

# INTRODUCTION: HARD TIMES

---

By Attorney Michael DeLucia

---

*“If the debtor be insolvent to serve creditors, let his body be cut in pieces on the third market day. It may be cut into more or fewer pieces with impunity. Or, if his creditors consent to it, let him be sold to foreigners beyond the Tiber.”*

-Twelve Tables, Table III, 6 (ca. 450 B.C.)

This issue of Bar Journal deals with the aftermath of the economic events that are symbolized by the words “Lehman Brothers,” “AIG,” “credit-default swaps,” and “subprime mortgage lending.” September 2009 marks the one-year anniversary of the collapse of Lehman Brothers; and for those who have forgotten, it also marks the drop of the stock market on September 15, 2008, by 500 points and the ensuing financial panic that engulfed global financial markets.

This “Hard Times” issue deals with recession-related legal topics in three broad areas: issues for attorneys representing individuals or consumers; impacts on institutions, including a roadmap guiding board members wrestling with dissolution questions; and four articles looking at employment-law in a cost-cutting environment.

I want to thank the attorneys who made this issue one of the largest and most comprehensive that the Bar Journal has undertaken. Nearly 20 attorneys volunteered to wrestle with these topics; and the articles appearing here are informative and a handy guide for attorneys whose clients are bringing both novel and basic legal problems to the table.

## THE GREAT RECESSION

The articles do not, however, deal at length with the causes of the “Great Recession” or the devastating impact upon families, college graduates, retirees, homeowners, and those legions who have now joined the ranks of the unemployed. But some context is important to appreciate the articles that follow.

One year after the collapse of Lehman Brothers, the national unemployment rate stands at 9.7 percent, and is expected to pass the 10 percent mark. The unemployment rate, however, is deceptive, since it excludes those American workers who long ago abandoned the search for employment. In August 2009, an additional 216,000 jobs were lost, marking the 20th consecutive month of national job losses. As others have pointed out, these job losses may be permanent, since many older businesses have closed permanently and numerous jobs have moved overseas.

## TWIN DEVELOPMENTS

As this issue was being finalized, two developments threw a spotlight on why these economic events may reoccur. These developments deserve comment, since they go to the core issue of why the existing regulatory structures failed so profoundly to protect all of us.

### ISSUE #1: ROBUST REGULATION

First, it is becoming clear why the Securities and Exchange Commission (SEC) failed repeatedly to uncover the fraud involved in the Bernard Madoff scam as well as other financial manipulations intended to deceive investors and game the markets. The SEC, once such a respected institution among the Washington regulatory agencies, is typical of how regulatory structures fail.

While the scandals involving Enron, Tyco, HealthSouth, Rite Aid, and Worldcom (1999-2002) may have underscored the need for more robust regulation and intensified scrutiny to protect investors and the markets, Christopher Cox, the SEC Commissioner, went the other way, and proceeded to cut the scope of SEC enforcement actions. He avoided hiring additional enforcement staff, and – remarkable for any agency – failed to spend funds appropriated by Congress for additional enforcement. Cox made those decisions, thereby engaging in a policy of “deregulation” at a critical point when robust regulation was needed. Given the low morale, inexperienced staff, reduced enforcement actions, and insufficient budgets at the SEC, and the growing complexity of the financial and securities markets, what could be expected to happen? Somehow, the mission to serve the public interest was lost at this critical regulatory agency.

### ISSUE #2: THAT OLD BLACK MAGIC READY FOR AN ENCORE

On Labor Day weekend, it was reported that a Wall Street firm was starting work on the purchase and securitization of life insurance policies, many held by aging and financially strapped seniors. Investors purchasing these securities would be gambling that aging seniors would die sooner rather than later, thereby producing a profit for investors in those securities. If the aging seniors lived longer than expected, the securities would not produce a profit. It sounds much like the high-risk subprime mortgage lending ventures that brought down Countrywide Savings, undermined its acquirer, Bank of America, and helped produce the present plight that made this issue of Bar Journal necessary.

The games change, but human nature does not. Perhaps we should all revisit the work of Harry Markowitz, the economist who won the Nobel Prize for Economics in the early 1990’s for his work on

the element of “risk” in the stock market. His message: at our peril, we fail to appreciate the role of “risk.”

### THE THREE RECURRING DEBACLES

Finally, what is so dismaying about the recent scandals is their cyclical nature and the frequency of their reoccurrence. Those in New Hampshire remember the collapse in the early 1990’s of our major banking institutions (Amoskeag Bank, BankEast, to name two), and the insider trading and other scandals, including junk-bond king Michael Milken and New Hampshire’s own felon, Charles H. Howard III.

Right on schedule, scandals of a similar nature reappeared ten years later in the 1999-2002 period with Enron, Worldcom and, yes, New Hampshire’s own convicted felon, Dennis Kozlowski of Tyco Corp. This second wave involved manipulation of financial statements, false filings with the SEC, and the remarkable technique of back-dating already profitable stock options.

The third wave of scandals now rocking our world is more profound, directly impacting all Americans and the global economy. Appearing somewhat ahead of schedule, it has presented us with a new cast of characters: Lehman Brothers and its CEO Richard Fuld; Fannie Mae and Freddie Mac, AIG, and fallout that affects an estimated 20 million unemployed and 40 million uninsured. The failures of the past year are now all household names, replacing Dennis Kozlowski, Ken Lay, Jeffrey Skilling, and Andrew Fastow (the “Smartest Guys in the Room”) who stood for financial mismanagement a decade ago.

Finally, for those wanting to see some powerful testimony on the most recent scandals, U.S. Congressional hearings are now posted

on youtube.com, including the confrontation of former-Chair Henry Waxman (of the House Committee on Oversight and Government Reform) and Lehman CEO Richard Fuld, as well as the testimony and crucial examination of Alan Greenspan, Christopher Cox, and others. For those wanting to view a remarkable documentary on the collapse of Enron, the film “Enron: the Smartest Guys in the Room” is now on dvd. Based upon the book by a Wall Street Journal reporter, it reminds all of us of why good, solid, fact- based journalism is so important – and that if we don’t learn from the past, we are doomed to repeat it.

### THE MISSING CABOOSE

Despite the long train of impressive articles in this issue, it may not escape the notice of Bar Journal’s faithful readers that this issue appears to be missing its caboose – the beloved Lex Loci column reviewing the recent output of our Supreme Court. That situation is temporary – thanks to the flexibility of the online format, the latest Lex Loci column will be added in a matter of weeks. David Ruoff, the first of our interim Lex Loci author-candidates (due to no fault of his own) had been given a later deadline. The timeliness of the Hard Times themes articles impelled us to provide them as soon as they were ready. When Lex Loci is posted, readers will be notified.

We hope that these articles will provide practical guidance as we weather these “hard times” and that before too long, we will see a turn for the better for New Hampshire’s citizens, businesses, and legal community. May we also add the hope that those good times do not once again lead us to relax our vigilance.



*Michael DeLucia*

#### Author

***Michael DeLucia***

*Chair, NH Bar Journal  
Editorial Advisory Board;  
Issue Editor*