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CURRENTS

Commercial Foreclosure: The Risk to the Commercial Tenant

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By Jamie L. Winter

Commercial tenants beware! While you may be current on your lease payments and otherwise complying with the terms of your lease agreement, you may be at risk of losing your commercial space if the commercial landlord defaults on its loan. In cases where the commercial landlord has a lender and

the landlord defaults under its loan, the lender may foreclose on the property effectively wiping out leases signed after the loan entered into by the lender and landlord. While not all lenders want tenancies to automatically terminate following a foreclosure, there are instances in which lenders do seek to terminate tenancies following

foreclosures. The risk to the tenant cannot be understated and includes the capital invested in the leased space, the goodwill built with the tenant's client base at the premises, and the interruption of business and cost to the business owner if the tenancy is terminated and the tenant has to find a new

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NV Dept of Taxation Amnesty Program

By John C. Rogers

Nevada Offer Of Taxation Amnesty Through Sept. 30, 2010:

Nevada is currently offering a tax amnesty program. Actually, it is an offer to waive penalties and interest due on certain unpaid taxes that are paid in full during the amnesty period which ends September 30, 2010. Rather than telling you in detail what is covered, we attach a copy of the information sheet

(see page 7) that describes the "Department of Taxation's Amnesty Program," and which includes a phone number and website for further information. It also includes an "Amnesty Application" for your use if you want to take advantage of the Amnesty offer. Please review the information sheet closely to see if it applies to any taxes you or your entities might owe. Probably the biggest items for potential savings will be failure to report or pay

sales and/or use taxes, the Modified Business Tax, and prior years Business Licensing "fees" for entities previously registered with the NV Department of Taxation. If you need help with questions of coverage or assistance processing the Amnesty Application, please don't hesitate to ask one of the attorneys in our firm to assist you.

The Amnesty Program is intended to encour-

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Commercial Foreclosure: The Risk to the Commercial Tenant

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location and move its business.

The basic rule applied to commercial leases in the foreclosure process is known as “first in time, first in right.” In short, if the mortgage between lender and landlord is signed before the landlord and tenant enter into the commercial lease agreement, the commercial lease is wiped out thereby allowing the new property owner to sell the property, lease the commercial space back to the current occupant, or evict the commercial tenant and lease the space to a new tenant.

In order for a commercial tenant to protect itself against such a risk, the tenant should ask a prospective landlord if there is a loan on the commercial property. If the answer is yes, the tenant may seek to enter into a non-disturbance agreement with the landlord’s lender as a precondition to commencement of the lease term. The landlord may also be a party to the agreement which in essence formalizes the tenant’s knowledge of the landlord’s financial condition effectively minimizing the tenant’s risk before en-

tering into the commercial lease agreement.

The non-disturbance agreement typically involves three interrelated concepts: subordination, non-disturbance and attornment. The concept of subordination simply means that the tenant agrees that its leasehold interest in the commercial property is secondary to the lender’s lien. In exchange for the tenant agreeing to subordinate its leasehold interest to the lender’s interest, the lender then agrees to non-disturbance of the tenant’s possession of the commercial space should the lender foreclose on the landlord; a precondition to this non-disturbance is that the tenant has complied with the lease terms including timely making its lease payments. Finally, the concept of attornment simply means that if the tenant agrees to recognize the lender as its landlord following foreclosure, the tenant gets to stay in the leased commercial premises according to the terms of the lease.

Practically speaking, tenants will not always be successful in obtaining the lender’s agreement to enter into a non-disturbance

agreement, particularly tenants leasing smaller spaces in larger commercial properties. The tenant may still wish to enter into a commercial lease agreement without a non-disturbance agreement (if the lender is unwilling to play ball) but at the very least the tenant has considered and assumed the risk of doing so. If, prior to the commencement of the lease term, the lender was unwilling to enter into a non-disturbance agreement and a foreclosure results, the tenant can attempt to negotiate a new lease with the lender.

The good news is that generally speaking, lenders do not want tenancies to terminate upon foreclosure. Quite obviously, good tenants increase the value of the commercial property and typically there is no reason for the lender to terminate a source of income. Even so, attempting to minimize the risk outlined above by proposing a non-disturbance agreement may be the difference between success and failure in today’s economic climate and would be a prudent consideration by business owners before entering into a commercial lease agreement.

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Recent Water Cases – Part Two

By Andrew N. Wolf

In the last newsletter, I summarized the case of *United States v. Bell* (4-20-2010), in which the U.S. Ninth Circuit Court of Appeals ruled on excess water diversions in the 1970's and '80's by the Truckee-Carson Irrigation District. I also promised a report on a January, 2010, case by the Nevada Supreme Court, *Great Basin Water Network v. State Engineer*, regarding water rights applications filed more than 20 years ago by the Las Vegas Valley Water Department (LVVWD). Before the ink was dry on the court's decision in *Great Basin*, the Supreme Court granted a rehearing, withdrew its January opinion and issued a new opinion, *Great Basin Water Network v. State Engineer* (126 Nev. Adv. Op. No. 20, June 17, 2010). I will report on this revised opinion before the ink dries. Here is the factual background:

In 1989, the LVVWD filed approximately 146 applications with the Nevada State Engineer to appropriate public water from groundwater sources in various areas in rural Nevada. LVVWD's intended purpose was to pump the water to the greater Las Vegas area. With nearly 800,000 acre-feet per year of groundwater at issue, the State Engineer referred to the project as "the largest inter-

basin appropriation and transfer of water ever requested in the history of the state of Nevada." In 1990, the State Engineer published statutory notice of the applications in the counties where the water was to be appropriated. In response, more than 830 protests were filed with the State Engineer. Although Nevada state law generally required the State Engineer to take action on applications within one year after the close of the protest period, the State Engineer did not rule on the applications or identify an exception that permitted postponement of action within the allotted time. In 1991, Southern Nevada Water Authority (SNWA) was formed to address and secure the water needs for the millions of residents of and visitors to the Las Vegas valley. SNWA acquired LVVWD's rights to the 1989 groundwater applications.

In 2005 and 2006, the State Engineer began taking action on the 1989 applications. A group of environmental organizations and property owners opposed to the inter-basin transfers demanded that the State Engineer re-notice the applications and reopen the protest period. The State Engineer refused and this lawsuit followed. The District Court ruled that the State Engineer

had acted within its rights in acting upon the applications, even though they were "stale" – more than a year after the protest period had ended.

After analyzing state water rights laws, the Nevada Supreme Court determined that the State Engineer had failed to follow proper procedure by delaying action on the subject 1989 applications to appropriate groundwater. The court then concluded that simply voiding the State Engineer's ruling and preventing him from taking any further action would be inequitable to SNWA and similarly situated applicants. The court also stated that the 1989 water rights applicants cannot be punished for the State Engineer's failure to follow his statutory duty. Similarly, it would be inequitable to the original and subsequent opponents of these massive water appropriations to conclude that the State Engineer's failure to take action results in approval of the applications over 14 years after their protests were filed. Accordingly, in its initial January, 2010, opinion (now withdrawn), the Nevada Supreme Court reversed the district court's order denying appellants' petition for judicial review and remanded it back to the district court,

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Beware: Facebook Can Be Used In Divorce

By Stacey F. Herhusky

A recent USA Today article, "*Divorce Lawyers: Facebook Tops in Online Evidence*" (June 29, 2010) highlights the perilous link between real life and virtual life. Evidently, sharing too much on social networks has led to an overabundance of evidence in divorce cases. The American Academy of Matrimonial Lawyers reports that 81% of its members have used evidence from Facebook, MySpace, Twitter and other social networking sites, including YouTube and LinkedIn, over the last five years. This epidemic is not limited to the United States. A December 21, 2009, article in United Kingdom's *Telegraph* online magazine reports that law firms in the UK have seen Facebook cited in 20% of its divorce petitions. These statistics should come as no surprise considering a 2008 report by the Pew Internet and American Life Project which re-

ported that about one in five adults uses Facebook for flirting and catching up with old flames.

The article reported that some of the ways that Facebook and other social networking sites have been used as evidence in divorce court are as follows:

1. A man went on Match.com and declared he was single and childless while seeking primary custody of his "nonexistent" children.
2. A man who had denied in court that he had anger management issues posted on Facebook in his "write something about yourself" section: "If you [sic] get in my face, I'll kick you're a#* into submission."
3. A father seeking custody of his children claimed (among other things) that his ex-wife never attended the events of their children. The woman denied the claims. How-
4. A mother denied in court that she smokes marijuana but posts partying, pot-smoking photos of herself on Facebook.
5. Individuals who have denied having the ability to pay court ordered support obligations have also been known to post photos from their recent vacations out of the country.

As one can imagine, the list could go on and on. If you have a Facebook account and are facing a Family Court case, consider the

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"The American Academy of Matrimonial Lawyers reports that 81% of its members have used evidence from Facebook, MySpace, Twitter and other social networking sites, including YouTube and LinkedIn, over the last five years."

"Recent legislation authorizes the Department to start charging a \$450.00 penalty for each reporting period where a tax return is not filed."

NV Dept of Taxation Amnesty Program

(continued from front page...) age voluntary compliance and payment of past due taxes. We have also learned of another program soon to be implemented by the Dept. of Taxation. Recent legislation authorizes the Depart-

ment to start charging a \$450.00 penalty for **each reporting period where a tax return is not filed**. This could add up significantly and quickly! We are informed there will also be a 45 day appeal period which

may allow the penalty to be waived if the required return is filed during this period. Although Nevada is considered a tax and business friendly state, it pays to keep informed about what taxes Nevada does have.

Hardest Hit Fund

By Cassell von Baeyer

The latest installment in foreclosure prevention was announced June 23, 2010, when the Obama administration declared that the five states hit hardest by the foreclosure crisis can begin using \$1.5 Billion in "Hardest Hit Funds" for foreclosure-prevention under plans approved by the Obama Administration. This aid is intended to support local initiatives to assist struggling homeowners in the hardest hit states as part of the first round of funding available under this new pro-

gram.

According to press releases from the Federal government, Nevada is to receive \$102.8 million of the \$1.5 Billion Hardest Hit Fund dollars. The funds are approved for use in Nevada for the following programs:

- Nevada will create a mortgage modification program using a combination of forgiveness and forbearance with a goal of reducing principal to less than 115 percent of LTV (loan-to-value) and lowering payments to 31 percent of DTI (debt-to-

income).

- The state will also offer assistance to reduce/eliminate second liens with earned forgiveness over a three-year term.
- Additionally, the state will provide allowances for appraisal and transaction fees, moving fees, a legal allowance for up to three months, and a combination of incentives for borrowers and servicers to facilitate short sales.

Funds are allocated to different counties and communities based on weighted
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"Nevada is to receive \$102.8 million of the \$1.5 Billion Hardest Hit Fund dollars."

Recent Water Cases – Part Two

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with instructions to undertake the necessary proceedings to adjudicate the proper remedy, namely whether SNWA is required to file completely new applications or whether the State Engineer is required to re-notice and reopen the protest period.

The uncertainty produced by the court's initial January disposition -- leaving all parties in limbo, and casting a cloud of doubt over possibly a multitude of other water rights applications that had not been acted upon within one year -- resulted in a rehearing and amended opinion. Specifically, the

June, 2010, decision eliminated much of the uncertainty for parties by specifying that the LVVWD/SNWA 1989 applications did not need to be re-filed. However, the State Engineer is now required to re-notice those 1989 applications, and thereby reopen the protest period and entertain the protests before acting on the applications. This result balanced the rights of the parties without inadvertently tarnishing the water rights of nonparties. The court concluded that, "The proper and most equitable remedy is that the State Engineer must re-notice the applications and reopen the protest pe-

riod. Accordingly, we reverse the district court's order denying appellants' petition for judicial review and remand the matter to the district court with instructions to, in turn, remand the matter to the State Engineer for further proceedings consistent with this opinion."

As a result of this decision, there will be 20 more years of history and economic development potentially available to either justify or to protest these water appropriations, which are the modern-day equivalent of the Los Angeles/Owens River Valley water diversions of the early 1900s.

"The uncertainty produced by the court's initial January disposition... resulted in a rehearing and amended opinion."

Beware: Facebook Can Be Used In Divorce

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following tips:

1. Remember not to post anything that you don't want the Judge to see.
2. Don't post any compromising photographs.
3. Utilize privacy settings to minimize who has access

to your information

Even if you are not facing a Family Court case, you should be sure to use these tips to avoid allowing anything incriminating to show up online. Ex spouses and their attorneys are not the only ones watching you

in this age of virtual reality. Employers, clients, probation officers, law enforcement, teachers and college admissions officers have also been known to use Facebook and other online networking sites as ways to obtain information about you.

“you should be sure to use these tips to avoid allowing anything incriminating to show up online.”

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averages tied to foreclosure statistics. 14.617% of these funds (\$14,310,770) are allocated to Washoe County. When you get down to the brass tax – the number of families to be assisted by the funds – between all three approved programs a total of

Hardest Hit Fund

743 Washoe County families can expect to receive help. Overall the program is intended to assist 5,085 families statewide. The average dollar amount of that assistance is approximately \$20,000 per family.

California will also receive almost \$700 Million in funds. The California pro-

grams are not expected to be online until November, 2010. Information on the California programs can be found at keepyourhomecalifornia.com.

For more information on Hardest Hit Fund and the use of the funds in Nevada you can visit www.nahac.org.

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At Incline Law Group, we provide ethical, personalized service and honest, no-nonsense advice, with a focus on our clients' best interests. The firm was established by John C. Rogers in 1973. We have provided legal services to our clients and our communities continuously since then.

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NV Dept of Taxation Amnesty Program Information Sheet

Department of Taxation's Amnesty Program

The 26th Special Session of the Nevada Legislature enacted AB 6 that provides for a one time penalty and interest amnesty program beginning July 1, 2010 and ending September 30, 2010. The amnesty program allows for penalty and interest to be waived provided the outstanding tax debt is paid in full during the amnesty period.

The types of taxes included in the amnesty program are Sales & Use Tax, Modified Business Tax, prior year Business Licensing if previously registered with the Department, Cigarette Tax, Other Tobacco Products Tax, Liquor Tax, Bank Branch Excise Tax, Insurance Premium Tax, Tire Tax, Live Entertainment Tax, Short Term Lease Tax (Passenger Car), Exhibition Facilities Fees, Property Taxes that are Centrally Assessed, and the Net Proceeds of Minerals Tax. The outstanding tax debt must have been due prior to July 1, 2010. The debt may be a result of not filing tax returns or the filing of no money returns, a past audit, a large untaxed purchase, or an error found in prior tax returns.

WHO DOES THE PROGRAM NOT APPLY TO?

The amnesty program does not apply to any person or business that has entered into a compromise or settlement agreement with the Department or Nevada Tax Commission regarding the unpaid tax, fee or assessment, and it does not apply to a person or a business that is not able to pay the outstanding tax in full. It does not apply to the Lodging tax (room tax), the Real Property Transfer Tax, and Property Tax that is Locally Assessed.

HOW DO YOU TAKE ADVANTAGE OF THE PROGRAM?

Beginning July 1, 2010, please send to the Department of Taxation a completed application (see below) along with any unfiled tax returns and your payment. The tax must be paid in full during the period of July 1, 2010 through September 30, 2010. If you are an individual or business who purchased an aircraft, vessel, automobile or other tangible personal property, you must provide a copy of the bill of sale, or purchaser's agreement and pay the tax.

Mail the amnesty application, documents, and payment to the Department's Carson City Office address. "AMNESTY" must be clearly written on the outside of the envelope and should also be shown on the tax returns. Taxpayers may also go to their nearest District office shown at our website <http://tax.state.nv.us> to take advantage of the amnesty program. Unlike typical returns, do not mail the amnesty application to the Department's P.O. Box.

CONTACT INFORMATION FOR QUESTIONS: Call 866-962-3707 or see <http://tax.state.nv.us/>.

AMNESTY APPLICATION

Business or Individual Name: _____

Account Number (typically, your 10-digit TID number): _____

If not registered with the Department indicate "none"

Tax Type(s) (see above): _____ Amount of Payment: \$ _____

Period(s) debt covers _____

Mail To: Nevada Department of Taxation
1550 College Parkway, Suite 115
Carson City Nevada 89706-7937

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These newsletter articles are not intended as legal advice. Readers may not rely upon them concerning their factual circumstances. Small differences in facts can produce substantially different outcomes. Before proceeding with a matter with legal consequences, readers must consult with legal counsel who can examine the facts and the law as it applies to the particular fact situation. Also, it is critically important to consult with a tax professional before taking action on any real estate matter. There are significant tax consequences and potential risks involved in most real estate transactions.

Rogers, Wolf, von Baeyer & Herhusky, LLP is a boutique law firm located on the North Shore of Lake Tahoe.

The firm, founded in 1973 by John C. Rogers, has earned a reputation for professionalism, discretion, diligence and positive results.

In short, we are personally committed to excellence and to our clients' success.

Our areas of practice include change of residency, creation and management of entities, contracts, real estate, asset protection, family law, commercial transactions, civil litigation and estate planning.

All of our attorneys are licensed in Nevada and California.

A Law Firm Committed to Excellence & Committed to You.



From left to right: John C. Rogers, Esq.; Catrina Jenkins; Jamie L. Winter, Esq.; Heidi Shaughnessy; Cassell von Baeyer, Esq.; Stacey F. Herhusky, Esq.; Vicki Munns; Willow Cornelius; Andrew N. Wolf, Esq.; not pictured: Vera Ann Struc, Esq., of counsel