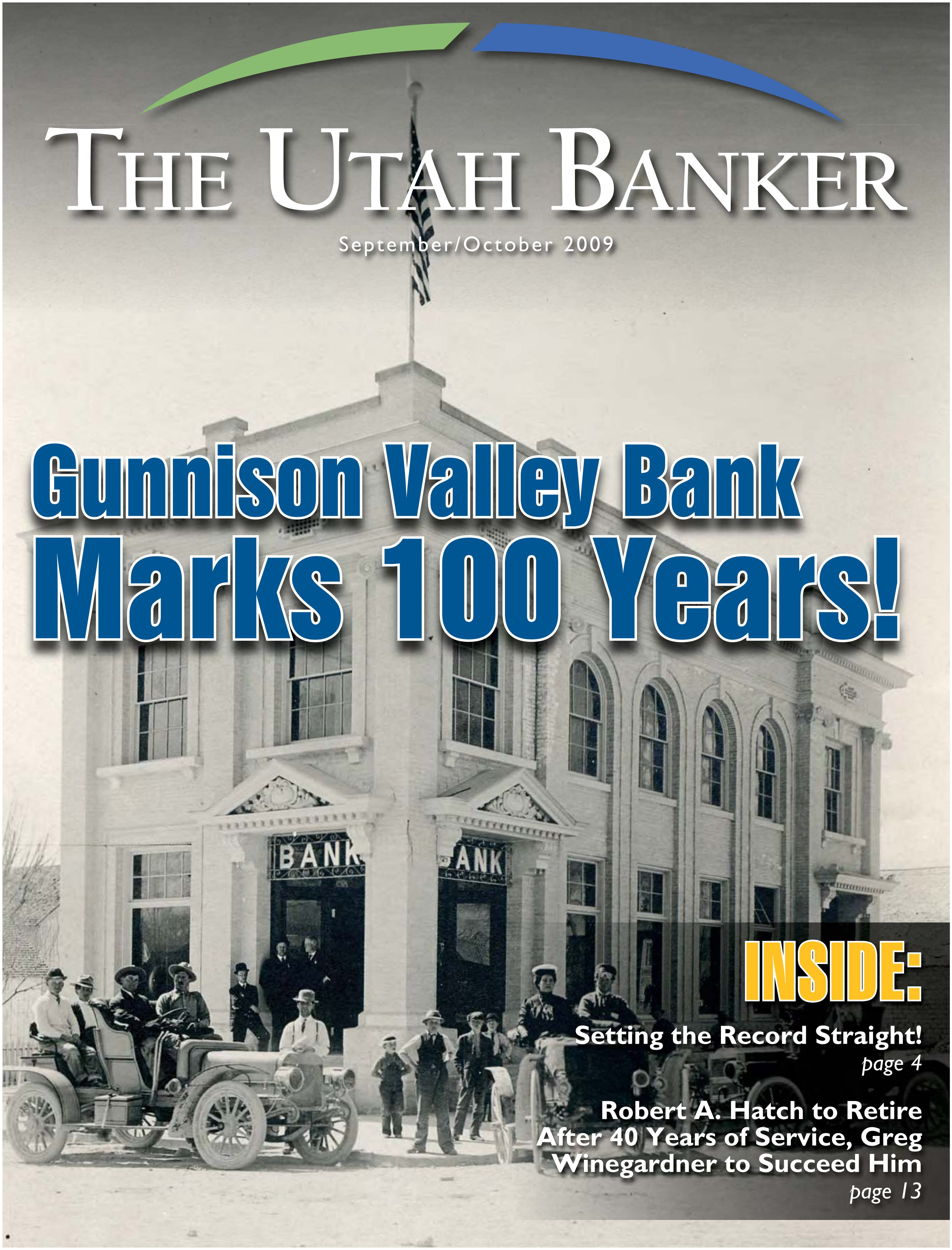
The Utah Banker

September/October 2009



Gunnison Valley Bank Marks 100 Years!

INSIDE:

The Utility and Flexibility of Forbearance Agreements

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Current economic and credit conditions continue to negatively affect borrower cash flows and property values, resulting in fewer opportunities to refinance existing debt and more loan defaults.

Banks are facing an unprecedented wave of defaulted loans and often are forced to evaluate whether to pursue remedies granted under the loan documents or to delay enforcement of its rights; or, perhaps, even waive the default and restructure the loan to avoid future defaults of a similar nature, in an attempt to maximize recovery on the loan. In a stagnant economy or declining real estate market, restructuring the loan may not be practical or effective, yet the bank may be hesitant to foreclose on its collateral before considering other workout strategies. In the interim, the bank should consider utilizing a forbearance agreement to formally recognize the underperforming loan and establish the rules by which the bank and borrower will operate after such recognition.

Forbearance agreements vary in complexity but function to conditionally delay a bank's exercise of its remedies after a borrower default. By employing a well-crafted forbearance agreement, a bank can improve its position and the outcome of the bank/borrower relationship by correcting document or collateral deficiencies while granting the borrower time to cure, refinance or restructure. Forbearance agreements can be drafted to fit any circumstance; however, forbearance agreements normally contain the following customary provisions:

Reaffirmation of Loan and Acknowledgment of Defaults and Debt: The borrower reaffirms its obligations under the loan documents and acknowledges the existing defaults and existing debt. Such acknowledgments recognize that the bank is not forgiving the debt owed and negate borrower's ability to later dispute the existence and enforceability of such obligations, defaults and debt.

Terms of Forbearance: The agreement must set forth the forbearance period, conditions to continued forbearance and triggering events for early termination of the forbearance period. The agreement may set forth an extension of the forbearance period upon satisfaction of certain conditions such as the bank's receipt of an executed commitment letter to refinance the loan. The conditions to continued forbearance should be clearly stated in the agreement, including, without limitation, whether additional disbursements of the loan will be made, whether interest will continue to accrue and whether the borrower will continue to pay principal and/or interest payments. Regardless of the specified forbearance period, forbearance will terminate upon the happening of certain events such as failure to comply with the terms and conditions of the forbearance agreement, bankruptcy filing by the borrower or any guarantor and additional defaults under the loan documents.

Preservation of Rights and Waiver of Claims and Defenses: The agreement provides that the bank agrees to forbear action against the borrower (rather than waive action) and that the bank preserves its rights and remedies under the loan documents. The foregoing statements will ensure the bank's ability to exercise its remedies with respect to the existing defaults upon the expiration or earlier termination of forbearance. The borrower and each guarantor should agree to a general release of all claims and defenses against the bank. The release provides consideration for the bank to forbear, a necessary element to the enforceability of any contract, and protects the bank from future claims by the borrower and guarantors.

Consent and Reaffirmation of Guarantors: Each guarantor should consent to the terms and conditions of the forbearance agreement and reaffirm its obligations under the guaranty agreement and, to the extent applicable, the other loan documents.

Payment of Expenses: The borrower normally agrees to pay for all of the bank's costs and expenses incurred in connection with the forbearance agreement, including appraisal, inspection and legal fees.

In addition to the foregoing provisions, banks may utilize the flexible attributes of a forbearance agreement to include one or more of the following conditions:

Forbearance Fee: The bank may want to collect a forbearance fee to serve as additional consideration to forbear; however, the bank may need to be sensitive to the borrower's declining financial position and impose a reasonable fee. The forbearance agreement should expressly state that any fee is earned and nonrefundable as of the date of the agreement. This will negate borrower's ability to claim it is entitled to repayment of the fee in the event of expiration or earlier termination of the forbearance.

Modify Interest Rate, Principal Payments and Other Terms and Conditions: Although a bank will generally require continued payment of accruing interest during the forbearance period, the bank may want to increase or decrease the applicable interest rate and increase, decrease or suspend any required principal payments. Similar to imposing a fee, the bank needs to understand the borrower's financial situation if increasing rates or payments. The bank may also choose to modify other terms and conditions in the loan documents to, for example, enhance its remedies, increase reporting requirements and/or adjust financial covenants.

Third-Party Consultants: If the borrower's operations are sluggish or continually declining, the bank may require that the borrower hire a third-party consultant, approved by the bank, to help evaluate and improve the borrower's operations or to advise on the sale of property or other key business issues.

Additional Collateral or Guarantors: The bank may request that the borrower pledge additional collateral security for the loan or add additional guarantors. Under certain bankruptcy laws, however, the bank may lose the benefit of the collateral if the pledge occurred within 90 days of a bankruptcy filing by the borrower. Therefore, if additional collateral is obtained, the forbearance period should generally be a minimum of 90 days to give the borrower time before, or alternatives to, filing bankruptcy.

Bankruptcy Protection: Although bankruptcy laws generally prevent enforcement of an agreement by a borrower or guarantor to not file bankruptcy, some courts may enforce a waiver of the automatic stay if included in a forbearance agreement. Issued automatically upon a bankruptcy filing, the automatic stay prohibits the bank from pursuing certain actions against the borrower, including foreclosure of collateral, without bankruptcy court approval. Enforcement of a waiver is within the bankruptcy court's discretion and will be determined after evaluating certain factors, including sophistication of the parties, consideration for the waiver, effect of the waiver on other creditors and whether the borrower's plan of reorganization is feasible.

Due to the utility and flexibility offered by forbearance agreements, banks should take care in negotiating and crafting the agreement.

Due to the utility and flexibility offered by forbearance agreements, banks should take care in negotiating and crafting the agreement. Banks should limit informal communications with the borrower unless a pre-negotiation agreement is in place to prevent unintentional disputes regarding the terms and conditions of forbearance. Additionally, since forbearance agreements are subject to the covenant of good faith and fair dealing applied to all contracts, banks should act reasonably to avoid any bank liability claims. After careful consultation with counsel and borrowers, forbearance agreements can be an effective tool to encourage borrower cooperation while permitting banks to improve their position and evaluate workout strategies.

About the Authors:

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