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CURRENTS

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Divorce Rate Beginning to Increase

By Stacey F. Herhusky

In the Winter 2009/2010 edition of Currents, I reported that the divorce rate had decreased dramatically since 2007 as a result of the recession and had reached its 30 year low in 2009. That decline continued into 2010. The figures showed us that even though difficult economic times typically come with higher rates of domestic violence and greater stresses in the marriage, the marriage rates were lower presumably because people simply could not afford to get divorced. With housing values depressed and jobs disappearing, divorce became a luxury beyond the reach of many couples. There is often not enough money to pay for separate households, to hire lawyers, fight over children, go to court, etc. However, it appears that with economic recovery the divorce rate may be on the rise again.

Analysts have reported that this recession bears similarities to the Great Depression in terms of the cycle of divorce rates. Andrew Cherlin, a sociologist at Johns Hopkins University, did a study which noted that in the 1930s, divorce rates fell amid the worst of the economic crisis, only to rise as the country recovered. "Troubled economic times breed troubled marriages," he says. "But whether those marriages end in divorce right away is another thing." Cherlin had predicted that the

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California & Nevada Good Samaritan Laws

By Jamie L. Winter

Under well established principles of common law, an individual has no duty to come to the aid of another unless there is a special relationship between the rescuer and the individual being rescued. If, however, a person elects to aid another individual, the person electing to do so must exercise due care or that "Good Samaritan" may be found liable.

Both the California and Nevada Legislatures have enacted statutes providing for exceptions to the due care requirement for Good Samaritans. Until recently,

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Town of Mammoth gets Shellacked in Lawsuit over Development Agreement

> "Before signing, the Town did not disclose to the Developer that the FAA had voiced concerns about the long-term leases and the option to purchase land near the airport"

> "Both Intrawest and the Town wanted the airport runways expanded for commercial air carriers"

By: Andrew N. Wolf

In late December 2010, a California appeals court upheld a jury verdict favoring a real estate developer in its lawsuit against the Town of Mammoth Lakes. [*Mammoth Lakes Land Acquisition, LLC v. Town of Mammoth Lakes* (12/30/2010)]

In 1997, the Town of Mammoth Lakes (the "Town") made a complex Development Agreement with a real estate developer to build various improvements at the Mammoth Yosemite airport. The Town had determined that a first-class airport operation, increased hangar space, modern fuel facilities, a hotel or condominium or residential condominium and related amenities, and space for recreational vehicles, would benefit the Town's economy, and that such development should be funded with private capital and that airport operations should be privatized.

The Development Agreement allowed the Developer to substantially improve the airport and build a maximum of 250 hotel or condominium units. The hotel/condominium project was to be built on a 26-acre parcel adjacent to the airport. In 2027, the Developer would have an option to purchase the parcel conditioned upon construction of the other improvements. The Developer would make the improvements and build the hotel or condominiums, initially leasing the land from the Town, then exercising the option to purchase the land many years later.

Before signing, the Town did not disclose to the Developer that the Federal Aviation Administration (FAA) had voiced concerns about the long-term leases and the option to purchase land near the airport, as such long term commitments might interfere with later airfield expansion/operations.

In 2000, after the Developer spent approximately $17 million on airport improvements, the Developer submitted to the Town an application with a plan for the hotel/condominium project. By this time the Town had shifted its strategic plan to expanding the airport rather than development of amenities.

In 2004, the FAA advised the Town that it could ***either*** expand its airport for commercial air service with FAA money, ***or*** it could let the Developer build the hotel, condos, etc., on the land adjoining the airport, ***but it could not do both***. The new big player in town was Intrawest and both Intrawest and the Town wanted the airport runways expanded for commercial air carriers. Clearly this conflicted with the Development Agreement under which the Developer already spent $17 million upgrading the airport in exchange for the right to build a hotel or condos on adjoining lands.

According the appellate decision, the Town first concealed the FAA's concerns from the Developer and many years later asked the FAA to provide ammunition (FAA red-tape) to help the Town kill the hotel/condo project. Rather than condemning the Developer's lease or the option of using eminent domain proceedings, the Town figured it would pretend the FAA was pro-

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Divorce Rate Beginning to Increase

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current recession probably created "a backlog of unhappy married couples who would like to get a divorce soon but can't afford it," and he predicted a surge in cases during the first several recovery years. "The longer this severe economic downturn continues," he said, "the larger the backlog will be."

It appears that history is, in fact, repeating itself. For the first time since 2007, divorce rates are on the rise. Attorneys in the Northwest have reported an increase in their divorce caseload by approximately 15% in the past few months. The Huffington Post recently reported that Florida has seen a 12% increase. That observation is in line with a NPR report which aired recently and pointed out that the country is, indeed, experiencing such an uptick as the economy bounces back from recession. NPR reported that, though the divorce rate fell around 7% during the recession, as the financial situation eases, unhappy couples are divorcing more readily. Clearly, we are not out of the woods in terms of the recession, particularly in Nevada where we experienced, and continue to experience, some of the highest unemployment rates and the sharpest declines in real estate values. In fact, as of this writing Washoe County is showing that the number of divorce filings is about the same as it was last year at this time. However, there is reason to believe that the numbers will begin to rise in line with the national trends. As a stronger economy, lower unemployment and a housing market that, while still weak, begins to recover from its free fall, we may begin to see a rebound in divorce filings over the course of the next year.

While news of higher divorce rates is never heartening, in this case it does come with a positive indication that our economy could be starting to rebound and more couples may be financially able to move on with their lives and end unhealthy relationships.

"For the first time since 2007, divorce rates are on the rise."

Deficiency Actions After Foreclosure

By Cassell von Baeyer

In a foreclosure sale the lender often ends up receiving less than is owed by the borrower under the loan documents. In Nevada, as discussed in previous articles, under NRS 40.455, a foreclosing lender has six months to sue a borrower for deficiency in payment after a foreclosure sale. So are lenders pursuing deficiency judgments? The short answer, at least in Washoe County, is no.

We recently made a public records request with the Second Judicial District Court in and for the County of Washoe, asking for court records relating to deficiency judgments under NRS 40.455. Interestingly, the response that we received was that the search was unable to identify any cases where NRS 40.455 was cited in the case entry information.

Prior to the Court awarding a deficiency judgment under NRS 40.455, the court must hold a hearing and take evidence presented by either party concerning the fair market value of the property sold as of the date of foreclosure sale or trustee's sale (NRS 40.457). According to our public records search, since 2004 there have been a total of 4 cases requesting hearings under

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"A foreclosing lender has six months to sue a borrower for deficiency in payment after a foreclosure sale."

Town of Mammoth gets Shellacked in Lawsuit over Development Agreement

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hibiting it from performing (i.e., issuing the permits it promised the Developer). A big lawsuit against the Town ensued.

The trial centered around whether the Town had breached the Development Agreement by refusing to allow the Developer to actually construct the hotel and residential condominium project. The Town denied that it breached the agreement and maintained that was ready to perform. The jury found that, in fact, the Town failed to perform under the contract or improperly made up new conditions to obstruct its own performance. The jury set the amount of damages at **$30 million**, and the trial judge later awarded the Developer **$2.36 million in attorneys fees**.

The Court of Appeal reviewed the decade-long

great detail and affirmed the trial court's judgment in all respects. The court found that the Town of Mammoth changed its strategic vision for itself after the Developer performed his side of the deal. Instead of confronting the issue head-on by buying out the Developer's position through negotiation or eminent domain, it decided to roll the dice in court and lost.

"Instead of confronting the issue head-on ... it decided to roll the dice in court and lost."

Deficiency Actions After Foreclosure

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NRS 40.457. In a review of the dockets for those 4 cases it appears that 3 are related to commercial loans, not residential. The remaining case, filed in 2009, appears to be the only real suit for a deficiency judgment after a non-judicial foreclosure sale and the Lender was a private party.

So why don't lenders pursue deficiency judgments after foreclosure sales pursuant to NRS 40.455? It is probably a number of factors not the least of which is that with the sheer volume of non-judicial foreclosure sales taking place in Nevada, it would take a herculean effort for large lenders to put the mechanisms in place to manage the process of deficiency actions on such a short timeline. Additionally, every state differs with regard to the lender's ability to pursue deficiency actions: California, for example, with few exceptions disallows deficiency judgments after non-judicial foreclosure sales. In comparison, states which provide only for judicial foreclosure, tend to have built in mechanisms for deficiency judgments to be granted during the foreclosure process making it easier for lenders to obtain these judgments without the need for a secondary action, as would be required in Nevada. It also remains an unfortunate fact that many homeowners that lose their homes to foreclosure face extreme financial difficulties making any recovery on a judgment a challenge.

Regardless of the reason, the reality is that we see very few deficiency actions by foreclosing lenders after a foreclosure sale. We should note that these statutes do not bar junior lien holders (such as HELOC lenders) from seeking recovery for their losses after foreclosure sale.

As always, the distressed real estate market, foreclosures and short sales continue to create complex issues for borrowers. Keep in mind that our office does provide flat fee one hour consultations for homeowners in which we discuss options for managing distressed real estate.

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HOA Matters—Pending Legislation

By: John C. Rogers

The Nevada legislature is in session, as it is every two years. For Common-Interest Communities (CICs), including Homeowners Associations (HOAs), this means changes are coming. I had intended to summarize some of the issues that are pending in current legislative proposals, but have set aside that wonderfully optimistic plan. The reason: the volume of the proposals. At least eight separate bills were submitted dealing with amendments to NRS Chap. 116, the Uniform Common-Interest Ownership Act. There were five Senate Bills (SB) and three Assembly Bills (AB). Four of the former and two of the latter have survived the April 15 cutoff . No further action can occur on the two bills that did not get out of committee by April 15. Of the bills remaining under consideration, listed below, the bill proposals total almost 250 pages of text. That is far too much to summarize here. And, until they are enacted, some with amendments, it is not clear what will be signed into law amending Chap. 116 and related laws.

For now, I will identify the surviving bills and where one can go to look at the current amended text. By the time the next edition of ***Currents*** is published this summer, we will know what provisions have actually been adopted. A summary of some of the key changes will be made at that time.

Below is a list of the bills that remain under consideration. They cover a broad range of subjects. Their length in pages ( ) suggests the detail covered. To review the text of the bills, you can find them at: http://www.leg.state.nv.us/Session/76th2011/Reports/TablesAndIndex/2011_76-Chapter.html
Scroll down to "Chapter 116," and all bills affecting changes to Chap. 116 will be listed with links for access.

~SB 174 – (43) Deals with, among other things, the vote necessary to remove a director, revisions to requirements for owner meetings and the executive board, and other provisions concerning liens, charges and collections.
~SB 183 – No longer active
~SB 185 – (43) Concerns matters dealing with real property, including regulating/restricting fees charged on transfer of private property, and other fees and disclosures concerning CICs.
~SB 204 – (61) Proposing to adopt numerous amendments recommended by the Uniform Law Commission, including use of common areas.
~SB 254 – (20) Concerns changes to mediation and arbitration rules and assessment of penalties for bringing frivolous, false or fraudulent claims.
~AB 236 – No longer active
~AB 394 – (19) Concerns among other things, provisions for collection of past due accounts.
~AB 448 – (59) Numerous proposals affecting CIC governance.

Look for a further update in the next edition of ***Currents***.

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California & Nevada Good Samaritan laws

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> *"In 2010, the California legislature amended the Health and Safety Code provision to better protect Good Samaritans."*

Good Samaritans who rendered "*emergency care* at the scene of an emergency" were immune from liability. In 2008, the California Supreme Court interpreted the words "emergency care" to mean only "emergency medical care." *Van Horn v. Watson*, 45 Cal. 4th 322, 86 Cal. Rptr. 3d 350 (2008). In other words, the *Van Horn* Court determined that if a Good Samaritan simply pulled a person from a burning vehicle the Good Samaritan could be found liable for doing so, if the Good Samaritan acted negligently. But if the Good Samaritan applied a band-aid or attempted to provide some other form of "medical care," the Good Samaritan would be immune from liability.

In 2010, the California legislature amended the Health and Safety Code provision to better protect Good Samaritans. Section 1799.102 now reads in pertinent part: "No person who in good faith, and not for compensation, renders emergency medical *or nonmedical care or assistance* at the scene of an emergency shall be liable for civil damages resulting from any act or omission other than an act or omission constituting gross negligence or willful or wanton misconduct." (emphasis added).

Similarly, Nevada Revised Statute 41.500 et seq. entitled "Liability of Persons Who Render Emergency Care or Gratuitous Care" provides in pertinent part that "any person in this State who renders emergency care *or assistance* in an emergency, gratuitously and in good faith...is not liable for any civil damages as a result of any act or omission, not amounting to gross negligence, by that person in rendering the emergency care *or assistance* or as a result of any act or failure to act, not amounting to gross negligence, to provide or arrange for further medical treatment for the injured person." (emphasis added).

In other words, in both California and Nevada if an individual elects to come to the aid of another, and renders or attempts to render emergency care or assistance, that individual will not face liability absent grossly negligent, willful or wanton misconduct.

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