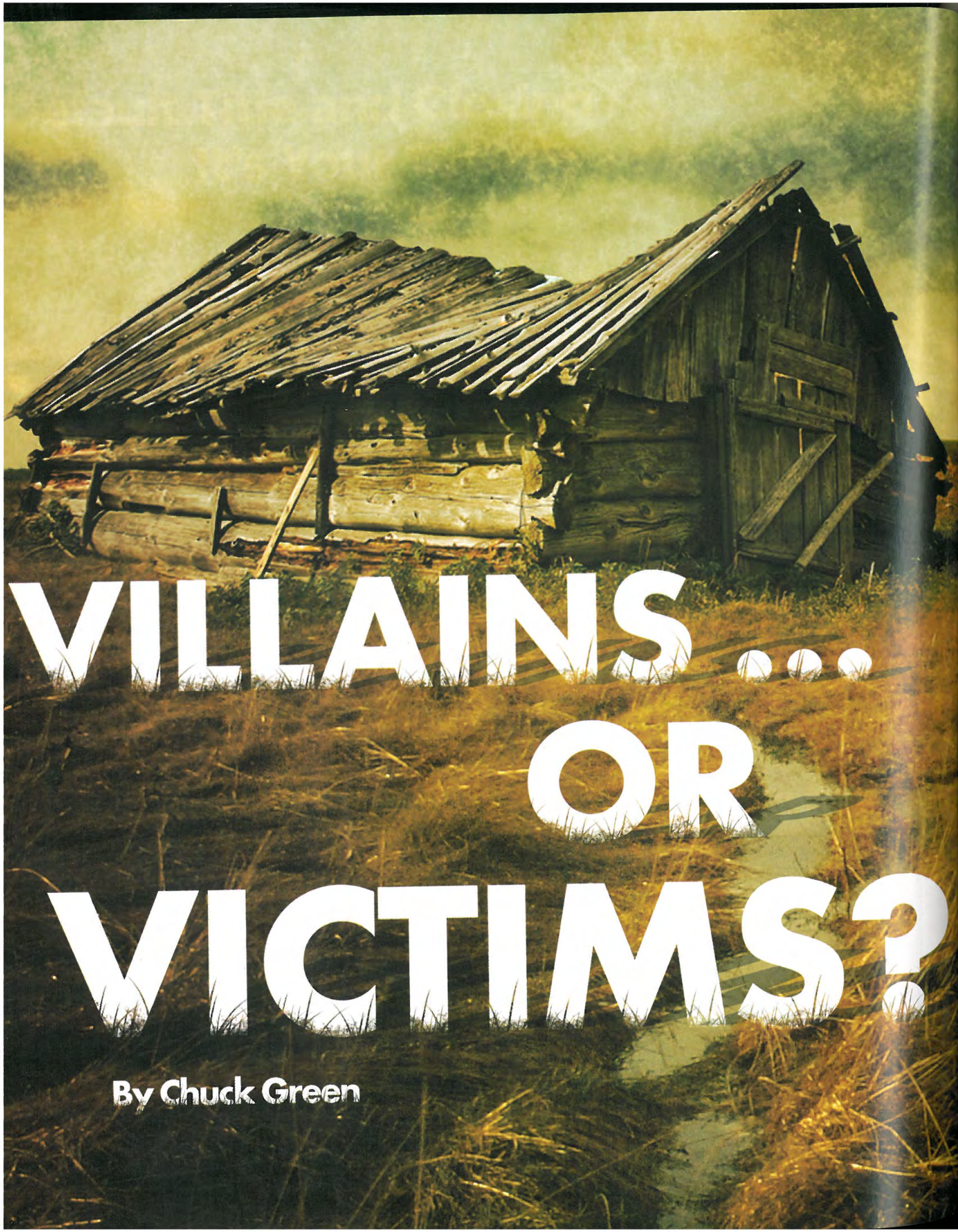

VILLAINS ... OR VICTIMS?

Did officials in Nevada bend the rules to make robo-signing a criminal offense, or is it a case where the end justifies the means?

By Chuck Green

Suicide. Accusations of prosecutorial overkill fanned by political aspirations. Scores of homeowners perhaps unfairly evicted. All elements, surely, of a nightmarish made-for-TV movie, right?

Unfortunately, it's all too real. For some, raw, even. "Just the facts of this story will scare the hell out of you," is how the incident is described by an executive with first-hand knowledge of the case who spoke with *DS News* on condition of anonymity.

Also very real is the profound, almost defiant difference of opinion the circumstances have stirred.

In one corner, you have those who are convinced Nevada Attorney General Catherine Cortez Masto—motivated, perhaps, at least partially, by political ambitions—went outlandishly overboard in the November 2011 trial of two mid-level staffers at Lender Processing Services, Inc. (LPS), title officers Gary Trafford and Gerri Sheppard, and that members of Masto's staff overstepped their bounds in the investigation leading up to the trial, causing a key witness and LPS notary to take her own life.

Trafford and Sheppard were indicted on 606 counts of felony and gross misdemeanor charges for allegedly directing "the fraudulent notarization and filing of documents which were used to initiate foreclosure" on thousands of Clark County homeowners in violation of state law, according to the Nevada attorney general's office.

As described by the *Huffington Post*, Masto's was the first criminal indictment to come out of the nationwide robo-signing scandal uncovered in late 2010 in which mortgage servicing companies and banks processed foreclosures "en masse at lightning speed by signing documents they neglected to review and falsifying information."

"It wasn't the right way to do it, but it certainly wasn't illegal," the source who asked not to be named said of the procedural errors in question, which were discovered to be widespread across the industry. The source added that the two title officers were in no way attempting to defraud the system or homeowners, nor were their actions meant for personal gain, and when the issue was brought to the attention of LPS' upper management, they ordered the practice stopped immediately and controls instituted to prevent its recurrence.

"We wouldn't have thought [Sheppard and Trafford] would have been prosecuted for a criminal offense," nor were they members of senior management who, based on the fundamental chain of command, would have characteristically been held accountable, according to the source. "We couldn't figure out why [the state] was going after these lower-level people. They weren't senior executives. These were low-level people that were being criminally prosecuted," and their bail was higher than Penn State football coach Jerry Sandusky's, the source said in quantifying the extreme nature in which some believe the case was handled.

In the other corner of this contentious storyline are those who insist the government hasn't gone nearly far enough in cases like LPS'. One such individual who doesn't find Trafford and Sheppard's situation at all perplexing is longtime consumer advocate Ira Rheingold. He undoubtedly parrots the view of many, citing the thousands of families and individuals who, perhaps unnecessarily—or, at the very least, prematurely—lost their homes as a result of what he describes as overzealous mortgagers, champing at the bit to foreclose on properties and rake in profits.

"What seems to get forgotten is that we're talking about people's homes. We're talking about families' homes, and I think the notion that we need to speed up everything, that we need to maximize every dollar that we can wring out of the poor homeowner who's struggling is wrong," said Rheingold, executive director of the National Association of Consumer Advocates. "The systems that LPS devised were about making collections fast and easy and when something wound up in default, move people out of their homes as quickly as possible."

Gary Trafford

Gerri Sheppard Nevada Attorney General's Office

the more persuasive argument? Should the big mortgage corporations pony up billions in penalties and borrower recompense, sacrificing a few employees with the wrong job title at the wrong time to prosecutors along the way, all to atone for cutting corners so that the foreclosure convoy kept pace with the staggering numbers of borrowers who stopped paying their mortgage? Or has the seemingly remarkable degree of vitriol gone too far in this "blame game," specifically in terms of state attorneys general and government officials taking any and every means possible—even if it's unethical or unlawful—to publicly place blame for the housing and financial crises squarely on the shoulders of the mortgage industry, targeting individual professionals as "examples"?

When the charges were levied against Trafford and Sheppard, "The grand jury found probable cause that there was a robo-signing scheme which resulted in the filing of tens of thousands of fraudulent documents with the Clark County Recorder's Office between 2005 and 2008," according to Nevada's chief deputy attorney general at the time, John Kelleher.

Prentiss Cox, a law professor at the University of Minnesota and a former assistant attorney general for the state of Minnesota, told the *Huffington Post* it was admirable for Attorney General Masto and her staff to pursue the robo-signing case, but, he was quick to add, "When criminal prosecutions are done for robo-signing, I would hope the target of those prosecutions would be the people who designed the system and profited from it, not just the low-level people doing what they were told."

The unnamed source, still seeming somewhat haunted by the ordeal, asserts LPS officials were kept in the dark about Trafford's and Sheppard's alleged actions. "[Management wasn't] even aware that these employees were doing this. It was just kind of an administerial [procedure]. That's not an excuse, it's just the way it was," the source stated. Trafford and Sheppard were suspended for about a year with pay following their indictments and later rejoined the company.

Those keeping an eye on how these events played out, speculated at the time that the state of Nevada went after Trafford and Sheppard hoping they'd roll on their superiors higher up the executive chain at LPS. In a blog post on *Firedoglake's News Desk* website, David Dayen commented, "LPS hasn't been indicted, but you can see where this is going . . . . Indictments of Trafford and Sheppard will almost certainly not end there. Everyone who worked for LPS in Nevada will be culpable."

"We just assumed [Masto] wanted to make a statement, to embarrass LPS in a major way," the source said. "Politicians are using these crises for their own political gain, [and] the industry is portrayed as villains."

Attorney General Masto is making a play for the Nevada governorship, according to the source. Masto's office didn't respond to a request for comment, but in a report published January 16, 2013, the *Las Vegas Sun* said while "[i]t's unclear what Democrat will challenge [the incumbent governor] Sandoval in 2013 . . . Attorney General Catherine Cortez Masto's campaign adviser said she's considering it."

While our unnamed source describes the case in Nevada as "farfetched [and] bizarre," the same scenario strikes a much different cord with Rheingold, who said LPS was driven by "profit and greed and [the belief] that it was above the law; that rules we've had for a century in this country about how homes are transferred, about how documents are reviewed, how our court system requires accuracy and fairness, [didn't apply to them]."

He added that companies like LPS feel that "if you're big enough, you don't have to follow the rules of the law until [you] get caught. It was all about moving paper as quickly as possible, regardless of whether their work was compliant with the law. It got in the way of their profits, so they figured they could ignore it."

Particularly galling to Rheingold is that the foreclosure crisis, at least to a degree, "could have been mitigated but for the fact that the servicing industry failed miserably in trying to help homeowners," he said. "I think a lot of people lost homes, or were charged more money than they should have been because [LPS and others] didn't have systems in place." Consequently, people were severely damaged, he noted.

Our unnamed source holds a similar distaste recalling the severity of the damage the state caused the LPS employees. Even though Trafford and Sheppard were reinstated by the company, their careers were marred and their lives were broken. "They were physically ill and emotionally distraught," is the description the source used. And that's not the worst of the outcomes among those involved in the case.

During the course of their investigation, prosecutors for the attorney general's office zeroed in on Tracy Lawrence, a notary and Trafford's assistant. Lawrence was characterized in the media as the "whistleblower" whose testimony could potentially topple some of the country's most prominent mortgage powerhouses and negate thousands upon thousands of foreclosures in Nevada.

Lawrence was scheduled to appear in court on November 28, 2011, to be sentenced after agreeing to a plea bargain—guilty of one misdemeanor charge of notarizing the signature of a person not in her presence. Lawrence reportedly admitted to falsely notarizing the signatures on tens of thousands of foreclosure documents but was charged with only one count in exchange for her testimony.

Lawrence didn't show up for her sentencing and was found later that morning, dead in her Las Vegas apartment. Her death was ruled a suicide; the Clark County coroner's office reported finding three different types of prescription medicine in her bloodstream.

Lawrence faced up to a year behind bars and a fine of up to $2,000 for the single charge against her. The attorney general's office said she was one of four LPS notaries cooperating with prosecutors in the case against Trafford and Sheppard in exchange for lesser sentences. But according to attorneys with the firm Brownstein Hyatt Farber Schreck, LLP, which represented Trafford, Lawrence's testimony didn't support the attorney general's case and even the charge against her of notarizing the signature of a person not in her presence was unfounded.

Steven Miller, managing editor of the *Nevada Journal*, covered the AG's case against Trafford and Sheppard extensively, and in an article dated April 16, 2012, he cites statements from state officials and Assembly members who stress that a gross misdemeanor charge is only applicable if the notary public "willfully notarizes that document" without the person present. Miller references Deputy Secretary of State Renee Parker who, back when the Assembly was considering the statute in May 2005, explained, "[W]e do have situations where you are known to the notary, they can notarize your signature if they have been notarizing it for years. Section 1 is a person who is not in the presence of the notary public or unknown to the notary public. So in the circumstance of the notary public who has never notarized your signature, they would be committing a gross misdemeanor. In circumstances of someone you are known to, they would not be." Lawrence had known and worked for Trafford for years.

In a brief filed with the court on April 9, 2012, the attorneys for Trafford also asserted, "As a matter of law," Masto's charges of "forgery" require the attorney general to "prove that Lawrence (1) did not have authorization to sign the NODs [notices of default], and (2) acted with criminal intent to defraud." The attorney general presented no evidence to the grand jury establishing probable


Catherine Cortez Masto | John Kelleher

cause for either, according to Trafford's lawyers.

"In fact," they wrote, "the evidence presented established the exact opposite: Lawrence testified that she had authority to sign Trafford's name, and she actually told the prosecutors that because she had such authorization, her conduct did not constitute 'forgery.'"

According to our source, "One thing that doesn't seem to come out" in any of the reports on Lawrence's suicide is that Assistant Chief Deputy AG Kelleher "was trying to kind of bully his way into getting ... a confession [and] that Lawrence was just distraught. He basically threatened to put her in jail for document signing."

The legal brief filed last April by Trafford's attorneys also calls attention to "bullying" by the attorney general's staff. "[P]rosecutors persisted in their erroneous understanding of the law and actually bullied Lawrence into accepting their incorrect definition of the crime," ultimately relying on "baseless" allegations of forgery, the defendant's lawyers wrote.

As someone who says he's endured more than his fair share of bullying, Rheingold essentially dismisses anyone who rues feeling bullied. "As a consumer advocate, I've been bullied by banks for many years and have absolutely no sympathy for a bank that's claiming an attorney general's bullying them. They got away with a lot in the last decade and, finally, they're being held accountable. I'm not going to shed crocodile tears for them," Rheingold said.

At the same time, Rheingold did express sympathy over Lawrence's death. "That's sad," he said. "How do you respond to that? Most human beings, when they work for a company, think they're doing good. I'm not questioning any individuals. I think a lot of people just got caught up in it."

It wasn't until eight months after filing the brief that claimed the attorney general's staff "bullied" key witnesses and bent legal definitions to win its indictments that Trafford's legal team unearthed the type of prosecutorial behavior and misconduct that not only makes the argument for a dismissal, but some say calls for the disbarment of the AG's lead prosecutor ... and perhaps the attorney general herself. In researching the case, defendants' counsel happened upon a media report referencing foreclosure proceedings on Kelleher's personal residence and exposing a clear conflict of interest in the prosecution of Trafford and Sheppard.

In September 2011, Kelleher received an NOD on his personal residence identifying LPS as the processor of the foreclosure documents. According to the legal briefing filed November 26, 2012, the attorney general's chief investigator was sent to Lawrence's home just two days after Kelleher was served with the NOD, and Lawrence "was threatened with arrest if she did not assist in the AG's attempt to make a case against Trafford," defendant's counsel wrote. Kelleher proceeded to build his case against Trafford and Sheppard and, as lead prosecutor, presented the case to the grand jury for indictment—all the while in the midst of foreclosure proceedings in which Trafford and Sheppard's employer was named.

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In July 2012, 10 months after the NOD was filed on Kelleher's home, Attorney General Masto told a local reporter with KLAS-TV Las Vegas that she had removed the lead prosecutor from Nevada's Mortgage Fraud Task Force and transferred him to a different division "based on what she called a conflict of interest surrounding Kelleher's personal foreclosure crisis." Masto never disclosed this conflict to the court or the defendants' counsel despite the fact that "the law is clear that a prosecution team cannot administer justice or preserve the fairness and impartiality required of grand jury proceedings when its lead team member has a conflict of interest," Trafford's attorneys explained in the brief.

"On these facts, it is evident that Trafford is the victim of an overzealous prosecution and unfairly biased grand jury presentation by a prosecutor whose own foreclosure documents were processed by Trafford's employer," they wrote. "The lead prosecutor presented this case to the grand jury while operating under a serious, undisclosed, disabling conflict of interest."

Trafford's attorneys argued, "Even if the lead prosecutor's conflict did not warrant dismissal—which it does—the AG's other inappropriate conduct before the grand jury pushes this case well past the 'tipping point' for dismissal," referencing a "litany of inadmissible, irrelevant, and inflammatory evidence presented to the grand jury on which Trafford and Sheppard's indictments were purposed."

The defendant's counsel goes on to outline a host of misconstrued evidence, predisposed interpretations of the law, and questionable behavior that raises doubts about the due process and fairness of the grand jury's decision to indict the two LPS title officers.

The criminal charges against Trafford and Sheppard were dismissed, but other damaging aftershocks fell like dominoes at LPS. Key employees departed, fearing the Nevada AG's case was just the tip of the iceberg and that they might get pulled into other legal proceedings. On top of that, the document processor had trouble hiring new talent because the events in Nevada painted the company as "some kind of criminal organization," one employee remarked.

Compounding matters, LPS' stock price plummeted to almost $10 a share from a high in the mid-30s. Although the share price has worked its way back to around $22 to $25, the company is still working to repair its reputation. "It would have been nice to have written some finale to this," said a company staff member. "We never got an apology; no one said 'we're sorry for putting your employees through this or we're sorry for destroying your reputation.' Nothing. They wanted to make a statement; they wanted to embarrass LPS." None of the company's clients pulled away because of the legal proceedings in Nevada, however. They, too, thought it was an overreaction by the attorney general, the employee said.

Our unnamed source believes the actions taken by the state of Nevada reflect a groundhog day of sorts. "What happened to LPS is nothing new. We've seen similar kinds of grandstanding [by attorneys general] that went too far, all across the country," the source stated.

Regardless of where they occur, the actions of a few grandstanders are impacting housing markets from coast to coast. In late August, the Federal Housing Finance Agency (FHFA) announced its intention to raise the GSEs' guarantee fees by an average of 10 basis points across the board, and some say the agency's move is a prime example of how regional and local developments—oftentimes political developments—can affect the overall housing market.

With FHFA's all-inclusive fee increase, higher-risk mortgages are subsidized by lower-risk loans and the same can be said for geographies. States with shorter foreclosure timelines, lower carrying costs, and better default rates are picking up the tab for those states that have a less favorable foreclosure environment and thus higher servicing costs associated with GSE loans. Any added expense is likely to be passed on to borrowers in the form of higher fees, regardless of locale.

Soon after its August announcement of the sweeping fee-hike, FHFA released a statement saying the agency noticed "a wide variation among states in the costs that the enterprises incur from mortgage defaults." Under the current model, "borrowers in states with lower default-related carrying costs are effectively subsidizing borrowers in states with higher costs," FHFA stated. Consequently, the GSEs' conservator proposed raising g-fees even more in certain high-cost states, namely Connecticut, Florida, Illinois, New Jersey, and New York. In these states, lenders will pay guarantee fees between 15 and 30 basis points higher than in other parts of the country.

One of the broader consequences specific to the AG's case in Nevada is a newly passed statewide ordinance that has essentially halted foreclosures for more than a year now. Our anonymous source noted, "These types of market interruptions only delay and diminish the recovery and keep markets like Las Vegas down in the trenches. The evidence is right in front of us—take Phoenix, for example; there the market is clearing naturally versus Nevada, where they can't seem to get off the bottom."

The source continued, "Politicians are using these crises for their own political gain. That's the kind of things these folks are doing to accomplish their goals. Rather than working to keep markets moving self-sufficiently and helping to pull their states out of this downcycle, these 'public servants' are artificially suppressing their own markets in their own states."

Rheingold, however, sees this type of government intervention as necessary. "I think what we saw was real abuse of process ... making things fast without doing things right," he noted flatly.

But is it fair to blame an entire industry for the actions of a few? And, as in the Nevada case, does the enormity of the crisis and extent of its repercussions mean an action should carry a heavier weight than the law says it does? Trafford and Sheppard "were doing something wrong," our source conceded, "but not criminal." DS