, Nevada leads the U.S. with 10.25 bankruptcy filings per 1,000 people; a 300 percent increase from last year when the Nevada bankruptcy filing rate was only 3.38 cases per 1,000 people.

The Nevada bankruptcy rate has been fueled by increasing unemployment. In 2008, our unemployment rate was at 7.7 percent. In 2009, it shot up to more than 13 percent as the recession hit Nevada's tourism economy hard. Moreover, the growth of hotels and gaming projects slowed, taking a toll on the construction and development industries and resulted in many lost jobs.

Another report, from the credit report company TransUnion, found that Nevada also leads the nation in credit card delinquency. In 2009, Nevada's credit card delinquency rate was 1.98 percent while the national delinquency rate was 1.1.

Of the bankruptcy filings in Nevada, 26,679 were personal and 881 were business. More than 19,000 of those bankruptcies were Chapter 7 bankruptcy filings.

There may be a silver lining for the Silver State. Nevada's current credit card delinquency rate has improved during the previous two quarters of 2010. It fell from 2.44 percent in the first quarter to 2.19 in the second quarter. However, the rising foreclosure rate in Nevada suggests that mortgage payments are being used to pay credit card debts instead. New credit card laws will play an undetermined role in spending and credit card debt in the future. For now, the falling rate of credit card delinquency is a promising trend in Nevada.

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**Federal Home Modification and Short Sale Programs**

Tisha Black Chernine, Esq.

Las Vegas is the foreclosure capital of the nation. In February alone, 7,400 homeowners in Clark County received notices of default. Many homeowners defaulting on their mortgage payments are experiencing tough economic times, making their current house payment difficult. Other valley homeowners are so underwater they see foreclosure as their only option to get out of a home worth half of what they paid for it only a few years ago. Unfortunately, many of these defaulted and foreclosed upon homeowners face the possibility of being pursued by lenders for deficiency judgments. In an attempt to alleviate the foreclosure epidemic and the presence of deficiency judgments, the United States government has created two programs that offer alternatives to foreclosure to qualified homeowners.

**Home Affordable Modification Program (HAMP)**

The HAMP program is designed to help between three to four million financially struggling homeowners nationwide avoid foreclosure by modifying loans to a level that is affordable and sustainable for borrowers. Borrowers can check if their loan servicer is participating in HAMP by going to the Making Home Affordable website. Eligibility for the program depends upon the following criteria:

- Borrower is delinquent on their mortgage or faces imminent risk of default;
- Property is occupied as borrower's primary residence;
- Mortgage was originated on or before January 1, 2009; and
- Unpaid principal balance must be no greater than \$729,750 for one-unit property.

Loan servicers can take steps for eligible borrowers to adjust their monthly mortgage payment to 31 percent of their pre-tax monthly income. Borrowers may have their interest rates cut to 2 percent, their loan extended out to 40 years, or a portion of the principal deferred until the loan is paid off. If the borrower qualifies for a trial modification and makes all required trial modification payments on time, there is chance that loan modification will become permanent.

While the program intends to help millions across the country, data indicates that it may not be helping many Las Vegas residents. Over a year after HAMP went into effect, only about 4,000 Las Vegas homeowners have qualified for permanent

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# Federal Home Modification

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modifications. Moreover, those few thousand residents helped by the program are not seeing long-term relief because the modification generally does not reduce the loan principal.

A second federal program helps those homeowners that are either not approved for a HAMP modification, a HAMP modification is offered and not accepted by the borrower, or the borrower disqualifies out of a HAMP modification. In those instances, the borrower may benefit from the foreclosure alternatives offered under the HAFA program.

## Home Affordable Foreclosure Alternatives (HAFA)

HAFA compliments HAMP by providing an alternative to borrowers who are HAMP-eligible but unable to keep their home. The HAFA program was introduced to simplify the short-sale and deed-in-lieu (DIL) process. HAFA applies to all loans from servicers participating in HAMP not owned or guaranteed by Fannie Mae or Freddie Mac. However, both Fannie and Freddie will issue versions of HAFA in the coming weeks.

Homeowners should experience several benefits by participating in HAFA. First, HAFA will decrease the time to complete a short-sale through standardized documentation and timelines. Servicers are required to clearly state short-sale approval requirements up front, increasing the efficiency of transaction and negotiations. After an offer is received on a property, the servicers have 10 days to accept or reject the short sale. Second, HAFA prohibits servicers from requiring cash contributions or promissory notes and prevents servicers from filing deficiency judgments. Homeowners who successfully complete a HAFA short-sale or DIL are truly free and clear from a home that has brought stress and financial problems into their lives. Lastly, successful borrowers can receive a \$3,000 moving expense incentive upon successful completion of HAFA. This incentive was increased recently to provide financially strapped borrowers with the funds necessary to cover moving expenses and rental deposits.

The HAFA program just recently became effective on April 5, 2010. While it is too early to determine the program's effectiveness, an estimated 70 percent of Las Vegas homeowners with negative equity in their home may be helped by HAFA's foreclosure alternatives. Only time will tell if HAFA is more successful than HAMP in helping distressed borrowers in Las Vegas. &

## Bankruptcy Judge Orders Wells Fargo Executives to Testify

Thomas G. Grace, Esq.

Like many people, Bobbi Jean Giguere, suffered the brunt of the economic storm that has pounded the nation over the last few years. She lost her job of 22 years, and within a month, her husband left. Ms. Giguere was left with little income and unable to pay her mortgage serviced by Wells Fargo. The run around with Wells Fargo began with the continued denial by the bank that it had received her financial information and other paperwork. Yet, Ms. Giguere had sent in the requested paperwork three separate times.



Left with no choice, she and her husband, although separated, filed together for bankruptcy protection. Wells Fargo then filed a motion for relief from the automatic stay with the intention of foreclosing on Ms. Giguere's home. Although Ms. Giguere did not file a response to Wells Fargo's motion to lift the stay, Ms. Giguere later submitted a letter which explained the efforts she had gone through with Wells

Fargo and how the bank had caused her to believe that she was working towards a modification.

The bankruptcy judge, Hon. Randolph J. Haines, chose to help Ms. Giguere. He did so carefully and based upon a well reasoned application of the law. Judge Haines stated that "although bankruptcy courts do not have the authority to order loan modifications, bankruptcy courts are a court of equity, and there's an ancient equitable principle that whoever seeks equity must do equity." He then determined that "when Wells Fargo comes to this Court and asks this Court to lift the automatic stay in effect so that it can foreclose sooner than it could without stay relief . . . It's asking this Court to give it equity, and in my view anyone coming to court asking this Court to grant equity must similarly behave equitably."

Judge Haines went on to recognize that Ms. Giguere's situation was certainly not an isolated one and entered an order vacating the lift of the automatic stay precluding Wells Fargo from moving forward with foreclosure. Further, Haines ordered that a senior officer of Wells Fargo's home loan modification department appear in court and testify about numerous matters Wells Fargo had allegedly misrepresented to Ms. Giguere, whether or not Wells Fargo had received the loan modification paperwork, and if Ms. Giguere had qualified. After a delay of two weeks, Wells Fargo appeared in Judge Haines' courtroom represented by two attorneys and two senior officers. The result rendered testimonials from the senior officers covering many issues including the addition of 4,000 people at Wells Fargo to address mortgage issues, the bank's commitment to training and customer service, and the federal programs designed to help homeowners. The testimony and cross examinations of the senior officers by Ms. Giguere and Judge Haines revealed that the quality of communication between Wells Fargo and Ms. Giguere and within Wells Fargo was dismal. The resulting transcript from the hearing is more than 120 pages long.

A senior officer testified that Wells Fargo had requested that Ms. Giguere complete and submit an updated financial worksheet, only later to be discredited by a Wells Fargo letter to Ms. Giguere which demanded documents, but not a financial worksheet. After some questioning by Judge Haines, it appeared

that Wells Fargo had refused to move forward with a loan modification because it did not have certain information, yet Wells Fargo had not requested the information from Ms. Giguere.

Ultimately, the senior officer admitted that Ms. Giguere's loan was no longer under consideration for a modification, that he did not know exactly when that determination had been made, but that Wells Fargo had never advised Ms. Giguere the bank had terminated its consideration of her request for a



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# Judge Orders Wells Fargo

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loan modification. Judge Haines then fired the key question at the senior officer, "Is that one of the kinds of customer communication issues you think Wells Fargo ought to fix?" In response, the senior officer testified, "Customer communication is something that we're taking a serious look at, Your Honor." Based on the transcript, one would hope that Wells Fargo is "taking a serious look at" its customer communication.

Ultimately, Judge Haines granted Wells Fargo relief from the bankruptcy's automatic stay so that Wells Fargo could request further financial information from Ms. Giguere and consider modification of the mortgage under the HAMP program or other options. The decision of Judge Haines to issue an order mandating the appearance and testimony of Wells Fargo's upper management was extraordinary.

Ms. Giguere should consider herself lucky to have received the opportunity to look the bank's senior officer in the eyes and ask about her mortgage. What is most interesting about the case is that the frustration experienced by homeowners was so great that it spilled over and frustrated a federal bankruptcy judge who could do something about it. Now that Judge Haines has reached out and pulled the curtain back and exposed the wizard, we can expect that the banks will come under further Court scrutiny by judges who not only have the power to act, but the inclination to do so.

See In Re Theodore P. and Bobbi J. Giguere, 09-BK-09592-RJH, United States Bankruptcy Court, District of Arizona; Emergency Motion to Reconsider, Dkt. 37; Order Vacating Order Lifting Automatic Stay and Order Directing Wells Fargo Bank to Show Cause, Dkt. 39; and Transcript of Proceedings, Dkt. 47, &

## Division of Negative Equity in Divorce

John D. Jones, Esq.

In 2007, Nevada family courts easily adhered to the legal presumption of equal division of community assets and debts in a divorce. Most divorcing couples owned a marital home with enough equity that could be used to "equalize" the distribution of other community property and debt. With the drastic decline in Nevada property values, the issue of "negative equity" has begun to haunt most divorce cases. In many cases, no equity exists to use as an equalizer, making the home a "toxic asset" which neither party wants to assume.

Equity is defined as the fair market value of a property minus any loan encumbrances or other liabilities. Therefore, a fair market value in excess of related liens and encumbrances has equity. However, negative equity arises when the owner owes more on the property than the property is worth.

Family Court judges have difficulty dealing

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## Which is Worse: Bankruptcy or Foreclosure

Randy M. Creighton, Esq.

It is a myth that bankruptcy is always worse than foreclosure. Lenders typically categorize foreclosures, short sales, and "deeds in lieu" as a prior inability to pay a mortgage. Therefore, lenders tend to view these actions as more unfavorable than a bankruptcy on a credit report.

It is true that a bankruptcy remains on a credit report for 10 years while a foreclosure stays for only 7 years. Yet, credit counselors report that a foreclosure has twice the negative impact on a credit score compared with a bankruptcy. As such, it can be much more difficult to obtain a new mortgage for many years after losing a home to foreclosure rather than filing bankruptcy.

Further, following bankruptcy, mortgage lenders and other creditors stop negative reporting on discharged debts which

improves credit. Following foreclosure, however, mortgage lenders and other creditors continue negative reporting which erodes a credit score.

In addition, bankruptcy cancels debt associated with mortgage deficiencies and other debts at the same time. Foreclosure can create a deficiency debt. The mortgage lender then chooses whether to pursue the borrower for the debt or issue a form which can result in a tax liability.

Lastly, and most importantly, a person can be eligible to purchase a home within two to four years after a Chapter 7 discharge, the court order that forgives debt. In contrast, it takes a minimum of three years to purchase a home following a foreclosure. Also, government-backed loans have lending standards that mandate a three to five year waiting period on a foreclosure. A bankruptcy time-frame is significantly less. In cases that involve both a foreclosure and bankruptcy, purchasing a home may be possible after two years under certain circumstances.

While it's not an easy option, bankruptcy is becoming more common. Furthermore, when considering a home purchase in the near future, bankruptcy is a better option than a foreclosure. Some 30,000 Nevadans filed for bankruptcy protection as well as 112,097 foreclosures noticed over the last year and those numbers are predicted to increase. In both situations, Nevadans will have to weigh the dwindling number of options available very carefully when considering where and how they want to live. &

## Attorney Spotlight

Carlos L. McDade, Esq.

Abe Geller, Editor for Black & LoBello's YHBS! Newsletter, sits down with Carlos L. McDade, Esq., for an exclusive interview.

**AG: Carlos, what are your primary areas of legal practice?**

CLM: My primary practice area is environmental and energy law. I also work in the areas of estate planning, trust and will formation and amendments, along with small business formation and operation. I have also helped a few clients with military and federal law matters, such as security clearance appeals, Merit System Protection Board matters and other federal administrative matters.

**AG: How many years have you been practicing law?**

CLM: I have been practicing law for twenty-three years.

**AG: In all the cases you have been involved in, which one has affected you the most?**

CLM: While I was stationed at Nellis Air Force Base, here in Las Vegas, we were able to make some incredible things happen. We helped the Nellis Aviation Air Show grow

into the best in the Air Force, built the Photovoltaic Solar Array, and enabled the Nevada Air National Guard to become a key component of the Predator operations. We teamed up with the great people of Nevada to make the impossible happen.

**AG: What is the best part of your job?**

CLM: As an Air Force Judge Advocate, I have practiced law all over the world. I worked on environmental permitting, compliance and tort cases, aircraft accidents, criminal prosecution and defense matters, and much more. The greatest part was working with the best people from the other military branches, the U.S. Attorney's Office, FBI, OSI, EPA, and more state governments than I can count. Since I began practicing in Las Vegas, I have met even more interesting people who make up this incredible city.

**AG: What advice would you give to young lawyers as they try to build their careers?**

CLM: I think every young lawyer should give back to the community either through public service, pro bono work, civic or church groups, or other organizations. Being a part of the community is a very worthwhile. &



## Black & LoBello Welcomes Tiffany N. Ballenger, Esq.



Tiffany N. Ballenger joined Black & LoBello in 2010. Her practice focuses on estate planning, elder law, and asset protection. Ms. Ballenger has significant experience in trusts and estates, long-term care planning, Medicare, Medicaid and veterans benefits, adult guardianship, estate settlement, probate and trust administration, business entity formation, and domestic asset protection trusts.

Before joining Black & LoBello, Ms. Ballenger practiced with a Las Vegas estate planning and asset protection law firm and has also practiced elder law in California. Ms. Ballenger received her Juris Doctorate from the University of San Francisco School of Law in May of 2007, where she was an Arthur Zief scholarship recipient. While in law school, she served as an editor for the Maritime Law Journal and The Forum. Ms. Ballenger's "FGM: Legal and Non-Legal Approaches to Eradication" was published in the Spring 2008 issue of the Journal of Law and Social Challenges. While in law school, Ms. Ballenger served as a clerk for the Superior Courts in both the San Mateo and Alameda counties of California. She also handled high-asset family law and estate planning with a well-respected boutique firm in San Francisco. She graduated from the University of California, Santa Barbara in 2003, with a bachelor's degree in Global Socioeconomics and Politics, with a minor in History.

Ms. Ballenger is a member of the State Bar of California (2007), the State Bar of Nevada (2008), the National Academy of Elder Law Attorneys, the American Bar Association, Wealth Counsel, and Elder Counsel. She is an accredited attorney who can practice before the U.S. Department of Veterans Affairs. She lectures frequently on issues including estate planning, elder law, and asset protection and teaches continuing education classes for other attorneys, financial professionals, and realtors. &

## Negative Equity in Divorce *Continued from page 3*

with negative equity because of how the parties tend to deal with it. Under most circumstances, a party will keep assets with positive equity but walk away from assets with negative equity. When faced with the dilemma of servicing loan obligations for thousands of dollars in negative equity, property owners are abandoning property even when they have the monthly income to maintain the payments. These "strategic foreclosures," along with the options of a "short-sale" or traditional bankruptcy, can reset negative equity to zero. The potentially unknown nature of debt in the current economy troubles the courts and family law practitioners in dealing with negative equity.

At a recent Family Law conference, most Family Court judges in Clark County stated they treat negative equity as a "zero." The substantial benefit to the individual retaining the home is residing in the home, without making a mortgage or rent payment, for a significant period of time. Many judges also believe that the consistency associated with remaining in the marital residence and not having to move is another significant benefit. These benefits are weighed against the debt being assigned to the party maintaining the home and the possible future deficiency judgment one or both parties may eventually incur. Most judges retain jurisdiction to later adjudicate the debt due to the uncertainty of the final outcome of a short sale or foreclosure whether or not the mortgage holder takes a deficiency judgment or pursues it. Family law practitioners and the litigants, depending on which litigant

is retaining the residence, must ensure that any final Decree of Divorce contains sufficient provisions to protect either or both parties. They can ensure an alimony claim will survive the divorce so that it can be modified in the event of a negative effect. In most cases, the simple retention of jurisdiction over any contingent liability to make any and all appropriate orders to protect either or both spouses is sufficient. Whereas this may result in future litigation, it is more equitable than giving litigants credit for a liability which they may never pay. The key to this complicated issue is carefully drafting the Decree of Divorce and settlement documents, ensuring a fair and equitable result or to make sure the judge's decision includes such protection. &



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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](mailto:editor@blacklobellolaw.com). &

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