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Barrett Daffin Frappier Turner & Engel, LLP, Barrett Daffin Frappier Treder & Weiss, LLP and Barrett Frappier & Weisserman, LLP collectively referred to as the BDF Law Group provide a full range of legal services to creditors on defaulted residential mortgage loans. The BDF Law Group is always on the creative edge of innovation while maintaining the bedrock principles of integrity, accountability and service as it has strived to represent its clients with the highest degree of character and expertise. The firm's founders started operations in Texas in 1990 and over the past three (3) decades have expanded into Arizona, California, Colorado, Georgia & Nevada. The firm has fully staffed office locations in each of our six (6) practice states and we proudly retain many of our original employees. The BDF Law Group's mission is to provide the highest standard of ethical, compliant and transparent default legal services.

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The logo for Carrington Foreclosure Services features a blue silhouette of a house roof above the word "CARRINGTON" in a large, bold, blue serif font. Below "CARRINGTON" is a horizontal line, and underneath that is the text "FORECLOSURE SERVICES" in a smaller, blue, all-caps, sans-serif font.

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## MESSAGE FROM THE PRESIDENT

Welcome to the United Trustees Association's 43<sup>rd</sup> Annual Education Conference, this year held at the Green Valley Ranch Resort, Casino & Spa in Las Vegas, Nevada. This year's conference features exceptional educational programs, a Biking Adventure, both a bowling and gold tournament, and a celebrity Murder Mystery, all within or near the confines of a first-class resort. I hope you are able to enjoy the wonderful facilities at the resort during your stay.

Our program this year includes sessions and speakers on a variety of topics including; 'Legal and Practical Concerns When the Borrower is Deceased'; Differences between Residential and Commercial Nonjudicial Foreclosures; a session on Third-Party Bidders; an update from Home Means Nevada; and an exciting opening session on 'Ethics and Compliance.' And of course our annual sessions featuring Case Law, Bankruptcy, Legislation, and our Trustees Roundtable are not to be missed.

We are proud of the effort our Conference Committee puts into this event and we hope you enjoy each and every one of the sessions.

Although this year, for the first time Board Director elections are held electronically, members may still vote by paper ballot at this year's annual membership meeting - held during lunch on Monday, November 5<sup>th</sup>.

We will also congratulate our "Dorothy Schick Veteran Member of the Year Award", and "Phil Adleson Award" winners.

Our annual Monday night dinner gala event will feature a participatory celebrity Murder Mystery – a 'Clue' game come to life. And what would a UTA Dinner event be without our silent auction, and dancing. So join us for what promises to be a terrific night with great prize giveaways, delicious food, and excellent networking with your friends and colleagues.

Have a wonderful conference!

*Cathe Cole-Sherburn*

Cathe Cole-Sherburn  
President



## MESSAGE FROM THE CONFERENCE CHAIRS

Welcome to the 43<sup>rd</sup> Annual Education Conference & Trade Show. As Education Chairs, it is our job to ensure that participants receive an enjoyable and educational experience while here at the Green Valley Ranch Resort, Casino & Spa. Putting together an education conference requires the talents of many, and we would like to thank the Education Conference Committee for all of their hard work.

UTA President Cathe Cole-Sherburn of Trustee Corps; Mark Blackman of Wright Finlay & Zak, Joyce Copeland-Clark of Wright, Finlay & Zak; and Susan Pettem of Novare National Settlement Service are all to be thanked for their efforts in making this conference such a success.

This year our Session Evaluation Forms and Conference Evaluation Form will be available online via your electronic devices at the conference. Please complete these as they do assist us in our ability to provide you with quality programs.

This is Gary's Seventeenth Year as Conference Chair and Robert and DeeAnn's second year as Conference Chairs.

We would like to acknowledge our generous Gold Conference Sponsors:

- **Foreclosure Solution, Inc.**
- **iMailTracking**
- **ServiceLink Auction**

We would also like to acknowledge our generous Silver Conference Sponsors:

- **BDF Law Group**
- **Carrington Foreclosure Services**
- **Daily Journal**
- **First American Mortgage Solutions**
- **Metropolitan News Company**

Your participation at the conference and Trade Show should be an enjoyable one, so please feel free to locate one of us or our Executive Director, Richard Meyers, during the conference to provide us with any comments, suggestions or questions you might have.

Again, thank you for participating in the 2018 Conference and for your continued support of the United Trustees Association.

Sincerely,

*Robert Cullen*

Robert Cullen  
Conference Co-Chair

*DeeAnn Gregory*

DeeAnn Gregory  
Conference Co-Chair

*Gary Wisham*

Gary Wisham  
Conference Co-Chair



## MESSAGE FROM THE MEMBERSHIP CHAIRS

Welcome to the 2018 Annual United Trustees Association Education Conference & Trade Show! On behalf of the Membership Committee for the UTA, we are very excited to be hosting the '43<sup>rd</sup> Annual' at the Green Valley Ranch Resort, Casino & Spa.

Our annual conference is only one great reason to join the United Trustees Association. We host many education sessions with expert speakers and panelists throughout the year. We encourage you to attend all of the UTA-sponsored events during the conference – it is a great way to meet your professional peers in the trustee-related default servicing industry and to keep abreast of all the latest trends and news affecting trustees, servicers and their affiliate vendors. There are many benefits of membership, and our organization will provide educational and growth opportunities for our members from every Western state. As a member of UTA, you will receive our journal, *UTA Quarterly*, as well as our electronic newsletter, *UTA eNews*. These two publications, along with our web site, [www.unitedtrustees.com](http://www.unitedtrustees.com), provide industry updates, event notifications, case law updates and other informative and essential news.

UTA is a non-profit organization, and its success is due not only to the many hard-working volunteers who serve on the board, but also to the industry professionals who help sponsor and underwrite our educational efforts.

If you are not yet a member of the Association, what better time to sign up for 2019? Our application is conveniently available online at [www.unitedtrustees.com](http://www.unitedtrustees.com).

Additionally, volunteerism is the way we keep our organization viable. Please feel free to reach out to join one of our many committees, including membership. We would be delighted to hear from you!

With our best wishes for an enjoyable conference and a very happy holiday season.

*Eva Tapia*

Eva Marin-Tapia  
Membership Co-Chair

*Olivia Todd*

Olivia Todd  
Membership Co-Chair



## 2018 UTA Advocates



Advocate, Partner and Supporter companies are those who support the UTA and its mission with at least 3, 4, or 5 members represented in the United Trustees Association from their company. We thank them for their support of the association.

### Advocate (5 or more members)

- First American Title Insurance Company
- ServiceLink
- Trustee Corps
- Wright, Finlay & Zak, LLP

### Partner (4 members)

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UNITED TRUSTEES ASSOCIATION  
2018 Annual Education Conference  
**Schedule at-a-glance**

**Sunday, November 4, 2018**

- 8:00 AM – 11:00 AM **Biking Adventure at Red Rock Canyon**  
*(Meet in Hotel Lobby.)*
- 8:00 AM – 3:00 PM **The Adleson Cup** *(Sponsored by FSI; iMailTracking; Kirby & McGuinn; Redwood Trust Deed Services; and ServiceLink Auction)*  
*(The Revere Golf Club)*
- 2:00 PM – 5:00 PM **Bowling Tournament** *(Sponsored by FSI; iMailTracking; and ServiceLink Auction)*  
*(Van leaves hotel at 2:00 pm and returns at 5:00 pm.)*
- 6:00 PM – 7:00 PM **President's Reception** *(Sponsored by BDF Law Group; Carrington Foreclosure Services; Daily Journal; First American Mortgage Solutions; FSI; iMailTracking; Metropolitan News Company; and ServiceLink Auction)*  
*(The Pond)*

**Monday, November 5, 2018**

- 8:00 AM – 9:00 AM **Continental Breakfast** *(Sponsored by BDF Law Group)*
- 9:00 AM – 9:45 AM **Making the Right Choice – Lessons in Ethics and Compliance**  
*(Sponsored by Foreclosure Solution)*
- 9:45 AM – 10:15 AM **Break in Exhibit Hall** *(Sponsored by Carrington Foreclosure Services)*
- 10:15 AM – 11:30 AM **Case Law Update** *(Sponsored by Daily Journal)*
- 11:45 AM – 1:15 PM **Luncheon: Update on Nevada Mediation Portal and Annual Meeting**  
*(Sponsored by ServiceLink Auction)*
- 1:30 PM – 2:45 PM **Bankruptcy Case Updates** *(Sponsored by Metropolitan News Company)*
- 2:45 PM – 3:15 PM **Break in Exhibit Hall** *(Sponsored by First American Mortgage Solutions)*
- 3:15 PM – 4:15 PM **Differences Between Residential and Commercial Nonjudicial Foreclosures** *(Sponsored by iMailTracking)*
- 6:00 PM – 10:00 PM **Murder in Malibu - A Celebrity Mystery** *(Sponsored by BDF Law Group; Carrington Foreclosure Services; Daily Journal; First American Mortgage Solutions; FSI; iMailTracking; Metropolitan News Company; and ServiceLink Auction)*

**Tuesday, November 6, 2018**

- 8:00 AM – 8:30 AM     **Continental Breakfast** *(Sponsored by Carrington Foreclosure Services)*
- 8:30 AM – 9:30 AM     **Legislative Updates** *(Sponsored by First American Mortgage Solutions)*
- 9:30 AM – 9:45 AM     **Break in Exhibit Hall** *(Sponsored by Foreclosure Solution)*
- 9:45 AM – 11:15 AM    **Trustees Roundtable** *(Sponsored by BDF Law Group)*
- 11:15 AM – 11:30 AM   **Break in Exhibit Hall** *(Sponsored by Daily Journal)*
- 11:30 AM – 12:45 PM   **Legal and Practical Concerns When the Borrower is Deceased**
- 12:45 AM – 1:45 PM    **Lunch and Exhibitors Raffle** *(Sponsored by iMailTracking)*
- 2:00 PM – 3:00 PM     **Third Party Bidders** *(Sponsored by ServiceLink Auction)*

**End of Conference**

UNITED TRUSTEES ASSOCIATION  
2018 Annual Education Conference  
**Schedule of Events**

**Sunday, November 4, 2018**

8:00 AM – 11:00 AM **Biking Adventure at Red Rock Canyon**  
Our scenic one-way park road loops and winds the hilly valley of Red Rock Canyon, past the coral mounds and along the base of the Wilson cliffs. This is a guided 10 mile ride for the casual cyclist. This experience includes the shuttle to/from the hotel, bike rental, helmet, water, and guide.

*Conference registration fee does not include biking adventure*

*Meet in Hotel Lobby*

8:00 AM – 3:00 PM **The Adleson Cup**  
We'll be playing the Concord Course at the Revere Golf Club. The Revere presents a blend of beauty and challenge unlike any other in southern Nevada. Draped through the rugged desert canyons and valleys of the Las Vegas foothills, The Revere Golf Club offers unending, awe-inspiring views of the Las Vegas Skyline and mountains beyond, and the Concord Course is a 7,034 yard par-72 layout that offers Bermuda fairways and large greens.

The event includes a Putting Contest; a Chipping Contest; a Longest Drive and Closest to the Pin Contest and a \$10,000 hole-in-one prize. Check-in begins at 8 am with a tee time of 9 am for the shotgun play. Players enjoy hors d'oeuvres and prizes after the tournament.

*(Sponsored by FSI; iMailTracking; Kirby & McGuinn; Redwood Trust Deed Services; ServiceLink Auction)*

*Conference registration fee does not include golf participation.*

2:00 PM – 5:00 PM **Bowling Tournament**  
Our bowling tournament will be held at the state-of-the-art Sunset Station Strike Zone. Prizes will be awarded for highest scores. Pizza and sodas are included!

*(Sponsored by FSI; iMailTracking; and ServiceLink Auction)*

*Conference registration fee does not include bowling participation.*

*Van leaves hotel at 2:00 pm and returns at 5:00 pm*

6:00 PM – 7:00 PM

**President's Reception**

After a hard day on the golf course or at the bowling alley, relax and catch up with old friends and new colleagues at UTA's Welcome Reception -- this year held outdoors.

*(Sponsored by BDF Law Group; Carrington Foreclosure Services; Daily Journal; First American Mortgage Solutions; FSI; iMailTracking; Metropolitan News Company; and ServiceLink Auction)*

The Pond

**Monday, November 5, 2018**

8:00 AM – 9:00 AM

**Continental Breakfast** *(Sponsored by BDF Law Group)*

9:00 AM – 9:45 AM

**Making the Right Choice - Lessons in Ethics and Compliance**

*(Sponsored by Foreclosure Solution)*

Rashmi Airan, was a successful lawyer, recruited to work with a local, Miami real-estate developer who later engaged in questionable ethical business practices. Rashmi's drive to succeed financially and to give her children the best life possible created an ethical blind spot for her. She chose not to question her client's behavior despite her inner voice screaming "ask questions!" Her involvement resulted in a six month sentence to Federal prison, alongside a \$19M judgment against future earnings, required community service hours, and 3 years supervised release.

Rashmi will discuss ethical issues in business, inspire change in how we view success, and enhance our decision-making to flourish ethically.

**Speaker:** *-Rashmi Airan, Ethics Speaker, Consultant, and Advocate*

*Note: This session provides both MCLE credit and one hour of legal ethics MCLE credit.*

9:45 AM - 10:15 AM

**Break in Exhibit Hall** *(Sponsored by Carrington Foreclosure Services)*

10:15 AM - 11:30 AM

**Case Law Update** *(Sponsored by Daily Journal)*

Our case law panel will address 2018 cases that impact foreclosure in California and all Western states. This session covers all of the key relevant court cases from the past year in a rapid-fire, yet detailed format that provides informative and practical information.

**Speakers:** *-Martin T. McGuinn, Esq., Kirby & McGuinn  
-Stephen T. Hicklin, Esq., The Hicklin Firm  
-Kristin A. Schuler-Hintz, Esq., McCarthy & Holthus*

11:45 AM – 1:15 PM

**Luncheon: Update on Nevada Mediation Portal and Annual Meeting**

*(Sponsored by ServiceLink Auction)*

During lunch we will be providing an update on the Nevada Mediation Portal; and present the 2018 Phil Adleson Award, the 2018 Dorothy

Schick Veteran Member of the Year Award and the 2018 Suzanne Kelly New Member of the Year Award. The annual meeting will include Board Elections for 2019.

**Speakers:** -*Cathe Cole-Sherburn, Trustee Corps, UTA President*  
-*Shannon Chambers, President, Home Means Nevada*

1:30 PM – 2:45 PM

**Bankruptcy Case Updates** (*Sponsored by Metropolitan News*)

This session will provide important information on recent bankruptcy decisions that have impacted foreclosure practice and real estate law. Current issues being litigated will be addressed with a specific emphasis on how cases impact the trustee.

**Speakers:** -*Mark S. Blackman, Esq., Wright Finlay & Zak*  
-*Lee Raphael, Esq., Prober & Raphael*  
-*Dean Kirby, Esq., Kirby & McGuinn*  
-*Ben Levinson, Esq., Law Office of Benjamin R. Levinson*

2:45 PM – 3:15 PM

**Break in Exhibit Hall** (*Sponsored by First American Mortgage Solutions*)

3:15 PM – 4:15 PM

**Differences Between Residential and Commercial Nonjudicial Foreclosures** (*Sponsored by iMailTracking*)

This session will address the liabilities and what you need for pre-foreclosure preparation and as it relates to Residential and Commercial foreclosure – and highlight the differences. For commercial foreclosure, we'll also address: what an Assignment of Rent is and how to enforce it; how to proceed if the Note is sold during the foreclosure process; and how to proceed when a partial reinstatement is received. For residential foreclosure, we'll address reviewing the files from private/small lenders to verify they have complied with CFPB, the note and anything else required of them prior to initiating the foreclosure processes. We will address issues such as: what the rules are in a balloon payment and why the loan is insured. You can then decide - can you offer Commercial and/or Residential non-judicial foreclosure services?

**Speakers**

-*Keith Attlesey Esq., Assured Lender Services*  
-*DeeAnn Gregory, First American Trustee Servicing Solutions*  
-*Julie O. Molteni, Esq., Quality Loan Service*  
-*Randy Newman, Esq., Total Lender Solutions*

6:00 PM – 10:00 PM

**Murder in Malibu - A Celebrity Mystery** (*Sponsored by BDF Law Group; Carrington Foreclosure Services; Daily Journal; First American Mortgage Solutions; FSI; iMailTracking; Metropolitan News Company; and ServiceLink Auction*)

The Murder in Malibu features Jay Leno, unfortunately, found collapsed in his wine cellar and pronounced dead from a gunshot wound. One of our attendees is the killer and the rest of you need to find out who it is. When you have found someone with a motive, a gun, and who was near the wine cellar this evening, then you may have discovered the true killer.

Attendees may arrive at the party in their celebrity character. Attendees will be provided with a detailed celebrity character description, along with

some background information in their personal invitation which will be provided at least two weeks before the event.

As always, UTA's dinner event features great food, dancing, and a silent auction with prizes awarded to the best-dressed male and female characters.

**Dinner is included!**

*This event is included with registration, but the spouse/partner fee is \$125.00. Must be non-industry to attend the event without registering for conference.*

Note: The Murder Mystery will begin at 7:00 pm sharp and end between 8:00pm and 8:30pm.

The Opium Terrace

**Tuesday, November 6, 2018**

- 8:00 AM – 8:30 AM **Continental Breakfast** (Sponsored by Carrington Foreclosure Services)
- 8:30 AM – 9:30 AM **Legislative Updates** (Sponsored by First American Mortgage Solutions)  
Our legislative update panel will provide us with detailed summaries of the key issues and bills addressed this year in California, Washington, Arizona, and Utah (Oregon).
- Speakers:** -T. Robert Finlay, Esq., Wright Finlay & Zak (moderator)  
-Michael Belote, Esq., California Advocates  
-Holly Chisa, HPC Advocacy  
-Brigham Lundberg, Esq., Lundberg + Associates
- 9:30 AM – 9:45 AM **Break in Exhibit Hall** (Sponsored by Foreclosure Solution)
- 9:45 AM – 11:15 AM **Trustees Roundtable** (Sponsored by BDF Law Group)  
This session will allow Trustees to exchange information concerning operations and best practices. How to deal with private lenders dealing with HOBR will be among the topics discussed.
- Facilitators:** -Linda Kidder Adleson, PLM Lender Services  
-Tammy Laird, Clear Recon Corp.  
-Olivia Todd, Tiffany & Bosco
- 11:15 AM – 11:30 AM **Break in Exhibit Hall** (Sponsored by Daily Journal)
- 11:30 AM – 12:45 PM **Legal and Practical Concerns When the Borrower is Deceased** (Sponsored by Metropolitan News Company)  
This panel will address the complexities of managing default and foreclosure when the borrower is deceased. Probate, what are

successors in interest, reverse mortgages, CFPB Rules, statute of limitation tolling, and monitoring the debt of the borrower will be addressed. You will leave this session with more tools in your arsenal to properly manage and defend these cases.

**Speakers:** -*Erica Jones, Esq., Barrett Daffin Frappier & Engel, LLP*  
-*Laura N. Couglin, Esq., Wright Finlay & Zak*  
-*Minda Turnbull, Reverse Mortgage Solutions*

12:45 PM – 1:45 PM

**Lunch and Exhibitors Raffle** (*Sponsored by iMailTracking*)

Enjoy a delicious lunch while our gracious exhibitors announce their prize winners. All raffle prizes will be announced at the lunch – but you must be present to win!

**Facilitator:** -*Gary Wisham, Allied Trustee Services, Education Co-Chair*

2:00 PM – 3:00 PM

**Third-Party Bidders** (*Sponsored by ServiceLink Auction*)

Investors are undaunted by rising home prices and increasing interest rates as the share of third-party sales rises. This session will provide insight on how the third party bidders began, what is taken into consideration when analyzing a property to be purchased, what is the average timeline to flip a property, and success and horror stories of properties acquired. This will be your opportunity to ask the questions directly.

- *Justin Bruni, Wedgewood*
- *Scott Sibley, Nevada Legal News*

**End of Conference**



## THE ROLE OF THE TRUSTEE

The real property trustee performs a little understood but crucial role in the real estate industry. In order to understand this role, a distinction must be drawn between the historic use of mortgages in real estate lending and the more modern use of deeds of trust. Many states now secure real estate loans almost exclusively with deeds of trust, to the exclusion of mortgages.

Whereas a mortgage consists of a two-party arrangement between the lender and the borrower, the deed of trust involves three parties. The borrower, or the “trustor”, conveys a technical form of title to the “trustee” for the benefit of the lender, also known as the “beneficiary”. In simple terms, the obligation of the trustee is to re-convey title to the borrower when the loan is paid off, or to commence foreclosure on behalf of the lender in the event of default.

The trustee thus helps clear title to real property in the event of lien satisfaction, and helps lenders protect their security in the unfortunate circumstances of nonpayment. While the law in all states permits lenders to seek foreclosure in court, many states allow trustees to act under a power of sale granted in the deed of trust to foreclose non-judicially. This helps keep costs down, to the benefit of all parties.

In summary, the trustee serves two functions:

- 1) To process a non-judicial foreclosure
- 2) To re-convey the Deed of Trust



## UNITED TRUSTEES ASSOCIATION

### INTRODUCTION

UTA membership is comprised of those acting as trustees under real property deeds of trust, including trustees, attorneys and loan servicing professionals from title companies, financial institutions, law firms and independent companies as well as allied and support organizations such as posting & publishing companies and computer service firms.

**Mission Statement:** To foster, improve and promote the integrity of the default services industry through a level of excellence, education, local outreach and legislative advocacy.

### UTA MEMBER BENEFITS

Members of the United Trustees Association enjoy the following benefits:

#### EDUCATION

- The industry's Best Educational Conference & Trade Show: Our annual fall educational conference (CLE accredited) and trade show keeps members current on all practice issues of interest to trustees and provides a marketplace for service providers to interact with you to improve your practice.
- Trustee Certification Program: Both UTA's Basic and Advanced Foreclosure Certification Course & Exams are taught by leading experts in the foreclosure, title and legal communities and give employers confidence in the recipient's basic knowledge of the non-judicial foreclosure process.

## COMMUNICATION

- UTA Quarterly: Our acclaimed quarterly publication provides practice hints and services available to trustees along with updates for members on changes to the law. *UTA Quarterly* provides vital information to members with new and thought-provoking developments and trends relating to the non-judicial foreclosure process.
- UTA eNews: *The UTA eNews* provides essential, relevant case law updates, news and happenings.

## LEGAL UPDATES AND CASE LAW REVIEW

- Case Law Program: Supervised by practicing real estate attorneys, UTA participates as amicus curiae (friend of the court) in cases of major importance, drafting and submitting briefs in order to assist courts in rendering a just result and ensuring a level playing field for trustee practice.
- Essential Legislative Advocacy: UTA's California and Washington lobbyists ensure that we help write real estate laws in the areas of distribution of foreclosure sales proceeds and collection of defaults under deeds of trust as well as draft appropriate language for recorded notices of default, re-conveyances and others. Our efforts in other states take place on a case-by-case basis as issues arise.

## NETWORKING & BUSINESS GROWTH

- Regional Dinner Meetings: Networking opportunities with the most respected trustee and default servicing professionals including trustees, attorneys, loan servicing professionals and industry vendors -- and introductions to new business ideas that will help your practice immeasurably.
- Advertising Opportunities: Advertising and sponsorship opportunities in all our publications including our annual Membership Directory and our events allowing member vendors to easily reach their target audience.
- Association Job Board: Allowing members to post and reply to industry positions.

The United Trustees Association is a non-profit corporation.



## **UNITED TRUSTEES ASSOCIATION**

### **CODE OF ETHICS**

The Trustee, under a Deed of Trust, is the instrumentality through which foreclosure and re-conveyance activity is affected. The responsibilities and obligations undertaken in such actions are of the utmost importance. All United Trustees Association members (UTA Member(s)), therefore should strive to maintain and improve the standards of their calling, as well as sharing with their fellow members a common responsibility for integrity and honor.

All member classes identified in the Bylaws of the United Trustees Association pledge to observe the spirit of, and to conduct their business in accordance with, the following Code of Ethics.

#### **Article I**

A UTA Member shall conduct trustee business in a professional manner, keeping himself informed as to statutes, regulations and common provisions of notes and security instruments relating to non-judicial foreclosures and to the re-conveyance process, as well as other matters relating to the trustee profession in which he participates.

#### **Article II**

Protection of the public against fraud, misrepresentation and unethical practices in the trustee profession shall be uppermost in the mind of the UTA Members and the UTA Member shall report such fraud, misrepresentation or unethical practices to the appropriate government entity.

#### **Article III**

Much of the information contained in a trustee's file is confidential and should not be revealed or disclosed to any person not entitled to such information, except where such information is disclosed with the consent of an entitled person or is required to be revealed by subpoena or process of law.

#### **Article IV**

A UTA Member shall not be a party to the falsification of any of the facts relative to a non-judicial foreclosure or re-conveyance.

#### **Article V**

A UTA Member shall not engage in activities that constitute the unauthorized practice of law and should never hesitate to recommend that parties seek independent legal counsel in connection with a non-judicial foreclosure or re-conveyance.

#### **Article VI**

A UTA Member shall act in conformity with all applicable laws, regulations and terms of the security agreement and shall cooperate, without being required to waive any legal rights he may have, with all government agencies.

#### **Article VII**

If a UTA Member is charged with unethical practices, he shall place all pertinent facts before the proper tribunal of the National Association to which he/she belongs for investigation or decision.

#### **Article VIII**

A UTA Member shall never knowingly provide false information with respect to a fellow UTA Member nor shall he disparage the professional practice of a competitor or volunteer an opinion of the competitor's services for the purpose of obtaining a competitive advantage.

#### **Article IX**

A UTA Member shall assist to the best of his abilities in furthering the work and goals of UTA and willingly share lessons of his study and experience with his fellow members.

#### **Article X**

A UTA Member shall maintain all monies received on behalf of others in a prudent and identifiable manner and shall disburse these funds to the persons entitled thereto or, if the persons entitled thereto cannot be reasonably determined, as provided by law.

#### **Article XI**

A UTA Member shall not discriminate on the basis of race, color, sex, religion, marital status, national origin or age in conducting trustee business.

#### **Article XII**

A UTA Member shall cooperate with the National board of directors or duly appointed committee of either board, in furnishing information relating to any UTA investigation of alleged violations of the Bylaws and/or of these Code of Ethics.

#### **Article XIII**

In the best interest of the trustee profession, UTA Members, and of society, a UTA Member shall be loyal to the National Association and shall actively participate in these associations' work and conform to the Bylaws of and Code of Ethics of the National Association.



## **UTA DISCLAIMER**

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# **43<sup>rd</sup> Annual Education Conference & Trade Show**

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# **Making the Right Choice - Lessons in Ethics and Compliance**

**Presented by**

**Rashmi Airan**

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## **Rashmi Airan**

Rashmi Airan, a first generation immigrant of Indian parents and the oldest of three daughters, was raised with high expectations to achieve. She had both professional and personal pressures. Rashmi's father came to the United States with just \$8 in his pocket to attend school and achieve the American dream for the hope of a better life for his family. He obtained a masters degree and a doctorate degree in engineering and is now on his second career after obtaining a juris doctor and masters in law degree. In the Indian community, there is a strong desire to achieve good grades, go to the top schools, win awards, get hired by big companies, and make money.

In addition to being a mother of two, Rashmi was a successful lawyer who graduated with honors from Columbia Law School. After working for several major corporations, she launched an independent law practice in Miami, Florida. During the housing boom, she was recruited to work with a local real-estate developer who later engaged in questionable business practices. Rashmi's drive to succeed financially and to give her children the best life possible created an ethical blind spot for her. She chose not to question her client's behavior despite her inner voice screaming "ask questions!" Her involvement resulted in a six month sentence to Federal prison, alongside a \$19M judgment against future earnings, required community service hours, and 3 years supervised release.

Before beginning her sentence, Rashmi's community of friends and family embraced her. Though previously believing only a high level of success would make them proud, she now felt for the first time the true power of what building strong relationships meant. A close family friend remarked quietly "You will eventually learn that this is not happening to you, it is happening for you."

In prison, Rashmi felt shame and remorse for her decisions. Taking in six months of federal prison life, Rashmi came to a place of peace and self-forgiveness. While being immensely humbled by this life-changing experience, she emerged with invaluable lessons learned both personally and professionally. Rashmi shares her emotional development of living with remorse, but not letting it define you. She is determined to create a culture of conversation around ethics and compliance and to integrate ethics into all aspects of our lives.

Rashmi continues to tour the country as a public speaker, sharing her story to illustrate the ethical perils that can result from a drive to succeed and the blind spots created when we are pursuing our goals. She mines her vast legal and business expertise and tells her powerful story to deliver game-changing messages to universities, law firms, corporate teams, and trade associations around the United States. Rashmi redefines what it means to be successful in an American culture where success is often obtained by any means necessary.



# Case Law Updates

Presented by

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**Martin T. McGuinn, Esq.**  
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**Stephen T. Hicklin, Esq.**

Stephen T. Hicklin (Steve) has been practicing law in California since 1988 and is also admitted in Texas and Washington. His practice has been largely dedicated to representing financial institutions as both a law firm and an in house attorney. He has served as General Counsel for Northwest Trustee Services, as Chief Compliance Officer for ReconTrust Company, Inc., Bank of America's foreclosure trustee, and as litigation counsel at Countrywide Financial, Glendale Federal Bank and WMC Mortgage Corp. Steve has also worked for large and small law firms including Brobeck, Phleger & Harrison and Wright, Finlay & Zak, LLP. In early 2018, Steve opened his own litigation firm in Tustin, California, The Hicklin Firm. He can be reached at *shicklin@thehicklinfirm.com*.



**Martin T. McGuinn, Esq.**

Marty has extensive experience in representing creditors, fiduciaries, loan servicers and foreclosure trustees in complex bankruptcy, foreclosure and lender liability litigation, including class actions. He acts as an expert witness on foreclosure and lending issues on cases throughout California.

Marty has served as a Director and State Legislative Chairman of the United Trustee's Association. He is a member of the Legal Issues Committee of the Mortgage Bankers Association of America and Loan Servicing Committee of the California Mortgage Bankers Association. Marty also served as a member of the Legal Resource Panel of the California Mortgage Association (formerly the California Trust Deed Brokers Association). He is a member of the American Bankruptcy Institute, the REO Managers Association and of the San Diego Bankruptcy Forum.

Marty is rated AV® by Martindale-Hubbell, their highest rating of skill and integrity, indicating very high to pre-eminent legal ability and very high ethical standards as established by confidential opinions from members of the bar. He can be reached at *mmcguinn@kirbymac.com*.



**Kristin Schuler-Hintz, Esq.**

Kristin Schuler-Hintz is the Managing Partner for the Nevada office of McCarthy & Holthus. Ms. Schuler-Hintz, graduated from the University of Nevada Las Vegas, with a BA in Psychology and obtained her law degree from the University of San Diego School of Law in 1999. While at USD, she received the CALI Award for Excellence in Conflict of Laws and was recognized as one of the best Oral Advocates during her first year of Law School. In addition, she contributed to the Children's Regulatory Law Reporter and was published in the Journal of Contemporary Legal Issues - Issues in California Family Law. Ms. Schuler-Hintz is a frequent guest speaker at CLE's on the subject of foreclosure mediation and Lender/Service related issues. She is admitted to practice law before all the courts in the states of California and Nevada. Ms. Schuler-Hintz has received an AV Preeminent® rating from Martindale Hubbell, ranking her at the highest level of professional excellence for legal knowledge, communication skills and ethical standards. She can be reached at *khintz@McCarthyHolthus.com*.



**Arizona**

## Arizona

### **Andra R. Miller Designs v. US Bank, No. 1 CA-CV 16-0723 (Feb. 13, 2018)**

**Appellate court rules on case involving recording cancellation of trustee's notice of sale:** In the Miller Designs case before the Arizona Court of Appeals, the trustee recorded a notice of trustee's sale, then recorded a cancellation of notice of sale, deceleration of default and demand for sale, and notice of breach and election to cause sale. In Arizona, the relevant statute of limitation (SOL) for a non-judicial foreclosure is six years. When it comes to applying the statute, Arizona follows the installment contract theory whereby the SOL applies to each installment separately and doesn't begin to run until each one is due. However, if a creditor chooses to accelerate the debt, then the SOL starts running for the total amount owed as of that date.

In an Arizona non-judicial foreclosure, the notice of trustee's sale (NOS) serves as the first legal action. It sets the sale date, time, and place, and is the only core foreclosure document. The Miller Designs case presupposed that the NOS accelerated the debt, despite the borrower's statutory right to reinstate the loan before the sale. Under the statute, the trustee is required to record a trustee's notice of sale cancellation (a statutory form) if the default is cured or if the scheduled sale is cancelled or postponed. The court held that "the mere recordation of the notice [as set forth in the statute] is not, by itself, an affirmative act sufficient to revoke the acceleration of the debt, [even though] it cancels the trustee's sale." However, if additional verbiage is added to the trustee's notice of sale cancellation that the acceleration has been withdrawn, then, according to the court, it becomes an affirmative debt act providing sufficient notice to the borrower.

The court commented that the additional language used in the notice was "not a model of clarity," but that it nonetheless served to inform the borrower of the continuing default on the loan and the lender's ongoing rights secured by the deed of trust. Taking into account controlling case law in other jurisdictions that requires providing the borrower with "clear and unequivocal" written notice, it makes sense to review other affirmative actions that could be taken to similarly revoke the debt acceleration.

### **Deutsche Bank v. Pheasant Grove, LLC, 1 CA-CV 16-0663 (Aug. 23, 2018)**

**Appellant court rules that three year statute of limitations applies to reformation claim as well as related declaratory relief claim:** Homeowners refinanced a loan in 2003, and the legal description included only one of the two lot numbers encumbered by the deed of trust. The property was further subject to a 2006 deed of trust wherein the legal description encompassed both lot numbers. A foreclosure was conducted under the deed of trust encumbering both lots. The 2003 Deed of Trust, upon default and determination that its deed of trust had not been satisfied, filed a complaint seeking to reform the 2003 deed of trust to encompass both lots. The complaint sought reformation of the deed of trust, quiet title and declaratory relief. The lower court held the reformation claim was time barred by a three year statute of limitations. As to the declaratory relief claim, the bank argued that a six year statute of limitations applied under ARS §12-548(A)(1), and that the claim accrued when the 2006 deed of trust foreclosure was completed and title transferred in 2011, putting the titleholder on constructive notice of the 2003 deed of trust. The court looked to the substance of the action to identify the relationship out of which the claim arose and the relief sought and determined that the declaratory relief claim was a reformation and the same statute of limitations applied, three years. The Bank further argued that the declaratory relief claim could have been premised on the doctrine of replacement of mortgages, which allows a senior lender to discharge a mortgage of record and record a replacement mortgage to keep its priority against the holder of an intervening interest, however in this case it was inapplicable as there was no intervening interest.

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION ONE

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ANDRA R MILLER DESIGNS LLC, *Plaintiff/Appellee*,

*v.*

US BANK NA, et al., *Defendants/Appellants*.

No. 1 CA-CV 16-0723  
FILED 2-13-2018

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Appeal from the Superior Court in Maricopa County  
No. CV2015-051479  
The Honorable Aimee L. Anderson, Judge

**REVERSED AND REMANDED**

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COUNSEL

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By Ari Ramras  
*Counsel for Plaintiff/Appellee*

Quarles & Brady LLP, Phoenix  
By Scott A. Klundt, Lauren E. Stine (argued), Amelia B. Valenzuela  
*Counsel for Defendant/Appellant*

MILLER DESIGNS v. US BANK, et al.  
Opinion of the Court

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**OPINION**

Judge Paul J. McMurdie delivered the opinion of the Court, in which Presiding Judge Lawrence F. Winthrop and Judge Jennifer B. Campbell joined.

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**M c M U R D I E**, Judge:

¶1 U.S. Bank NA (“Bank”) appeals the superior court’s grant of summary judgment in favor of Andra R Miller Designs, LLC (“Miller”) and the resulting final judgment. We reverse and remand to the superior court for further proceedings consistent with this opinion and hold that: (1) a purchaser of real property acquired at an execution sale under Arizona Revised Statutes (“A.R.S.”) section 12-1622 has standing to assert a statute of limitations defense under A.R.S. § 33-816 and no additional contractual privity is necessary; (2) a creditor may unilaterally revoke its acceleration of debt; (3) unilateral revocation of the debt’s acceleration requires an affirmative act by the creditor, which must communicate to the debtor that the debt’s acceleration has been cancelled; (4) a notice of cancellation of the trustee’s sale may be an affirmative act by the creditor sufficient to communicate to the debtor, and to any third party investigating title to the property, that the creditor cancelled the debt’s acceleration if it contains a statement revoking the acceleration; and (5) recording the notice of cancellation of trustee’s sale with language revoking the acceleration constitutes sufficient notice that the creditor has revoked the debt’s acceleration.

**FACTS AND PROCEDURAL BACKGROUND**

¶2 The real property in question is a home located in Paradise Valley (“Property”) in the Clearwater Hills Improvement Association (“HOA”). In July 2006, Don Davis (“Borrower”) executed an Adjustable Rate Note (“Note”) in favor of Washington Mutual Bank, FA (“WAMU”) in the principal amount of \$1,940,000. The Note was secured by a Deed of Trust (“Deed”) encumbering the Property in the same amount. The Deed and Note allowed the lender to accelerate the debt upon default as follows: “If the default is not cured . . . Lender at its option may require immediate payment in full of all sums secured by this Security Instrument without further demand and may invoke the power of sale and any other remedies permitted by Applicable Law.”

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¶3 Borrower failed to make the monthly payment due on September 1, 2008, and failed to cure his default after notice by WAMU. The notice sent by WAMU also contained a reference to the acceleration clause. In January 2009, the trustee recorded a Notice of Trustee's Sale ("2009 Notice"), but no sale was held. On March 5, 2012, the trustee recorded a "Cancellation of Notice of Sale, of Declaration of Default and Demand for Sale, and of Notice of Breach and Election to Cause Sale" ("2012 Cancellation Notice"), which included the following clause (Acceleration Revocation Clause):

NOW THEREFORE: Notice is hereby given that the Beneficiary and/or the Trustee does hereby rescind, cancel and withdraw said Declaration of Default and Demand for Sale and said Notice of Breach and Election to Cause Sale; it being understood, however, that this cancellation shall not in any manner be construed as waiving or affecting any breach or default past, present or future, under said Deed of Trust, or as impairing any right or remedy thereunder, but is, and shall be deemed to be, only an election, without prejudice, not to cause a sale to be made pursuant to said Declaration and Notice, and shall in no way jeopardize or impair any right, remedy or privilege secured to the Beneficiary and/or the Trustee, under said Deed of Trust, nor modify nor alter in any respect any of the terms, covenants, conditions or obligations thereof, and said Deed of Trust and all obligations secured thereby are hereby reinstated and shall be said and remain in force the same as if said Declaration and Notice had not been made and given.

¶4 In February 2013, the HOA obtained a Judgment and Decree of Foreclosure and Order of Sale for unpaid planned community assessments, and other costs, in the amount of approximately \$16,000. The Property was to be sold at a sheriff's sale, but the sale was not held at that time.

¶5 In May 2013, the trustee recorded a new Notice of Trustee's Sale ("2013 Notice"). In January 2014, the loan servicer sent Borrower a Notice of Default—Right to Cure ("Right to Cure Notice"), notifying Borrower he had the right to cure his default by paying \$1,033,052.10 by February 22, 2014. The Right to Cure Notice stated that the lender could accelerate the debt if the borrower failed to cure the default. In June 2014, the trustee recorded a "Cancellation of Notice of Sale" ("2014 Cancellation Notice") to cancel the 2013 Notice. The 2014 Cancellation Notice contained the same Acceleration Revocation Clause as the 2012 Cancellation Notice.

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¶6 In December 2014, the trustee recorded a new Notice of Trustee's Sale. In February 2015, Miller purchased the HOA Judgment. On March 26, 2015, a sheriff's sale was executed on the HOA Judgment, and Miller purchased the Property for the sum of \$41,000. On March 27, 2015, Miller filed to enjoin Bank from foreclosing on its lien and conducting the trustee's sale of the Property. Both sides moved for summary judgment. The court granted summary judgment in favor of Miller, finding Bank's claim was barred by the statute of limitations based on Bank's acceleration of the debt in the 2009 Notice. Bank filed for reconsideration.

¶7 In its Motion for Reconsideration, Bank claimed it had paid \$453,277 in property taxes and insurance on behalf of the Property, \$62,596 of which was paid on or after April 1, 2015. Bank argued the later amount entitled it to initiate a foreclosure action, even if suit on the original loan amount was barred by the statute of limitations. *See Deutsche Bank Tr. Co. Americas v. Beauvais*, 188 So. 3d 938, 941 (Fla. 3d DCA 2016) (en banc) (holding that even though a lender's right to foreclose a previously accelerated loan balance was barred by the statute of limitations, the lender was not barred from initiating foreclosure based on different acts if the new foreclosure action was brought within the applicable statute of limitations); *Singleton v. Greymar Assocs.*, 882 So. 2d 1004, 1007 (Fla. 2004) (lender permitted to maintain a separate action for foreclosure for a default which occurred after acceleration on an earlier default). The superior court denied reconsideration, and entered a final judgment holding that Bank's lien was unenforceable. Bank timely appealed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and -2101(A)(1).

**DISCUSSION**

¶8 Bank argues the superior court erred by granting summary judgment because (1) Miller had no standing to raise the statute of limitations defense against Bank's enforcement of its lien; (2) if Miller does have standing, Bank revoked the debt's acceleration, which reset the statute of limitations on its foreclosure action; (3) the loan documents authorized Bank to pay for insurance and property taxes after the 2009 Notice, and the superior court should have considered Bank's argument even if it was first raised in a motion for reconsideration; and (4) it was error to hold that the lien was "unenforceable."

¶9 In reviewing an order granting summary judgment, we view the facts in the light most favorable to Bank, the party against which summary judgment was granted, and determine "*de novo* whether there are any genuine issues of material fact and whether the trial court erred in its application of the law." *Galati v. Lake Havasu City*, 186 Ariz. 131, 133 (App.

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1996) (quoting *Gonzalez v. Satrustegui*, 178 Ariz. 92, 97 (App. 1993)); Ariz. R. Civ. P. 56(a).

**I. Miller Had Standing to Raise the Statute of Limitations Defense.**

¶10 Bank argues the superior court erred by finding the applicable statute of limitations expired on January 21, 2015, because Miller was not in privity to the Note, the Deed, or the Borrower, and thus did not have standing to raise a statute of limitations defense.<sup>1</sup> Whether a party has standing to assert a statute of limitations defense is a question of law we review *de novo*. See *Baier v. Mayer Unified Sch. Dist.*, 224 Ariz. 433, 438, ¶ 15 (App. 2010) (citing *Robert Schalkenbach Found. v. Lincoln Found., Inc.*, 208 Ariz. 176, 180, ¶ 15 (App. 2004)).

**A. The Applicable Statute of Limitations.**

¶11 An action to collect a debt evidenced by a written contract “shall be commenced and prosecuted within six years after the cause of action accrues, and not afterward.” A.R.S. § 12-548(A)(1). “The defense of the statute of limitations is a personal privilege that a debtor or one in privity may elect to urge or waive.” *Acad. Life Ins. Co. v. Odiorne*, 165 Ariz. 188, 190 (App. 1990) (citing *Trujillo v. Trujillo*, 75 Ariz. 146, 148 (1953)). When the statute of limitations expires, however, the debt is not extinguished; rather, the remedy for an action on the debt is merely barred. *Provident Mut. Bldg.-Loan Ass’n v. Schwertner*, 15 Ariz. 517, 518–19 (1914) (when a debt has not been paid, the debt is not extinguished by the expiration of the limitation period, “only the remedy has been lost,” preventing recovery when “properly invoked by the debtor”); *De Anza Land & Leisure Corp. v. Raineri*, 137 Ariz. 262, 266 (App. 1983).

¶12 “The deed of trust scheme is a creature of statutes.” *Zubia v. Shapiro*, \_\_\_ Ariz. \_\_\_, \_\_\_, 2018 WL 387772, \*4, ¶ 15 (Jan. 12, 2018) (quoting *BT Capital, LLC v. TD Serv. Co. of Ariz.*, 229 Ariz. 299, 300, ¶ 9 (2012)); *Manicom v. CitiMortgage, Inc.*, 236 Ariz. 153, 156, ¶¶ 8–9 (App. 2014) (“[T]he Arizona’s Deeds of Trust Act, A.R.S. §§ 33-801 through 33-821, . . . ‘is a comprehensive set of statutes governing the execution and operation of deeds of trust.’”) (citing *In re Bisbee*, 157 Ariz. 31, 33 (1988)). A six-year limitation period applies here because Bank is attempting to collect on a property interest secured by a Deed of Trust. Section 33-816 ties “the

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<sup>1</sup> The superior court found the 2009 Notice recorded on January 21, 2009, accelerated the debt and the trustee’s sale was not held within six years, or by January 21, 2015.

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limitation period for an action *in rem* to the same period applicable to an action on the contract." *Stewart v. Underwood*, 146 Ariz. 145, 150 (App. 1985). Section 33-816 specifies:

The trustee's sale of trust property under a trust deed shall be made, or any action to foreclose a trust deed as provided by law for the foreclosure of mortgages on real property shall be commenced, within the period prescribed by law for the commencement of an action on the contract secured by the trust deed.

A.R.S. § 33-816; *see Stewart*, 146 Ariz. at 150 ("There is no indication that our legislature intended to create some type of sliding scale in which enforcement of the lien is precluded if some fortuitous circumstance prevents an action on the contract."); *Manicom v. CitiMortgage, Inc.*, 236 Ariz. at 158, ¶ 17 (any person interested in acquiring an interest in a real property has a "duty to search grantor and grantee indices for potential liens, at least for the relevant six-year limitation period provided for sales and foreclosures under deeds of trust") (citing cases).

**B. Miller's Interest in the Property Entitles It to Invoke a Statute of Limitations Defense.**

¶13 When real property is sold under execution at a public auction to the highest bidder, *see* A.R.S. § 12-1622(A), "the purchaser is substituted to and acquires all the right, title, interest and claim of the judgment debtor thereto," A.R.S. § 12-1626(A).

¶14 Miller foreclosed on its junior lien, the HOA Judgment, and purchased the Property at a sheriff's sale, *see* A.R.S. § 12-1626(A), subject to Bank's senior lien, *see Mid-Kansas Fed. Sav. and Loan v. Dynamic Dev. Corp.*, 167 Ariz. 122, 130 (1991) ("[T]he purchaser at a foreclosure sale of a junior lien takes subject to all senior liens . . . Although the purchaser does not become personally liable on the senior debt . . . the purchaser must pay it to avoid the risk of losing his newly acquired land to foreclosure by the senior lienholder . . . [and] the land becomes the primary fund for the senior debt.") (citations omitted); *see also Midyett v. Rennat Props., Inc.*, 171 Ariz. 492, 494 (App. 1992) (same). By purchasing the property at the sheriff's sale, Miller acquired the right to invoke the limitation period in an action *in rem* pursuant to § 33-816; no additional contractual privity was necessary. The court did not err by concluding Miller could raise the statute of limitations defense.

**C. The Statute of Limitations Had Not Expired Before the Filing of this Case.**

**1. The Statute of Limitations Was Initially Triggered by Bank's Acceleration of the Debt.**

¶15 When a creditor has the power to accelerate a debt, the six-year statute of limitations begins to run on the date the creditor exercises that power. *See Navy Fed. Credit Union v. Jones*, 187 Ariz. 493, 495 (App. 1996) (“[I]f the acceleration clause in a debt payable in installments is optional, a cause of action as to future nondelinquent installments does not accrue until the creditor chooses to take advantage of the clause and accelerate the balance. Unless the creditor exercises the option, the statute of limitations applies to each installment separately, and does not begin to run on any installment until it is due.”); *Wheel Estate Corp. v. Webb*, 139 Ariz. 506, 508 (App. 1983) (cause of action accrues when holder exercises option to accelerate). To exercise its option to accelerate a debt, the creditor “must undertake some affirmative act to make *clear to the debtor* it has accelerated the obligation,” even if the parties contractually agree the option to accelerate a debt need not require a notice to the debtor. *Baseline Fin. Servs. v. Madison*, 229 Ariz. 543, 544, ¶ 8 (App. 2012) (emphasis added) (citing cases). Demand of a full payment before all installments fall due constitutes a sufficiently affirmative act of acceleration. *See Jones*, 187 Ariz. at 495. The commencement of foreclosure likewise operates as an affirmative act of acceleration. *Prevo v. McGinnis*, 142 Ariz. 298, 302 (App. 1984) (citing *Barnett v. Hitching Post Lodge, Inc.*, 101 Ariz. 488 (1966)).

¶16 The recordation of the 2009 Notice was an affirmative act of the debt's acceleration, *see Prevo*, 142 Ariz. at 302, which triggered the statute of limitations on Bank's right to foreclose its security interest, *see* A.R.S. § 33-816; *Jones*, 187 Ariz. at 495; *see also Webb*, 139 Ariz. at 508 (absent the debt's acceleration, each failure to make an installment payment gives rise to a separate cause of action); *Deutsche Bank Nat. Tr. Co. Americas v. Bernal*, 59 N.Y.S.3d 267, 270 (N.Y. Sup. Ct. 2017) (separate cause of action accrues for each mortgage payment that is not paid). Neither party argues the 2009 Notice did not accelerate the debt; the parties disagree regarding the effect of Bank's subsequent actions on the statute of limitations. Miller argues Bank failed to revoke the debt's acceleration and, because no trustee's sale was held within six years pursuant to A.R.S. § 33-816, the statute of limitations expired on January 21, 2015. Bank counters that its publicly noticed cancellations of trustee's sale with the Acceleration Revocation Clause, restarted the statute of limitations regarding future obligations in 2012 and in 2014.

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**2. Bank Revoked its Acceleration of the Debt.**

¶17 Bank argues the superior court erred by ruling Bank did not revoke the acceleration of the debt. Bank contends that each notice of cancellation canceled both the trustee's sale and the underlying acceleration of the debt; and that the Right to Cure Notice, which demanded payment of the delinquency and not all unpaid amounts under the note, also indicated the debt's acceleration had been cancelled.

¶18 Pursuant to Arizona's statutory scheme, a trustee's sale is cancelled, if it is not held or properly postponed, by "[a]n acknowledged recorded cancellation of a recorded notice of sale under a trust deed[, which] shall be sufficient if it is in substantially the following form: [legal description of the trust property, detailed information about the trust deed]." A.R.S. § 33-813(F), (G). Because both the 2012 and 2014 Notices of Cancellation were recorded and contained the required information, the relevant trustee's sales were properly cancelled.

¶19 Bank argues the language of the Cancellation Notices, in addition to the fact they were recorded, "reinstated the obligations secured by the Deed of Trust as though the Notices of Trustee's Sale had never been recorded," effectively restarting the limitations on the default and placing Bank in the position to exercise its power to accelerate the debt at its discretion.<sup>2</sup> We agree.

¶20 As noted above, to exercise its power to accelerate the debt, the creditor "must undertake some affirmative act to make clear to the debtor it has accelerated the obligation." *Madison*, 229 Ariz. at 544, ¶ 8. The parties acknowledge that acceleration of the debt can be revoked

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<sup>2</sup> The revocation of an acceleration would not reset the statute of limitations for payments already in default. *Webb*, 139 Ariz. at 508 (absent the debt's acceleration, each failure to make an installment payment gives rise to a separate cause of action); *Bernal*, 59 N.Y.S.3d at 270 (separate cause of action accrues for each mortgage payment that is not paid). In this appeal, we are not asked to apply the statute of limitations under A.R.S. § 12-548(A)(1) to defaulted payments and leave such application, if any, to the parties and court on remand. See *City of Phoenix v. Yarnell*, 184 Ariz. 310, 319 (1995) (court of appeals is to address only issues developed on the record, including issues of law presented on facts "put in issue by a properly focused motion").

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unilaterally by the creditor.<sup>3</sup> See *Fed. Nat. Mortg. Ass'n v. Mebane*, 618 N.Y.S.2d 88, 89 (N.Y. App. Div. 1994) (“[A] lender may revoke its election to accelerate all sums due under an optional acceleration clause in a mortgage provided that there is no change in the borrower’s position in reliance thereon.”). Both the acceleration of a debt and the acceleration’s revocation have equally important effects on a debtor’s financial decision-making based on knowledge of the actual amount due. We thus hold that a unilateral revocation of the debt’s acceleration requires an affirmative act by the creditor that communicates to the debtor that the creditor has revoked the debt’s acceleration. See *Mebane*, 618 N.Y.S.2d at 89.

¶21 The mere recordation of a cancellation notice is not, by itself, an affirmative act sufficient to revoke the acceleration of the debt, although it cancels the trustee’s sale. See *Madison*, 229 Ariz. at 544, ¶ 8; *Mebane*, 618 N.Y.S.2d at 89 (court’s dismissal of action to collect on accelerated obligation not “an affirmative act by the lender to revoke its election to accelerate” and does not affect running of limitations period). A cancellation notice filed under § 33-813, by itself, does not communicate an intent to revoke acceleration. For the cancellation of the trustee’s sale to become an affirmative act by the creditor sufficient to revoke the debt’s acceleration, the notice of cancellation must also contain a statement that the acceleration of the debt has been withdrawn. Because recording the notice of cancellation of trustee’s sale is a public notice available to any party, we hold that, if the cancellation notice contains a statement revoking the acceleration, it provides sufficient notice “to the debtor,” and to any third party investigating title, that the acceleration has been cancelled. See *Madison*, 229 Ariz. at 544, ¶ 8; see also A.R.S. § 33-813(F), (G).

¶22 Because Bank inserted the Acceleration Revocation Clause into the 2012 and 2014 Notices of Cancellation, it sufficiently communicated to the Borrower, and to any third party investigating title to the property, that Bank was also revoking the debt’s acceleration. The Acceleration Revocation Clause informed the Borrower that the “Beneficiary and/or the Trustee does hereby rescind, cancel and withdraw said Declaration of Default and Demand for Sale and said Notice of Breach and Election to Cause Sale [“Declaration and Notice”]; . . . and said Deed of Trust and all obligations secured thereby are hereby reinstated and shall be said and remain in force the same as if said Declaration and Notice had not been

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<sup>3</sup> Parties may also negotiate a modification or a forbearance agreement or the debtor may reinstate the loan by curing defaults pursuant to § 33-813(A) and (B).

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made and given.” Because the Declaration and Notice caused the acceleration, its withdrawal (“as if [it] had not been made”) constituted the affirmative act and revoked the debt’s acceleration. *See Madison*, 229 Ariz. at 544, ¶ 8. The additional language, although not a model of clarity, merely informed the Borrower of its continuing default on the loan and Bank’s rights secured by the Deed.

¶23 Therefore, no genuine dispute can be maintained about the effect of the 2012 and 2014 Cancellation Notices. *See Ariz. R. Civ. P.* 56(a). We reverse the grant of summary judgment in favor of Miller and vacate the corresponding judgment, including the award of attorney’s fees associated with that judgment. Because the acceleration’s revocation reset the statute of limitations in 2012, as well as in 2014, we find the statute of limitations regarding future obligations has not run, and remand the case for further proceedings consistent with this opinion. *See supra* note 2. Because it is not necessary to our holding, we decline to reach Bank’s arguments relating to its payments for property insurance and taxes and the scope of relief granted to Miller. *See State v. Hardwick*, 183 Ariz. 649, 657 (App. 1995) (the court need not review other arguments if one argument is dispositive).

**II. Attorney’s Fees on Appeal.**

¶24 Both parties request we award their attorney’s fees incurred on appeal pursuant to A.R.S. § 12-341.01 and Arizona Rule of Civil Appellate Procedure 21. Section 12-341.01(A) provides a court with discretion to award reasonable attorney’s fees to a successful party “[i]n any contested action arising out of a contract.” *See also Bennett v. Baxter Grp., Inc.*, 223 Ariz. 414, 423–24, ¶ 40 (App. 2010). In our discretion, we decline to award either party its attorney’s fees incurred on appeal. We award Bank its taxable costs upon compliance with Arizona Rule of Civil Appellate Procedure 21.

**CONCLUSION**

¶25 For the reasons stated above, we reverse the judgment and remand for further proceedings consistent with this opinion. We award Bank its taxable costs incurred on appeal upon compliance with Arizona Rules of Civil Appellate Procedure 21.



AMY M. WOOD • Clerk of the Court  
FILED: AA

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION ONE

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DEUTSCHE BANK NATIONAL TRUST COMPANY, *Plaintiff/Appellant*,

*v.*

PHEASANT GROVE LLC, *Defendant/Appellee*.

No. 1 CA-CV 16-0663  
FILED 8-23-2018

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Appeal from the Superior Court in Maricopa County  
No. CV2015-005125  
The Honorable Douglas Gerlach, Judge

**AFFIRMED**

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COUNSEL

Gust Rosenfeld PLC, Phoenix  
By Scott A. Malm, Charles W. Wirken  
*Counsel for Plaintiff/Appellant*

Robert Stewart & Associates PC, Phoenix  
By Robert L. Stewart, Jr., Sid A. Horwitz  
*Counsel for Defendant/Appellee*

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**OPINION**

Judge Randall M. Howe delivered the opinion of the Court, in which  
Presiding Judge James P. Beene and Judge Kent E. Cattani joined.

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HOWE, Judge:

¶1 Deutsche Bank National Trust Company (the “Bank”) sued Pheasant Grove LLC seeking a reformation of a deed of trust (“DOT”) secured by Pheasant Grove’s property and a declaratory judgment that it holds a superior interest in the property. The trial court granted Pheasant Grove summary judgment, ruling that the Bank had filed its suit outside the applicable statute of limitations’ time period.

¶2 The Bank has appealed that ruling, raising several claims of error. Its primary argument, however, is that although its reformation claim may be barred by the applicable statute of limitations, its declaratory judgment claim—that the Bank’s interest in the property was superior to Pheasant Grove’s interest under a constructive notice or replacement mortgage theory—was within the statute of limitations applicable to an action to collect a debt. We reject all of the Bank’s claims of error, and we specifically hold that when a claim for reformation is time-barred, a request for declaratory judgment seeking substantively the same relief as the reformation claim is also time-barred.

**FACTS AND PROCEDURAL HISTORY**

¶3 This action involves the real property known as 40660 N. 109th Place, Scottsdale, Arizona (the “Property”). The Property includes a residence built across two adjoining parcels, described as Lots 8 and 9, Desert Mountain Phase II Unit Six. Lot 8 is assigned Maricopa County Assessor’s Parcel Number (“APN”) 219-56-205 and Lot 9 is assigned APN 219-56-206.

¶4 Brian Pellowski and Debra Peterson (collectively, the “Homeowners”) bought the Property in 2000 and obtained a \$1.26 million loan secured by a recorded DOT in favor of Washington Mutual Bank, FA that encumbered Lots 8 and 9. The Homeowners refinanced the loan in 2001 and 2002. Both times the Homeowners recorded a new DOT in Washington Mutual’s favor, encumbering Lots 8 and 9; both times Washington Mutual released the prior DOT.

¶5 The Homeowners refinanced the loan again in 2003. They recorded a DOT in Washington Mutual’s favor (the “2003 DOT”), and Washington Mutual released the prior DOT. Although the 2003 DOT referenced the address of 40660 N. 109th Place, Scottsdale, Arizona, the 2003 DOT legally described the collateral as only “Lot 8, DESERT MOUNTAIN PHASE II, UNIT SIX.” JP Morgan Chase Bank NA (“Chase”) acquired the

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beneficial interest in the 2003 DOT from Washington Mutual. Chase assigned its beneficial interest in the 2003 DOT to the Bank in November 2012; the assignment described the collateral as “LOT 8, DESERT MOUNTAIN PHASE II, UNIT SIX.”

¶6 Meanwhile, the Homeowners borrowed \$800,000 from First National Bank of Omaha (“FNB”) in September 2006 and secured that loan with a DOT in FNB’s favor that encumbered Lots 8 and 9. The Homeowners defaulted on the loan, and FNB bought the Property in a trustee’s sale in July 2010. FNB later quitclaimed the Property to Pheasant Grove in December 2011.

¶7 The Homeowners subsequently defaulted on the promissory note secured by the Bank’s 2003 DOT, and the Bank learned that Pheasant Grove had obtained the Property without satisfying the 2003 DOT. In August 2015, the Bank filed a three-count “Verified Complaint for Quiet Title” against Pheasant Grove. Count One sought reformation of the 2003 DOT to include Lot 9 in the legal description. Count Two was denominated quiet title; it sought a determination pursuant to Arizona’s quiet title statute, A.R.S. § 12-1101, that the Bank “has a superior interest in Lots 8 and 9 of the Property and that Pheasant Grove’s interest in the Property is subject to [the Bank’s] interest under the Deutsche Bank DoT.” Count Three was denominated declaratory relief; it sought a declaration under A.R.S. § 12-1101 that “Plaintiff’s interest under the Deutsche Bank DoT encumbers both Lots 8 and 9 of the Property and is superior to any other encumbrances currently existing against the property and that Pheasant Grove’s interest in the Property is subject to Plaintiff’s interest under the Deutsche Bank DoT.”

¶8 Pheasant Grove moved for summary judgment, arguing that (1) the reformation claim was barred under the applicable statute of limitations and (2) the quiet title and declaratory relief claims failed as a matter of law because the Bank did not hold title to either Lot 8 or 9. In response, the Bank argued that (1) the statute of limitations did not apply to a reformation claim and (2) the declaratory relief claim sought a determination that Pheasant Grove had constructive notice of the 2003 DOT, which had priority over FNB’s DOT, or alternatively, that the 2003 DOT was a replacement DOT for the 2000, 2001, and 2002 DOTs. Additionally, the Bank moved under Arizona Rules of Civil Procedure 15

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and 56(f) (2016)<sup>1</sup> for additional time to conduct discovery and filed a “countermotion” for leave to amend the complaint to clarify the declaratory relief sought.

¶9 The trial court denied the Bank’s motions and granted summary judgment in Pheasant Grove’s favor:

Almost 12 years after the fact—11 years, nine-and-a-half months after the fact, to be precise—Deutsche Bank as a successor wants to be relieved of what amounts to its own mistake. The statute of limitations ran on that claim some time ago. There’s nothing in the record that would warrant the Court to recognize a tolling of the statute of limitations, and otherwise if this is something that goes up on appeal, I’ll simply adopt the other reasons set forth in the Defendant’s motion and reply memorandum.

¶10 The trial court entered a final judgment and the Bank timely appealed.

## DISCUSSION

### 1. Rule 56(f) Motion

¶11 The Bank argues that the trial court erred by denying its Rule 56(f) motion. We review the denial of a Rule 56(f) request for an abuse of discretion. *Simon v. Safeway, Inc.*, 217 Ariz. 330, 332 ¶ 4 (App. 2007). The trial court abuses its discretion if it makes an error of law or the record does not substantially support its decision. *MM&A Prods., LLC v. Yavapai-Apache Nation*, 234 Ariz. 60, 66 ¶ 18 (App. 2014).

¶12 A party opposing summary judgment may seek additional discovery before responding to the motion for summary judgment. *See generally* Ariz. R. Civ. P. 56(f) (2016). Rule 56(f)’s “major objective” is “to insure that a diligent party is given a reasonable opportunity to prepare his case.” *Simon*, 217 Ariz. at 333 ¶ 6 (citations omitted). Accordingly, the motion must be accompanied by an affidavit “describing the reasons justifying the delay,” including “the evidence outside the party’s control, its location, what the party believes the evidence will show, the discovery

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<sup>1</sup> The Arizona Rules of Civil Procedure were revised effective January 1, 2017, to reflect comprehensive stylistic and substantive changes. To be consistent with the record below and briefing on appeal, we cite the former rules.

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method the party wishes to use, and an estimate of the time required to complete the discovery.” *Id.* (citation omitted).

¶13 The trial court did not abuse its discretion in denying the motion. In the Bank’s Rule 56(f) affidavit, counsel stated that it would require two months to complete discovery. The trial court did not rule on the Rule 56(f) motion until two months later, effectively giving the Bank the two months it stated that it needed, even though the court technically denied the motion. As the trial court noted, the request was “in effect, moot because Deutsche Bank has had the benefit of the two months that it said were required.” In its ruling, the trial court nevertheless allowed the Bank to file a new, comprehensive response and statement of facts, but the Bank did not file a new statement of facts and its second response largely restated its first. In the trial court and on appeal, the Bank has not explained why the evidence it hoped to discover could not have been obtained during the eight months preceding the summary judgment motion. As such, Deutsche Bank has not presented a prima facie case that it should have been allotted additional time for discovery. Thus, the trial court did not abuse its discretion by denying the Rule 56(f) motion.

**2. Summary Judgment: Declaratory Judgment Claim**

¶14 The Bank contends that the trial court erred in granting summary judgment against its claim that it was entitled to a declaratory judgment stating that its interest in Lot 9 was superior to Pheasant Grove’s interest.<sup>2</sup> The Bank argues that Pheasant Grove had constructive notice of its interest in Lot 9, and because the Bank was seeking to enforce the 2003 DOT against Pheasant Grove’s interest, the trial court should have applied the six-year limitations period under A.R.S. § 12-548, which applies to actions for debt.<sup>3</sup>

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<sup>2</sup> The Bank does not dispute the granting of summary judgment based on the reformation or quiet title claims.

<sup>3</sup> Although the complaint did not specifically raise constructive notice, it alleged facts to support its contention that Pheasant Grove had constructive notice that the 2003 DOT encumbered Lots 8 and 9; thus, the complaint sufficiently raised this issue. *See Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 419 ¶ 6 (2008) (citation omitted) (“Arizona follows a notice pleading standard, the purpose of which is to give the opponent fair notice

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¶15 A motion for summary judgment should be granted “if the facts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense.” *Orme Sch. v. Reeves*, 166 Ariz. 301, 309 (1990). We review de novo whether any genuine issues of material fact exist and whether the trial court properly applied the law. *Parkway Bank & Trust Co. v. Zivkovic*, 232 Ariz. 286, 289 ¶ 10 (App. 2013). The application of the statute of limitations, including the question of accrual, is also reviewed de novo. *Cook v. Town of Pinetop-Lakeside*, 232 Ariz. 173, 175 ¶ 10 (App. 2013).

¶16 The Bank argues that a six-year statute of limitations under A.R.S. § 12-548(A)(1) applies to the declaratory relief claim premised on constructive notice. Section 12-548(A)(1) provides that “[a]n action for debt shall be commenced and prosecuted within six years after the cause of action accrues . . . if the indebtedness is evidenced by or founded on . . . [a] contract in writing that is executed in this state.” The Bank contends that it filed its complaint with this claim within six years of the claim’s accrual. The Bank believes that the claim accrued when Pheasant Grove received title to the Property in 2011, when a proper title search would have revealed to Pheasant Grove the Bank’s 2003 DOT. Because the Bank filed its complaint in August 2015, it argues that it satisfied A.R.S. § 12-548(A)(1)’s time limit.

¶17 In determining the limitations period applicable to a claim for declaratory relief, we examine the substance of the action “to identify the relationship out of which the claim arises and the relief sought.” *Canyon del Rio Inv’rs, L.L.C. v. City of Flagstaff*, 227 Ariz. 336, 341 ¶ 21 (App. 2011) (citation omitted). The Bank seeks a declaration that Pheasant Grove holds title to Lot 9 subject to the Bank’s 2003 DOT, which is nothing more than an action to reform the 2003 DOT to include Lot 9 in the legal description. *See Cosgrove v. Cade*, 468 S.W.3d 32, 35 (Tex. 2015) (noting that a plaintiff’s declaratory relief claim asking the court to recognize mineral rights mistakenly left out of a deed was “in effect a suit to reform the deed”). The substance of the Bank’s action arises out of Washington Mutual’s mistaken omission of Lot 9 from the 2003 DOT. As such, the declaratory relief theory is based on that mistaken omission, and reformation is not “merely

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of the nature and basis of the claim and indicate generally the type of litigation involved.”).

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incidental to the ultimate relief sought.”<sup>4</sup> See *Bradbury v. Higginson*, 140 P. 254, 256 (Cal. 1914). If the trial court were to grant the Bank’s request for relief, “the legal effect would be identical to that involved in a successful reformation.” See *N. Star Reinsurance Corp. v. Super. Ct.*, 13 Cal.Rptr.2d 775, 782 (App. 1992). Because the three-year statute of limitations bars the claim for reformation, see *Transam. Ins. Co. v. Trout*, 145 Ariz. 355, 358 (App. 1985), the declaratory relief claim is time-barred as well, cf. *Canyon del Rio*, 227 Ariz. at 341 ¶ 21 (“Declaratory judgment claims filed within the relevant analogous limitations period are treated as timely.”).<sup>5</sup>

¶18 The Bank also argues that its declaratory judgment claim could have been premised on the doctrine of replacement of mortgages. The replacement doctrine “allows a senior lender that discharges its mortgage of record and records a replacement mortgage to keep its priority as against the holder of an *intervening interest* in the property.” *Cont’l Lighting & Contracting, Inc. v. Premier Grading & Utilities, LLC*, 227 Ariz. 382, 387 ¶ 17 (App. 2011) (emphasis added). “Because an intervening lienholder maintains the same position it had before the replacement lender satisfied the pre-existing obligation, it suffers no prejudice.” *Brimet II, LLC v. Destiny Homes Mktg., LLC*, 231 Ariz. 457, 459–60 ¶ 11 (App. 2013). The problem with the doctrine’s application to this case, however, is that no “intervening interest” exists. Washington Mutual recorded a DOT in 2002 against Lots 8 and 9, and released that lien in 2003. Washington Mutual then recorded a DOT only against Lot 8, which the Bank acquired in 2003. FNB did not record its DOT against Lots 8 and 9 until 2006. Thus, FNB’s DOT cannot be an “intervening interest” between the 2002 and 2003 DOTs, and the replacement doctrine is inapplicable as a matter of law.

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<sup>4</sup> The Bank explained during oral argument in the trial court that “[t]he problem is that if the mistake was not made, we would have an interest in both [Lots 8 and 9].”

<sup>5</sup> Although not argued in its opening brief, the Bank claims in its reply brief that, in the alternative, the declaratory relief claim’s limitations period was four years under A.R.S. § 12-550. We generally do not consider arguments raised for the first time in a reply brief. *Tucson Estates Prop. Owners Ass’n, Inc. v. McGovern*, 239 Ariz. 52, 55 n.4 ¶ 11 (App. 2016). Moreover, the four-year limitations period is to be used when “no limitation is otherwise prescribed[.]” A.R.S. § 12-550. Because we find that the three-year statute of limitations applies, this argument fails.

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**3. Motion to Amend**

¶19 The Bank argues that the trial court erred by denying leave to amend the complaint to more specifically plead the declaratory relief claim. The denial of a motion to amend is reviewed for an abuse of discretion. *Alosi v. Hewitt*, 229 Ariz. 449, 452 ¶ 13 (App. 2012). Although leave to amend is liberally granted, *MacCollum v. Perkinson*, 185 Ariz. 179, 185 (App. 1996), it may be denied if the amendment would be futile, *ELM Ret. Ctr., LP v. Callaway*, 226 Ariz. 287, 292 ¶ 26 (App. 2010). As discussed above, the court correctly ruled that the statute of limitations barred the declaratory relief claim. Accordingly, an amendment clarifying the declaratory relief sought would have been futile, and the court did not abuse its discretion by denying it. See *Toorea v. Nolan*, 178 Ariz. 485, 490 (App. 1993).

**CONCLUSION**

¶20 For the foregoing reasons, we affirm. We award costs to Pheasant Grove upon compliance with Arizona Rule of Civil Appellate Procedure 21.



AMY M. WOOD • Clerk of the Court  
FILED: AA



**Nevada**

## Nevada

### October 2018

#### **Rodriguez v. Fiesta Palms, LLC, 134 Nev., Adv. Op. 78 (Oct. 4, 2018) Case No. 72098**

**Motion to set aside judgment denial not an abuse of discretion when knowingly neglected requirements and failed to move promptly for relief:** The Supreme Court affirmed a district court order denying a pro se plaintiff's (Plaintiff) motion to set aside the judgment under Nev. R. Civ. P. 60(b) that was filed five months and three weeks after the court dismissed Plaintiff's case, holding that the district court's decision was not an abuse of discretion.

Plaintiff sued Fiesta Palms, LLC (Defendant) for injuries he sustained at the Fiesta Palms sportsbook. Plaintiff appeared pro se at several hearings. The district court eventually granted Defendant's motion to dismiss in an order stating that Defendant's motion was unopposed and therefore deemed meritorious. Five months and three weeks later, Plaintiff moved to set aside the district court's order of dismissal pursuant to Rule 60(b), recounting his efforts to obtain legal representation. The district court denied relief. The Supreme Court affirmed, holding that the district court did not abuse its discretion in denying relief to Plaintiff, an unrepresented litigant who knowingly neglected procedural requirements and then failed promptly to move for relief.

#### **Howard v. Hughes, 134 Nev. Adv. Op. 80 (Oct 4, 2018) Case No. 72685**

**Evidence presented was sufficient to establish donative intent despite unequal contributions to joint tenancy acquisition of property:** The Supreme Court affirmed the decision of the district court ruling that the parties in this case were joint tenants with equal ownership interests in certain property, taking the opportunity of this case to clarify that the presumptions from *Sack v. Tomlin*, 871 P.2d 298 (Nev. 1994), concerning tenants in common apply to joint tenants.

Elizabeth Howard and Shaughnan Hughes jointly applied for credit in anticipation of purchasing a home. Howard used the proceeds from a third-party settlement award to purchase the property and then executed a quitclaim deed naming herself and Hughes as joint tenants. During their ownership, Howard contributed in excess of \$100,000 to the property, while Hughes contributed approximately \$20,000. Hughes later filed a complaint to partition the property. The district court concluded that Howard and Hughes were joint tenants with equal ownership interests in the property. The Supreme Court agreed, holding (1) the district court correctly interpreted and applied the presumptions from *Sack and Langevin v. York*, 907 P.2d 981 (Nev. 1995); and (2) Hughes presented sufficient evidence of Howard's donative intent at trial, thereby rebutting the secondary presumption that the parties did not own the property equally.

### September 2018

#### **Valley Health System, LLC v. Estate of Jane Doe, 134 Nev., Adv. Op. 76 (Sept. 27, 2018) Case No. 71045**

**Sanctions for Discovery Violations and Violation of Rules of Professional Conduct were appropriate:** The Supreme Court affirmed the order of the district court sanctioning a party for discovery violations and finding that the party's attorneys violated Nevada Rule of Professional Conduct (RPC) 3.3(a)(1) by making a false statement of fact or law to the court, holding that the district court acted within its discretion when it sanctioned the party for violating Nev. R. Civ. P. 16.1.

The Court further concluded that a district court's citation to the RPC in support of a determination of attorney misconduct causes reputational harm that amounts to a sanction and that the district court correctly determined that the attorneys violated RPC 3.3(a)(1). Lastly, although the attorneys were not provided sufficient notice that their conduct was under review, any notice deficiencies were subsequently cured by the attorneys' motion for reconsideration.

**Rosenberg Living Trust v. MacDonald Highlands Realty, 134 Nev., Adv. Op. 69 (Sept. 13, 2018) Case No. 70478**

**Nevada declines to recognize implied restrictive covenants based on a common development scheme:**

In this appeal and cross-appeal from a final judgment in an action arising from the purchase of real property, the Supreme Court affirmed in part and reversed in part the judgment of the district court, holding that Nevada law has not recognized implied restrictive covenants based on a common development scheme, and the Court declines to adopt the doctrine based on the record.

Appellant purchased a residential lot adjoining Respondent's residential lot (the Lot). The Lot also adjoined a golf course and included a small parcel of land that had previously been an out-of-bounds area between the golf course and the property. The Supreme Court (1) affirmed the district court's determination that Appellant cannot maintain an implied restrictive covenant upon the out-of-bounds parcel because the Court declines to recognize implied restrictive easements; (2) reversed the judgment of the district court that Appellant waived any claims it may have had against a real estate company, real estate agent, and developer for misrepresentations or failure to disclose information in the purchase process of the property; and (3) reversed the award of attorney fees and costs.

**Bank of America v. SFR Investments Pool 1, 134 Nev., Adv. Op. 72 (Sept. 13, 2018) Case No. 70501**

**Unconditional tender of super-priority payment results in buyer taking property subject to deed of trust:** In this quiet title dispute between the buyer at a homeowners association (HOA) lien foreclosure sale and the holder of the first deed of trust on the subject property, the Supreme Court reversed the district court's grant of summary judgment for the buyer of the property, holding that the buyer took title subject to the first deed of trust.

Following the HOA lien foreclosure sale, the district court denied summary judgment to the first deed of trust holder in this quiet title action. The Supreme Court reversed, holding that a first deed of trust holder's unconditional tender of the superpriority amount due results in the buyer at foreclosure taking the property subject to the deed of trust.

**Wells Fargo Bank v. Radecki, 134 Nev., Adv. Op 74. (Sept. 13, 2018) Case No. 71405**

**Without a showing of unfairness or irregularity in the HOA sale there is no equitable basis to invalidate an HOA foreclosure sale; The Uniform Fraudulent Transfer Act does not apply to HOA Sales; and deed irregularities are insufficient to invalidate the sale as a whole:** The Supreme Court affirmed the district court's determination that Appellant's deed of trust was extinguished by a valid foreclosure sale, holding that the district court properly concluded that the foreclosure sale should not be invalidated on equitable grounds, the sale did not constitute a fraudulent transfer, and the foreclosure should not be invalidated due to an irregularity in the foreclosure deed.

The case concerned the competing rights to property that was purchased at a homeowners' association foreclosure sale. Appellant was the beneficiary of a deed of trust on that property at the time of the sale. Respondent was the winning bidder at the sale. After a bench trial to determine whether Respondent or Appellant had superior title to the property, the district court quieted title in favor of Respondent, holding that Appellant's deed of trust was extinguished pursuant to *SFR Investments Pool 1, LLC v. U.S. Bank, N.A.*, 334 P.3d 408 (Nev. 2014). The Supreme Court affirmed, holding (1) there was no unfairness or irregularity in the foreclosure process, and therefore, the district court correctly rejected Appellant's equitable argument; (2) the foreclosure sale did not constitute a fraudulent transfer under the Uniform Fraudulent Transfer Act; and (3) an irregularity in the foreclosure deed upon sale does not invalidate the foreclosure as a whole.

## **August 2018**

### **O'Connell v. Wynn Las Vegas, 134 Nev., Adv. Op. 67 (Aug. 30, 2018) Case No. 71789**

#### **Hourly billing records are not a prerequisite to obtaining an attorney's fee award in a contingency case:**

The Supreme Court held that district court cannot deny attorney fees otherwise allowed by agreement, rule, or statute because a lawyer representing a client on a contingency fee basis does not provide proof of hourly billing records. Plaintiff sought an attorney fees award under Nev. R. Civ. P. 68 after suing Defendant for negligence after she tripped and fell on Defendant's property. Plaintiff requested \$96,000 in attorney fees, which she calculated as forty percent of the reduced judgment amount based on a forty-percent contingency fee agreement with her attorneys. The district court denied her request because, in part, Plaintiff did not submit hourly billing records of the work performed by her counsel to show that the requested fee was reasonable.

The Supreme Court reversed the denial of Plaintiff's request for attorney fees and remanded for a full hearing on the request, holding (1) a lawyer who represents a client on a contingency fee basis need not submit hourly billing records before he or she can be awarded attorney fees; and (2) the district court improperly analyzed certain factors set forth in *Beattie v. Thomas*, 668 P.2d 268, 274 (Nev. 1983) in otherwise denying Plaintiff's fees request.

### **SFR and Star Hills v. The Bank of New York Mellon, 134 Nev., Adv. Op. 58 (Aug. 2, 2018) Case No. 72931**

**State Supreme Court rules on HOA super priority statutes:** The Nevada Supreme Court has opined yet again on Nevada's super-priority lien statutes as they existed before they were amended in October 2015. In the Star Hill Homeowners Association case, the court was presented with the question as to "whether NRS 116.31168(1)'s incorporation of NRS 107.090 required a homeowner's association to provide notices of default and/or sale to persons or entities holding a subordinate interest even when such persons or entities did not request notice, prior to the amendment that took effect on October 1, 2015." The court ruled in the affirmative, concluding that NRS 116.31168 required notifying all subordinate security interest holders before a homeowner's association (HOA) foreclosure sale.

A significant percentage of federal litigation on the HOA lien issue was stayed pending this ruling, so we now expect this litigation to become active in very short order. In addition, the Bourne Valley Court Trust case opinion from the U.S. Court of Appeals for the 9th Circuit that declared NRS 116.3116 et seq unconstitutional for failure to require notice is no longer good law in light of the Nevada Supreme Court interpretation.

At this point, there are two remaining servicer defenses to an HOA foreclosure:

1. There was an insufficient purchase price plus some element of fraud, unfairness, or oppression in the sale.
2. The loan is held by one of the government-sponsored enterprises, such as Fannie Mae or Freddie Mac.

## **June 2018**

### **West Sunset Trust v. Nationstar Mortgage, 134 Nev., Adv. Op. 47 (Jun. 28, 2018) Case No. 70754**

**To invalidate HOA sale, failure to provide notice requires prejudice:** In the West Sunset 2050 Trust case, the homeowner's association (HOA) provided notice of sale to the current deed of trust beneficiary, but failed to provide the notice of default to the deed of trust beneficiary that was in place when the HOA notice of default was recorded. The failure to provide notice, without evidence of how that failure prejudiced the beneficiary's rights, wasn't enough to invalidate the HOA foreclosure sale.

The court held that that because the notice of default was recorded at the time the current assignee recorded its assignment, the notice of default recording was sufficient to consider the current assignee notified about the HOA notice of default. The court further held that a factoring agreement (when the accounts receivable are sold to a factor at a discounted price) where the HOA collections were sold for a discounted price did not deprive the HOA of its standing to foreclose. The court held that the factoring agreement didn't split the lien and collection, it merely changed where the money was to be sent.

**Carrington Mortgage Holdings v. R. Ventures VIII, 134 Nev., Adv. Op. 46 (Jun. 14, 2018) Case No. 71437**

**Statute for fees and costs only applies when action is brought by HOA:** NRS 116.3116 addresses homeowner's association (HOA) superpriority liens. NRS 116.3116(8) provides that an action brought under this section includes fees and costs for a prevailing party. In the R Ventures VIII case, the third-party purchaser at an HOA sale brought a quiet title action and the district court awarded attorney's fees and costs to the third-party purchaser under NRS 116.3116(8). The Supreme Court reversed, holding that "any action brought under this section" referred solely to an action by an association to enforce its lien, not a quiet title and declaratory judgment action by a third-party purchaser.

**May 2018**

**Saticoy Bay (Christine View) v. Federal National Mortgage Assoc., 134 Nev., Adv. Op. 36 (May 17, 2018) Case No. 69419**

**State Supreme Court rules that Fannie Mae is protected by Federal Foreclosure Bar:** In the Saticoy Bay case, the borrowers obtained a home loan secured by a deed of trust. The deed was assigned to Fannie Mae. A third-party purchaser bought the home at an HOA foreclosure sale, then sued to quiet title. The district court awarded summary judgment to Fannie Mae, finding that the foreclosure sale didn't extinguish Fannie Mae's interest without the Federal Housing Finance Agency's (FHFA) consent under the Federal Foreclosure Bar (also known as HERA). The Supreme Court of Nevada agreed and held that the Federal Foreclosure Bar invalidates any purported extinguishment of a regulated entity's property interest while under FHFA conservatorship unless the FHFA consents. The court further held that the regulated entity, including Fannie Mae or Freddie Mac, has standing to assert the Federal Foreclosure Bar in a foreclosure case.

**Cotter v. EJDCR (Cotter), 134 Nev., Adv. Op. 32 (May 3, 2018) Case No. 71267**

**Work product can be shared with third parties with a common interest in the litigation without waiving the work product privilege:** The Supreme Court adopted the common interest rule that allows attorneys to share work product with third parties that have common interest in litigation without waiving the work-product privilege.

Petitioner shared purported work-product material through emails with third parties who were intervening plaintiffs in the litigation and were suing the same defendants on similar issues. The district court concluded, without reviewing the emails that Petitioner must disclose the emails based on his insufficient showing of common interest between him and the intervening plaintiffs. The Supreme Court granted Petitioner's petition for extraordinary relief and directed the district court to refrain from compelling disclosure of the emails before it conducts an in camera review to establish clear findings concerning the work-product privilege, holding that Petitioner and the intervening Plaintiffs shared common interest in litigation.

## **Las Vegas Development Group v. Blaha, 134 Nev., Adv. Op. 33 (May 3, 2018) Case No. 71875**

**Courts rule that claim for quiet title to determine superior title has five-year statute of limitation:** The homeowner's association (HOA) and lender each initiated separate non-judicial foreclosures. The HOA's foreclosure sale was held pursuant to NRS Chapter 116 and the property was sold to a third-party purchaser, who recorded the deed in April 2011. About five months later, the lender conducted a sale pursuant to NRS Chapter 107; the property was sold to another third-party purchaser, who sold it to a fourth party, who recorded the deed in September 2011. The purchaser at the HOA's earlier sale brought an action for quiet title against the purchaser from the second sale. The second sale purchaser filed a motion for summary judgment, arguing that the claims were barred by the statute of limitations. NRS 107.0805(5)-(6) requires that an action to challenge a foreclosure sale's validity be brought within 90 days of the foreclosure sale (120 days if proper notice isn't given).

The district court held that NRS 107.0805(5)-(6) applies to actions challenging the procedural aspects of a non-judicial foreclosure sale. The Supreme Court agreed, but added that where the claim requires determining who holds superior title to a land parcel, the action is governed by NRS 11.080, which provides for a five-year statute of limitations.

## **April 2018**

### **U.S. Home Corp., v. The Ballesteros Trust, 134 Nev. Adv. Op. 25 (Apr. 13, 2018) Case No. 68810**

**Federal Arbitration Act applied as the underlying transaction involved interstate commerce:** In this construction defect action brought by Homeowners, the Supreme Court reversed the order of the district court denying Defendant's motion to compel arbitration, holding that the Federal Arbitration Act (FAA) did not govern the arbitration agreement contained in the common-interest community's covenants, conditions, and restrictions (CC&Rs) because, contrary to the conclusion of the district court, the underlying transaction involved interstate commerce. Further, to the extent that Nevada case law concerning procedural unconscionability disfavors arbitration of disputes over transactions involving interstate commerce, that case law is preempted by the FAA. The Court remanded this case for entry of an order directing the parties to arbitration.

### **Cain v. Price, 134 Nev., Adv. Op. 26 (Apr. 12, 2018) Case No. 69889**

**One party's material breach of a contract releases the non-breaching party's contractual obligation to a third-party beneficiary:** The promisor in this case failed to fulfill its contractual obligations to Appellants under a settlement agreement. Appellants sued the promisor and six of its officers, including Respondents. Respondents, the third-party beneficiaries, claimed that the settlement agreement released them from liability for the promisor's actions and precluded Appellants' suit. The district court granted summary judgment to Respondents. The Supreme Court reversed, holding that the promisor's material breach of the settlement agreement released Appellants from their obligation under that agreement not to sue the promisor's officers. Therefore, the Court reversed the district court's grant of summary judgment and remanded the matter to the district court for further proceedings.

## **March 2018**

### **Southworth v. EJDC (Las Vegas Paving) 134 Nev., Adv. Op. 20 (Mar. 29, 2018) Case No. 73655**

**Time to appeal is jurisdictional and mandatory (even from small claims actions):** The time to appeal outlined in the Justice Court Rules of Civil Procedure (JCRCP), specifically the five-day period set forth in JCRCP 98, is jurisdictional and mandatory, therefore removing for the district court's jurisdiction an untimely appeal from justice court. Petitioner filed a small claims complaint against real party in interest Las Vegas Paving Corporation (LVPC). The justice of the peace pro tempore granted Petitioner full relief. LVPC appealed to the district court. Petitioner moved to have the appeal dismissed under JCRCP 98. The

district court denied the motion, thereby exerting jurisdiction to hear the matter despite an untimely appeal. Petitioner petitioned the Supreme Court for a writ of mandamus or prohibition arresting the district court's improper exercise of jurisdiction or compelling the district court to grant his motion to dismiss. The Supreme Court granted the petition, holding that because LVPC filed its appeal outside the allotted five-day period, the district court did not have jurisdiction to entertain LVPC's untimely appeal.

**Dezzani v. Kern, 134 Nev., Adv. Op. 9 (Mar. 1, 2018) Case No. 69410**

**Attorney not considered an agent of homeowner's association:** In the Dezzani case, the Nevada Supreme Court considered consolidated appeals to determine, in part, whether an attorney can be held liable by a unit owner for claims of retaliatory action under Nevada Revised Statutes (NRS) § 116.31183 through the classification of that attorney as an agent of a common-interest community homeowners' association. After discussing rules of statutory interpretation and principles of public policy, the court in Dezzani ruled that "an attorney who is providing legal services and acting on behalf of a common-interest community homeowners' association is not an 'agent' of the association for purposes of NRS 116.31183" and cannot be liable under that statute for acting in that capacity.

NRS § 116.31183, in part, provides that a separate action can be brought by a unit owner when a homeowner's association agent takes certain retaliatory action against that unit owner. Although the term "agent" isn't defined in NRS Chapter 116 on common-interest ownership, the court found that NRS § 116.31164, which governs the lien foreclosures, uses the words "agent" and "attorney" distinctly. The court said this distinction demonstrates that the Legislature used the term "attorney" when it intended to address situations applying to attorneys and the term "agent" when it intended to generically address the duties owed by agents. As a result, the court held that the Legislature did not intend for attorneys to be included in the term "agent" for the purposes of retaliatory action claims brought pursuant to NRS § 116.31183.

Further, the court declined to conclude as a matter of public policy that attorneys are included in the term "agent" in NRS § 116.31183. After comparing a traditional agent-principal relationship to an attorney-client relationship, the court declared that because of an attorney's ethical obligations to be candid with a client and zealously represent that client, and the presumption that an attorney providing legal services isn't generally subject to third-party liability for that representation, the relationships should not be treated the same under the statute.

**Pawlik v. Deng, 134 Nev., Adv. Op. 11 (Mar. 1, 2018) Case No. 71055**

**Notice of expiration of two year tax sale redemption period is 60 days after the two year redemption period expires:** Deng defaulted on special assessments on Las Vegas residential real property, which entered delinquency and underwent a duly noticed and authorized sale (NRS Chapter 271). On January 27, 2014, Pawlik purchased the property at the sale and was issued a sales certificate. Under NRS 271.595(1), Deng had a two-year redemption period from that date. On January 7, 2016, Pawlik began attempting to serve Deng with notice of the upcoming expiration of the redemption period and Pawlik's intent to apply for a deed pursuant to NRS 271.595(3). NRS 271.595 creates a clear redemption period of two years *and also creates an ambiguous 60-day redemption window after notice that the certificate holder will demand a deed*. On March 14, 2016, 47 days after the Dengs' two-year redemption period expired and 67 days after Pawlik began attempting service, Pawlik applied for a deed. The treasurer denied the request. Deng redeemed on April 6, 2016, with full payment to the city. Pawlik sought to quiet title and applied for a writ of mandamus to compel issuance of the deed. The Nevada Supreme Court affirmed dismissal, finding that the 60-day period does not overlap with the two-year period. NRS 271.595 requires that the 60-day notice and additional redemption period begin after the end of the two-year redemption period. Pawlik attempted service on Deng before the end of the two-year redemption period, which provided Deng with less than two years and 60 days of redemption.

## February 2018

### **Castillo v. United Federal Credit Union, 134 Nev., Adv. Op. 3 (Feb. 1, 2018) Case No. 70151**

**A claim for statutory damages can be combined with a claim for elimination of the deficiency amount to determine jurisdiction:** Castillo entered into a vehicle and security agreement with the Credit Union. The Credit Union repossessed and sold the vehicle and notified Castillo that she owed a deficiency balance of \$6,841.55. Castillo filed a complaint, alleging that the notice of sale violated the Uniform Commercial Code (UCC) and that the case met the prerequisites for a class action under NRC 23(a) and that the class was maintainable under NRC 23(b). She never subsequently requested that the court certify the class due to the anticipation of discovery. Castillo amended her complaint, reducing the number of causes of action, and asserting that the district court had jurisdiction because "each [c]lass [m]ember is entitled to the elimination of the deficiency balance and the statutory damages [NRS 104.9625(3)(b)]," so "the amount in controversy exceeds \$10,000.00." The district court dismissed for lack of subject matter jurisdiction because Castillo failed to demonstrate individual entitlement to damages in excess of \$10,000. The Supreme Court of Nevada reversed. Because Castillo sought appropriate injunctive relief, the district court possessed original jurisdiction. In Nevada, aggregation of putative class member claims is not permitted to determine jurisdiction, but statutory damages can be combined with statutory damages on a per person basis to determine jurisdiction.

### **SFR v. First Horizon Home Loans, 134 Nev., Adv. Op. 4 (Feb. 1, 2018) Case No. 71325**

**Notice of foreclosure is only required to the party who is entitled to receive it at the time of the notice:** Two days after Silver Springs Homeowner's Association recorded a notice of foreclosure sale, First Horizon Home Loans recorded its own notice of foreclosure sale. First Horizon was the first to hold its foreclosure sale and bought the property on a credit bid. Before First Horizon recorded its trustee's deed, Silver Springs held its foreclosure sale, at which SFR purchased the same property. SFR sued to quiet title. The district court granted First Horizon summary judgment, finding that Silver Springs had not provided the statutorily required notices pursuant to NRS 116.31162 and NRS 116.311635. The Supreme Court of Nevada reversed and remanded, finding that the district court erred in finding Silver Springs' foreclosure sale invalid. Because NRS 116.31162 requires a homeowner's association (HOA) foreclosing on its interest to record its notice of foreclosure sale, any subsequent buyer purchases the property subject to that notice that a foreclosure may be imminent. Therefore, an HOA need not restart the entire foreclosure process each time the property changes ownership so long as the HOA has provided the required notices to all parties who are entitled.

## **Nevada Court of Appeals – Unpublished Decisions**

**October 2018**

### **LN Management (Sarment) v. Wells Fargo Bank, Case Number 72979 c/w 73451 (Oct. 5, 2018)**

**Failure to timely seek to vacate a judgment:** District Court properly denied motion to set aside dismissal in the quiet title action and properly dismissed the complaint in the related action. In 2013, Wells Fargo was granted a motion to dismiss in a quiet title action related to an HOA foreclosure. Three years later LN attempted to have the dismissal set aside, the District Court properly denied the motion under NRCP 60(b)(4) which requires “for a judgment to be void there must be a defect in the court’s authority to enter judgment through either lack of personal jurisdiction or jurisdiction over the subject matter in the suit.” The Court of Appeals found no challenge by LN to jurisdiction or subject matter. A party may seek to vacate a judgment by motion or independent action, not both. Accordingly, bringing both was improper, however the court properly dismissed the independent action holding that LN failed to allege any facts explaining the three year delay in seeking to set aside the prior judgment.

**August 2018**

### **Pioneer Ave 201 Trust v. Bank of New York Mellon, Case Number 73134 (Aug. 30, 2018)**

**Substantial compliance standard for foreclosure notices:** (Reversed and Remanded) Summary judgment granted in an HOA foreclosure quiet title action. Summary Judgment granted on the basis of BONY not receiving notices under NRS 116.3116 and NRS 107.090. To determine sufficient notice pursuant to statute “we examine whether the purpose of the statute or rule can be adequately served in a manner other than by technical compliance with the statutory or rule language.” Therefore the Supreme Court applies substantial compliance, requiring that the interest holder has actual notice and is not prejudiced. Reversed and remanded for district court to make additional findings.

### **Cody v. Wilmington Savings Fund, Case Number 72603 (Aug. 27, 2018)**

**Scope of Mediation Petition for Review:** Appeal from a Petition for Judicial Review of a foreclosure mediation. Appellant argued at the District Court that he had previously accepted a loan modification from Respondent, Respondent refused to acknowledge the loan modification, and the loan balance at mediation was incorrect, and this was lack of good faith. The Court denied the petition for review holding that the arguments were outside the scope of the petition for review and lacking in evidentiary support. Court of Appeals affirmed the District Court holding that Appellant challenged the denial of the evidentiary hearing, not the issue of the scope of the Petition.

### **Argo v. Bayview, Case Number 71215 (Aug. 27, 2018)**

**Appropriate to consider other Court order attached to Complaint:** Motion to dismiss quiet title action filed by third party purchaser at bankruptcy trustee sale was properly granted where the third party purchaser failed to timely record its interest in the subject property pursuant to the bankruptcy court order. It was proper for the District Court to consider the bankruptcy court order where it was attached to the complaint.

## July 2018

### **Jack Ferm v. State of Nevada, Office of the AG, Case Number 72753 (July 13, 2018)**

Appellant argues that AG breached a contract and breached the covenant of good faith and fair dealing, related to a plea agreement he reached with the AG. Assuming Ferm could bring a civil action for money damages related to a breach of a criminal plea agreement, Ferm failed to identify any duty imposed and/or breached by the AG. Additionally, the plea agreement did not contain a non-disclosure provision. Further, as there was no non-disclosure agreement in the plea agreement, communicating with the media was not a breach of the covenant of good faith and fair dealing. Ferm had no justified expectation that the AG's office would refrain from engaging in the communication at issue here.

## May 2018

### **Castl v. Pennymac Holdings, LLC, Case Number 71082 c/w 71990, May 9, 2018**

Borrower brought a petition for judicial review of a foreclosure mediation and a related civil case asserting trespass, quiet title and declaratory and injunctive relief. First, borrower alleged in the petition for judicial review that the absence of an assignment from the beneficiary to the receiver was evidence of a missing assignment. The District Court correctly held that no assignment was required as the transfer was proper under 12 U.S.C. 1821(d)(2)(A), (G)(i).

Next, Borrower argued that the District Court failed to address her claim that the signature on the Note was forged. The District Court held that the forgery claim was outside the scope of a petition for review. Beneficiary argued that the recent case of *Nationstar Mortg., LLC v. Rodriguez* where the Supreme Court held that a petition for judicial review is not meant as an avenue to bring original claims was the applicable standard. The Supreme Court explained that while *Wood v. Germann* held that certain unspecified challenges to the veracity of a lender's loan documents can fall within the scope of a petition for review, Appellant/Borrower failed to address the *Nationstar* argument and accordingly waived any challenge to the argument that the original claim of forgery was outside the scope of petition for judicial review. The Appellate Court affirmed the denial of the petition for judicial review.

Next, under the separate civil action, the Court of Appeals reviewed the dismissal of the complaint on issue preclusion grounds, based on the denial of the petition for judicial review. Borrower asserted that the claims for Statute of Limitations, Trespass and Forgery were not litigated in the petition for judicial review. Beneficiary did not dispute the statute of limitations and trespass claims were not litigated and accordingly the District Court erred in dismissing those claims on issue preclusion grounds.

As to the forgery claim, while Beneficiary argued that the lower court record included a finding that Borrower signed the Note, despite finding the claim for forgery was beyond the scope of the petition for review, the record did not support such a finding and accordingly it was an error to dismiss that claim on issue preclusion grounds.

Beneficiary, asserted the "harmless error doctrine" (NRC 61 – requiring the court at every state of the proceeding to disregard errors that do not affect a party's substantial rights) arguing that dismissal was necessary as trespass and statute of limitations. The court held that the trespass issue required a factual finding as it was disputed whether entry was authorized and to what extent. As to Statute of Limitations, dismissal was appropriate and harmless error, as the statutory limitation period for contracts does not apply to non-judicial foreclosure. Matter remanded to address the trespass and forgery based claims.

**Wells Fargo v. Moore, Case Number 70844; Wells Fargo v. Pappas, Case Number 70887 (Dec. 18, 2017)**

**Beneficiary must certify it possesses original deed of trust when producing certified copy in mediation:**

The Nevada Court of Appeals recently held in the Pappas and Moore decisions that in order to produce a certified copy of a deed of trust in mediation for purposes of NRS § 107.086(5) and Foreclosure Mediation Rule (FMR) 12(7)(a), a beneficiary must certify that it is in possession of the original document in accordance with FMR 12(8)(a)(2).

Under the amended FMR, the beneficiary of a deed of trust must prepare and submit certain documents to the mediator and the homeowner, including "[t]he original mortgage note or a certified copy of the mortgage note, together with each assignment or endorsement of said note, the original or a certified copy of the deed of trust, and a certified copy of each assignment of the deed of trust." This must happen at least 10 days before mediation.

In the two appellate court decisions at issue, the beneficiary attempted to produce a certified copy of the homeowner's deed of trust in mediation. In both instances, the document included a certification by a deputy recorder indicating that it was a true and correct copy of the recorded deed of trust. However, in each case, the mediator found that this was insufficient because it didn't satisfy NRS § 107.086(5) or FMR 12(7) (a). The beneficiary petitioned for judicial review of the mediator's decision; the district court agreed with the mediator by holding that FMR 12(8) (a) (2) required a beneficiary to certify that it was in possession of the original deed of trust to meet the "certified copy" standard.

In both instances, the beneficiary appealed the district court decision, but the Court of Appeals affirmed the lower courts' decisions, holding that unlike a deed of trust assignment, it is not merely the existence of a deed of trust that's important, but also possession of the original.

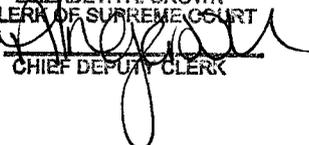
IN THE SUPREME COURT OF THE STATE OF NEVADA

ENRIQUE RODRIGUEZ, AN  
INDIVIDUAL,  
Appellant,  
vs.  
FIESTA PALMS, LLC, A NEVADA  
LIMITED LIABILITY COMPANY, D/B/A  
PALMS CASINO RESORT, N/K/A FCH1,  
LLC, A NEVADA LIMITED LIABILITY  
COMPANY,  
Respondent.

No. 72098

FILED

OCT 04 2018

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY   
CHIEF DEPUTY CLERK

Appeal from a district court order denying a motion to set aside the judgment under NRCP 60(b). Eighth Judicial District Court, Clark County; Joseph Hardy, Jr., Judge.

*Affirmed.*

Marquis Aurbach Coffing and Micah S. Echols and Adele V. Karoum, Las Vegas,  
for Appellant.

Lemons, Grundy & Eisenberg and Robert L. Eisenberg, Reno,  
for Respondent.

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BEFORE CHERRY, PARRAGUIRRE and STIGLICH, JJ.

*OPINION*

By the Court, STIGLICH, J.:

This appeal requires us to consider two fundamental interests of our justice system: the importance of deciding cases on the merits and the

need to swiftly administer justice. Deciding cases on the merits sometimes requires courts to accommodate the needs of litigants—especially unrepresented litigants like the appellant in this case. Swiftly administering justice requires courts to enforce procedural requirements, even when the result is dismissal of a plaintiff’s case. We afford broad discretion to district courts to balance these interests within the context of an NRCP 60(b)(1) motion for relief. In this case, a district court denied a pro se plaintiff’s NRCP 60(b) motion for relief that was filed five months and three weeks after the court dismissed his case because he did not comply with procedural requirements. That decision was not an abuse of discretion. Accordingly, we affirm.

#### *BACKGROUND*

In 2006, appellant Enrique Rodriguez sued Fiesta Palms, LLC, for injuries he sustained at the Fiesta Palms sportsbook. Those injuries occurred when a Fiesta Palms employee threw merchandise into a crowd, causing an unknown customer to dive into Rodriguez’s knee. Rodriguez won a judgment for \$6,051,589.38.

Fiesta Palms appealed to this court. Identifying numerous evidentiary errors, this court reversed the judgment and remanded for a new trial. *FCH1, LLC v. Rodriguez*, 130 Nev. 425, 435, 335 P.3d 183, 190 (2014). Following remittitur on November 4, 2014, Rodriguez’s counsel moved to withdraw from representing Rodriguez. The district court granted that motion and subsequently granted two continuances to allow Rodriguez to secure counsel.

Rodriguez eventually secured new counsel. The district court proceeded to grant two more continuances of the trial, one to accommodate Rodriguez and one to accommodate Fiesta Palms. Approximately one month before trial, Rodriguez’s new counsel moved to withdraw from the

case. The court held a pretrial conference, at which neither Rodriguez nor his counsel appeared. Fiesta Palms consented to the proposed withdrawal, which the district court granted. The district court pushed the trial date to May 2, 2016, to allow Rodriguez to again secure new counsel.

Fiesta Palms timely filed numerous pretrial motions: a motion to dismiss, a motion for partial summary judgment, and 16 motions in limine. Rodriguez filed nothing in response and appeared pro se at the hearing on the motions in limine on April 7, 2016. He intimated that he was struggling to find counsel to represent him and requested a six-month continuance. The court denied that request and then granted the motions in limine as unopposed pursuant to EDCR 2.20(e). The court then warned him, “Mr. Rodriguez, if you want to pursue this case, you have to do something.” The court then informed him of the pending April 14 hearing on Fiesta Palms’ motion to dismiss. The court reiterated, “If you can’t find an attorney, you have to do it yourself. It’s your claim. You are the plaintiff. If you want to pursue it, you have to follow the rules like anyone else.”

Rodriguez filed nothing before the April 14 hearing and appeared without legal representation. Rodriguez stated that he had contacted a local attorney who agreed to appear at the hearing, but no attorney showed up. Rodriguez requested a continuance, which the court denied. The court explained that he had a duty to respond to Fiesta Palms’ motions and told him, “[W]hile we are to accord some accommodations and deference to self-represented litigants, you still have to follow the rules.” On April 20, 2016, the district court entered an order granting Fiesta Palms’ motion to dismiss. That order stated: “Defendant’s Motion was unopposed and therefore deemed meritorious pursuant to EDCR 2.20(e).”

Five months and three weeks later, on October 14, 2016, Rodriguez moved to set aside the district court's order of dismissal pursuant to NRCPC 60(b). As good cause for his delay, Rodriguez alleged various medical issues and recounted his efforts to obtain legal representation. He provided affidavits from his girlfriend and medical provider in support of his claim that he was in poor health.

After full briefing and oral argument, the district court denied Rodriguez's motion for NRCPC 60 relief. In its written order, the district court considered the factors set forth in *Yochum v. Davis*, 98 Nev. 484, 486, 653 P.2d 1215, 1216 (1982), and concluded that they favored denial of Rodriguez's NRCPC 60 motion. Rodriguez appeals that order.

#### *DISCUSSION*

Rodriguez's primary argument on appeal is that the district court abused its discretion when it denied his motion to set aside the judgment under NRCPC 60(b).<sup>1</sup> "The district court has wide discretion in deciding whether to grant or deny a motion to set aside a judgment under NRCPC 60(b). Its determination will not be disturbed on appeal absent an

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<sup>1</sup>We reject Rodriguez's additional arguments. First, our disposition renders moot his appeal from the district court's order denying his request to set aside the order granting Fiesta Palms' motions in limine. Second, we decline to address Rodriguez's argument relating to the judge's law clerk's alleged conflict of interest. Rodriguez was represented when the district court informed the parties of the potential conflict and failed to pursue this issue below. See *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) ("A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal."). Finally, we decline to consider whether dismissal was an appropriate discovery sanction, since the district court granted Fiesta Palms' motion to dismiss because it was unopposed, not as a discovery sanction. See EDCR 2.20(e).

abuse of discretion.” *Cook v. Cook*, 112 Nev. 179, 181-82, 912 P.2d 264, 265 (1996).

In general, the rules of civil procedure “shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.” NRCP 1. “The salutary purpose of Rule 60(b) is to redress any injustices that may have resulted because of excusable neglect or the wrongs of an opposing party.” *Nev. Indus. Dev., Inc. v. Benedetti*, 103 Nev. 360, 364, 751 P.2d 802, 805 (1987). NRCP 60(b)(1) provides that a district court “may relieve a party or a party’s legal representative from a final judgment, order, or proceeding” on grounds of “mistake, inadvertence, surprise, or excusable neglect.” In *Yochum v. Davis*, this court established four factors that indicate whether NRCP 60(b)(1) relief is appropriate: “(1) a prompt application to remove the judgment; (2) the absence of an intent to delay the proceedings; (3) a lack of knowledge of procedural requirements; and (4) good faith.”<sup>2</sup> 98 Nev. at 486, 653 P.2d at 1216. Finally, when evaluating an NRCP 60(b)(1) motion, “the district court must consider the state’s underlying basic policy of deciding a case on the merits whenever possible.” *Stoecklein v. Johnson Elec., Inc.*, 109 Nev. 268, 271, 849 P.2d 305, 307 (1993).

*Whether Rodriguez acted promptly*

Beginning with the first *Yochum* factor, a motion for NRCP 60(b)(1) relief must be filed “within a reasonable time” and “not more than 6 months after the proceeding was taken or the date that written notice of

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<sup>2</sup>*Yochum* additionally required the moving party to “tender a ‘meritorious defense’ to the claim for relief.” 98 Nev. at 487, 653 P.2d 1215. We overruled that requirement in *Epstein v. Epstein*, 113 Nev. 1401, 1405, 950 P.2d 771, 772 (1997).

entry of the judgment or order was served.” NRCP 60(b). The six-month period “represents the extreme limit of reasonableness.” *Union Petrochemical Corp. of Nev. v. Scott*, 96 Nev. 337, 339, 609 P.2d 323, 324 (1980) (internal quotation marks omitted).

As the district court noted, Rodriguez filed his request for NRCP 60 relief “approximately five months and three weeks after” the order was entered dismissing his case. That is, his motion was filed just before “the extreme limit of reasonableness.” *Union Petrochemical*, 96 Nev. at 339, 609 P.2d at 324. Rodriguez argues that this delay was excusable in light of his circumstances, namely, that he was living outside of Nevada, that he was struggling to find counsel, and that he was in poor physical and mental health.

While this case had a voluminous record and Rodriguez evidently struggled to find counsel, the facts relevant to an NRCP 60 motion would not have been overly burdensome for an attorney to review. Indeed, the motion that Rodriguez ultimately filed was not complex, but mostly consisted of allegations of personal hardship. Those allegations are partially rebutted by the fact that he was personally present when the district court granted Fiesta Palms’ motion to dismiss, and therefore evidently capable of acting on his behalf.

Ultimately, the district court was in a better position than we are to determine whether Rodriguez’s nearly six-month delay was excusable. The record supports the district court’s determination that it was not. *See Kahn v. Orme*, 108 Nev. 510, 514, 835 P.2d 790, 793 (1992), *overruled in part on other grounds by Epstein*, 113 Nev. at 104, 950 P.2d at 772 (affirming a district court’s finding that an unrepresented litigant was not prompt in filing an NRCP 60(b) motion “nearly six months” after entry

of a default judgment). This factor weighs heavily in favor of affirmance. See *Union Petrochemical*, 96 Nev. at 339, 609 P.2d at 324 (“[W]ant of diligence in seeking to set aside a judgment is ground enough for denial of such a motion.”).

*Whether Rodriguez intended to delay the proceedings*

Turning to the second *Yochum* factor—whether the party seeking NRCP 60(b)(1) relief exhibited “an intent to delay the proceedings,” 98 Nev. at 486, 653 P.2d at 1216—the district court noted that “[t]here have been numerous continuances of the trial date at [Rodriguez]’s request.” However, the district court did not make a specific finding as to Rodriguez’s intent.

The facts of this case support an inference of an intent to delay. That is, Rodriguez exhibited a pattern of repeatedly requesting continuances and filed his NRCP 60(b)(1) motion just before the six-month outer limit. His conduct differed markedly from that of a litigant who wishes to swiftly move toward trial. Cf. *Stoecklein*, 109 Nev. at 272, 849 P.2d at 308 (wherein a litigant “retained new local counsel promptly after learning of the judgment” and “timely filed his motion for relief”). His conduct indicates that he intended to delay trial until he secured new counsel, rather than proceeding without representation. Thus, this factor favors affirmance.

*Whether Rodriguez lacked knowledge of the procedural requirements*

Regarding the third *Yochum* factor, Rodriguez argues that he was not aware of the procedural requirements because he lacked representation at the time that the motion to dismiss was filed. The district court rejected this argument upon finding that Rodriguez “had actual knowledge of the mandatory procedural requirements imposed upon him.”

Fiesta Palms argues that Rodriguez was on legal notice as to the procedural requirements because the district court and Fiesta Palms mailed notices to his home address. Fiesta Palms further argues that Rodriguez was put on actual notice at the April 7 hearing, when the court informed him of the upcoming hearing and warned him, “Mr. Rodriguez, if you want to pursue this case, you have to do something.”

Rodriguez counters that he did not receive the notices that were mailed to his house and he misunderstood the court’s warning at the April 7 hearing. That is, he claims to have understood that warning to mean that he must appear at the hearing on Fiesta Palms’ motion to dismiss; he did not realize he was required to file a written opposition. This claim is unpersuasive because Rodriguez personally witnessed the court grant Fiesta Palms’ motions in limine because he did not file a written opposition. Rodriguez should have inferred the consequences of not opposing the motion to dismiss, especially in light of the court’s express warning to take action. Moreover, Rodriguez had previously filed a motion to recuse a prior judge on this case without the assistance of counsel, so he was evidently capable of filing motions on his own. Lastly, in general, the rules of civil procedure “cannot be applied differently merely because a party not learned in the law is acting pro se.” *Bonnell v. Lawrence*, 128 Nev. 394, 404, 282 P.3d 712, 718 (2012). While district courts should assist pro se litigants as much as reasonably possible, a pro se litigant cannot use his alleged ignorance as a shield to protect him from the consequences of failing to comply with basic procedural requirements. *See Kahn*, 108 Nev. at 515, 835 P.2d at 793 (concluding that an unrepresented party’s “failure to obtain new representation or otherwise act on his own behalf is inexcusable”).

In short, the record supports the district court's finding that Rodriguez was aware of the procedural requirements imposed upon him. This factor favors affirmance.

*Whether Rodriguez acted in good faith*

The district court considered but made no finding regarding the fourth *Yochum* factor—whether Rodriguez acted in “good faith.” 98 Nev. at 486, 653 P.2d at 1216. “Good faith is an intangible and abstract quality with no technical meaning or definition and encompasses, among other things, an honest belief, the absence of malice, and absence of design to defraud.” *Stoecklein*, 109 Nev. at 273, 849 P.2d at 309. Because the district court made no finding as to this fourth *Yochum* factor, we decline to consider it further. Even assuming Rodriguez acted in good faith, we affirm the district court's decision based on the first three *Yochum* factors, all of which favor denial of Rodriguez's NRCP 60(b)(1) motion.

**CONCLUSION**

The decision to grant or deny an NRCP 60(b)(1) motion for relief requires a district court to balance the preference for resolving cases on the merits with the importance of enforcing procedural requirements. When finding that balance, a district court must carefully consider all of the relevant facts, including the difficulties faced by pro se litigants such as Rodriguez. The record in this case indicates that the district court carefully considered Rodriguez's unique circumstances when it denied his NRCP 60(b)(1) motion. We afford “wide discretion” to district court determinations within this realm, *Stoecklein*, 109 Nev. at 271, 849 P.2d at 307, and we conclude that there was no abuse of discretion in denying NRCP 60(b)(1)

relief to an unrepresented litigant who knowingly neglected procedural requirements and then failed to promptly move for relief. Accordingly, we affirm.

Stiglich, J.  
Stiglich

We concur:

Cherry, J.  
Cherry

Parraguirre, J.  
Parraguirre

IN THE SUPREME COURT OF THE STATE OF NEVADA

ELIZABETH C. HOWARD, AN  
INDIVIDUAL,  
Appellant,  
vs.  
SHAUGHNAN L. HUGHES,  
Respondent.

No. 72685

FILED

OCT 04 2018

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY: *[Signature]*  
CHIEF DEPUTY CLERK

Appeal from a district court order in an action to partition real property. Tenth Judicial District Court, Churchill County; Thomas L. Stockard, Judge.

*Affirmed.*

Kozak & Associates, LLC, and Charles R. Kozak, Reno,  
for Appellant.

Allison MacKenzie, Ltd., and Justin M. Townsend, Carson City,  
for Respondent.

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BEFORE PICKERING, GIBBONS and HARDESTY, JJ.

OPINION

By the Court, GIBBONS, J.:

In this proceeding, we are asked to clarify the property interest presumptions outlined in *Sack v. Tomlin*, 110 Nev. 204, 871 P.2d 298 (1994), and *Langevin v. York*, 111 Nev. 1481, 907 P.2d 981 (1995). Under *Sack*, cotenants are presumed to equally share property, “unless circumstances indicate otherwise.” *Sack*, 110 Nev. at 213, 871 P.2d at 304. Additionally,

the presumption of equal shares may be rebutted through unequal contributions to property by unrelated cotenants who lack donative intent. *Id.* If successfully rebutted, fractional shares are based on the amount contributed by each party. *Id.* *Langevin* purportedly applied the *Sack* presumptions to joint tenants, but it divided property in proportion to the amount contributed by each party without clearly rebutting the presumption of equal ownership. *Langevin*, 111 Nev. at 1485-86, 907 P.2d at 984. We take this opportunity to clarify that the presumptions from *Sack* concerning tenants in common apply to joint tenants. As such, prior to dividing fractional shares held by cotenants, the initial presumption of equal ownership must be successfully rebutted. We therefore hold that because Hughes rebutted the secondary presumption by presenting substantial evidence of Howard's donative intent, Howard and Hughes were joint tenants with equal ownership interests in the property. Accordingly, we affirm the decision of the district court.

#### *FACTS AND PROCEDURAL HISTORY*

Appellant Elizabeth Howard and respondent Shaughnan Hughes engaged in a romantic relationship for many years, but were never married. Approximately one year into the relationship, they relocated to Fallon, Nevada, with Hughes' two daughters. After leasing property in Fallon for a few years, the couple jointly applied for credit in anticipation of purchasing a home. However, in late 2011 or early 2012, Howard obtained a third-party settlement award and used the proceeds from the settlement to purchase the property subject to this dispute. Three days after the purchase, Howard executed a quitclaim deed naming herself and Hughes as joint tenants. Howard paid the entire \$67,000 purchase price of the property, but Hughes paid the transfer property taxes.

Howard, Hughes, and Hughes' daughters moved into the property in late 2012. The property is approximately 11.09 acres and, at the time of purchase, consisted of a single-family residence and an airplane hangar. Prior to their purchase, the former owners used the property as a ranch and to store disabled cars. At trial, Hughes testified that he removed substantial debris from the property prior to the move in. Moreover, trial testimony revealed that over the course of three years, Hughes' labor contributions included, but are not limited to: erecting a fence around 4.5 acres of the property, moving the driveway, installing a new entrance and hang gate, reinforcing the hanger, installing a chicken coop and poultry house, excavation, and grading. Much of this work included excavation by hand and preventative installations and maintenance to reinforce dilapidated areas. Hughes also leveled and graded the property with a tractor purchased by his father, and when the tractor became overburdened, Hughes hired a third-party contractor to complete the remaining work. Additionally, the couple erected a mother-in-law quarters for Howard's mother and a detached garage as a work space for Hughes. The district court found that throughout the three years, Howard contributed in excess of \$100,000 to the property, while Hughes contributed approximately \$20,000. Additionally, the value of the property increased from \$67,000 to \$225,000 during that time.

In March 2015, Howard locked Hughes out of the property, leading Hughes to file a complaint to partition the property under NRS Chapter 39. A bench trial was conducted in February 2017, wherein Hughes, Hughes' father, and one of Hughes' daughters testified for Hughes, while Howard alone testified on her behalf. Neither party was able to articulate, with any degree of certainty, how much time or money they had spent on the property. Additionally, Howard's only defense as to the

execution and recording of the quitclaim deed was that she did not remember any of it and had “blank spots” in her memory. The district court concluded that Howard and Hughes were joint tenants with equal ownership interests in the property and ordered Howard to either buy out Hughes’ interest, or sell the property and equally share in the proceeds.

### *DISCUSSION*

#### *Howard and Hughes are entitled to equal shares of the property*

This case concerns the partition of real property under NRS Chapter 39. NRS 39.010 provides that any person holding title to real property as a joint tenant may bring an action for partition of said real property according to the rights of the persons holding title. It is undisputed that Howard and Hughes hold title to the property as joint tenants. This court is asked whether Howard and Hughes, as joint tenants, own the property equally, or whether the circumstances indicate that equal ownership is inappropriate. The district court, applying *Sack v. Tomlin*, 110 Nev. 204, 871 P.2d 298 (1994), and *Langevin v. York*, 111 Nev. 1481, 907 P.2d 981 (1995), held that the parties were entitled to equal shares of the property based on substantial evidence of Howard’s donative intent. Howard appeals, arguing that because *Langevin* made no mention of donative intent, this step was dispelled from our analysis.<sup>1</sup>

#### *Standard of review*

This court reviews a district court’s interpretation of caselaw de novo. *LVMPD v. Blackjack Bonding*, 131 Nev. 80, 85, 343 P.3d 608, 612 (2015). However, “where the trial court, sitting without a jury, makes a determination predicated upon conflicting evidence, that determination will

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<sup>1</sup>Howard also argues that Hughes failed to present substantial evidence of his contributions to the property. However, following a review of the record, we find this argument lacks merit.

not be disturbed on appeal where supported by substantial evidence.” *Trident Constr. Corp. v. W. Elec. Inc.*, 105 Nev. 423, 427, 776 P.2d 1239, 1242 (1989) (internal quotation marks omitted). “Substantial evidence is that which a reasonable mind [can] accept as [sufficient] to support a conclusion.” *Dynamic Transit Co. v. Trans Pac. Ventures Inc.*, 128 Nev. 755, 761, 291 P.3d 114, 118 (2012) (internal quotation marks omitted).

*Langevin did not alter the Sack presumptions*

*Sack v. Tomlin* concerned unmarried tenants in common who unequally contributed to the purchase price of real property. 110 Nev. at 208, 871 P.2d at 301. Following separation and sale of the property, the parties disputed how to distribute the proceeds. *Id.* The *Sack* court held that “[t]he fractional shares held by tenants in common are usually equal and are presumed to be equal unless circumstances indicate otherwise.” *Id.* at 213, 871 P.2d at 304. However, the court further held that this presumption can be rebutted where cotenants “are not related and show no donative intent.” *Id.* Where the presumption is successfully rebutted, the proceeds upon sale are to be divided “in proportion to the amount contributed by each to the purchase price.” *Id.* at 210, 871 P.2d at 303 (quoting *Williams v. Monzingo*, 16 N.W.2d 619, 622-23 (Iowa 1944)). Accordingly, under *Sack*, it is presumed tenants in common own property equally, unless successfully rebutted through lack of familial relationship or lack of donative intent, and if successfully rebutted, ownership interest is based on the amount contributed by each party. *See id.* at 210, 213, 871 P.2d at 303, 304.

*Langevin v. York*, issued one year after *Sack*, concerned joint tenants rather than tenants in common. 111 Nev. at 1485, 907 P.2d at 983. However, the court found this distinction inconsequential and considered *Sack* to be controlling law, thus extending the *Sack* presumptions to joint

tenants. *Id.* *Langevin* concerned four properties held by unmarried joint tenants, Norman and Laurie. *Id.* at 1481-82, 907 P.2d at 981-82. This court noted that the relationship between Norman and Laurie was unclear, “Norman paid for all the property acquired during the relationship and paid all the bills,” and “Norman presented substantial, unrefuted evidence regarding his contribution.” *Id.* at 1482, 1484, 907 P.2d at 981-82, 983. The court also noted, “Laurie presented no evidence concerning the issue of contribution.” *Id.* at 1484, 907 P.2d at 983. Ultimately, the *Langevin* court divided the property in proportion to each party’s contributions to the purchase price, thereby awarding Norman two of the parcels in full as the sole purchaser and remanding for the remaining two parcels to be divided based on Norman and Laurie’s respective contributions. *Id.* at 1485-86, 907 P.2d at 984.

Howard asserts that under *Langevin*, unmarried joint tenants share ownership in real property in proportion to the amount each contributed to the purchase price of the property, and thus, she should be awarded the property in full. We disagree and conclude that *Langevin* did not overrule *Sack*, particularly because *Langevin* noted that *Sack* was controlling law. *Langevin*, 111 Nev. at 1485, 907 P.2d at 983. As such, the initial presumption that cotenants share equally must first be successfully rebutted through evidence of lack of relatedness or donative intent, prior to the court dividing the property or proceeds in proportion to each party’s contributions. *See id.*; *Sack*, 110 Nev. at 213, 871 P.2d at 304.

*Hughes presented overwhelming evidence of Howard’s donative intent, thereby demonstrating that the parties intended to share the property equally*

The district court properly applied the presumptions laid out in *Sack* and *Langevin*. First, because Howard and Hughes own the property as joint tenants, the district court began with the presumption that they

share the property equally. The district court then found that Howard rebutted the initial presumption of equal ownership when she paid the entire purchase price of the property. Having rebutted the first presumption, Howard was presumed to be the full owner, and the burden shifted to Hughes to prove either that he and Howard are related, or that Howard possessed sufficient donative intent. In that vein, the district court went on to conclude that Hughes provided “clear and convincing evidence of Ms. Howard’s donative intent at the time of the transfer—thereby rebutting the secondary presumption.” Specifically, the district court found that Howard intended to gift Hughes an equal share as a joint tenant when she executed the quitclaim deed.

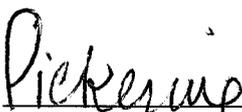
“Determining a donor’s donative intent and beliefs is a question for the fact-finder . . . .” *In re Irrevocable Tr. Agreement of 1979*, 130 Nev. 597, 608, 331 P.3d 881, 888 (2014). “In Nevada, a valid . . . donative transfer requires a donor’s intent to voluntarily make a present transfer of property to a donee without consideration, the donor’s actual or constructive delivery of the gift to the donee, and the donee’s acceptance of the gift.” *Id.* at 603, 331 P.3d at 885. Further, “[w]here an individual obtains possession of property pursuant to a written agreement establishing a joint tenancy, the law generally presumes that such agreement is conclusive, and a donative intent is presumed on the part of the predeceasing tenant.” 48A C.J.S. *Joint Tenancy* § 10 n.8 (2014).

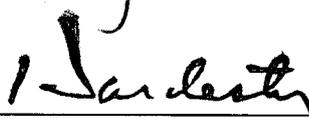
Hughes testified that he and Howard jointly searched for property in Fallon and that both sought financing for said property, but they altered their plan when Howard obtained a third-party settlement award. Additionally, at trial it was revealed that the parties frequently discussed putting both of their names on the deed and that they “ultimately went to the County Recorder’s office together to execute the quitclaim deed.”

Furthermore, Hughes testified that when they executed the quitclaim deed, Howard stated that Hughes had to pay the \$237 transfer tax because she had "already paid . . . her half." Hughes also testified that Howard joked, "when was the last time you paid \$274 for a \$35,000 coin." Moreover, Hughes and his three witnesses testified as to the relationship between Howard and Hughes and Hughes' contributions to the property, while Howard alone testified on her own behalf and stated merely that she had "a lot of blank spots" concerning the execution of the quitclaim deed and the house itself. The district court found Howard's testimony not credible and stated that "Mr. Hughes presented overwhelming and largely uncontroverted evidence regarding Ms. Howard's donative intent." We agree and conclude that nothing in Howard's briefs, nor the record, indicate otherwise. We therefore hold that the district court correctly interpreted and applied the presumptions from *Sack* and *Langevin*, and that Hughes presented sufficient evidence of Howard's donative intent at trial, thereby rebutting the secondary presumption that the parties did not own the property equally. Accordingly, we affirm the judgment of the district court.

  
\_\_\_\_\_, J.  
Gibbons

We concur:

  
\_\_\_\_\_, J.  
Pickering

  
\_\_\_\_\_, J.  
Hardesty

IN THE SUPREME COURT OF THE STATE OF NEVADA

VALLEY HEALTH SYSTEM, LLC, A  
NEVADA LIMITED LIABILITY  
COMPANY, D/B/A CENTENNIAL  
HILLS HOSPITAL MEDICAL CENTER;  
AND UNIVERSAL HEALTH  
SERVICES, INC., A DELAWARE  
CORPORATION,

Appellants,

vs.

ESTATE OF JANE DOE, BY AND  
THROUGH ITS SPECIAL  
ADMINISTRATOR, MISTY PETERSON,  
Respondent.

HALL PRANGLE & SCHOONVELD,  
LLC; MICHAEL PRANGLE, ESQ.;  
KENNETH M. WEBSTER, ESQ.; AND  
JOHN F. BEMIS, ESQ.,

Petitioners,

vs.

THE EIGHTH JUDICIAL DISTRICT  
COURT OF THE STATE OF NEVADA,  
IN AND FOR THE COUNTY OF  
CLARK; AND THE HONORABLE  
RICHARD SCOTTI, DISTRICT JUDGE,  
Respondents,

and

MISTY PETERSON, AS SPECIAL  
ADMINISTRATOR OF THE ESTATE  
OF JANE DOE,  
Real Party in Interest.

No. 70083

FILED

SEP 27 2018

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY *[Signature]*  
CHIEF DEPUTY CLERK

No. 71045

Consolidated appeal from a district court order of dismissal and original petition for a writ of mandamus challenging a district court order

finding that petitioners violated RPC 3.3. Eighth Judicial District Court, Clark County; Richard Scotti, Judge.

*Appeal affirmed in Docket No. 70083; petition denied in Docket No. 71045.*

Bailey Kennedy and Dennis L. Kennedy, Joseph A. Liebman, and Joshua P. Gilmore, Las Vegas; Hall Prangle & Schoonveld, LLC, and Michael E. Prangle, Kenneth M. Webster, and John F. Bemis, Las Vegas, for Appellants/Petitioners.

Murdock & Associates, Chtd., and Robert E. Murdock, Las Vegas; Eckley M. Keach, Chtd., and Eckley M. Keach, Las Vegas, for Respondent Estate of Jane Doe and Real Party in Interest Misty Peterson, Special Administrator.

Adam Paul Laxalt, Attorney General, Ketan D. Bhirud, General Counsel, Gregory L. Zunino, Bureau Chief of Business and State Services, and Jordan T. Smith, Assistant Solicitor General, Carson City, for Respondents the Eighth Judicial District Court and The Honorable Richard Scotti, District Judge.

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BEFORE THE COURT EN BANC.

*OPINION*

By the Court, HARDESTY, J.:

In this consolidated direct appeal and original petition for a writ of mandamus, we consider an order in which the district court sanctioned a party for discovery violations and found that the party's attorneys violated Nevada Rule of Professional Conduct 3.3(a)(1) by making a false statement of fact or law to the district court.

First, we conclude that the district court acted within its discretion when it sanctioned the party. Second, we are asked to decide whether a district court's citation to the RPC in support of a determination of attorney misconduct causes reputational harm that amounts to a sanction. Because we hold that it does, we entertain the writ but conclude that the district court correctly determined that the attorneys violated RPC 3.3(a)(1). We thus affirm the district court order and deny the writ petition.

### *FACTS AND PROCEDURAL HISTORY*

In May 2008, appellants Valley Health System, LLC, d/b/a Centennial Hills Hospital Medical Center, and Universal Health Services, Inc. (collectively, Centennial) hired Steven Farmer as a certified nurses' assistant (CNA). Centennial had a contractual agreement with American Nursing Services to provide hospital staff, including CNAs, to Centennial. Jane Doe was a patient at Centennial during the time Farmer was employed there. On May 14, 2008, Farmer sexually assaulted Doe in her hospital room.

On May 15 and 16, 2008, Farmer sexually assaulted another patient, R.C., at Centennial. The assault was reported to Centennial, and Centennial began an internal investigation, hiring petitioners (collectively, Hall Prangle) as part of the investigation. While investigating the assault involving R.C., the attorneys from Hall Prangle interviewed several nurses employed at Centennial, including Margaret Wolfe in June 2008, Christine Murray in July 2008, and Ray Sumera in August 2008. Nurses Wolfe and Murray each gave statements to the Las Vegas Metropolitan Police Department (LVMPD) regarding the R.C. incident in May and June 2008, respectively. In their police statements, the nurses explained that they had raised concerns about Farmer before his assault on Doe because (1) he was overly attentive to female patients, (2) Farmer was anxious to perform

procedures where female breasts would be exposed and possibly touched, and (3) Farmer was involved in an incident wherein an elderly woman Farmer was attending to yelled, "Get outta here! I don't want you by me!" During the course of the investigation of the R.C. incident, several of Centennial's supervisory employees revealed that they had knowledge of the police reports and the nursing staff's concerns about Farmer.

R.C. filed a complaint against Centennial and Farmer in September 2008 alleging claims of sexual assault, negligence, intentional infliction of emotional distress, negligent misrepresentation, and false imprisonment. After the R.C. incident became public, Doe reported Farmer's sexual assault against her. Doe filed a lawsuit against Centennial in July 2009 for negligent failure to maintain the premises in a safe manner and vicarious liability for Farmer's actions. Centennial retained Hall Prangle to represent it in the Doe case in August 2009.

Prior to the early case conference that was held in November 2009, Centennial filed an initial list of witnesses and documents pursuant to NRCP 16.1. The initial disclosures did not identify nurses Wolfe, Murray, or Sumera as persons with knowledge of relevant facts and did not disclose the existence of the police statements.

In September 2014, Doe filed a motion for summary judgment regarding liability, arguing that Centennial was strictly liable for Farmer's assault. Centennial, through Hall Prangle, filed an opposition to Doe's motion for summary judgment, arguing that strict liability did not apply because "Farmer's actions weren't reasonably foreseeable under the facts and circumstances of th[is] case." As part of their foreseeability argument, Centennial cited to and summarized our decision in *Wood v. Safeway, Inc.*, 121 Nev. 724, 121 P.3d 1026 (2005), stating that "the Nevada Supreme

Court concluded that . . . because the assailant had no prior criminal record in the United States or Mexico, and because there w[ere] no prior complaints against the assailant for sexual harassment, that it was not reasonably foreseeable that the assailant would sexually assault a Safeway employee.” Based on its interpretation of *Wood*, Centennial argued that “[i]n the instant situation, there were absolutely no known prior acts by Mr. Farmer that could potentially put Centennial Hills on notice that Mr. Farmer would assault a patient.” The district court denied Doe’s motion, finding that there was a genuine issue of material fact regarding liability, especially whether Farmer’s misconduct was reasonably foreseeable.

In April 2015, Centennial, through Hall Prangle, filed a writ petition in this court challenging the district court’s order granting in part a motion for summary judgment. In explaining the factual and procedural history of this case, Centennial again explained that it “relied upon this [c]ourt’s decision in *Wood v. Safeway, Inc.*, 121 Nev. 724, 737, 121 P.3d 1026, 1035 (2005), and urged that there were no known prior acts or any other circumstances that could have put Centennial Hills on notice that Farmer would sexually assault Ms. Doe.” We denied the writ petition, determining that Centennial’s right to appeal following trial precluded extraordinary intervention. *See Valley Health System, LLC v. Eighth Judicial Dist. Court*, Docket No. 67886 (Order Denying Petition for Writ of Mandamus or Prohibition, May 20, 2015).

In October 2014, the discovery commissioner ordered Hall Prangle to produce a file provided to them by the LVMPD concerning the Farmer investigation. Doe learned of the nurses’ police statements through the LVMPD file provided to them in 2015.

Doe filed a motion for NRCP 37 sanctions related to Centennial's nondisclosure of the three nurses who had been interviewed during the internal investigation as well as their statements to police, seeking to establish that Farmer's misconduct was reasonably foreseeable to Centennial as a matter of law. After briefing and oral argument, the discovery commissioner recommended full admission of the nurses' police statements, that Centennial pay a monetary sanction, and that the district court conduct an evidentiary hearing to determine whether (1) case-terminating sanctions were appropriate based on Centennial's failure to disclose witnesses, (2) it was Centennial's intention to thwart the discovery process and hinder Doe from discovering the relevant facts, and (3) Centennial misled the court. The discovery commissioner also recommended that the sanctions be reduced if Centennial could prove with a degree of probability that they had no knowledge of the witnesses until recently.

In its order setting the evidentiary hearing, the district court informed Hall Prangle and Centennial of the scope and purpose of the hearing, stating that it was considering case-terminating sanctions, whether there was intent to thwart the discovery process, and whether the defendants misled the court. Following the evidentiary hearing, the district court found the following:

based on evidence that this [c]ourt considers to be clear and convincing, Centennial intentionally and willfully (a) violated its discovery obligations under NRCP 16.1 in failing to timely disclose that nurses Murray, Wolfe, and Sumera possessed relevant and material evidence relating to the central issue in this case—whether it was reasonably foreseeable to Centennial that Mr. Farmer would commit a criminal sexual assault on a patient; and

(b) violated its duty under NRCP 16.1 to timely disclose the [p]olice [s]tatements which also contained relevant and material evidence relating to the same central issue.

The district court sanctioned Centennial pursuant to NRCP 37 by striking its answer, thereby establishing liability against Centennial, allowing it only to litigate the damages, and ordering Centennial to pay \$9,000 to Doe's counsel and \$9,000 to Legal Aid of Southern Nevada. As part of its finding that Centennial willfully violated its disclosure obligations, the district court also determined that Hall Prangle violated Rule 3.3 of the Nevada Rules of Professional Conduct by incorrectly representing that it had not withheld any relevant evidence.

Hall Prangle and Centennial filed a motion for reconsideration of the sanction order, arguing that the district court erred by not providing Hall Prangle with the requisite notice that Hall Prangle's conduct was under consideration and finding that Hall Prangle violated RPC 3.3(a)(1) by making a false statement of fact. The district court denied Centennial's motion for reconsideration and clarified that, while it took Hall Prangle's conduct into consideration, it did not sanction Hall Prangle and the sanction order was based on Centennial's misconduct. Subsequently, the parties entered into a settlement agreement with Centennial reserving the right to challenge the sanction order. However, a successful appeal would not alter the terms of the settlement agreement.

Centennial appeals the district court's sanction order, and Hall Prangle filed an original petition for a writ of mandamus challenging the district court's findings of professional rule violations. These cases were consolidated for disposition.

## DISCUSSION

In the appeal, we consider Centennial's argument that the district court abused its discretion when it found that Centennial willfully and intentionally concealed relevant, discoverable information in violation of NRCP 16.1. Next, we must determine whether to entertain a writ petition seeking review of a reputational, rather than a monetary, sanction of an attorney. Because we conclude that a reputational sanction of an attorney is reviewable by writ, we address Hall Prangle's claim that it did not violate RPC 3.3(a)(1).

*The district court acted within its discretion when it struck Centennial's answer as a sanction for violating NRCP 16.1*<sup>1</sup>

### *Standard of review*

"This court generally reviews a district court's imposition of a discovery sanction for abuse of discretion." *Foster v. Dingwall*, 126 Nev. 56, 65, 227 P.3d 1042, 1048 (2010). When a district court imposes case-ending sanctions, we apply "a somewhat heightened standard of review." *Id.* However, sanctions are not considered case ending when, as here, the district court strikes a party's answer thereby establishing liability, but allows the party to defend on the amount of damages. *Bahena v. Goodyear Tire & Rubber Co.*, 126 Nev. 243, 249, 235 P.3d 592, 596 (2010).

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<sup>1</sup>As a threshold question, we must determine whether this matter is moot since the underlying case has settled. Because Centennial incurred both a monetary (for which they seek recovery) and reputational sanction, we conclude that the sanction order is justiciable notwithstanding the settlement. *See Grider v. Keystone Health Plan Cent., Inc.*, 580 F.3d 119, 133 (3d Cir. 2009) ("Appellants respond that the settlements did not moot the appeals because the Appellants experienced (and continue to experience) reputational harm. This court's precedent supports Appellants' position.").

Noncase-concluding sanctions will be upheld if the district court's sanction order is supported by substantial evidence. *Id.* at 254, 235 P.3d at 599. Furthermore, a district court's "findings of fact shall not be set aside unless they are clearly erroneous and not supported by substantial evidence." *Id.* When a district court adopts the factual findings of a discovery commissioner, they are "considered the findings of the [district] court." *Id.* Finally, "[e]ven if we would not have imposed such sanctions in the first instance, we will not substitute our judgment for that of the district court." *Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev. 88, 92, 787 P.2d 777, 779 (1990).

#### *NRCP 37 sanctions*

Under NRCP 37(b)(2)(C), when a party fails to make a discovery disclosure pursuant to NRCP 16.1, the district court may make "[a]n order striking out pleadings or parts thereof . . . or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party." In *Young*, we articulated the abuse-of-discretion standard with regard to discovery sanctions:

The factors a court may properly consider include, but are not limited to, the degree of willfulness of the offending party, the extent to which the non-offending party would be prejudiced by a lesser sanction, the severity of the sanction of dismissal relative to the severity of the discovery abuse, whether any evidence has been irreparably lost, the feasibility and fairness of alternative, less severe sanctions, such as an order deeming facts relating to improperly withheld or destroyed evidence to be admitted by the offending party, the policy favoring adjudication on the merits, whether sanctions unfairly operate to penalize a party for the

misconduct of his or her attorney, and the need to deter both the parties and future litigants from similar abuses.

106 Nev. at 93, 787 P.2d at 780.

In its order striking Centennial's answer and establishing liability on Doe's negligence and respondeat superior claims, the district court addressed each *Young* factor. Centennial argues primarily that the district court abused its discretion in its determination of the first *Young* factor—that Centennial willfully and intentionally concealed relevant, discoverable information in violation of NRCP 16.1. Specifically, Centennial argues that the district court misapplied the “collective knowledge doctrine” in reaching its conclusion, and that the district court's finding of willful misconduct is not supported by substantial evidence. We disagree.

*Centennial's misconduct was willful*

In considering the *Young* factors, the district court determined that clear and convincing evidence demonstrated “that Centennial willfully and intentionally concealed the relevance of nurses Murray, Wolfe, and Sumera, and the existence of the [p]olice [s]tatements with an intent to harm and unfairly prejudice [Doe].” In its order denying Centennial's motion for reconsideration, the district court explicitly stated that it did not use or apply the collective knowledge doctrine in reaching its conclusion that Centennial willfully concealed relevant information. In explaining its reasoning, the district court stated: “Simply put, Centennial's management was aware of the knowledge of numerous Centennial staff of various stations, and exhibited an unlawful pattern of suppression and denial over the course of years to [Doe's] detriment.”

Centennial acknowledges that the collective knowledge doctrine was not explicitly used or applied by the district court. Nonetheless, Centennial argues that the district court used the doctrine to aggregate the employees' knowledge in order to conclude that Centennial willfully and intentionally concealed information with the intent to harm Doe. Centennial contends that a court cannot find that a corporation acted willfully or intentionally unless at least one employee has a culpable mental state. In support of its argument, Centennial cites to several cases for the proposition that the collective knowledge doctrine cannot be used to impute a culpable state of mind to an employer. Primarily, Centennial relies on *Ginena v. Alaska Airlines, Inc.*, No. 2:04-CV-01304-MMD-CWH, 2013 WL 3155306 (D. Nev. June 19, 2013), which held that the collective knowledge doctrine cannot be used to show that an employer acted with actual malice unless "someone in the corporation had the required culpability." *Id.* at \*8. Thus, Centennial argues, the district court erred as a matter of law because it did not identify, by name, an employee who acted with a culpable state of mind.

We conclude that Centennial's reliance on the collective knowledge doctrine is misplaced. First, we have never applied the collective knowledge doctrine when reviewing discovery sanction orders. Second, Centennial's reliance on *Ginena* is unpersuasive. *Ginena* involved a defamation claim where, in order to recover, the plaintiffs had to show that the defendants acted with actual malice. *Id.* at \*6. Thus, the court was considering the collective knowledge doctrine in the context of establishing the required state of mind for intentional tort liability. *Id.* at \*7. Here, the district court was considering whether Centennial willfully chose not to comply with NRCP 16.1 disclosure requirements. Thus, Centennial has not

put forth a persuasive argument that the district court applied, or we should consider, the collective knowledge doctrine in this case.<sup>2</sup>

We further conclude that substantial evidence supports the district court's finding that Centennial willfully concealed relevant evidence. The district court listed a 17-point overview of the evidence it found to amount to clear and convincing proof that Centennial willfully withheld evidence from its NRCP 16.1 discovery disclosure. We conclude that the evidence is supported by the record. For example, Hall Prangle and Centennial conducted the investigation of the R.C. incident well before Doe filed her complaint yet Centennial failed to disclose nurses Wolfe, Murray, and Sumera in its initial NRCP 16.1 disclosures in the Doe case. Thus, we conclude that the district court did not abuse its discretion in making the factual determination that Centennial had knowledge of the relevant evidence and willfully concealed it during discovery.

*The district court did not penalize Centennial for its attorneys' conduct*

Centennial argues that the district court abused its discretion in striking its answer based on Centennial's attorneys' misconduct. Specifically, Centennial argues that, because it is an attorney's

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<sup>2</sup>The other cases Centennial cites to in support of its reliance on the collective knowledge doctrine are similarly unpersuasive. *See Lind v. Jones, Lang LaSalle Ams., Inc.*, 135 F. Supp. 2d 616, 622 n.6 (E.D. Pa. 2001) (explaining that the collective knowledge doctrine cannot be used to aggregate intent in claims for fraudulent misrepresentation and intentional nondisclosure); *First Equity Corp. of Fla. v. Standard & Poor's Corp.*, 690 F. Supp. 256, 259-60 (S.D.N.Y. 1988) (stating that in a claim for fraud, the collective knowledge doctrine cannot be used to establish intent when a specific employee with the requisite state of mind is not identified); *Reed v. Nw. Publ'g Co.*, 530 N.E.2d 474, 484 (Ill. 1988) (stating that the collective knowledge doctrine cannot be used to establish actual malice in an action for libel).

responsibility to comply with NRCP 16.1, it is unfair to sanction a client for its attorney's failure to comply. We disagree.

As noted above, when considering discovery sanctions, a district court should consider "whether sanctions unfairly operate to penalize a party for the misconduct of his or her attorney." *Young*, 106 Nev. at 93, 787 P.2d at 780. The district court took that factor into consideration. Specifically, the district court stated that "[t]he misconduct in this case is clearly that of Centennial, to an equal or greater extent tha[n] its lawyers." The district court went on to explain that Centennial knew about the relevant, concealed evidence, "yet allowed their attorneys to submit no less than [eight (8) NRCP 16.1 disclosures that omitted any reference to" the evidence. Finally, the district court pointed out that Centennial provided verifications for all of the false discovery disclosures. Accordingly, the district court did not unfairly penalize Centennial.

*The other Young factors support the district court's decision*

Centennial argues that the sanction the district court imposed was extreme when considering the other *Young* factors. First, Centennial argues that the sanction violates Nevada's public policy of deciding cases on the merits. Second, Centennial argues that the sanction was unnecessary because Centennial was unlikely to engage in future misconduct. Finally, Centennial argues that the district court's finding that Doe was prejudiced by the NRCP 16.1 violation was speculative.

As with the other *Young* factors, the district court considered Centennial's arguments and explained, in detail, why they fail. With regard to Nevada's policy of deciding cases on the merits, the district court decided that the only way to undo the prejudice created by Centennial was to strike Centennial's answer. Furthermore, the district court correctly pointed out that striking Centennial's answer was not a case-concluding sanction.

Indeed, Centennial was still able to litigate the measure of damages. Therefore, with respect to this *Young* factor, the district court did not abuse its discretion.

Similarly, the district court acted within its discretion when it decided that striking Centennial's answer would effectively deter future sanctionable conduct. Centennial argues that it is unlikely to repeat its misconduct, but the *Young* court explicitly stated that a court should consider "the need to deter both the parties *and future litigants* from similar abuses." *Young*, 106 Nev. at 93, 787 P.2d at 780 (emphasis added). The district court stated that it intended to "deter future misconduct by Centennial." But the district court also considered its order's effect on future litigants by stating that "[n]o party should be allowed to conceal evidence, and then suffer merely a monetary sanction, while being allowed to reap the tactical benefit of the loss of that evidence. Litigants should be entitled to have their cases adjudicated on the merits."

Finally, the district court considered the prejudice that had already materialized as a result of Centennial's NRCP 16.1 violation. Specifically, the court stated that the prejudice to Doe was that "memories . . . fade[ ] over time" and that any lesser sanction would not mitigate that prejudice. The court also noted that because the lost evidence potentially went to a central issue in the case, substantial prejudice would linger if the court imposed any alternative sanction. Thus, the district court did not abuse its discretion in striking Centennial's answer.

*Hall Prangle's writ petition is denied because the district court's sanction was a fair comment on the attorneys' conduct*

Hall Prangle filed an original petition for a writ of mandamus in this court, arguing that the district court improperly sanctioned Hall

Prangle for violating RPC 3.3(a)(1).<sup>3</sup> Hall Prangle also argues that the district court's sanction was an abuse of discretion because (1) Hall Prangle did not receive the required notice that the district court was considering attorney sanctions, and (2) Hall Prangle did not violate RPC 3.3(a)(1). Doe, the Eighth Judicial District Court, and the Honorable Richard Scotti (collectively, the District Court Judge) filed answers to Hall Prangle's petition.

*Petition for writ relief should be entertained*

A writ of mandamus is available to compel the performance of an act that the law requires or to control an arbitrary or capricious exercise of discretion. NRS 34.160; *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008). "This court has discretion to entertain a petition for extraordinary writ relief." *Bradford v. Eighth Judicial Dist. Court*, 129 Nev. 584, 586, 308 P.3d 122, 123 (2013). However, we will exercise that discretion "only when there is no plain,

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<sup>3</sup>Specifically, the district court stated in its order:

Rule 3.3 of the Nevada Rules of Professional Conduct states "(a) A lawyer shall not knowingly: (1) Make a false statement of fact or law . . . to [a] tribunal by the lawyer." Centennial's lawyers violated this Rule.

Centennial incorrectly represented to the Nevada Supreme Court that it had not withheld any relevant evidence. Centennial stated: "there were no known prior acts or any other circumstances that could have put Centennial on notice that Farmer would sexually assault Ms. Doe." Again, Centennial's lawyers violated Rule 3.3.

(Citation omitted.)

speedy and adequate remedy in the ordinary course of law or there are either urgent circumstances or important legal issues that need clarification in order to promote judicial economy and administration.” *State v. Eighth Judicial Dist. Court (Logan D.)*, 129 Nev. 492, 497, 306 P.3d 369, 373 (2013) (internal quotation marks omitted). It is petitioner’s burden to demonstrate that our extraordinary intervention is warranted. *Otak Nev., LLC v. Eighth Judicial Dist. Court*, 129 Nev. 799, 804, 312 P.3d 491, 495 (2013).

We have consistently held that an appeal is generally an adequate legal remedy precluding writ relief. *Bradford*, 129 Nev. at 586, 308 P.3d at 123. However, “[s]anctioned attorneys do not have standing to appeal because they are not parties in the underlying action; therefore, extraordinary writs are a proper avenue for attorneys to seek review of sanctions.” *Watson Rounds, P.C. v. Eighth Judicial Dist. Ct.*, 131 Nev. 783, 786-87, 358 P.3d 228, 231 (2015).

Although the district court did not impose monetary sanctions against Hall Prangle, the court did find that Hall Prangle twice violated RPC 3.3(a)(1). As discussed below, we conclude that this amounts to a reputational sanction and provides a basis to entertain Hall Prangle’s petition. *See Martinez v. City of Chi.*, 823 F.3d 1050, 1053 (7th Cir. 2016) (“[A] finding of attorney misconduct in a sanctions order can seriously impair an attorney’s professional standing, reputation, and earning possibilities. . . . Such an injury, inflicted in a formal judicial order, can be serious enough to make the order appealable.”) We find *Martinez* persuasive and conclude that the importance of an attorney’s reputation alone provides a basis for justiciability where the district court made a finding that the attorney violated the rules of professional conduct.

In *United States v. Talao*, 222 F.3d 1133, 1135 (9th Cir. 2000), the United States Court of Appeals for the Ninth Circuit considered an appeal by an assistant United States attorney challenging a finding by the federal district court that she violated the California Rules of Professional Conduct. The court first addressed the issue of whether the district court's finding provided a basis for an appeal. *Id.* at 1137. In concluding that it did, *id.* at 1138, the Ninth Circuit distinguished the district court's finding of ethical misconduct from "mere judicial criticism," *id.* at 1137, explaining:

The district court in the present case . . . did more than use "words alone" or render "routine judicial commentary." Rather, the district court made a finding and reached a legal conclusion that [the attorney] knowingly and wilfully violated a specific rule of ethical conduct. Such a finding, *per se*, constitutes a sanction.

*Id.* at 1138.

This approach is followed in the majority of federal circuits and has support in other state courts. *See, e.g., Butler v. Biocore Med. Techs., Inc.*, 348 F.3d 1163, 1168 (10th Cir. 2003) (stating that "damage to an attorney's professional reputation is a cognizable and legally sufficient injury"); *Walker v. Mesquite Tex.*, 129 F.3d 831, 832-33 (5th Cir. 1997) (holding "that the importance of an attorney's professional reputation, and the imperative to defend it when necessary, obviates the need for a finding of monetary liability or other punishment as a requisite for the appeal of a court order finding professional misconduct"); *Sullivan v. Comm. on Admissions & Grievances*, 395 F.2d 954, 956 (D.C. Cir. 1967) (holding that a finding of professional misconduct not accompanied by other sanctions is analogous to a defendant found guilty but given a suspended sentence and is appealable); *State v. Perez*, 885 A.2d 178, 187 (Conn. 2005) ("[A] judicial finding of professional misconduct is tantamount to an official sanction,

irrespective of whether the finding is made in the context of a formal grievance proceeding.”).

The vast majority of courts that have considered the issue have held that a finding that an attorney has violated a specific rule of professional conduct is tantamount to a sanction. Additionally, several states have commented on a trial court’s inherent authority to sanction an attorney for improper conduct due to violation of the rules of professional conduct. *See Wong v. Luu*, 34 N.E.3d 35, 48 (Mass. 2015) (upholding a lower court’s determination that an attorney had violated a rule of professional conduct because “it is plain that the inherent powers of the court include the authority to sanction an attorney for such misconduct, regardless of the adjudication of any complaint before the board for violation of this rule”); *Westview Drive Invs., LLC v. Landmark Am. Ins. Co.*, 522 S.W.3d 583, 616 (Tex. App. 2017) (“Courts have the inherent power to discipline attorneys, and the Texas Supreme Court has addressed some violations of the disciplinary rules under both the State Bar’s disciplinary system and its own inherent powers.”); *Featherstone v. Schaerrer*, 34 P.3d 194, 200 (Utah 2001) (holding that the trial court did not exceed its authority in finding a violation of the rules of professional conduct, because holding otherwise “would bind the ‘inherent powers’ of judicial regulation by allowing attorneys who have violated the ethics code to hide behind the guise that only the state bar association may enforce the rules”). We are persuaded by the reasoning of these federal and state courts finding that a reputational sanction is reviewable and conclude that a district court has inherent authority to cite to the rules of professional conduct as part of its authority to regulate attorney misconduct in the courtroom:

[T]he power to sanction defense counsel in the instant case derived from the inherent powers of a

trial court to control proceedings before it. It has been cogently stated that [a] trial judge is under a duty, in order to protect the integrity of the trial, to take prompt and affirmative action to stop . . . professional misconduct.

*Young v. Ninth Judicial Dist. Court*, 107 Nev. 642, 646, 818 P.2d 844, 846 (1991) (second alteration in original) (internal quotation marks omitted). We, therefore, entertain Hall Prangle's writ petition and consider whether the reputational sanction was warranted considering Hall Prangle's conduct.

*The district court properly found that Hall Prangle violated RPC 3.3*

RPC 3.3 provides in relevant part: "(a) A lawyer shall not knowingly: (1) Make a false statement of fact or law to a tribunal." As noted above, the district court found that Hall Prangle twice violated RPC 3.3(a)(1). The district court found that Hall Prangle first violated RPC 3.3(a)(1) when, in its opposition to summary judgment, it stated: "In the instant situation, there were absolutely no known prior acts by Mr. Farmer that could potentially put Centennial on notice that Mr. Farmer would assault a patient." The district court found another RPC 3.3(a)(1) violation when Hall Prangle, in its first writ petition in this court, stated: "there were no known prior acts or any other circumstances that could have put Centennial on notice that Farmer would sexually assault Ms. Doe." The district court found that each of these statements constituted violations of RPC 3.3(a)(1) because they were false statements of facts made by a lawyer to a tribunal.

Hall Prangle argues that its statement to the district court could not have constituted a rule violation because it was not a purely factual statement, but rather, argument intertwined with opinion regarding the evidence relating to reasonable foreseeability. Hall Prangle further

argues that its use of the statement in its writ petition was appropriate because it was used in the context of explaining what arguments they made in the district court and was thus a factually accurate statement.

The district court concluded that the statement in Centennial's opposition violated the rule because it falsely represented that Centennial had no notice of prior behavior indicating that Farmer might assault a patient in the future. Specifically, the district court found that Centennial hired Hall Prangle to investigate Farmer's assault, which included the nurses' previous concerns about Farmer's behavior with patients. Thus, Centennial and Hall Prangle had knowledge of Farmer's conduct that would put them on notice that a sexual assault was foreseeable. The district court's finding in that regard is supported by the record. Thus, the district court acted well within its discretion in finding that Hall Prangle violated RPC 3.3(a)(1) in its statement to the district court. However, we note that the false statement as used in Hall Prangle's writ petition was included in the petition's procedural history to explain what Hall Prangle argued in the district court. Thus, it was an accurate statement in that it correctly represented the false statement Hall Prangle argued in the district court. Nonetheless, we hold that the record supports the district court's sanction because, at least in the district court, Hall Prangle knowingly made a false statement in violation of RPC 3.3(a)(1).

*The district court's sanction complied with due process*

Hall Prangle argues that it was deprived of due process because the district court did not give it notice that it was considering attorney sanctions. The parties agree that when a district court is considering attorney sanctions, the attorney is entitled to notice that his or her conduct is at issue. The parties disagree, however, about what satisfies the notice requirement. The District Court Judge argues that the notice requirement

was satisfied here because Hall Prangle knew that the district court would consider its conduct in its *Young* analysis and Centennial accused Hall Prangle of violating RPC 3.3(a)(1) during litigation. Hall Prangle argues that it is the tribunal considering sanctions, not opposing counsel, that is required to give particularized notice that it is considering sanctions.

Due process principles require that an attorney accused of professional misconduct receive notice of the charges levied against him or her. See *Lioce v. Cohen*, 124 Nev. 1, 26, 174 P.3d 970, 986 (2008) (“[T]he district court may, on a party’s motion or sua sponte, impose sanctions for professional misconduct at trial, after providing the offending party with notice and an opportunity to respond.”); see also *Randolph v. State*, 117 Nev. 970, 982 n.16, 36 P.3d 424, 432 n.16 (2001) (issuing a contemporaneous order to show cause to the attorney so he could explain why sanctions should not be imposed). Here, the district court entered an order setting the evidentiary hearing based on the discovery commissioner’s report and recommendations. In that order, the district court informed the parties of the hearing’s scope and purpose:

The purpose of the evidentiary [h]earing shall be to determine (1) if case terminating sanctions are appropriate based on the conduct of failing to disclose witnesses; (2) whether or not th[ere] was intention to thwart the discovery process in this case, and hinder [p]laintiff to discover[ ] the relevant facts[;] and (3) a failure to let the [c]ourt know what was going on in the case and whether the . . . [d]efendants misled the [c]ourt.

The order did not mention that the district court would be considering sanctions against Hall Prangle and specifically indicated that the court

would only be considering whether the defendants, not Hall Prangle, misled the court. Thus, this notice was deficient under due process principles.

The District Court Judge argues that, even if Hall Prangle did not receive the required notice that the district court was considering attorney sanctions, any deficiency was cured through Hall Prangle's motion for reconsideration. In support of its argument, the District Court Judge cites to *Sun River Energy, Inc. v. Nelson*, 800 F.3d 1219 (10th Cir. 2015). In *Sun River*, the United States Court of Appeals for the Tenth Circuit determined that an order sanctioning an attorney was procedurally defective because the attorney was not afforded the proper notice. *Id.* at 1230. The court acknowledged that "[a]dvance notice that the court is considering sanctions and an opportunity to respond in opposition is, of course, required." *Id.* However, the court concluded that the procedural defect was cured because the attorney "had a full opportunity to brief his various objections to imposition of the . . . sanction in conjunction with [a] motion for reconsideration." *Id.* at 1231. Thus, the court concluded that the motion for reconsideration cured any defect in connection with the initial imposition of sanctions because "the opportunity to fully brief the issue is sufficient to satisfy due process requirements." *Id.* at 1230 (internal quotation marks omitted).

Here, Hall Prangle filed a motion for reconsideration of the district court's sanction order in which it extensively briefed the due process issues it now raises before this court. Furthermore, Hall Prangle argued in its motion for reconsideration that it did not engage in intentional misconduct and did not violate RPC 3.3(a)(1). Consistent with the Tenth Circuit, we conclude that a subsequent opportunity to fully brief the issue

of imposition of attorney sanctions is sufficient to cure any initial due process violation, and any notice deficiency was similarly cured in this case.

### CONCLUSION

We hold that the district court acted within its discretion when it struck Centennial's answer as a sanction for its violation of NRCP 16.1. First, district courts are afforded discretion when imposing sanctions and those determinations will generally be upheld even if we would not have imposed such sanctions in the first instance. *See Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev. 88, 92, 787 P.2d 777, 779 (1990). Second, even though it did not impose case-concluding sanctions, the district court conducted a thorough analysis of each *Young* factor in its 38-page sanction order. Third, Centennial's reliance on the collective knowledge doctrine is misplaced because we have not applied the doctrine to court-imposed sanctions, and the cases Centennial cites to only address the application of the doctrine in intentional tort actions. Finally, in its order denying Centennial's motion for reconsideration, the district court expressly considered, and rejected, Centennial's assertion that the court either misapplied the collective knowledge doctrine or sanctioned Centennial for its attorneys' conduct. Thus, we hold that the district court did not abuse its discretion and we affirm its order striking Centennial's answer.

We further conclude that a district court finding that an attorney violated a specific rule of professional conduct is a reputational sanction, and that the district court properly found that Hall Prangle violated RPC 3.3(a)(1). Finally, we conclude that, although Hall Prangle was not provided sufficient notice that its conduct was under review, any

initial notice deficiencies were subsequently cured by Hall Prangle's motion for reconsideration. We therefore deny Hall Prangle's petition for a writ of mandamus.

Hardesty, J.  
Hardesty

We concur:

Douglas, C.J.  
Douglas

Cherry, J.  
Cherry

Gibbons, J.  
Gibbons

Parraguirre, J.  
Parraguirre

Pickering, J.  
Pickering

Stiglich, J.  
Stiglich

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IN THE SUPREME COURT OF THE STATE OF NEVADA

FREDERIC AND BARBARA  
ROSENBERG LIVING TRUST,  
Appellant/Cross-Respondent,  
vs.  
MACDONALD HIGHLANDS REALTY,  
LLC, A NEVADA LIMITED LIABILITY  
COMPANY; MICHAEL DOIRON, AN  
INDIVIDUAL; AND FHP VENTURES, A  
NEVADA LIMITED PARTNERSHIP,  
Respondents/Cross-Appellants.

THE FREDERIC AND BARBARA  
ROSENBERG LIVING TRUST,  
Appellant,  
vs.  
SHAHIN SHANE MALEK,  
Respondent.

No. 69399

**FILED**

SEP 13 2018

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY *[Signature]*  
CHIEF DEPUTY CLERK

No. 70478

Consolidated appeals and cross-appeal from a judgment certified as final and a final judgment in an action arising from the purchase of real property and from a post-judgment order awarding attorney fees and costs. Eighth Judicial District Court, Clark County; Kenneth C. Cory, Judge.

*Affirmed in part, reversed in part, and remanded.*

Kim Gilbert Ebron and Karen L. Hanks and Jacqueline A. Gilbert, Las Vegas,  
for Appellant/Cross-Respondent Frederic and Barbara Rosenberg Living Trust.

Kemp, Jones & Coulthard, LLP, and J. Randall Jones, Spencer H. Gunnerson, and Matthew S. Carter, Las Vegas, for Respondents/Cross-Appellants MacDonald Highlands Realty, Michael Doiron, and FHP Ventures.

Smith & Shapiro, PLLC, and James E. Shapiro and Sheldon A. Herbert, Henderson, for Respondent Shahin Shane Malek.

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BEFORE THE COURT EN BANC.<sup>1</sup>

*OPINION*

By the Court, HARDESTY, J.:

Appellant/cross-respondent Frederic and Barbara Rosenberg Living Trust (the Trust) purchased a residential lot that adjoins respondent Shahin Malek's residential lot (the Lot), and which also adjoins a golf course. The Lot also includes a small parcel of land (the out-of-bounds parcel), which had previously been an out-of-bounds area between the golf course and the Lot. In this appeal, we must determine whether the Trust can maintain an implied restrictive covenant upon the out-of-bounds parcel. Because we decline to recognize implied restrictive covenants, we affirm the district court as to this issue.

Next, we consider whether the Trust waived any claims it may have had against respondents/cross-appellants MacDonald Highlands Realty, LLC, real estate agent Michael Doiron, and the developer of MacDonald Highlands, FHP Ventures (the MacDonald parties) for

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<sup>1</sup>The Honorable Ron D. Parraguirre, Justice, voluntarily recused himself from participation in the decision of this matter.

misrepresentations or failing to disclose information in the purchase process of the Trust property. We conclude that the Trust waived its common law claims but did not waive its statutory claims under NRS Chapter 645. Because we reverse this claim, we necessarily reverse the MacDonald parties' award of attorney fees and costs. Finally, we determine that the district court abused its discretion in awarding attorney fees and costs to Malek pursuant to NRS 18.010(2)(b) because the Trust had reasonable grounds to maintain this litigation.

### *FACTS AND PROCEDURAL HISTORY*

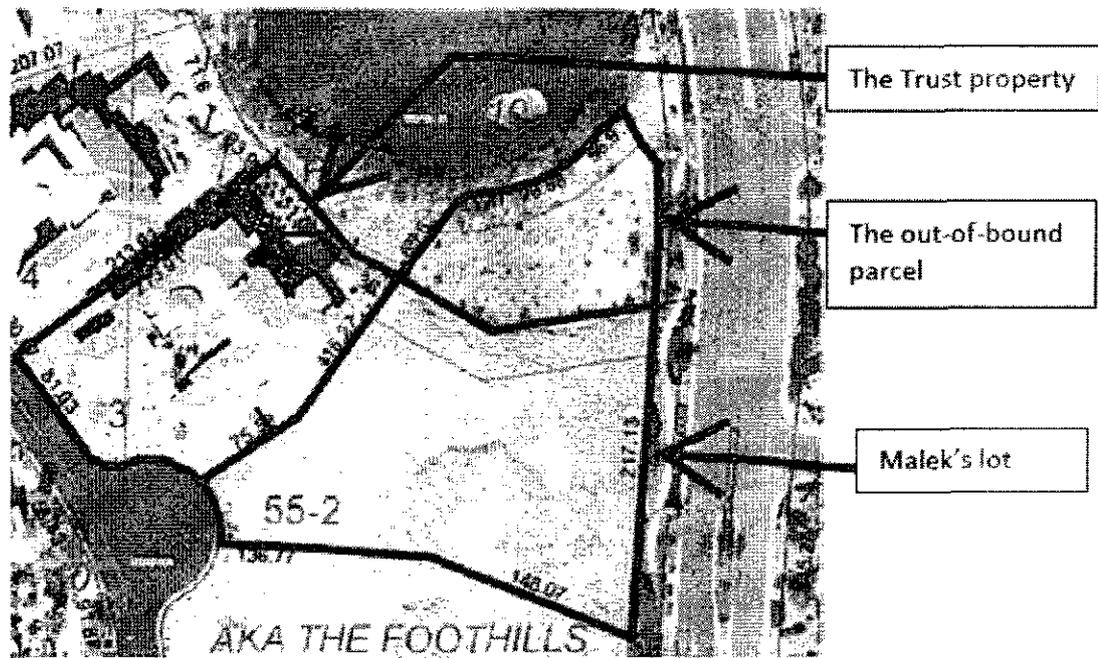
The MacDonald Highlands master planned community is situated around the Dragon Ridge Golf Course in Henderson, Nevada. In the summer of 2012, Malek expressed interest in purchasing the Lot, which was undeveloped and located at 594 Lairmont Place within the MacDonald Highlands master planned community, in order to build a new home. The Lot is located to the south of the ninth hole of the golf course.

Malek also insisted on purchasing the out-of-bounds parcel,<sup>2</sup> which was situated to the north of the Lot, in between the Lot and the ninth hole of the golf course. Below is a map depicting Malek's lot, the out-of-bounds parcel, and the Trust's lot.<sup>3</sup>

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<sup>2</sup>The record demonstrates that the out-of-bounds parcel is a 0.34-acre dirt area, covered in rocks and shrubs. While it appears to be within the golf course, it is not an in-play area.

<sup>3</sup>This map was included in Malek's answering brief, and its accuracy was not disputed in the Trust's reply brief.



In order for Malek to purchase the out-of-bounds parcel, it had to be rezoned from its public/semi-public designation to residential. Relying on MacDonald Highlands' real estate agent Doiron's commitment to rezone and sell the out-of-bounds parcel, Malek purchased the Lot in August 2012. With the help of MacDonald Highlands, he sought and obtained the City of Henderson's approval to rezone the out-of-bounds parcel. In December 2012, while the rezoning was pending, Malek hired surveyors to stake the Lot and out-of-bounds parcel to show where he intended to build.

The rezoning process involved several steps, which the MacDonald parties were familiar with because they had rezoned at least two other parcels of land prior to rezoning the out-of-bounds parcel. First, the MacDonald parties and a third-party company gave notice of and held a homeowners' association community meeting to discuss the rezoning. Next, the City of Henderson held a planning commission meeting. The Henderson City Council eventually passed a resolution approving the rezoning and held a public meeting where they again approved it. The

City's resolution rezoning the out-of-bounds parcel to residential use was adopted on December 8, 2012, and recorded on January 7, 2013. On January 24, 2013, the City of Henderson adopted a new map reflecting the zoning change, and the final map was recorded on June 26, 2013. There were no objections to the rezoning request throughout this process.

At the time Malek inquired about purchasing the Lot and initiated the rezoning process, Bank of America owned the neighboring Trust property to the northwest of the Lot. The Trust property also abuts the ninth hole of the golf course and shares one point of contact with the out-of-bounds property on the southeast corner of the Trust property. Bank of America received notice of the rezoning but did not object.

In February 2013, Barbara Rosenberg sent a letter of intent to Bank of America expressing intent to purchase the Trust property "As-Is," "Where-is," and "With All Faults." In March 2013, the Trust signed a written purchase offer and attached a proposed residential purchase agreement that included those terms. The residential purchase agreement contained several waivers and obligations to be undertaken on the part of the Trust, the sellers, and the sellers' agents, including the Trust's waiver of its right to perform a survey and determine the boundary lines surrounding the Trust property. The purchase agreement also provided the Trust with a 12-day due diligence period to inspect the Trust property, and included a waiver of claims against all brokers and their agents. The MacDonald parties are listed as the agent and broker for Bank of America in the purchase agreement. The Trust took title in May 2013.

Malek's deed for the out-of-bounds parcel was recorded on June 26, 2013. When the Trust learned about Malek's purchase of the out-of-bounds parcel, it filed a complaint seeking, among other things, to

establish an easement against the MacDonald parties and Malek. The Trust filed an amended complaint, reasserting the easement claim against the MacDonald parties and Malek, and also including a separate claim for an implied restrictive covenant against Malek alone to enjoin him from constructing anything on the out-of-bounds parcel. The Trust further sought monetary damages against the MacDonald parties for negligent and intentional misrepresentations, for real estate broker violations under NRS Chapter 645, and for failure to make various disclosures, including failing to disclose the zoning change of the out-of-bounds parcel.

Both Malek and the MacDonald parties brought motions for summary judgment on all of the Trust's claims. The MacDonald parties argued that the purchase agreement placed the burden on the Trust to investigate boundary and zoning issues, the proper disclosures were made, and the Trust waived any claims by signing the purchase agreement. Malek and the MacDonald parties argued that there is no easement or implied restrictive covenant for light, air, view, or privacy in Nevada.<sup>4</sup>

The district court granted both Malek and the MacDonald parties' motions for summary judgment, determining that (1) the Trust had sought, and then agreed, to purchase the Trust property as-is from the seller; (2) the Trust's claims failed as a matter of law because Nevada law does not recognize the types of easements and covenants the Trust sought; and (3) the Trust voluntarily and knowingly waived any claims it may have had against the MacDonald parties. The district court subsequently awarded the MacDonald parties and Malek attorney fees and costs.

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<sup>4</sup>Malek also moved for summary judgment on his counterclaim for slander of title, which the district court denied. However, Malek and the Trust stipulated to dismissing that counterclaim.

## DISCUSSION

On appeal, the Trust argues that the district court erred in granting summary judgment for both the MacDonald parties and Malek, and, further, abused its discretion in granting them attorney fees and costs. We first discuss the Trust's claim for an implied restrictive covenant against Malek to determine whether Nevada law has previously recognized such a doctrine and, if so, whether the Trust has established an implied restrictive covenant in this case.<sup>5</sup> We then consider whether the Trust waived all of its other claims against the MacDonald parties, and, in doing so, we consider whether reversal of the MacDonald parties' award of attorney fees and costs is warranted. Finally, we address whether the district court abused its discretion in awarding attorney fees and costs to Malek.

*The district court did not err in concluding that Nevada law has not recognized an implied restrictive covenant for use*

The Trust sought an implied restrictive covenant over the out-of-bounds parcel, under the terms of which the out-of-bounds parcel must perpetually be used as part of the golf course. The district court rejected this claim, concluding that under Nevada law, "there is not an implied easement or implied restrictive covenant requiring property formerly owned

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<sup>5</sup>In its first amended complaint, the Trust asserted a claim for easement against both the MacDonald parties and Malek. The district court concluded that the Trust was truly seeking an implied negative easement for light, air, and view, which Nevada law prohibits. We affirm the district court's grant of summary judgment on this issue as the Trust concedes that Nevada law does not recognize such an easement, the Trust offers no argument on appeal as to the easement claim, and Nevada law clearly precludes an easement for view. *See Probasco v. City of Reno*, 85 Nev. 563, 565, 459 P.2d 772, 774 (1969) ("Nevada has expressly repudiated the doctrine of implied negative easement of light, air and view for the purpose of a private suit by one landowner against a neighbor.").

by a golf course to remain part of the golf course indefinitely, especially where that property was not a part of the playable grass area of the golf course.” The district court also concluded that the Trust did not provide evidence demonstrating that an implied restrictive covenant would preserve anything other than its view, light, or privacy. The Trust argues that this was error because Nevada law has recognized implied restrictive covenants and implied easements.

We review orders granting summary judgment *de novo*. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is only appropriate “when the pleadings and other evidence on file demonstrate that no genuine issue as to any material fact [remains] and that the moving party is entitled to a judgment as a matter of law.” *Id.* (alteration in original) (internal quotation marks omitted). “A factual dispute is genuine when the evidence is such that a rational trier of fact could return a verdict for the nonmoving party.” *Id.* at 731, 121 P.3d at 1031. “[W]hen reviewing a motion for summary judgment, the evidence, and any reasonable inferences drawn from it, must be viewed in a light most favorable to the nonmoving party.” *Id.* at 729, 121 P.3d at 1029.

The Trust points us to our decision in *Shearer v. City of Reno*, 36 Nev. 443, 136 P. 705 (1913), to demonstrate that we have previously recognized implied restrictive covenants. In *Shearer*, a landowner sold several lots, expressly agreeing that he would not improve or sell the surrounding lots. *Id.* at 447, 136 P. at 707. The landowner dedicated the surrounding lots “to the public for all time,” and filed a plat identifying so. *Id.* We acknowledged that “[t]he filing of the original plat and the selling of lots was with the representation and assurance that purchasers would have the benefit of streets and avenues as represented on the map.” *Id.* at 448,

136 P. at 707. We further explained that “[t]he purchaser took not merely the interest of the grantor in the land described in the deed, but, as appurtenant to it, an easement in the streets and in the public grounds named, with an implied covenant that subsequent purchasers should be entitled to the same rights.” *Id.* at 450, 136 P. at 708.

While we recognized an implied covenant in *Shearer*, it was in the context of an express agreement and a public land dedication. Here, the out-of-bounds parcel was part of a common development, where, as counsel for the Trust conceded during oral argument, there was no express agreement that the out-of-bounds parcel would remain part of the golf course, or even that the golf course itself would remain a golf course in perpetuity. Further, there was no public dedication for the golf course. As the parties acknowledge, the golf course was not public land; rather, those wanting to use the golf course had to have memberships or pay to play. Thus, the Trust is not seeking the type of implied covenant that we discussed in *Shearer*. Further, it is clear that we did not adopt in *Shearer* the type of covenant sought by the Trust—an implied restrictive covenant based on the existence of a common development scheme.

The Trust also points to our decision in *Boyd v. McDonald*, in which we recognized implied easements for ingress and egress across another’s property. 81 Nev. 642, 647, 408 P.2d 717, 720 (1965). The Trust uses the term “implied easement” interchangeably with “implied restrictive covenant”; however, the two property interests are distinct. As we explained in *Boyd*, an implied easement is

an easement created by law. It is grounded in the court’s decision that as to a particular transaction in land, the owner of two parcels had so used one to the benefit of his other that, on selling the benefited parcel, a purchaser could reasonably have

expected, without further inquiry, that these benefits were included in the sale.

*Id.* at 649, 408 P.2d at 721. An implied easement gives a person the right “to use in some way the land of another.” *Id.* at 647, 408 P.2d at 720 (internal quotation marks omitted). In this case, however, it is undisputed that the Trust did not seek a *right to use* the property of another, as the plaintiffs did in *Boyd*. Rather, the Trust sought to *restrict the use* by another of his or her own property. The Trust claimed that a restrictive covenant should be implied from the existence of the common development plan, requiring the out-of-bounds parcel to remain part of the golf course in perpetuity.<sup>6</sup>

While we outlined the requirements for the creation of an implied easement for use of another’s land in *Boyd*, we did not address the doctrine of implied restrictive covenants that involves restrictions imposed upon an owner relating to the use of his or her own land. *See Boyd*, 81 Nev. at 647, 408 P.2d at 720 (explaining that “the three essential characteristics of an easement by implication are (1) unity of title and subsequent separation by a grant of the dominant tenement; (2) apparent and continuous user; and (3) the easement must be necessary to the proper or reasonable enjoyment of the dominant tenement”). Thus, although the Trust correctly points out that we recognized implied easements, it conflates the relief sought in *Boyd* with the relief it seeks here.

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<sup>6</sup>Situations, as here, where a property owner seeks to enforce a restrictive covenant based on a common development are also generally referred to as “implied reciprocal covenants,” as well as “reciprocal negative easement[s]” or “implied servitude[s].” 20 Am. Jur. 2d *Covenants, Etc.* § 156 (2017).

As the district court stated, we have not previously acknowledged implied restrictive covenants in the context of a common development scheme, nor have we stated that one exists under Nevada law. While other courts have recognized them, implied restrictive covenants are generally disfavored. 20 Am. Jur. 2d *Covenants, Etc.* § 155 (2015); *see also* 9 Richard R. Powell, *Powell on Real Property* § 60.03[1] (2000) (explaining that because implied covenants “involve[] a relaxation of the writing requirement,” many courts are cautious to infer a restrictive covenant only when it is “obvious and clearly intended”). Other jurisdictions have acknowledged that implied restrictive covenants “should be applied with extreme caution because in effect it lodges discretionary power in a court to deprive a [person] of his [or her] property by imposing a servitude through implication.” *Walters v. Colford*, 900 N.W.2d 183, 191 (Neb. 2017) (alterations in original) (quoting *Galbreath v. Miller*, 426 S.W.2d 126, 128 (Ky. 1968)). We are not persuaded to recognize an implied restrictive covenant in this case based on the facts before us.<sup>7</sup> Moreover, even assuming implied restrictive covenants exist under Nevada law, the Trust has not proved that an implied restrictive covenant existed in this case. *See* 20 Am. Jur. 2d *Covenants, Etc.* § 155 (2015) (explaining that the party attempting to establish the implied restrictive covenant bears the burden of proving it exists).

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<sup>7</sup>The Trust argues that under *Jackson v. Nash*, 109 Nev. 1202, 866 P.2d 262 (1993), whether an implied restrictive covenant exists is a question of fact. We note that *Jackson* involved an implied easement, not an implied restrictive covenant. 109 Nev. at 1208, 866 P.2d at 267. Moreover, we can conclude from the undisputed facts that no implied restrictive covenant existed here.

In arguing in favor of an implied restrictive covenant, the Trust relies upon and applies the elements of an implied easement from *Boyd*. But those elements do not apply where a party seeks to establish an implied restrictive covenant. Though the Trust has failed to argue the specific elements of an implied restrictive covenant, we nevertheless discern from the evidence presented that the requirements have not been met here. A restrictive covenant by implication may arise when the following elements are established: (1) there is a common grantor, (2) there is “a designation of the property subject to the restrictions,” (3) there exists “a general plan or scheme of restriction for such property,” and (4) the restrictions run with the land. 20 Am. Jur. 2d *Covenants, Etc.* § 156 (2015). Thus, there must be a restriction “evidencing a scheme or intent that the entire tract should be similarly treated, so that once the plan is effectively put into operation, the burden placed upon the land conveyed is by operation of law reciprocally placed upon the land retained.” *Id.* Implied restrictive covenants are “enforceable against the grantor or a subsequent purchaser of the lot from the grantor with notice, either actual or constructive.” *Id.*

The Trust established the first element for an implied restrictive covenant as MacDonald Highlands was the common grantor of the residential lots as the developer of the master planned community. *See id.* However, the Trust failed to establish the remaining elements. Primarily, the Trust did not demonstrate that MacDonald Highlands intended to restrict the use of the out-of-bounds parcel. *See id.* (explaining that it must be shown that the common grantor, “in the various grants of the lots [in the common development scheme],...included some restriction, either affirmative or negative, for the benefit of the land retained, evidencing a scheme or intent that the entire tract should be

similarly treated”). In the district court, the Trust characterized the scope of the implied restrictive covenant as one for view. On appeal, the Trust states that characterization was not its contention, but that it instead seeks to ensure the out-of-bounds parcel remains part of the golf course. However, the Trust does not point to any evidence in the record demonstrating that the out-of-bounds parcel was used as part of the golf course or that the sale of the out-of-bounds parcel diminishes the ability to use the golf course. Notably, it is undisputed that the actual golf course remains a golf course. Additionally, there is no evidence in the record before us that the MacDonald parties ever expressed, implied, or intended that the out-of-bounds parcel would perpetually be part of the golf course or that Malek or his predecessors in interest were on either actual or constructive notice of such a restriction. *See id.* (noting that “[a] court’s primary interest in [determining whether an implied restrictive covenant exists] is to give effect to the actual intent of the grantor” and clarifying that a subsequent purchaser will only be bound by an implied restrictive covenant when on actual or constructive notice).

Therefore, the Trust has failed to demonstrate that the elements of an implied restrictive covenant were met in this case. *See* 20 Am. Jur. 2d *Covenants, Etc.* § 155 (2015) (explaining that “in order for a restriction to be thus created, the implication must be plain and unmistakable, or necessary” (footnote omitted)). Accordingly, we conclude that no genuine issue of material fact remains, and the district court correctly granted summary judgment on this claim. *See Wood*, 121 Nev. at 729, 121 P.3d at 1029.

*The Trust waived its common law, but not statutory, claims against the MacDonald parties*

The district court determined that the Trust's claims against the MacDonald parties for unjust enrichment, fraudulent or intentional misrepresentation, negligent misrepresentation, real estate broker violations of NRS Chapter 645, and declaratory relief failed because the Trust insisted and agreed upon taking the Trust property as-is and thus knowingly, intentionally, and voluntarily waived these claims. The Trust argues that the district court erred in determining that it waived its claims against the MacDonald parties because the MacDonald parties had a common law and statutory duty to disclose that the out-of-bounds parcel had been rezoned and that the lot lines had been changed in a way that reduced the Trust property's value.

Generally, “[n]ondisclosure by the seller of adverse information concerning real property . . . will not provide the basis for an action by the buyer to rescind or for damages when property is sold ‘as is.’” *Mackintosh v. Jack Matthews & Co.*, 109 Nev. 628, 633, 855 P.2d 549, 552 (1993). Moreover, “[l]iability for nondisclosure is generally not imposed where the buyer either knew of or could have discovered the defects prior to the purchase.” *Land Baron Invs., Inc. v. Bonnie Springs Family LP*, 131 Nev. 686, 696, 356 P.3d 511, 518 (2015). The general rule foreclosing liability for nondisclosure when property is purchased as-is does not apply when

the seller knows of facts materially affecting the value or desirability of the property which are known or accessible only to [the seller] and also knows that such facts are not known to, or within the reach of the diligent attention and observation of the buyer.

*Mackintosh*, 109 Nev. at 633, 855 P.2d at 552 (alteration in original) (internal quotation marks omitted).

We agree with the district court that the Trust waived its common law claims of negligent misrepresentation, fraudulent or intentional misrepresentation, and unjust enrichment. The record demonstrates that the Trust expressly agreed that it would carry the duty to inspect the property and ensure that all aspects of it were suitable prior to close of escrow, and the information regarding the lot lines was reasonably accessible to the Trust. Accordingly, we conclude that the Trust's agreement to purchase the property as-is foreclosed its common law claims against the MacDonald parties, and thus, the district court did not err in granting summary judgment on the Trust's common law claims. See *Wood*, 121 Nev. at 729, 121 P.3d at 1029.

However, we agree with the Trust that it did not waive its statutory claims of real estate broker violations. In its complaint, the Trust alleged that the MacDonald parties violated the duties and obligations required under NRS 645.252. NRS 645.252 provides, in pertinent part, as follows:

A licensee who acts as an agent in a real estate transaction:

1. Shall disclose to each party to the real estate transaction as soon as is practicable:

(a) Any material and relevant facts, data or information which the licensee knows, or which by the exercise of reasonable care and diligence should have known, relating to the property which is the subject of the transaction.

Under NRS 645.255, except for the duty to present all offers to the client, "no duty of a licensee set forth in NRS 645.252 or 645.254 may be waived." Thus, the Trust could not waive its statutory claims against the MacDonald parties. Accordingly, we conclude that the district court erred in granting summary judgment on the basis that the Trust waived the duty of disclosure

pursuant to NRS 645.252. Because we reverse the district court's order granting summary judgment in favor of the MacDonald parties on the Trust's statutory claims, we necessarily reverse the attorney fees and costs awarded to the MacDonald parties.<sup>8</sup> See *Bower v. Harrah's Laughlin, Inc.*, 125 Nev. 470, 494-95, 215 P.3d 709, 726 (2009) (“[I]f we reverse the underlying decision of the district court that made the recipient of the costs the prevailing party, we will also reverse the costs award.”).

*The district court abused its discretion in awarding attorney fees and costs to Malek*

The district court granted Malek's motion for attorney fees and costs pursuant to NRS 18.010(2)(b), which states that attorney fees may be awarded to a prevailing party if “the claim, counterclaim, cross-claim or third-party complaint or defense of the opposing party was brought or maintained without reasonable ground or to harass the prevailing party.” During the hearing on Malek's motion for attorney fees and costs, the district court concluded that the Trust's claims were not frivolous when initially filed. However, the district court concluded that after the Trust received Malek's motion for summary judgment, the Trust lacked reasonable grounds to maintain the litigation, even if it initially had reasonable grounds to file suit, because of the facts and law in Malek's motion. Therefore, the district court awarded Malek the attorney fees he

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<sup>8</sup>We reverse the attorney fees and costs awarded to FHP Ventures on the separate ground that it was not included in the offer of judgment. Further, because we reverse the award of attorney fees and costs to the MacDonald parties, we do not reach their argument on cross-appeal that the district court erred in not granting post-judgment interest on their award.

incurred from the time he filed his motion for summary judgment until the date he filed his motion for attorney fees, which totaled \$18,417.50. The district court also awarded Malek \$7,568.50 in costs.

The Trust argues that the district court abused its discretion in determining that its claims were frivolously maintained.<sup>9</sup> We agree. We review a district court's attorney fees decision for an abuse of discretion. See *Baldonado v. Wynn Las Vegas, LLC*, 124 Nev. 951, 967, 194 P.3d 96, 106 (2008). A district court may award attorney fees to a prevailing party when it finds that the opposing party brought or maintained a claim without reasonable grounds. NRS 18.010(2)(b). For purposes of NRS 18.010(2)(b), a claim is frivolous or groundless if there is no credible evidence to support it. *Semenza v. Caughlin Crafted Homes*, 111 Nev. 1089, 1095, 901 P.2d 684, 687-88 (1995). "Although a district court has discretion to award attorney fees under NRS 18.010(2)(b), there must be evidence supporting the district court's finding that the claim or defense was unreasonable or brought to harass." *Bower*, 125 Nev. at 493, 215 P.3d at 726.

The district court's order pointed to the facts and law included in Malek's motion for summary judgment to support its finding that the Trust lacked reasonable grounds to maintain this suit. Though we agree

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<sup>9</sup>The Trust makes additional arguments as to how the attorney fees award was an abuse of discretion, including that the district court did not conduct the required analysis under *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 455 P.2d 31 (1969). While we agree that the district court was required to conduct a *Brunzell* analysis, see *Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 864-65, 124 P.3d 530, 548-49 (2005), we do not further address these arguments as they are not necessary to the resolution of this issue. See *First Nat'l Bank of Nev. v. Ron Rudin Realty Co.*, 97 Nev. 20, 24, 623 P.2d 558, 560 (1981) ("In that our determination of the first issue is dispositive of this case, we do not reach the second issue . . .").

that the evidence produced and Nevada's current jurisprudence does not fully support the Trust's suit, we disagree that the Trust lacked reasonable grounds to maintain the suit, as it presented a novel issue in state law, which, if successful, could have resulted in the expansion of Nevada's caselaw regarding restrictive covenants. *See Rodriguez v. Primadonna Co., LLC*, 125 Nev. 578, 588, 216 P.3d 793, 801 (2009) (affirming the district court's denial of attorney fees under NRS 18.010(2)(b) where the claim "presented a novel issue in Nevada law concerning the potential expansion of common law liability"). Though we understand the Legislature's desire to deter frivolous lawsuits, this must be balanced with the need for attorneys to pursue novel legal issues or argue for clarification or modification of existing law. *See, e.g., Stubbs v. Strickland*, 129 Nev. 146, 153-54, 297 P.3d 326, 330-31 (2013) (determining that a party did not file suit for an improper purpose because he argued for a change or clarification in existing law). Accordingly, we reverse the district court's award of attorney fees and costs to Malek.

#### CONCLUSION

We determine that Nevada law has not recognized implied restrictive covenants based on a common development scheme, and we are not persuaded to adopt the doctrine based on the record before us. We further hold that the Trust could not waive its statutory claims under NRS Chapter 645 against the MacDonald parties, and, therefore, we reverse the district court's grant of summary judgment on this issue and reverse the district court's award of attorney fees and costs to the MacDonald parties. Finally, we conclude that the district court abused its discretion in awarding attorney fees and costs to Malek pursuant to NRS 18.010(2)(b) as the Trust presented a novel legal issue, and attorneys should not be prohibited from pursuing novel legal issues or arguing for modification or expansion of

existing law. As such, we affirm in part, reverse in part, and remand for proceedings consistent with this opinion.

Hardesty, J.  
Hardesty

We concur:

Douglas, C.J.  
Douglas

Cherry, J.  
Cherry

Gibbons, J.  
Gibbons

Pickering, J.  
Pickering

Stiglich, J.  
Stiglich

IN THE SUPREME COURT OF THE STATE OF NEVADA

BANK OF AMERICA, N.A.,  
SUCCESSOR BY MERGER TO BAC  
HOME LOANS SERVICING, LP, F/K/A  
COUNTRYWIDE HOME LOANS  
SERVICING, LP,  
Appellant,  
vs.  
SFR INVESTMENTS POOL 1, LLC, A  
NEVADA LIMITED LIABILITY  
COMPANY,  
Respondent.

No. 70501

FILED

SEP 13 2018

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY   
CHIEF CLERK

Appeal from a district court order granting summary judgment to the buyer and denying summary judgment to the first deed of trust holder in a quiet title action following an HOA lien foreclosure sale. Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

*Reversed and remanded.*

Akerman, LLP, and Darren T. Brenner, Thera A. Cooper, and Vatana Lay, Las Vegas,  
for Appellant.

Kim Gilbert Ebron and Jacqueline A. Gilbert, Howard C. Kim, Zachary Clayton, and Jason G. Martinez, Las Vegas,  
for Respondent.

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BEFORE THE COURT EN BANC.

OPINION

By the Court, PICKERING, J.:

This is a quiet title dispute between the buyer at an HOA lien foreclosure sale and the holder of the first deed of trust on the property. The

holder of the first deed of trust tendered the amount needed to satisfy the superpriority portion of the lien to the HOA before the sale but the trustee proceeded with foreclosure anyway. The question presented is whether the buyer took title subject to the first deed of trust. We hold that a first deed of trust holder's unconditional tender of the superpriority amount due results in the buyer at foreclosure taking the property subject to the deed of trust. We therefore reverse the district court's grant of summary judgment for SFR Investments Pool 1, LLC and remand for further proceedings consistent with this opinion.

I.

In 2012, the original owner of 3617 Diamond Spur Avenue (Property) fell behind on his payments to the Sutter Creek Homeowners Association (HOA). The HOA initiated foreclosure proceedings, recording a delinquent assessment lien and a notice of default and election to sell. After receiving notice of the default, Bank of America, the holder of the first deed of trust on the property, contacted the HOA, seeking to clarify the superpriority amount and offering to pay that amount in full. Based on the HOA's representations, Bank of America tendered payment of \$720—nine months' worth of assessment fees—to the HOA. The letter included with the tender stated that the HOA's acceptance would be an "express agreement that [Bank of America]'s financial obligations towards the HOA in regards to the [Property] have now been 'paid in full.'" The HOA rejected the payment and sold the property at foreclosure to respondent SFR Investments Pool 1, LLC.

After the foreclosure sale, litigation ensued with Bank of America and SFR both claiming title to the Property. On cross-motions for summary judgment, the district court granted summary judgment to SFR and denied summary judgment to Bank of America, from which order Bank

of America timely appealed. The case was routed to the court of appeals, which reversed and remanded. SFR then petitioned for review of the decision under NRAP 40B(a), which we granted.

## II.

Bank of America argues that its tender was valid and satisfied the superpriority portion of the HOA's lien. SFR responds that the HOA's rejection was in good faith because at the time of the tender it was unsettled as to the amount of the superpriority portion of the lien, and the tender was conditional. SFR also asserts that it is protected as a bona fide purchaser of the property.

The grant or denial of summary judgment is reviewed de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is appropriate if the pleadings and other evidence on file, viewed in the light most favorable to the nonmoving party, demonstrate that no genuine issue of material fact remains in dispute and that the moving party is entitled to judgment as a matter of law. *Id.* "A genuine issue of material fact exists if, based on the evidence presented, a reasonable jury could return a verdict for the nonmoving party." *Butler ex rel. Biller v. Bayer*, 123 Nev. 450, 457-58, 168 P.3d 1055, 1061 (2007).

## A.

Bank of America asserts that it tendered the correct amount to satisfy the superpriority portion of the HOA lien and that it was not required to do more. A valid tender of payment operates to discharge a lien. *Power Transmission Equip. Corp. v. Beloit Corp.*, 201 N.W.2d 13, 16 (Wis. 1972) ("Common-law and statutory liens continue in existence until they are satisfied or terminated by some manner recognized by law. A lien may be lost by . . . payment or tender of the proper amount of the debt secured

by the lien.”); *see also* 74 Am. Jur. 2d *Tender* § 41 (2012). Valid tender requires payment in full. Annotation, *Tender as Affected by Insufficiency of Amount Offered*, 5 A.L.R. 1226 (1920). The HOA refused to accept Bank of America’s tender, because it did not satisfy both the superpriority and subpriority portions of the lien.

NRS 116.3116 governs liens against units for HOA assessments and details the portion of the lien that has superpriority status. At the time of the tender in 2012, the statute provided that the superpriority portion of an HOA lien was prior to a first security interest on a unit

to the extent of any charges incurred by the association on a unit pursuant to NRS 116.310312 [maintenance and nuisance abatement] and to the extent of the assessments for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115 which would have become due in the absence of acceleration during the 9 months immediately preceding institution of an action to enforce the lien.

NRS 116.3116(2) (2012). A plain reading of this statute indicates that the superpriority portion of an HOA lien includes only charges for maintenance and nuisance abatement, and nine months of unpaid assessments. We explained as much in *SFR Investments Pool 1 v. U.S. Bank*, 130 Nev. 742, 748, 334 P.3d 408, 412 (2014), and *Horizons at Seven Hills v. Ikon Holdings*, 132 Nev., Adv. Op. 35, \_\_\_, 373 P.3d 66, 72 (2016).<sup>1</sup>

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<sup>1</sup>Citing *Horizons at Seven Hills*, 132 Nev., Adv. Op. 35, at n.4, 373 P.3d at 69 n.4, SFR argues for the first time in its petition for review that Bank of America’s tender was insufficient because it did not include collection costs and attorney fees. SFR waived this argument, both by failing to raise it timely in district court or on appeal and by failing to cogently distinguish the statutory and regulatory analysis in *Horizons at Seven Hills*. *See Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3,

The record establishes that Bank of America tendered the correct amount to satisfy the superpriority portion of the lien on the property. Pursuant to the HOA's accounting, nine months' worth of assessment fees totaled \$720, and the HOA did not indicate that the property had any charges for maintenance or nuisance abatement. Bank of America sent the HOA a check for \$720 in June 2012. On the record presented, this was the full superpriority amount.

B.

The district court deemed Bank of America's tender insufficient because it was conditional. It based this finding on the letter Bank of America sent with its payment, which stated,

This is a non-negotiable amount and any endorsement of said cashier's check on your part, whether express or implied, will be strictly construed as an unconditional acceptance on your part of the facts stated herein and express agreement that [Bank of America's financial obligations towards the HOA in regards to the [property] have now been "paid in full."

SFR argues, and the district court found, that this clause imposed an impermissible condition on the tender, as it required the HOA to potentially accept less than the full amount it was due under NRS 116.3116, given that the scope of the superpriority portion of an HOA's lien was not yet clarified at the time of the tender.

In addition to payment in full, valid tender must be unconditional, or with conditions on which the tendering party has a right

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252 P.3d 668, 672 n.3 (2011) (arguments not raised on appeal are deemed waived); *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (an appellate court needed not consider claims that are not cogently argued).

to insist. 74 Am. Jur. 2d *Tender* § 22 (2012). “The only legal conditions which may be attached to a valid tender are either a receipt for full payment or a surrender of the obligation.” *Heath v. L.E. Schwartz & Sons, Inc.*, 416 S.E.2d 113, 114-15 (Ga. Ct. App. 1992); *see also Stockton Theatres, Inc. v. Palermo*, 3 Cal. Rptr. 767, 768 (Ct. App. 1960) (tender of entire judgment with request for satisfaction of judgment was not conditional); *cf. Steward v. Yoder*, 408 N.E.2d 55, 57 (Ill. App. Ct. 1980) (concluding tender with request for accord and satisfaction was conditional, but not unreasonable).

Although Bank of America’s tender included a condition, it had a right to insist on the condition. Bank of America’s letter stated that acceptance of the tender would satisfy the superiority portion of the lien, preserving Bank of America’s interest in the property. Bank of America had a legal right to insist on this. SFR’s claim that this made the tender impermissibly conditional because the payment required to satisfy the superpriority portion of an HOA lien was legally unsettled at the time is unpersuasive. As discussed in Section A, a plain reading of NRS 116.3116 indicates that at the time of Bank of America’s tender, tender of the superpriority amount by the first deed of trust holder was sufficient to satisfy that portion of the lien. Thus, this issue was not undecided, and Bank of America’s tender of the superpriority portion of the lien did not carry an improper condition.

C.

SFR claims that even if Bank of America’s tender was valid, the HOA’s good-faith rejection because of a belief that Bank of America needed to tender the entire amount of the lien, is a defense to the tender. Bank of America responds that SFR’s assertion is speculative because the HOA

never gave a reason for its rejection, and thus cannot serve as the basis for summary judgment in SFR's favor.

Bank of America first contacted the HOA for assistance in determining the property's monthly assessment fee so it could pay the superpriority portion of the lien. The HOA responded with a demand that Bank of America pay the entire HOA lien to halt the foreclosure proceedings. Bank of America then tendered nine months of the property's assessment fees, along with a statutory analysis explaining that the amount was sufficient. The HOA returned the check a few weeks later and continued with foreclosure proceedings, giving no explanation for its rejection.

SFR did not present its good-faith rejection argument to the district court. *But see Schuck v. Signature Flight Support of Nev., Inc.*, 126 Nev. 434, 436, 245 P.3d 542, 544 (2010) (“[A] de novo standard of review does not trump the general rule that ‘[a] point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal.’”) (second alteration in original) (quoting *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981)). The authorities it cites to this court for that proposition do not support it. We therefore reject SFR's claim that the HOA's asserted “good faith” in rejecting Bank of America's tender allowed the HOA to proceed with the sale, thereby extinguishing Bank of America's first deed of trust.

D.

SFR next claims that if Bank of America's tender was valid and discharged the superpriority portion of the HOA lien, Bank of America's failure to record its tender or keep the tender good renders it unenforceable against SFR.

1.

SFR argues that Bank of America was required to record its tender under either NRS 111.315 or NRS 106.220.<sup>2</sup> Issues of statutory interpretation are questions of law reviewed de novo. *Taylor v. State, Dep't of Health & Human Servs.*, 129 Nev. 928, 930, 314 P.3d 949, 951 (2013). If a statute is unambiguous, this court does not look beyond its plain language in interpreting it. *Westpark Owners' Ass'n v. Eighth Judicial Dist. Court*, 123 Nev. 349, 357, 167 P.3d 421, 427 (2007). "Whenever possible, a court will interpret a rule or statute in harmony with other rules or statutes." *Nev. Power Co. v. Haggerty*, 115 Nev. 353, 364, 989 P.2d 870, 877 (1999).

NRS 111.315 states that "[e]very conveyance of real property, and every instrument of writing setting forth an agreement to convey any real property, or whereby any real property may be affected, proved acknowledged and certified in the manner prescribed in this chapter . . . shall be recorded . . . ." NRS 111.010 defines conveyance as "every instrument in writing, except a last will and testament . . . by which any estate or interest in lands is created, alienated, assigned or surrendered." Thus, when an interest in land is created, alienated, assigned, or surrendered, the instrument documenting the transaction must be recorded.

By its plain text, NRS 111.315 does not apply to Bank of America's tender. Tendering the superpriority portion of an HOA lien does not create, alienate, assign, or surrender an interest in land. Rather, it

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<sup>2</sup>In 2015, the Legislature amended NRS Chapter 116 to add NRS 116.31164(2), which imposes recording requirements on certain superpriority lien satisfactions. This statute is not at issue on this appeal, because the tender and foreclosure sale predated its enactment.

*preserves* a pre-existing interest, which does not require recording. See Baxter Dunaway, *Interests and Conveyances Outside Acts—Recordable Interests*, 4 L. of Distressed Real Est. § 40:8 (2018) (“[D]ocuments which do not create or transfer interests in land are often held to be nonrecordable; the records, after all, are not a public bulletin board.”). SFR’s argument that the tender was an instrument affecting real property is unpersuasive. NRS 111.315 pertains to written instruments “setting forth an agreement . . . whereby any real property may be affected . . . *in the manner prescribed in this chapter . . .*” (Emphasis added.) NRS Chapter 111 governs the creation, alienation, assignment, or surrendering of property interests, and their subsequent recording. Bank of America’s tender did not bring about any of these actions, and therefore did not affect the property as prescribed in NRS Chapter 111. Accordingly, NRS 111.315 did not require Bank of America to record its tender.

NRS 106.220 provides that “[a]ny instrument by which any mortgage or deed of trust of, lien upon or interest in real property is subordinated or waived as to priority, must . . . be recorded . . . .” The statute further states that “[t]he instrument is not enforceable under this chapter or chapter 107 of NRS unless and until it is recorded.” NRS Chapter 106 does not define instrument as used in NRS 106.220, but Black’s Law Dictionary defines the term as “[a] written legal document that defines rights, duties, entitlements, or liabilities, such as a statute, contract, will, promissory note, or share certificate.” *Instrument*, *Black’s Law Dictionary* (10th ed. 2014). Thus, NRS 106.220 applies when a written legal document subordinates or waives the priority of a mortgage, deed of trust, lien, or interest in real property.

The changes in the lien priority caused by Bank of America's tender do not invoke NRS 106.220's recording requirements. Generally, the creation and release of a lien cause priority changes in a property's interests as a result of a written legal document. But Bank of America's tender discharged the superpriority portion of the HOA's lien by operation of law. See NRS 116.3116; 53 C.J.S. Liens § 14 (2017) ("A statutory lien is created and defined by the legislature. The character, operation and extent of a statutory lien are ascertained solely from the terms of the statute."). NRS Chapter 116's statutory scheme allows banks to tender the payment needed to satisfy the superpriority portion of the HOA lien and maintain its senior interest as the first deed of trust holder. NRS 116.3116(1)-(3); see also Unif. Common Interest Ownership Act (UCIOA) § 3-116 cmt. (amended 2008), 7 pt. 2 U.L.A. 124 (2009) ("As a practical matter, secured lenders will most likely pay the [9] months' assessments demanded by the association rather than having the association foreclose on the unit."). Thus, under the split-lien scheme, tender of the superpriority portion of an HOA lien discharges that portion of the lien by operation of law. Because the lien is not discharged by using an instrument, NRS Chapter 106 does not apply.

2.

SFR also argues that Bank of America should have taken further actions to keep its tender good, such as paying the money into court or an escrow account. Bank of America responds that NRS Chapter 116 does not require any further action beyond tender of the superpriority portion of the lien to preserve its interest in the property.

Whether a tendering party must pay the amount into court depends on the nature of the proceeding and the statutory and common law of the jurisdiction. See Annotation, *Necessity of Keeping Tender Good in*

*Equity*, 12 A.L.R. 938 (1921) (“Generally, there is no fixed rule in equity which requires a tender to be kept good in the sense in which that phrase is used at law.”); *see also* Restatement (Third) of Prop.: Mortgages § 6.4 (Am. Law Inst. 1997) (“The tender must be kept good in the sense that the person making the tender must continue at all times to be ready, willing, and able to make the payment.”). Where payment into court is not explicitly required, “averment of a readiness and willingness to bring the money into court, and pay the same on the order of the court, is sufficient.” Annotation, *Necessity of Keeping Tender Good in Equity*, 12 A.L.R. 938 (1921). And, “the necessity of keeping a tender good and of paying the money into court has no application to a tender made for the purpose of discharging a mortgage lien.” Annotation, *Unaccepted Tender as Affecting Lien of Real Estate Mortgage*, 93 A.L.R. 12 (1934) (explaining that such a tender would either immediately discharge the mortgage lien or the lien would remain unimpaired by the tender).

To satisfy the superpriority portion of an HOA lien, the tendering party is not required to keep a rejected tender good by paying the amount into court. HOA liens created under NRS Chapter 116 are statutory liens and thus enforcement of the lien is governed by statute. *See Phifer v. Gulf Oil Corp.*, 401 S.W.2d 782, 785 (Tenn. 1966) (“A lien created by statute is limited in operation and extent by the terms of the statute, and can arise and be enforced only in the event and under the facts provided for in the statute . . .”). Neither NRS 116.3116, the related statutes in NRS Chapter 116, nor the UCIOA, indicates that a party tendering a superpriority portion of an HOA lien must pay the amount into court to satisfy the lien.

To judicially impose such a rule would only obstruct the operation of the split-lien scheme. The practical effect of requiring the first deed of trust holder to pay the tender into court is that a valid tender would no longer serve to discharge the superpriority portion of the lien. Instead, the tendering party would have to bring an action showing that the tender is valid and paid into court before the lien is discharged. With such conditions, a tendering party could only achieve discharge of the superpriority portion of the lien by litigation. This process negates the purpose behind the unconventional HOA split-lien scheme: prompt and efficient payment of the HOA assessment fees on defaulted properties. UCIOA § 3-116 cmt. (amended 2008), 7 pt. 2 U.L.A. 124 (2009) (recognizing the superpriority lien “strikes an equitable balance between the need to enforce collection of unpaid assessments and the obvious necessity for protecting the priority of the security interests of lenders”). Accordingly, after tendering the superpriority portion of an HOA lien to preserve its interest as first deed of trust holder, a party is not required to pay the amount into court, and need only be ready and willing to pay to keep the tender good.

E.

SFR claims that even if Bank of America’s tender discharged the superpriority portion of the HOA lien, SFR’s status as a bona fide purchaser (BFP) gives it title to the property free and clear of Bank of America’s interest, citing *Shadow Wood Homeowners Ass’n v. New York Community Bancorp, Inc.*, 132 Nev. 49, 366 P.3d 1105 (2016). Bank of America responds that *Shadow Wood* is inapplicable because it concerned the bank as the owner of the property, not the deed of trust holder, and that SFR has failed to prove its BFP status.

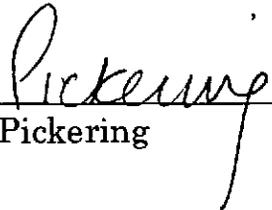
A party's status as a BFP is irrelevant when a defect in the foreclosure proceeding renders the sale void. *See Henke v. First S. Props., Inc.*, 586 S.W.2d 617, 620 (Tex. App. 1979) (“[T]he doctrine of good faith purchaser for value without notice does not apply to a purchaser at the void foreclosure sale.”); *see also* Baxter Dunaway, *Trustee's Deed: Generally*, 2 L. of Distressed Real Est. § 17:16 (2018) (“A void deed carries no title on which a bona fide purchaser may rely . . .”). Because a trustee has no power to convey an interest in land securing a note or other obligation that is not in default, a purchaser at a foreclosure sale of that lien does not acquire title to that property interest. *See id.*; *cf. Deep v. Rose*, 364 S.E.2d 228 (Va. 1988) (when defect renders a sale wholly void, “[n]o title, legal or equitable, passes to the purchaser”).

A foreclosure sale on a mortgage lien after valid tender satisfies that lien is void, as the lien is no longer in default. *See* 1 Grant S. Nelson, Dale A. Whitman, Ann M. Burkhart & R. Wilson Freyermuth, *Real Estate Finance Law* § 7:21 (6th ed. 2014) (“The most common defect that renders a sale void is that the mortgagee had no right to foreclose . . .”); *see also Henke*, 586 S.W.2d at 620 (concluding the payment of past-due installments cured loan's default such that subsequent foreclosure on the property was void). It follows that after a valid tender of the superpriority portion of an HOA lien, a foreclosure sale on the entire lien is void as to the superpriority portion, because it cannot extinguish the first deed of trust on the property.

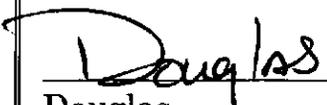
Because Bank of America's valid tender discharged the superpriority portion of the HOA's lien, the HOA's foreclosure on the entire lien resulted in a void sale as to the superpriority portion. Accordingly, the

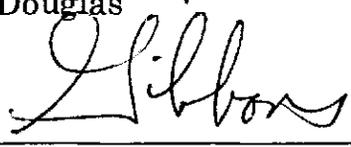
HOA could not convey full title to the property, as Bank of America's first deed of trust remained after foreclosure. See Baxter Dunaway, *Trustee's Deed: Generally*, 2 L. of Distressed Real Est. § 17:16 (2018) ("Any mortgages, deeds of trust, or liens which are senior to the deed of trust which is being foreclosed are unaffected by the foreclosure of the junior deed of trust.") As a result, SFR purchased the property subject to Bank of America's deed of trust. See UCIOA § 3-116 cmt. 2, illus. 3 (amended 2008), 7 pt. 1B U.L.A. 209 (Supp. 2018) (explaining that when a bank pays the superpriority portion of an HOA lien, the subsequent foreclosure sale "will not extinguish Bank's mortgage lien, and the buyer at the sale will take the unit subject to Bank's mortgage lien").

For these reasons, we reverse the district court's grant of summary judgment to SFR and remand this matter to the district court for further proceedings consistent with this opinion.

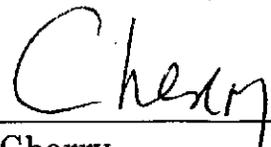
  
\_\_\_\_\_, J.  
Pickering

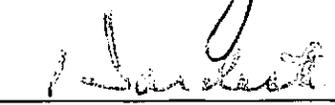
We concur:

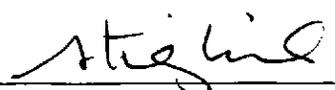
  
\_\_\_\_\_, C.J.  
Douglas

  
\_\_\_\_\_, J.  
Gibbons

  
\_\_\_\_\_, J.  
Parraguirre

  
\_\_\_\_\_, J.  
Cherry

  
\_\_\_\_\_, J.  
Hardesty

  
\_\_\_\_\_, J.  
Stiglich

134 Nev., Advance Opinion 74  
IN THE SUPREME COURT OF THE STATE OF NEVADA

WELLS FARGO BANK, N.A., AS  
TRUSTEE ON BEHALF OF THE  
HOLDERS OF THE HARBORVIEW  
MORTGAGE LOAN TRUST  
MORTGAGE LOAN PASS-THROUGH  
CERTIFICATES, SERIES 2006-12,  
Appellant,  
vs.  
TIM RADECKI,  
Respondent.

No. 71405

FILED

SEP 13 2018

ELIZABETH A. BROWN  
CLERK OF THE COURT  
BY *[Signature]*  
CHIEF DEPUTY CLERK

Appeal from a judgment, following a bench trial, in an action to quiet title. Eighth Judicial District Court, Clark County; James Crockett, Judge.

*Affirmed.*

Ballard Spahr LLP and Sylvia O. Semper and Abran E. Vigil, Las Vegas;  
Ballard Spahr LLP and Anthony C. Kaye, Salt Lake City, Utah,  
for Appellant.

The Wright Law Group and John Henry Wright, Las Vegas,  
for Respondent.

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BEFORE THE COURT EN BANC.

*OPINION*

By the Court, STIGLICH, J.:

This appeal requires us to consider the competing interests of the purchaser of a property at a homeowners' association foreclosure sale

and the beneficiary of a deed of trust on that property at the time of the sale. *See SFR Invs. Pool 1, LLC v. U.S. Bank, N.A. (SFR I)*, 130 Nev. 742, 758, 334 P.3d 408, 419 (2014) (holding that valid foreclosure of an HOA superpriority lien extinguishes a first deed of trust).

After a bench trial, the district court determined that appellant Wells Fargo Bank, N.A.'s deed of trust was extinguished by a valid foreclosure sale. On appeal, Wells Fargo argues that the foreclosure sale should have been invalidated on equitable grounds, the foreclosure sale constituted a fraudulent transfer under the Uniform Fraudulent Transfer Act (UFTA), and that the foreclosure deed failed to transfer ownership of the property.

We disagree on all three points. We agree with the district court's conclusion that there was no "unfairness or irregularity" in the foreclosure process, *see Golden v. Tomiyasu*, 79 Nev. 503, 515, 387 P.2d 989, 995 (1963), so the district court correctly rejected Wells Fargo's equitable argument. UFTA does not apply because regularly conducted, noncollusive foreclosure sales are exempt from that statute. Lastly, we agree with the district court's conclusion that an irregularity in the foreclosure deed upon sale does not invalidate the foreclosure as a whole. Accordingly, we affirm.

#### *FACTS AND PROCEDURAL HISTORY*

This case concerns competing rights to 2102 Logston Drive, North Las Vegas (the Property). In 2006, in exchange for a \$196,000 loan, a homeowner encumbered the Property with a Deed of Trust (DOT). That DOT was eventually assigned to appellant Wells Fargo.

The Property is located within the Cambridge Heights planned community (the HOA) and is subject to the HOA's Covenants, Conditions, and Restrictions (CC&Rs). Those CC&Rs obligated the Property owner to

pay monthly assessments and authorized the HOA to impose a lien upon the Property in the event of nonpayment.

By 2012, the homeowner had defaulted on both the loan and the HOA payments. The HOA recorded a Notice of Delinquent Assessment and a Notice of Default. Then, before the HOA recorded a Notice of Foreclosure sale, Wells Fargo sued for judicial foreclosure on the property. Wells Fargo secured a default judgment against both the homeowner and the HOA. The written judgment declared that Wells Fargo's DOT "is superior to all right, title, interest, lien, equity or estate of the Defendants with the exception of any super priority lien rights held by any Defendant pursuant to NRS 116.3116."

The HOA then conducted a foreclosure sale pursuant to NRS 116.3116. The winning bidder at that sale was respondent Tim Radecki, who purchased the property for \$4,000. The declaration of value associated with the sale indicated that the tax value of the property was \$56,197.

Radecki moved to intervene in Wells Fargo's foreclosure suit. The district court granted that motion and held a bench trial to determine whether Radecki or Wells Fargo had superior title to the Property. In its judgment following trial, the district court rejected Wells Fargo's arguments as to why the foreclosure sale should be invalidated and held that Wells Fargo's DOT was extinguished pursuant to *SFR Investments Pool 1, LLC v. U.S. Bank, N.A.*, 130 Nev. 742, 334 P.3d 408 (2014). Thus, the district court quieted title in favor of Radecki.

Wells Fargo appeals.

## DISCUSSION

Wells Fargo raises numerous issues, some of which this court has conclusively decided in our HOA foreclosure jurisprudence.<sup>1</sup> Three of Wells Fargo's arguments are novel: (1) Wells Fargo argues that the actions of the HOA and the intent of the purchaser at the foreclosure indicate "unfairness or irregularity" in the foreclosure process, rendering the foreclosure invalid, (2) Wells Fargo argues that the foreclosure constituted a "fraudulent transfer" under the Uniform Fraudulent Transfer Act, and (3) Wells Fargo argues that the foreclosure deed failed to convey the property to Radecki.

After a bench trial, this court reviews the district court's legal conclusions de novo. *Weddell v. H2O, Inc.*, 128 Nev. 94, 101, 271 P.3d 743, 748 (2012). The district court's factual findings will be left undisturbed unless they are clearly erroneous or not supported by substantial evidence. *Id.*

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<sup>1</sup>That is, Wells Fargo attacks NRS Chapter 116 as unconstitutional. We rejected this claim in *Saticoy Bay LLC Series 350 Durango 104 v. Wells Fargo Home Mortgage*, 133 Nev., Adv. Op. 5, 388 P.3d 970, 971 (2017), and we see no new arguments in Wells Fargo's briefing that would lead us to revisit this constitutional issue. Wells Fargo also argues that the foreclosure should be invalidated due to the grossly inadequate price alone. This claim has no merit in light of this court's decision in *Nationstar Mortgage, LLC v. Saticoy Bay LLC Series 2227 Shadow Canyon*, in which we clarified that "inadequacy of price, however gross, is not in itself a sufficient ground for setting aside a [foreclosure] sale." 133 Nev., Adv. Op. 91, 405 P.3d 641, 643 (2017) (alteration in original; quotation marks omitted).

*There was not unfairness or irregularity in the foreclosure process*

Wells Fargo argues that the foreclosure sale should be invalidated due to the low purchase price coupled with “evidence of unfairness or irregularity” in the foreclosure process. *See Golden v. Tomiyasu*, 79 Nev. 503, 515, 387 P.2d 989, 995 (1963). Wells Fargo first argues that the HOA “intentionally evaded the judicial process and went forward with the HOA sale despite defaulting” in Wells Fargo’s judicial foreclosure proceeding. The HOA’s actions, Wells Fargo contends, “suggest[ ] a race to complete a [foreclosure] sale before the [district] Court could issue a foreclosure judgment.” This argument ignores the fact that Wells Fargo’s default judgment explicitly stated that Wells Fargo’s DOT was superior to all other interests “*with the exception of any super priority lien* rights held by any Defendant pursuant to NRS 116.3116.” (Emphasis added.) NRS 116.31162 authorized the HOA to nonjudicially foreclose on that superpriority lien. To the extent the HOA “race[d]” to foreclose on that lien, it was entitled to do so.

Wells Fargo additionally argues that Radecki was not a bona fide purchaser (BFP) because he “admittedly had knowledge of Wells Fargo’s competing interest” and “he was aware of the legal and title issues surrounding HOA foreclosure sales.” Radecki cannot possibly be a BFP, Wells Fargo argues, because Radecki himself did not believe he was acquiring title to the property. Thus, Wells Fargo concludes, it is unfair to award unencumbered title to Radecki.

We agree with the district court that Radecki had no obligation to establish BFP status. The BFP doctrine provides an equitable remedy to protect innocent purchasers from an otherwise *defective* sale; it does not provide an equitable basis to invalidate an otherwise *valid* sale. *See 25*

*Corp. v. Eisenman Chem. Co.*, 101 Nev. 664, 675, 709 P.2d 164, 172 (1985) (“The bona fide doctrine protects a subsequent purchaser’s title against competing legal or equitable claims of which the purchaser had no notice at the time of the conveyance.”). “Where the complaining party has access to all the facts surrounding the questioned transaction and merely makes a mistake as to the legal consequences of his act, equity should normally not interfere, especially where the rights of third parties might be prejudiced thereby.” *Shadow Wood Homeowners Ass’n., Inc. v. N.Y. Cmty. Bankcorp, Inc.*, 132 Nev. 49, 66, 366 P.3d 1105, 1116 (2016) (quotation marks omitted). Given that the foreclosure sale was valid, Radecki’s subjective beliefs as to the effect of the foreclosure sale are irrelevant.

In sum, Wells Fargo has failed to show “evidence of unfairness or irregularity” in the foreclosure process that would invalidate the foreclosure sale on equitable grounds. *See Golden*, 79 Nev. at 515, 387 P.2d at 995.

*A properly conducted NRS Chapter 116 foreclosure sale is not a “fraudulent transfer”*

Wells Fargo argues that the foreclosure sale violated NRS Chapter 112, the Uniform Fraudulent Transfer Act (UFTA). “The UFTA is designed to prevent a debtor from defrauding creditors by placing the subject property beyond the creditors’ reach.” *Herup v. First Boston Fin., LLC*, 123 Nev. 228, 232, 162 P.3d 870, 872 (2007). While a “[f]raudulent conveyance under NRS Chapter 112 does not require proof of intent to defraud,” the creditor bears the burden of proof to establish that a fraudulent transfer occurred. *Sportsco Enters. v. Morris*, 112 Nev. 625, 631, 917 P.2d 934, 937 (1996).

Wells Fargo argues that the conveyance was fraudulent under NRS 112.180(1)(b)(1), NRS 112.180(1)(b)(2), and NRS 112.190(1). NRS 112.180(1)(b)(1) does not apply, because there was no evidence that the homeowner “[w]as engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small.” Nor is NRS 112.180(1)(b)(2) applicable, because there was no evidence that the homeowner “[i]ntended to incur, or believed or reasonably should have believed that [she] would incur, debts beyond . . . her ability to pay as they became due.” Wells Fargo’s strongest argument is that the sale violated NRS 112.190(1), which provides in full:

A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

As relevant here, to succeed under its NRS 112.190(1) UFTA claim, Wells Fargo must show the following: (1) A transfer of an asset occurred, (2) Wells Fargo’s claim preexisted the transfer, (3) the transfer was not for “reasonably equivalent value,” and (4) the homeowner was insolvent at the time of the transfer. *Id.*

Some of these elements are clearly met. As to the second element, Wells Fargo’s DOT constitutes a prior claim on the Property that was transferred via the foreclosure sale. The fourth element is likewise met because the homeowner was not paying her debts at the time of the transfer, and “[a] debtor who is generally not paying . . . her debts as they become due is presumed to be insolvent.” NRS 112.160(2).

We hold that the third element of an NRS 112.190(1) claim is not met.<sup>2</sup> At first glance, Wells Fargo persuasively argues that the \$4,000 purchase price was not “reasonably equivalent” to the Property’s value, which was assessed to have a tax value of \$56,197. However, Wells Fargo ignores NRS 112.170(2), which provides in pertinent part:

a person gives a reasonably equivalent value if the person acquires an interest of the debtor in an asset pursuant to a regularly conducted, noncollusive foreclosure sale or execution of a power of sale for the acquisition or disposition of the interest of the debtor upon default under a mortgage, deed of trust or security agreement.

The effect of this safe harbor provision is to exempt certain transfers from UFTA by treating them as being for “reasonably equivalent value” regardless of the price. A “regularly conducted, noncollusive foreclosure sale” is one such type of exempted transfer. NRS 112.170(2).

The question is whether this provision covers HOA foreclosure sales. One argument against such sales being included is that NRS 112.170(2) specifically refers to “default under a mortgage, deed of trust or security agreement.” In referring to those three types of encumbrances, the Legislature arguably intended to exclude other types of encumbrances, such as HOA assessment liens. *See Galloway v. Truesdell*, 83 Nev. 13, 26, 422

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<sup>2</sup>Given this holding, we need not consider whether the Property constitutes an “asset” within the meaning of UFTA. *Compare Guild Mortg. Co. v. Prestwick Court Tr.*, No. 2:15-CV-258 JCM, 2018 WL 894609, at \*10-11 (D. Nev. Feb. 14, 2018) (holding that property in any way encumbered is exempted from UFTA’s definition of “asset”), *appeal docketed*, No. 18-15293 (9th Cir. Feb. 22, 2018), *with Or. Account Sys., Inc. v. Greer*, 996 P.2d 1025, 1029 (Or. Ct. App. 2000) (holding that encumbered property constitutes an asset as long as the property’s value exceeds “the amount of the encumbering lien(s)”).

P.2d 237, 246 (1967) (“The maxim ‘Expressio Unius Est Exclusio Alterius,’ the expression of one thing is the exclusion of another, has been repeatedly confirmed in this State.”). However, we interpret “default under a mortgage, deed of trust or security agreement” to limit only “execution of a power of sale,” as opposed to “noncollusive foreclosure sale.” That is, we interpret NRS 112.170(2) to cover *any* “regularly conducted, noncollusive foreclosure sale” and *certain* types of executions of power of sale—namely, those that occur “upon default under a mortgage, deed of trust or security agreement.” This interpretation is consistent with both the statute’s plain meaning and UFTA’s primary purpose of “prevent[ing] a debtor from defrauding creditors by placing the subject property beyond the creditors’ reach.” See *Herup*, 123 Nev. at 232, 162 P.3d at 872. Wells Fargo’s DOT was extinguished not by fraud, but by the consequences of NRS 116.3116 and *SFR 1*, 130 Nev. at 743, 334 P.3d at 409.

The district court concluded that the foreclosure sale was valid because it complied with the relevant provisions of NRS Chapter 116. As we analyzed in the prior section of this opinion, the district court’s finding was supported by substantial evidence. A foreclosure sale that complies with the relevant statutory requirements is necessarily one that is “regularly conducted” and “noncollusive.” See *BFP v. Resolution Tr. Corp.*, 511 U.S. 531, 545 (1994) (holding that “‘reasonably equivalent value,’ for foreclosed property, is the price in fact received at the foreclosure sale, so long as all the requirements of the State’s foreclosure law have been complied with”). Thus, the foreclosure sale was necessarily for “reasonably equivalent value,” NRS 112.170(2), so Wells Fargo’s UFTA claim fails.

*Alleged inaccuracies in a foreclosure deed do not invalidate the foreclosure sale*

Lastly, Wells Fargo argues that reversal is warranted because the foreclosure deed did not say that it transferred ownership of the property to Radecki. The district court rejected this argument, holding that “[i]f the Foreclosure Deed contains irregular language, this irregularity can be remedied” without invalidating the foreclosure sale. The district court was again correct. Invalidation of the foreclosure sale is not the way to remedy alleged inaccuracies within the Foreclosure Deed. As the district court found, the foreclosure sale fully complied with NRS Chapter 116, so that sale “vest[ed] in the purchaser the title of the unit’s owner.” NRS 116.31166(3) (1993).

*CONCLUSION*

We affirm the district court’s conclusion that the foreclosure sale should not be invalidated on equitable grounds. We hold that a “regularly conducted, noncollusive” NRS Chapter 116 foreclosure sale is exempt from UFTA pursuant to NRS 112.170(2). Lastly, we hold that an alleged inaccuracy in a foreclosure deed does not invalidate an otherwise

valid foreclosure sale. Accordingly, we affirm the district court's decision to award title to Radecki.

Stiglich, J.  
Stiglich

We concur:

Douglas C.J.  
Douglas

Cherry, J.  
Cherry

Gibbons, J.  
Gibbons

Pickering, J.  
Pickering

Hardesty, J.  
Hardesty

Parraguirre, J.  
Parraguirre

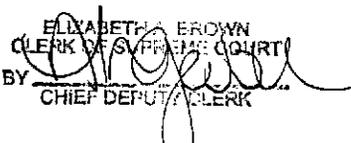
134 Nev., Advance Opinion 67  
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

YVONNE O'CONNELL, AN  
INDIVIDUAL,  
Appellant,  
vs.  
WYNN LAS VEGAS, LLC, D/B/A WYNN  
LAS VEGAS,  
Respondent.

No. 71789

**FILED**

AUG 30 2018

ELIZABETH BROWN  
CLERK OF SUPREME COURT  
BY   
CHIEF DEPUTY CLERK

Appeal from a post-judgment order denying appellant's motion for attorney fees and costs. Eighth Judicial District Court, Clark County; Carolyn Ellsworth, Judge.

*Reversed and remanded.*

Nettles Law Firm and Brian D. Nettles, Christian M. Morris, Jon J. Carlston, and Edward J. Wynder, Henderson,  
for Appellant.

Semenza Kircher Rickard and Lawrence J. Semenza, III, Christopher D. Kircher, and Jarrod L. Rickard, Las Vegas,  
for Respondent.

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BEFORE SILVER, C.J., TAO and GIBBONS, JJ.

## OPINION

By the Court, GIBBONS, J.:

Yvonne O'Connell sued Wynn Las Vegas, LLC, for negligence after she was injured when she slipped and fell on the resort's property.<sup>1</sup> Before the jury trial on O'Connell's claims, O'Connell made a \$49,999 offer of judgment to Wynn, which it rejected. A jury awarded O'Connell \$400,000 for past and future pain and suffering, with the final judgment of \$240,000 reflecting that the jury deemed Wynn 60 percent at fault and O'Connell 40 percent at fault.

O'Connell subsequently sought an attorney fees award under NRCP 68, which allows a party to seek attorney fees when the final judgment is more favorable than her rejected offer of judgment. She requested \$96,000 in attorney fees, which she calculated as 40 percent of the reduced judgment amount based on the 40-percent contingency fee agreement with her attorneys. The district court denied her request. The court did not award O'Connell any attorney fees because, in part, O'Connell did not submit hourly billing records of the work performed by her counsel to show the requested fee was reasonable. The court further found that the other factors set forth in *Beattie v. Thomas*, 99 Nev. 579, 588-89, 668 P.2d 268, 274 (1983), likewise supported denying attorney fees. O'Connell appealed, arguing that she should not be required to submit hourly billing records to support an attorney fees award when her attorneys represented her on a contingency fee basis and that the court otherwise abused its discretion in weighing the *Beattie* factors to deny her fees request.

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<sup>1</sup>This appeal was consolidated with the appeal in Docket No. 70583 prior to briefing. We now deconsolidate these appeals for the purposes of disposition. Judgment was affirmed in Docket No. 70583.

This case asks us to examine if a lawyer, who represents a client on a contingency fee basis, must provide proof of hourly billing records before he or she can be awarded attorney fees that are otherwise allowed by agreement, rule, or statute. We conclude that district courts cannot deny attorney fees because an attorney, who represents a client on a contingency fee basis, does not submit hourly billing records. The district court here relied primarily on the lack of hourly billing records in evaluating the reasonableness of O'Connell's application for attorney fees, without recognizing that attorney fees can be awarded when they are based upon contingency fee agreements. And because we further determine that the district court improperly analyzed certain of the remaining *Beattie* factors, we conclude the court abused its discretion in denying her request. Consequently, we reverse the district court's denial of O'Connell's request for attorney fees and remand for a full hearing on O'Connell's request.<sup>2</sup>

#### *FACTS AND PROCEDURAL HISTORY*

On February 8, 2010, O'Connell slipped and fell on a liquid substance as she was walking through the front atrium of the Wynn resort. Two days later, she went to an urgent care facility seeking treatment for her pain from the fall. She continued to see a series of doctors for pain and injuries related to the incident. Two years after her fall, O'Connell sued Wynn for negligence. Discovery progressed over the following three years,

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<sup>2</sup>The district court partially awarded O'Connell her requested expert witness fees. O'Connell argues on appeal that the district court should have awarded her the entirety of those fees. O'Connell did not raise this argument until her reply brief in her appeal. Therefore, we decline to consider it now. *See Weaver v. State, Dep't of Motor Vehicles*, 121 Nev. 494, 502, 117 P.3d 193, 198-99 (2005) ("As this argument was raised only in [appellant's] reply brief, we need not consider it."). All other points raised on appeal not discussed herein are unpersuasive.

and the case was tried before a jury, over a seven-day period, in November 2015.

Before the jury trial, Wynn and O'Connell attempted to settle the case by exchanging offers of judgment. Wynn's top offer was for \$3,000. O'Connell's last offer was for \$49,999, which included interest, costs, and attorney fees. Four months before O'Connell's last offer, and before the discovery deadline, she disclosed approximately \$33,000 in medical damages. She later disclosed an amended amount of nearly \$38,000 in damages approximately a month after the discovery deadline, but still before she presented her offer of judgment. The case proceeded to a jury trial, and the jury awarded O'Connell \$400,000 for pain and suffering, apportioned as \$150,000 for past pain and suffering and \$250,000 for future pain and suffering. The jury assigned 60 percent of the fault to Wynn and 40 percent to O'Connell, and the judgment amount of \$240,000 reflected the verdict minus 40 percent.

Post-trial, in her initial application for attorney fees, costs, and pre-judgment interest, O'Connell argued that her requested attorney fees were reasonable and justified because the State Bar of Nevada approves of contingency fee arrangements and "the industry standard" is 40 percent, or more, if the case goes to a jury trial. Within her application, O'Connell noted generally "the work done in this case" and argued that her "counsel expended substantial time and incurred costs to try this matter through a full jury trial." O'Connell further argued that, if the court did not award fees, it would undermine the purpose of NRCP 68 and its goal to settle cases. O'Connell contended that to decide "the amount of fees to award, the court may calculate a reasonable amount to be that of the contingency fee," citing to *Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 124 P.3d 530

(2005). She claimed, without elaborating, that under *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 455 P.2d 31 (1969), which sets out factors to help courts assess a reasonable amount of attorney fees, it was evident that her request for \$96,000 in attorney fees was “reasonable.” To support this request, O’Connell attached her contingency fee agreement, which stated, in part, that the fee would be 40 percent of any recovery and 50 percent of any recovery if there was an appeal.

In her later-filed amended application for fees, costs, and pre-judgment interest, O’Connell addressed the *Brunzell* factors and argued that her counsel satisfied all four factors. As to the second factor, the type of work done, O’Connell noted that contingency fees are common in personal injury cases because clients usually have fewer resources to pay legal fees up front or as the fees accrue. She argued that personal injury cases are difficult because the burden of proof rests on the plaintiff and the “[c]ases require considerable skill and effort in written discovery and trial work.” Additionally, she explained the risk attorneys take by accepting cases on a contingency fee basis because “attorneys will not be entitled to fees if they lose.” Regarding the third factor about the “work actually performed,” O’Connell summarily argued that her counsel “spent hundreds of hours preparing and litigating this case.”

The district court conducted a brief hearing on the motion for attorney fees, and no additional evidence was presented. The court allowed only limited argument by O’Connell and then denied the request for attorney fees. In its order, the district court rejected O’Connell’s request for attorney fees in its entirety. It applied the *Beattie* factors, 99 Nev. at 588-89, 668 P.2d at 274, as required when evaluating an NRCP 68 offer to decide whether the prevailing party is entitled to attorney fees. The district court

concluded that the first three *Beattie* factors favored Wynn, signaling that O'Connell was not entitled to attorney fees despite prevailing. For the fourth *Beattie* factor regarding the reasonableness of the fees, the court applied the factors from *Brunzell* to decide what, if any, amount of attorney fees it could award. It acknowledged that O'Connell provided the qualities of her counsel and that it was apparent she received a favorable result. The court did not distinctly address the remaining two *Brunzell* factors. Instead it only addressed the tasks performed and hours associated with them. It decided that it could not determine if the fees were reasonable without any bills describing the tasks completed and the hours expended, and found in favor of Wynn on the fourth *Beattie* factor.

In her appeal from the district court's decision regarding attorney fees, O'Connell does not argue that she provided any billing statements to the court in addressing the determination that the reasonableness of the award could not be determined absent any bills. Rather, she argues that the district court is holding contingency fee agreements to "a double standard" by requiring hourly billing records. We agree that declining to assess the reasonableness of a request for attorney fees, based upon a contingency fee agreement, because the motion was not supported by hourly billing statements, is improper when analyzing whether to award fees under *Beattie* and how much to award under *Brunzell*.

#### ANALYSIS

A party may seek attorney fees when allowed by an agreement, rule, or statute. See NRS 18.010 (governing awards of attorney fees); *RTTC Commc'ns, LLC v. The Saratoga Flier, Inc.*, 121 Nev. 34, 40, 110 P.3d 24, 28 (2005) (noting that "a court may not award attorney fees absent authority under a specific rule or statute"). NRCP 68 establishes the rules regarding

offers of judgment. A party may serve an offer of judgment “[a]t any time more than 10 days before trial.” NRCP 68(a). If a party “rejects an offer and fails to obtain a more favorable judgment,” that party is responsible for “the offeror’s post-offer costs, applicable interest on the judgment from the time of the offer to the time of entry of the judgment and reasonable attorney’s fees, if any be allowed, actually incurred by the offeror from the time of the offer.” NRCP 68(f)(2); *see also RTTC*, 121 Nev. at 40-41, 110 P.3d at 28.

The district court must evaluate the *Beattie* factors when deciding whether to award attorney fees pursuant to NRCP 68. *Frazier v. Drake*, 131 Nev. 632, 641-42, 357 P.3d 365, 372 (Ct. App. 2015). Ultimately, the decision to award attorney fees rests within the district court’s discretion, and we review such decisions for an abuse of discretion. *Id.* at 642, 357 P.3d at 372. The district court abuses its discretion when “the court’s evaluation of the *Beattie* factors is arbitrary or capricious.” *Id.*

The *Beattie* factors require the district court to evaluate:

- (1) whether the plaintiff’s claim was brought in good faith;
- (2) whether the defendants’ offer of judgment was reasonable and in good faith in both its timing and amount;
- (3) whether the plaintiff’s decision to reject the offer and proceed to trial was grossly unreasonable or in bad faith; and
- (4) whether the fees sought by the offeror are reasonable and justified in amount.

*Beattie*, 99 Nev. at 588-89, 668 P.2d at 274. *Beattie* applies to plaintiffs and defendants. *See Yamaha Motor Co., U.S.A. v. Arnoult*, 114 Nev. 233, 252, 955 P.2d 661, 673 (1998) (deciding that when the defendant is the offeree, the court should consider if the defendant’s defense was brought in good

faith under the first factor and remanding for the district court to reconsider liability issues when evaluating whether the defendant's rejection of the offer was unreasonable or in bad faith under the third factor). When it is determined that the first three *Beattie* factors weigh in favor of the party who rejected the offer of judgment, the reasonableness of the requested fees becomes irrelevant as the reasonableness of the fees alone cannot support an attorney fees award. *Frazier*, 131 Nev. at 644, 357 P.3d at 373.

When considering the amount of attorney fees to award, the analysis turns on the factors set forth in *Brunzell*. Of particular significance to this case, *Brunzell* provides that “[w]hile hourly time schedules are helpful in establishing the value of counsel services, other factors may be equally significant.” 85 Nev. at 349, 455 P.2d at 33. *Brunzell* directs lower courts to consider the following when determining a reasonable amount of attorney fees to award:

(1) *the qualities of the advocate*: his ability, his training, education, experience, professional standing and skill; (2) *the character of the work to be done*: its difficulty, its intricacy, its importance, time and skill required, the responsibility imposed and the prominence and character of the parties where they affect the importance of the litigation; (3) *the work actually performed by the lawyer*: the skill, time and attention given to the work; (4) *the result*: whether the attorney was successful and what benefits were derived.

*Id.* (internal quotation marks omitted). With these standards in mind, we turn to the matter before us.

*The offer of judgment was reasonable and in good faith*<sup>3</sup>

The district court concluded that the second *Beattie* factor weighed in Wynn's favor because the court precluded O'Connell from submitting "special medical damages at the time of trial," which made it difficult for Wynn to determine the value of the case. The court also concluded that the offer was unreasonable because O'Connell made it when she did not have a proper damages calculation. O'Connell argues that she had disclosed approximately \$38,000 in medical damages at the time of her offer. Wynn contends that O'Connell's damages should have been excluded because of discovery issues, while O'Connell points to the significant amount of discovery her attorneys completed before making the \$49,999 offer.

The second *Beattie* factor requires district courts to evaluate "whether the . . . offer of judgment was reasonable and in good faith in both its timing and amount." *Beattie*, 99 Nev. at 588, 668 P.2d at 274. "[T]here is no bright-line rule that qualifies an offer of judgment as per se reasonable in amount; instead, the district court is vested with discretion to consider the adequacy of the offer and the propriety of granting attorney fees."

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<sup>3</sup>We address only *Beattie* factors two and four in this opinion. On appeal, O'Connell does not challenge the district court's ruling on the first *Beattie* factor, and so we need not consider it. See *Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) ("Issues not raised in an appellant's opening brief are deemed waived."). Additionally, Wynn did not respond to O'Connell's argument regarding the third *Beattie* factor. Therefore, Wynn conceded this point, and thus, the district court will need to reweigh this factor upon remand. See *Bates v. Chronister*, 100 Nev. 675, 682, 691 P.2d 865, 870 (1984) (treating respondent's failure to address one of appellant's arguments "as a confession of error").

*Certified Fire Prot., Inc. v. Precision Constr., Inc.*, 128 Nev. 371, 383, 283 P.3d 250, 258 (2012).

Here, the district court justified its decision to weigh the second factor in Wynn's favor based on its conclusion that it had excluded evidence of O'Connell's medical damages. This reasoning has two significant flaws. First, as to timing, apart from its decision in its order denying O'Connell's request for attorney fees, it is not apparent from the record that the district court did in fact exclude O'Connell's medical damages. After it heard Wynn's motion in limine seeking to exclude the medical damages before trial, the court denied Wynn's motion without prejudice and deferred its decision until trial, which was almost two months after O'Connell's offer of judgment expired. Furthermore, on the first day of trial, O'Connell chose not to seek medical damages, so it is unclear if an order was ever needed, or entered, as one does not appear in the record. If the district court ever did exclude the evidence, any exclusion occurred after O'Connell's offer of judgment had expired. Therefore, Wynn did not know at the time it rejected the offer of judgment that it would not face potential liability for medical damages.

Second, as to the amount, whether O'Connell's medical damages were excluded did not control her request for general damages, which would include pain and suffering. Wynn had all of the necessary information to evaluate O'Connell's claim as discovery had closed before she made her offer. *See Certified*, 128 Nev. at 383, 283 P.3d at 258. Indeed, Wynn risked the possibility of a large, six-figure verdict by rejecting O'Connell's offer, regardless of the admissibility of her medical damages—and that is exactly what happened. During closing arguments, O'Connell asked the jury for a damages award in the six figures. She ultimately was

awarded \$400,000, and still received a \$240,000 judgment after fault was apportioned—well above her \$49,999 offer of judgment that Wynn rejected. *See generally RTTC*, 121 Nev. at 37, 43, 110 P.3d at 26, 29 (concluding that there was “ample support in the record to support the district court’s findings that both [respondent’s] claim and offer of judgment were brought in good faith” in a case in which respondent made a \$45,000 offer of judgment that was rejected, yet the respondent was ultimately awarded “\$53,333, plus interest”).

Based on the foregoing, the district court abused its discretion by mistakenly concluding that, because medical damages were precluded, O’Connell did not have a basis for her offer or that Wynn could not properly evaluate her offer.<sup>4</sup> *See Dillard Dep’t Stores, Inc. v. Beckwith*, 115 Nev. 372, 382, 989 P.2d 882, 888 (1999) (highlighting that “[t]he purpose of . . . NRCP 68 is to save time and money” and to “reward a party who makes a reasonable offer and punish the party who refuses to accept such an offer”). Thus, the determination regarding the reasonableness of the offer as to timing and amount was an abuse of discretion and must be reweighed on remand in consideration of all of the factors when deciding whether fees are warranted.

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<sup>4</sup>Wynn argued below that O’Connell’s various offers resulted in “gamesmanship” and was one reason why Wynn could not give due weight to her \$49,999 offer of judgment. But this argument is unpersuasive as the record suggests that Wynn did not give due weight to any of O’Connell’s offers. O’Connell’s \$49,999 offer was close to her two most recently disclosed medical damages at the time (\$33,000 in medical damages followed by a later disclosed \$38,000 in medical damages). In comparison, Wynn only made a \$3,000 offer of judgment when O’Connell disclosed an estimated \$29,000 in medical expenses.

*The district court abused its discretion by limiting its review of the reasonableness of O'Connell's fees to whether hourly billing records were submitted*

We now turn to the fourth *Beattie* factor to determine “whether the fees sought by the offeror are reasonable and justified in amount.” *Beattie*, 99 Nev. at 589, 668 P.2d at 274. As discussed above, courts apply the *Brunzell* factors within their analysis of the fourth *Beattie* factor to determine a reasonable amount of attorney fees. *Brunzell*, 85 Nev. at 349, 455 P.2d at 33. Here, the district court concluded that, because O'Connell did not provide bills detailing the tasks executed and hours expended to complete those tasks, it could not determine if the requested fee was reasonable based on the work performed.

We first address whether an attorney, who litigated a matter based on a contingency fee agreement, is required to produce hourly billing records to receive an attorney fees award. We conclude that such records are not required. We then provide guidance as to how trial courts can evaluate a fee request based on a contingency fee agreement that does not include hourly billing statements.

*Hourly billing records are not required to support an award of attorney fees based on a contingency fee agreement*

Nevada law does not require billing records with every attorney fees request. The law only requires the trial court to calculate “a reasonable fee.” *Shuette*, 121 Nev. at 864, 124 P.3d at 548 (internal quotation marks omitted); NRCP 68(f)(2) (allowing an offeror reasonable attorney fees); see also NRCP 54(d)(2)(B) (requiring “a fair estimate of” the reasonable attorney fees). “[I]n determining the amount of fees to award, the court is not limited to one specific approach; its analysis may begin with any method rationally designed to calculate a reasonable amount, including those based on a ‘lodestar’ amount or a *contingency fee*.” *Shuette*, 121 Nev. at 864, 124

P.3d at 549 (emphasis added) (citation omitted).<sup>5</sup> The district court must properly weigh the *Brunzell* factors in deciding what amount to award. *Id.* at 864-65, 124 P.3d at 549. “In this manner, whichever method the court ultimately uses, the result will prove reasonable as long as the court provides sufficient reasoning and findings in support of its ultimate determination.” *Id.* at 865, 124 P.3d at 549.

In *Cooke v. Gove*, the Nevada Supreme Court upheld an attorney fees award based on “the reasonable value” of the attorney’s services, even though the case was taken on a contingency fee basis with no formal agreement. 61 Nev. 55, 61, 114 P.2d 87, 89 (1941). The “evidence” to support the fee was the case file from the successful matter, some of the letters between the client and attorney, and two depositions from other attorneys about the value of the appellant’s services. *Id.* at 57, 114 P.2d at 88. The court noted that the reasonable fee was based on the trial court’s evaluation of “the reasonable value of plaintiff’s services from all the facts and circumstances” after the court considered how the plaintiff’s “work, thought and skill contributed” to the successful outcome. *Id.* at 61, 114 P.2d at 89 (internal quotation marks omitted).

Thus, the district court is not confined to authorizing an award of attorney fees exclusively from billing records or hourly statements. See *Shuette*, 121 Nev. at 864-65, 124 P.3d at 548-49; *Brunzell*, 85 Nev. at 349, 455 P.2d at 33. Rather, limiting the source for the calculation primarily to billing records is too restrictive. See generally *Shuette*, 121 Nev. at 864, 124

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<sup>5</sup>The lodestar method “involves multiplying the number of hours *reasonably* spent on the case by a *reasonable* hourly rate.” *Shuette*, 121 Nev. at 864 n.98, 124 P.3d at 549 n.98 (emphasis added) (internal quotation marks omitted).

P.3d at 549 (stating that there is no one approach to determining the amount of attorney fees). Accordingly, a trial court can award attorney fees to the prevailing party who was represented under a contingency fee agreement, even if there are no hourly billing records to support the request.

We note that our conclusion is in line with other jurisdictions that squarely address awarding attorney fees based on a contingency fee agreement. For example, in *McNeel v. Farm Bureau General Insurance Co.*, the Michigan Court of Appeals reversed a trial court's decision to reduce an award of fees to an attorney who represented a client on a contingency fee basis because the "court gave only mild consideration to the complexity of the case" and did not factor in the required attorney preparation. 795 N.W.2d 205, 221 (Mich. Ct. App. 2010). The *McNeel* court outlined what the trial court could do when reviewing a fee without billable hour statements: "The trial court can certainly consider the type of case, the length of the trial, the difficulty of the case, the numbers and types of witnesses, as well as other relevant factors . . . ." *Id.* at 220 (internal quotation marks omitted). Similarly, in California, billing records are not always required. See *Mardirossian & Assocs., Inc. v. Ersoff*, 62 Cal. Rptr. 3d 665, 676 (Ct. App. 2007) (concluding that the trial court did not abuse its discretion in an attorney fees award case, in part, because, despite a lack of billing records, the Mardirossian attorneys had personal knowledge of the legal work they performed and "each testified at length concerning the work he or she performed, the complexity of the issues and the extent of the work that was required").

Courts have recognized an additional reason that supports awarding attorney fees—the risks attorneys take by offering or accepting contingency fee agreements. See *King v. Fox*, 851 N.E.2d 1184, 1191-92

(N.Y. 2006) (“In entering into contingent fee agreements, attorneys risk their time and resources in endeavors that may ultimately be fruitless. Moreover, it is well settled that the client may terminate [the contingency fee agreement] at any time, leaving the lawyer no cause of action for breach of contract[,] only quantum meruit.” (first alteration in original) (citation and internal quotation marks omitted)); *see also Schefke v. Reliable Collection Agency, Ltd.*, 32 P.3d 52, 96-97 (Haw. 2001) (concluding that fee awards can be justified based on the risks associated with accepting a case on a contingency fee basis). Courts should also account for the greater risk of nonpayment for attorneys who take contingency fee cases, in comparison to attorneys who bill and are paid on an hourly basis, as they normally obtain assurances they will receive payment. *See Rendine v. Pantzer*, 661 A.2d 1202, 1228 (N.J. 1995) (recognizing that rewarding a lawyer for taking a case for which compensation is contingent on the outcome is based in part on providing a monetary incentive for taking such cases because an hourly fee is more attractive unless such an extra incentive exists).

Additionally, contingency fees allow those who cannot afford an attorney who bills at an hourly rate to secure legal representation. *See King*, 851 N.E.2d at 1191 (“Contingent fee agreements between attorneys and their clients . . . generally allow a client without financial means to obtain legal access to the civil justice system.”). Relatedly, attorney fees are permissible in pro bono cases, where there are likewise no billing statements. *See Miller v. Wilfong*, 121 Nev. 619, 622-23, 119 P.3d 727, 729-30 (2005) (discussing the public policy rationale in support of awarding attorney fees to pro bono counsel and concluding that such awards are proper); *Black v. Brooks*, 827 N.W.2d 256, 265 (Neb. 2013) (concluding that if organizations are not awarded for recovery of statutory fees, they may

decline to represent pro bono cases); see, e.g., *New Jerseyans for a Death Penalty Moratorium v. N.J. Dep't of Corr.*, 850 A.2d 530, 532 (N.J. Super. Ct. App. Div. 2004) (explaining that when determining a reasonable fee to award in a pro bono case, courts should consider whether to increase the “fee to reflect the risk of nonpayment in all cases in which the attorney’s compensation entirely or substantially is contingent on a successful outcome”) (internal quotation marks omitted), *aff’d as modified* by 883 A.2d 329 (N.J. 2005).

*Considerations when assessing an attorney fees award based on a contingency fee agreement*

Here, the district court determined that it could not award fees without hourly billing records despite citing no legal authority for that proposition. As discussed above, however, district courts may take almost any sensible approach or apply any logical method to calculate “a reasonable fee” to award as long as the court weighs the *Brunzell* factors. See *Shuette*, 121 Nev. at 864-65, 124 P.3d at 548-49 (internal quotation marks omitted).

As to the methods or approaches a district court may use to determine a reasonable amount, there are certainly more considerations than just hourly billing records. See *Hsu v. Cty. of Clark*, 123 Nev. 625, 637, 173 P.3d 724, 733 (2007) (remanding the issue of attorney fees to the district court to determine a starting point and adjust the fee accordingly based on several factors, including the “time taken away from other work,” case-imposed deadlines, how long the attorney worked with the client, the usual fee and awards in similar cases, if the fee was contingent or hourly, the amount of money at stake, and how desirable the case was to the attorneys involved); see also RPC 1.5(a)(1)-(8) (listing factors to consider in deciding if a fee is reasonable). Additionally, district courts can look at the facts before them, such as what occurred at trial and the record a party produced in

litigating a matter. *See Herbst v. Humana Health Ins. of Nev., Inc.*, 105 Nev. 586, 591, 781 P.2d 762, 765 (1989) (reviewing an attorney's affidavit of the number of hours of work performed and concluding that this document, "combined with the fact that Herbst's attorney worked for two years on the case, established 12 volumes of records on appeal, and engaged in a five day trial should enable the court to make a reasonable determination of attorney's fees").

In comparison here, the district court could consider the length of time counsel represented O'Connell and the length of the trial. We note that the appellate record was large and most of it pertained to the trial. Also, based on the lower court record, there is evidence that O'Connell's attorneys worked on the case in the form of motions they filed and at pretrial hearings held after O'Connell's offer of judgment expired, as well as at trial, which lasted seven days. Further, O'Connell's application indicated that counsel had performed a considerable amount of work—"hundreds of hours" on the case—and she included the contingency fee agreement as part of her request for fees.<sup>6</sup> *See generally* RPC 3.3(a)(1)

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<sup>6</sup>Although O'Connell did not provide a verified application or affidavits to the district court to support her request for attorney fees, the district court is not limited to considering affidavits in determining a reasonable amount of attorney fees. Further, despite the lack of an affidavit and based on O'Connell's representations in her application for fees, the district court could have sworn in counsel at the hearing to accept testimony supporting the fee request or possibly have taken judicial notice of certain facts. *See* NRS 47.130; NRCP 43(c) (indicating that when a motion is based on facts that are not in the record, the district court may decide the motion based on the affidavits presented or oral testimony); *Mardirossian*, 62 Cal. Rptr. 3d at 676 (accepting testimony from attorneys about the level of work required). We note, however, that in addition to any other potential evidence the district court may consider, O'Connell and other parties should

(prohibiting an attorney from making “a false statement of fact or law to a tribunal”); NRCPC 11(b)(3) (indicating that, by submitting pleadings to the court, parties are certifying that the facts contained within the document “are likely to have evidentiary support”); *compare* NRS 18.110(1) (requiring a verified memorandum of costs) *with* NRS 18.010 (awarding attorney fees based on an agreement or statute, not a verified memorandum); *see also* *Mardirossian*, 62 Cal. Rptr. 3d at 676 (accepting testimony from attorneys about the level of work required); *Weber v. Langholz*, 46 Cal. Rptr. 2d 677, 683 (Ct. App. 1995) (noting that the trial court did not lack substantial evidence for an attorney fees award even though there were no time records or billing statements).

Furthermore, although NRS 18.010(3) dictates that a district court may award attorney fees with or without additional evidence, the district court’s decision to require hourly billing records as a prerequisite to determine if the fee request was reasonable and justified was itself unreasonable as the court had presided over protracted litigation and witnessed a lengthy trial in which O’Connell overcame numerous challenges to prevail. *See Cooke*, 61 Nev. at 61, 114 P.2d at 89 (looking at “the reasonable value of plaintiff’s services from all the facts and circumstances”). Importantly, where, as here, a district court observes an attorney successfully litigating in court, rarely should the court decide to award no attorney fees when evaluating if fees based on a contingency fee agreement are reasonable and justified in amount under the fourth *Beattie* factor, assuming the factors as a whole weigh in favor of an award. *See Frazier*, 131 Nev. at 644, 357 P.3d at 373.

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provide district courts with affidavits or verified pleadings when seeking attorney fees awards.

Therefore, we conclude that, in this case, there were alternative sources of information for the district court to rely upon to determine whether the requested award was reasonable, even though hourly billing records were not provided. Thus, the district court should not have concluded that no attorney fees were warranted based on the absence of hourly billing records alone and without holding an evidentiary hearing or making a determination based upon all the information before it. Accordingly, the denial of attorney fees must be reversed and the matter remanded to the district court for further proceedings consistent with this opinion.

We note that the cases and methods used within this opinion to determine the amount of an attorney fees award are instructive and not exhaustive. Trial courts should also keep in mind that their awards of attorney fees should be made on a case-by-case basis by applying the considerations described herein to the evidence provided, and that an adequate record will be critical to facilitate appellate review. *Cf. Logan v. Abe*, 131 Nev. 260, 266, 350 P.3d 1139, 1143 (2015) (noting that while the district court has discretion, “the award must be supported by substantial evidence”).

Ultimately a party seeking attorney fees based on a contingency fee agreement must provide or point to substantial evidence of counsel’s efforts to satisfy the *Beattie* and *Brunzell* factors.<sup>7</sup> On remand, if O’Connell

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<sup>7</sup>We note that the better—but not required—practice in a contingency fee case is for an attorney to keep hourly statements or timely billing records to later justify the requested fees. *See, e.g., Copper Liquor, Inc. v. Adolph Coors Co.*, 684 F.2d 1087, 1094 (5th Cir. 1982) (cautioning that representing a client on a contingency fee basis is not a valid excuse for failure to keep

cannot provide substantial evidence of the time reasonably spent on this case, the district court can exercise its discretion to adjust the fee accordingly, while also being mindful of all applicable considerations. See *Hsu*, 123 Nev. at 637, 173 P.3d at 733; see also *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (explaining, in using the lodestar method, that the district court may reduce an attorney fees award if the documentation of the hours reasonably expended on the litigation is inadequate). Counsel must show how their work helped accomplish the result achieved. Additionally, O'Connell's claim for attorney fees is limited to those fees earned post-offer.<sup>8</sup> See NRCP 68(f)(2).

On remand, the district court should consider the proposed amount of the attorney fees award based on the judgment and the contingency fee agreement and evaluate the requested award based on the work performed. The evidence does not need to be limited to documents and may include what the trial court readily observed.

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time records), *overruled on other grounds by Int'l Woodworkers of Am. v. Champion Int'l Corp.*, 790 F.2d 1174, 1180-81 (5th Cir. 1986).

<sup>8</sup>On appeal, O'Connell concedes that her award should be limited to her post-offer fees. She estimates her request should accordingly be reduced to \$71,111.11. Her contingency fee agreement, however, also provided for a 50-percent fee if she was successful on appeal. Additionally, we note that O'Connell did not retain the same counsel from the beginning of the case until the end, and thus her current counsel is not automatically entitled to fees based on the entire litigation. *Cf. Van Cleave v. Osborne, Jenkins & Gamboa, Chtd.*, 108 Nev. 885, 888, 840 P.2d 589, 592 (1992) (awarding attorney fees to the firm that more efficiently resolved a matter, regardless of the length of time of its representation, in comparison to the prior firm that litigated the same case for six years without resolution). We leave the consideration of these circumstances to the district court.

CONCLUSION

Attorneys who represent a client on a contingency fee basis are not required to submit hourly billing records to support an award of attorney fees that are allowed by a valid agreement, rule, or statute. Because the district court incorrectly based its decision to deny fees, in part, on the second *Beattie* factor and on the failure to provide hourly billing records with regard to the fourth *Beattie* factor, we conclude that the district court abused its discretion in denying O'Connell's request. Accordingly, we reverse the district court's order as to its complete denial of O'Connell's request for attorney fees. We remand this matter for the district court to allow O'Connell a new hearing related to her attorney fees request, and then to address and reweigh the second, third, and fourth *Beattie* factors in light of this opinion. If the *Beattie* factors favor O'Connell, we direct the district court to determine a reasonable amount of attorney fees to award.

  
\_\_\_\_\_, J.  
Gibbons

We concur:

  
\_\_\_\_\_, C.J.  
Silver

  
\_\_\_\_\_, J.  
Tao

134 Nev., Advance Opinion 58  
IN THE SUPREME COURT OF THE STATE OF NEVADA

SFR INVESTMENTS POOL 1, LLC;  
AND STAR HILL HOMEOWNERS  
ASSOCIATION,  
Appellants,  
vs.  
THE BANK OF NEW YORK MELLON  
F/K/A THE BANK OF NEW YORK, AS  
TRUSTEE FOR THE  
CERTIFICATEHOLDERS OF THE  
CWABS, INC., ASSET-BACKED  
CERTIFICATES, SERIES 2006-6,  
Respondent.

No. 72931

FILED

AUG 02 2018

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY *[Signature]*  
CHIEF DEPUTY CLERK

Certified question, pursuant to NRAP 5, in a quiet title action.

*Question answered.*

Alverson Taylor Mortensen & Sanders and Kurt R. Bonds and Adam R. Knecht, Las Vegas,  
for Appellant Star Hill Homeowners Association.

Kim Gilbert Ebron and Howard Kim, Diana Cline Ebron, and Jacqueline A. Gilbert, Las Vegas,  
for Appellant SFR Investments Pool 1, LLC.

Akerman LLP and Ariel E. Stern, Las Vegas,  
for Respondent.

Legislative Counsel Bureau Legal Division and Brenda J. Erdoes, Legislative Counsel, and Kevin C. Powers, Chief Litigation Counsel, Carson City,  
for Amicus Curiae Nevada Legislature.

BEFORE THE COURT EN BANC.

*OPINION*

By the Court, CHERRY, J.:

This case comes before us as a certified question from the United States District Court for the District of Nevada, seeking an answer to “[w]hether NRS § 116.31168(1)’s incorporation of NRS § 107.090 required a homeowner’s association to provide notices of default and/or sale to persons or entities holding a subordinate interest even when such persons or entities did not request notice, prior to the amendment that took effect on October 1, 2015.” NRS 107.090, which governs trustee sales under a deed of trust, mandates notice to those holding subordinate interests. We conclude that, by requiring application of NRS 107.090 during the homeowners’ association foreclosure process, NRS 116.31168(1)<sup>1</sup> required notice to be provided to all holders of subordinate security interests prior to a homeowners’ association foreclosure sale and thus answer the question in the affirmative.

*FACTS AND PROCEDURAL HISTORY*

In 2010, former homeowners became delinquent on their homeowners’ association dues, and appellant Star Hill Homeowners Association recorded a notice of delinquent assessments, notice of default, and election to sell in 2010. Star Hill recorded notices of sale in 2011 and 2012. On September 14, 2012, Star Hill held the nonjudicial foreclosure sale pursuant to NRS Chapter 116. It recorded a foreclosure deed

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<sup>1</sup>Although the relevant provisions of NRS Chapter 116 were amended in 2015, unless otherwise indicated, this opinion addresses and refers to the versions of NRS 116.31163, NRS 116.311635, and NRS 116.31168 in effect from 2010-2012, which apply to the underlying case.

transferring the property to the purchaser, SBW Investment, Inc. The deed recitals stated that Star Hill had complied with all statutory notice requirements in conducting the sale. On April 15, 2013, SBW transferred title of the property to appellant SFR Investments Pool 1, LLC.

Respondent Bank of New York Mellon (BNYM) subsequently filed a complaint in the federal district court of Nevada, naming SFR and Star Hill as defendants and requesting a declaration that the foreclosure sale did not extinguish its deed of trust. BNYM alleged that the sale was void as violating due process because NRS Chapter 116 “lacks any pre-deprivation notice requirements.” SFR answered the complaint and asserted a counterclaim, seeking the opposite declaration and to quiet title, alleging that BNYM was provided with the notice of default and sale. The federal district court then filed in this court its order certifying the question of law stated above.

### *DISCUSSION*

*NRAP 5 permits us to answer the certified question*

Preliminarily, we address BNYM’s argument that we should not answer the certified question. Existing Nevada precedent does not fully resolve this legal question, and our answer may determine part of the underlying federal case. Thus, answering the question is appropriate. *See SFR Invs. Pool 1, LLC v. Bank of New York Mellon*, Docket No. 72931 (Order Accepting Certified Question, Directing Briefing and Directing Submission of Filing Fee, June 13, 2017) (citing NRAP 5(a) and *Volvo Cars of N. Am., Inc. v. Ricci*, 122 Nev. 746, 750-51, 137 P.3d 1161, 1163-64 (2006)). Although BNYM contends that *Bourne Valley Court Trust v. Wells Fargo Bank, N.A.*, 832 F.3d 1154 (9th Cir. 2016), resolved the question, the Ninth Circuit’s interpretation of NRS 116.31168 does not stand in the way of our

reaching the merits of the certified question.<sup>2</sup> See *Owen v. United States*, 713 F.2d 1461, 1464 (9th Cir. 1983) (providing that a federal court's construction of a state statute is only binding in the continued absence of a contrary construction by that state's highest court); see also *Cal. Teachers Ass'n v. State Bd. of Educ.*, 271 F.3d 1141, 1146 (9th Cir. 2001) (stating that state courts are the judicial body capable of authoritatively construing state statutes). Accordingly, we decline BNYM's invitation to reject the question. *NRS 116.31168 required homeowners' associations to provide notice to all holders of subordinate interests in the event of foreclosure*

SFR argues that this court recognized in *SFR Investments Pool 1, LLC v. U.S. Bank, N.A.*, 130 Nev. 742, 334 P.3d 408 (2014), that NRS 116.31168(1) mandated homeowners' associations to mail notices of default and sale to first security interest holders through incorporation of NRS 107.090.<sup>3</sup> SFR contends that, regardless, banks such as BNYM have continued to argue in federal district court that they have been deprived of due process because notice is not required under NRS Chapter 116. SFR points out that, in so doing, banks rely on *Bourne Valley*, which stated that

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<sup>2</sup>BNYM argues that, even if this court concludes that NRS 116.31168 mandated notice to first deed of trust holders who had not opted-in by requesting such notice in advance, the Ninth Circuit would still find the required notice to fall short of the requirements of due process unless the homeowners' association were required to provide notice of the amount of the lien that was granted superpriority status. In *Bourne Valley*, however, the Ninth Circuit based its due process conclusion on its contrary interpretation of NRS 116.31168's notice requirement. Thus, to the extent that BNYM contends that answering the certified question constitutes a circumvention of the certiorari petition process, we reject the argument.

<sup>3</sup>Star Hill joined in SFR's briefing.

the incorporation of NRS 107.090 would “render the express notice provisions of NRS Chapter 116 entirely superfluous,” and that NRS 116.31168 could not be read to require notice outside of its opt-in scheme. *See Bourne Valley*, 832 F.3d at 1159. SFR asserts that *Bourne Valley* was wrongly decided and notes that this court has since reaffirmed in unpublished orders the incorporation of NRS 107.090.

BNYM argues that NRS Chapter 116 merely required that notice be given to lienholders who had requested such notice from the HOA, as evidenced by the chapter’s continual reference to requests for notice. *See* NRS 116.31163(2). It seeks to invalidate Star Hill’s foreclosure on the basis that NRS Chapter 116 required notice only to parties that had opted-in to NRS Chapter 116’s notice provisions and was thus held to violate due process by the Ninth Circuit in *Bourne Valley*. We disagree with this interpretation of NRS 116.31168.

If a statute is unambiguous, this court interprets the statute according to its plain language. *Williams v. United Parcel Servs.*, 129 Nev. 386, 391-92, 302 P.3d 1144, 1147 (2013). We look beyond plain language if a statute is ambiguous or silent on the issue in question, and we read statutes within a common statutory scheme harmoniously with one another whenever possible. *Allstate Ins. Co. v. Fackett*, 125 Nev. 132, 138, 206 P.3d 572, 576 (2009). Where a statute’s language lends itself to conflicting interpretations, with one being constitutional and the other being unconstitutional, this court will choose the constitutional interpretation. *Sheriff, Washoe Cty. v. Wu*, 101 Nev. 687, 689-90, 708 P.2d 305, 306 (1985).

NRS 116.3116 to NRS 116.3117 governs homeowners’ association liens and the procedures for foreclosing on them. NRS 116.31163 required homeowners’ associations foreclosing on such liens to

provide notice to each person who requested it pursuant to NRS 116.31168 or NRS 107.090. NRS 116.31168(1), governing “Foreclosure of liens: Requests by interested persons for notice of default and election to sell,” stated “[t]he provisions of NRS 107.090 apply to the foreclosure of an association’s lien as if a deed of trust were being foreclosed. The request must identify the lien by stating the names of the unit’s owner and the common-interest community.” The statute did not, however, indicate whether it incorporated all or some of NRS 107.090’s provisions.

NRS 107.090(1) defines a “person with an interest” as “any person who has or claims any right, title or interest in, or lien or charge upon, the real property described in the deed of trust, as evidenced by any document or instrument recorded in the office of the county recorder.” NRS 107.090(2) allows “[a] person with an interest or any other person who is or may be held liable for any debt secured by a lien on the property desiring a copy of a notice of default or . . . sale under a deed of trust with power of sale upon real property” to request a copy of the notices by filing such a request in the office of county recorder where the subject property is located. NRS 107.090(3) requires, in the event of the recording of a notice of default on the property, that notice be provided to “[e]ach person who recorded a request for a copy” pursuant to NRS 107.090(2) and “[e]ach person with an interest whose interest or claimed interest is subordinate to the deed of trust.” NRS 107.090(4) requires the trustee or person authorized to make the sale to mail the notice of sale to all persons entitled to notice under NRS 107.090(3).

NRS 116.31168’s incorporation of NRS 107.090 was previously before the Ninth Circuit in *Bourne Valley*, 832 F.3d 1154. The Ninth Circuit was similarly evaluating a quiet title action following nonjudicial

foreclosure by a homeowners' association under NRS Chapter 116. *Id.* at 1156-57. *Bourne Valley* recognized that while a deed of trust ordinarily has priority over homeowners' association liens, NRS 116.3116(2) gave homeowners' association liens superpriority, making a portion of the homeowners' association lien senior to a deed of trust, *id.* at 1157 (citing *SFR Invs. Pool 1*, 130 Nev. at 744-50, 334 P.3d at 410-14), and as a result, foreclosure on a homeowners' association lien extinguished the mortgage lender's first deed of trust. *Id.*

It further interpreted NRS 116.31163(2) as requiring a mortgage lender to "opt-in" to receive notice in the event of foreclosure by a homeowners' association, despite NRS 116.31168's incorporation of NRS 107.090. *Id.* at 1157-59. The court reasoned that if NRS 107.090's notice requirements were fully incorporated into NRS 116.31168, mandating that notice be given to "mortgage lenders whose rights are subordinate to a homeowners' association super priority lien," the "express notice provisions of Chapter 116" would be rendered "superfluous." *Id.* at 1159. In doing so, the *Bourne Valley* court concluded that such an opt-in notice scheme violated due process because it placed the burden of learning about the foreclosure action on the mortgage lender. 832 F.3d at 1158-60.

However, NRS 116.31168 incorporated the notice requirements of NRS 107.090 and consequently required that notice be provided to all persons whose interests were subordinate to a homeowners' association superpriority lien, which is "prior to' a first deed of trust." See *SFR Invs. Pool 1*, 130 Nev. at 745, 334 P.3d at 411 (explaining the HOA lien has priority over the first security interest in the amount of "unpaid [ ] dues and maintenance and nuisance-abatement charges"). In stating that "[t]he provisions of NRS 107.090 apply to the foreclosure of an association's lien

as if a deed of trust were being foreclosed,” without any accompanying language to limit the incorporation, NRS 116.31168(1) manifested intent to have all notice provisions apply and that the parties requiring notice would be the same as those that would require notice in foreclosing on a deed of trust. Replacing the deed of trust with the homeowners’ association superpriority lien within the language of NRS 107.090 then requires that the homeowners’ association provide notice to the holder of the first security interest as a subordinate interest.

Furthermore, the complete incorporation of NRS 107.090 does not render NRS 116.31168’s opt-in notice provisions superfluous. The parties required to receive notice as recorded holders of subordinate interests and those who may request notice are not coextensive, as not every party who may request notice is entitled to notice under due process. *See* 1 Grant S. Nelson et al., *Real Estate Finance Law* § 7.25 (6th ed. 2014) (providing that while parties whose interest in a property is reasonably ascertainable must receive notice, a request-notice statute “protects the due process rights of those parties whose interests and addresses are not ‘reasonably ascertainable’”). This fact is similarly reflected in NRS 107.090(3) itself, which creates the distinction between parties entitled to notice and parties that must request it. Consequently, incorporation of NRS 107.090’s mandatory notice requirements does not offend the express provisions of NRS 116.31168.

Yet finding that NRS 116.31168 merely incorporated NRS 107.090’s opt-in provisions would itself pose a redundancy. At the time, NRS 116.31163(1) stated that it required notice to all parties who requested it under NRS 107.090 or NRS 116.31168. Because NRS 116.31163(1) already incorporated NRS 107.090’s notice provisions for parties requesting

it, NRS 116.31168's incorporation of NRS 107.090 exclusively for its opt-in provision would have been unnecessary. *See Harris Assocs. v. Clark Cty. Sch. Dist.*, 119 Nev. 638, 642, 81 P.3d 532, 534 (2003) (holding that statutes are construed in a way that "give[s] meaning to all of their parts and language . . . within the context of the purpose of the legislation" (internal quotation marks omitted)).

Finally, NRS 116.31168's use of "request[s]" for notice in both its title and first subsection does not limit its incorporation of NRS 107.090's notice requirement to its opt-in provision. Though NRS 116.31168 was titled "Foreclosure of liens: Requests by interested persons for notice of default and election to sell," it had a similar title, "Requests for notice of default and sale," prior to its 1993 amendment when it explicitly required the homeowners' association to provide notice to all known lienholders, regardless of whether they had requested notice. NRS 116.31168 (1991). Therefore, the fact that the statute's title referred to requests for notice did not contradict its mandatory notice requirements in the eyes of the Legislature, and we will not presume that the title does more now.<sup>4</sup>

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<sup>4</sup>We also note that the removal of NRS 116.31168's requirement to provide notice to all known lienholders in addition to its incorporation of NRS 107.090, 1993 Nev. Stat., ch. 573, § 40, at 2373, followed the amendment of NRS 107.090, requiring notice to all junior lienholders and others in deed-of-trust foreclosure sales rather than only those requesting it, 1989 Nev. Stat., ch. 306, § 1, at 644. The removal of the additional notice requirement from NRS 116.31168, therefore, eliminated the redundancy of both incorporating NRS 107.090 and requiring notice to all known lienholders and further supports the conclusion that the incorporation of NRS 107.090 includes its requirement to provide notice to all with recorded subordinate interests.

Similarly, though the second sentence of NRS 116.31168(1) identified “the request,” it can plainly be read as adapting the opt-in notice provision of NRS 107.090(2) to the context of a homeowners’ association foreclosure, instead of precluding notice requirements outside of parties who had requested it.

For the aforementioned reasons, we decline to follow the majority holding in *Bourne Valley*, 832 F.3d at 1159. NRS 116.31168 fully incorporated both the opt-in and mandatory notice provisions of NRS 107.090 and, to the extent NRS Chapter 116 was ambiguous in this regard, legislative history and the principles of statutory construction support this conclusion.<sup>5</sup>

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<sup>5</sup>BNYM also requests that, if we determine that NRS 116.31168 required notice to secured lenders that had not opted in, we also determine that NRS 116.31168 incorporated the formal notice requirements found in NRS 107.090. While this court may rephrase certified questions, *Progressive Gulf Ins. Co. v. Faehnrich*, 130 Nev. 167, 170-71, 327 P.3d 1061, 1063 (2014), the scope of our answer must still be limited to that which may be determinative of the underlying case, *Volvo*, 122 Nev. at 750-51, 137 P.3d at 1164. Similarly, we do not make factual findings outside of those presented by the certifying court in answering the question. *In re Fontainebleau Las Vegas Holdings*, 127 Nev. 941, 956, 267 P.3d 786, 795 (2011). Here, the certifying court made no findings as to whether any notice occurred. Whether the formal requirements of notice will be at issue going forward is entirely speculative, and we have no basis on which to conclude that expanding our answer to reach that issue may be determinative. We, therefore, decline to address that question here.

CONCLUSION

We answer the certified question in the affirmative, concluding that even before the October 1, 2015, amendment to NRS 116.31168, the statute incorporated NRS 107.090's requirement to provide foreclosure notices to all holders of subordinate interests, even when such persons or entities did not request notice.

Cherry J.  
Cherry

We concur:

Douglas, C.J.  
Douglas

Gibbons J.  
Gibbons

Pickering J.  
Pickering

Hardesty J.  
Hardesty

Parraguirre J.  
Parraguirre

Stiglich J.  
Stiglich

134 Nev., Advance Opinion 47  
IN THE SUPREME COURT OF THE STATE OF NEVADA

WEST SUNSET 2050 TRUST, A  
NEVADA TRUST,  
Appellant,  
vs.  
NATIONSTAR MORTGAGE, LLC, A  
FOREIGN LIMITED LIABILITY  
COMPANY,  
Respondent.

No. 70754

FILED

JUN 28 2018

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY: *[Signature]*  
CHIEF DEPUTY CLERK

Appeal from summary judgment in an action to quiet title.  
Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

*Reversed and remanded.*

Ayon Law, PLLC, and Luis A. Ayon and Stephen G. Clough, Las Vegas,  
for Appellant.

Akerman LLP and Ariel E. Stern and Thera A. Cooper, Las Vegas,  
for Respondent.

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BEFORE THE COURT EN BANC.

OPINION

By the Court, STIGLICH, J.:

This appeal again requires us to consider the competing interests of the purchaser of property at an HOA foreclosure sale and the beneficiary of a deed of trust on that property at the time of the sale. See *SFR Invs. Pool 1, LLC v. U.S. Bank, N.A. (SFR I)*, 130 Nev. 742, 758, 334

P.3d 408, 419 (2014) (holding that valid foreclosure of an HOA superpriority lien extinguishes a first deed of trust).

In this case, the district court determined that respondent Nationstar Mortgage LLC's deed of trust survived the HOA foreclosure sale because the HOA failed to provide statutorily required preforeclosure notice. Appellant West Sunset 2050 Trust argues that the district court erred in that determination. Nationstar counters that, even if the HOA fully complied with the notice requirements, the HOA lost its right to foreclose on the property because it sold its right to collect past-due assessments on that property to a third party. *See Edelstein v. Bank of N.Y. Mellon*, 128 Nev. 505, 508-09, 286 P.3d 249, 252 (2012) (holding that a party cannot foreclose on a property if the foreclosing entity does not simultaneously possess a promissory note and a lien on the property securing that note).

We hold that the foreclosure sale was not invalid due to a lack of notice, and we reject Nationstar's *Edelstein* argument as inapplicable to this scenario. Accordingly, we reverse the district court's order and remand for further proceedings consistent with this opinion.

#### *FACTS AND PROCEDURAL HISTORY*

This case concerns competing rights to 7255 W. Sunset Road, Unit 2015 (the Property). In 2005, a homeowner purchased the Property with a home loan from New Freedom Mortgage Corporation in the amount of \$176,760. New Freedom secured that loan with a senior deed of trust on the Property. That deed of trust was recorded and subsequently assigned to an organization that merged with Bank of America. It was then reassigned to respondent Nationstar Mortgage, LLC.

The Property is within the Tuscano Homeowners Association (the HOA) and is subject to the HOA's covenants, conditions, and restrictions (CC&Rs). Those CC&Rs obligated the owner of the Property to pay monthly assessments and authorized the HOA to impose a lien upon the Property in the event of nonpayment. In 2012, the HOA recorded a lien for delinquent assessments on the Property and subsequently recorded a Notice of Default (NOD). When the HOA recorded the NOD, Bank of America was on record as the beneficiary of the deed of trust. The HOA mailed the NOD to New Freedom but not to Bank of America.

The HOA then sold to nonparty First 100, LLC, its "interest in any and all [proceeds on past income] arising from or relating to the [Property's] Delinquent Assessment[]." In the written contract memorializing that sale, the HOA promised to continue its efforts to collect on the Property's past-due assessments and to remit all such payments directly to First 100.

On May 29, 2013, the HOA recorded a Notice of Foreclosure Sale. The HOA mailed that notice to New Freedom, Bank of America, Nationstar, and other parties not relevant here. The Property's delinquent assessment remained unpaid, so the HOA proceeded with a nonjudicial foreclosure sale. Appellant West Sunset purchased the Property at that sale for \$7,800.

West Sunset sued to quiet title against Nationstar, Bank of America, and other parties not relevant here. Nationstar counterclaimed to quiet title, and both parties moved for summary judgment.

The district court granted summary judgment to Nationstar. In its written order, the court found that the HOA failed to provide "any foreclosure notices to the beneficiary of the senior deed of trust," so

Nationstar's deed of trust survived the foreclosure sale. The practical effect of the court's decision is to vest ownership of the Property in West Sunset while subjecting it to Nationstar's senior deed of trust.

## *DISCUSSION*

### *Standard of review*

This court reviews de novo a district court's order granting summary judgment. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is appropriate upon a showing that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." NRCP 56(c).

In a quiet title action, "a plaintiff's right to relief . . . depends on superiority of title." *Chapman v. Deutsche Bank Nat'l Tr.*, 129 Nev. 314, 318, 302 P.3d 1103, 1106 (2013) (internal quotation marks omitted). "[T]he burden of proof rests with the plaintiff to prove good title in himself." *Breliant v. Preferred Equities Corp.*, 112 Nev. 663, 669, 918 P.2d 314, 318 (1996), *abrogated on other grounds by Delgado v. Am. Family Ins. Grp.*, 125 Nev. 564, 570, 217 P.3d 563, 567 (2009), *as recognized by In re Frei Irrevocable Tr.*, 133 Nev., Adv. Op. 8, 390 P.3d 646, 652 n.8 (2017).

### *Notice and due process*

Nationstar's primary argument, both below and on appeal, is that the HOA failed to provide statutorily required notice of the impending

foreclosure sale on the property.<sup>1</sup> That is, Nationstar attempts to escape the holding of *SFR I* by arguing that a lack of notice rendered the foreclosure improper. 130 Nev. at 758, 334 P.3d at 419 (holding that “proper foreclosure” of an HOA superpriority lien “will extinguish a first deed of trust”).

To be clear, Nationstar does not allege that Nationstar itself was deprived of notice. It is undisputed that the HOA served Nationstar with notice of the foreclosure sale, and Nationstar does not argue that it was entitled to be served the NOD. *Cf. SFR Invs. Pool 1, LLC v. First Horizon Home Loans (SFR II)*, 134 Nev., Adv. Op. 4, 409 P.3d 891, 893-94 (2018) (holding that an HOA need not re-serve notices each time a property changes ownership). Rather, Nationstar’s argument is that the HOA sale must be invalidated because its predecessor in interest—Bank of America—was not mailed the NOD.

While Nationstar is correct that Bank of America was not served the NOD, Nationstar provides no explanation as to how Nationstar was affected—much less injured—by defective notice to Bank of America. The HOA properly recorded the NOD prior to the assignment, so that assignment put Nationstar on record notice of the NOD. *Id.* at 892

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<sup>1</sup>As a preliminary matter, the parties disputed at length whether Nationstar’s deed of trust was invalid because, years before Nationstar became its beneficiary, the homeowner appears to have unilaterally executed a deed in lieu of foreclosure to New Freedom. We decline to settle this dispute because its resolution will not affect the outcome of this case. *See First Nat. Bank of Nev. v. Ron Rudin Realty Co.*, 97 Nev. 20, 24, 623 P.2d 558, 560 (1981) (“In that our determination of the first issue is dispositive of this case, we do not reach the second issue . . .”).

("Because NRS 116.31162 requires a[n] [HOA] foreclosing on its interest to record its notice of foreclosure sale, we conclude that any subsequent buyer purchases the property subject to that notice that a foreclosure may be imminent."). Nationstar's failure to allege prejudice resulting from defective notice dooms its claim that the defective notice invalidates the HOA sale.<sup>2</sup> See *State, Dep't of Motor Vehicles & Pub. Safety v. Pida*, 106 Nev. 897, 899, 803 P.2d 227, 228-29 (1990) (upholding a revocation of driving privileges despite the State's failure to serve statutorily required notice to the driver because the driver was not prejudiced by the defective service); *Turner v. Dewco Servs., Inc.*, 87 Nev. 14, 17, 479 P.2d 462, 465 (1971) (holding that defective notice "was not sufficiently prejudicial to void" a foreclosure sale).

In sum, the evidence does not support the district court's finding that the HOA failed to provide "any foreclosure notices to the beneficiary of the senior deed of trust." Rather, the record conclusively reveals that the HOA served notice of the foreclosure sale to Nationstar. Nationstar has failed to show that it was prejudiced by the HOA's failure to serve the NOD to Bank of America. Therefore, the district court erred in

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<sup>2</sup>Nationstar additionally argues that defective notice violated Bank of America's due process rights. We reject this argument as procedurally improper and substantively meritless. *Greene v. State*, 113 Nev. 157, 176, 931 P.2d 54, 66 (1997) ("Constitutional rights are personal and may not be asserted vicariously."), *receded from on other grounds by Byford v. State*, 116 Nev. 215, 235, 994 P.2d 700, 713 (2000); *Saticoy Bay LLC Series 350 Durango 104 v. Wells Fargo Home Mortg.*, 133 Nev., Adv. Op. 5, 388 P.3d 970, 975 (2017) ("[T]he Due Process Clauses of the United States and Nevada Constitutions are not implicated in an HOA's nonjudicial foreclosure of a superpriority lien.").

holding that Nationstar's deed of trust survived the foreclosure sale due to a lack of notice.

*The Edelstein issue*

Nationstar's second argument is that the foreclosure sale was invalid because the HOA lost standing to foreclose on the property when it entered into a "factoring agreement." A factoring agreement is "the sale of accounts receivable of a firm to a factor at a discounted price." *In re Straightline Invs., Inc.*, 525 F.3d 870, 876 n.1 (9th Cir. 2008) (internal quotation marks omitted). Such an agreement accords the seller "two immediate advantages: (1) immediate access to cash; and (2) the factor assumes the risk of loss." *Id.* (internal quotation marks omitted).

In this case, the HOA entered into a factoring agreement when it sold to nonparty First 100 its "interest in any and all [proceeds on past income] arising from or relating to the [Property's] Delinquent Assessment[ ]." That agreement indicates that the HOA sold for \$1,476 the right to receive \$4,279.86 in past-due assessments on the Property.

Nationstar contends that this factoring agreement deprived the HOA of standing to foreclose.<sup>3</sup> A lack of standing, says Nationstar, would invalidate the foreclosure sale and allow Nationstar's deed of trust to escape the fate of subpriority interests on properties properly foreclosed upon pursuant to NRS Chapter 116. *See SFR I*, 130 Nev. at 758, 334 P.3d at 419 (extinguishing all junior interests, including a first deed of trust).

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<sup>3</sup>Nationstar additionally argues that the factoring agreement's existence violates NRS 116.3102(1)(p) and the HOA's CC&Rs. We decline to consider this argument because resolving it will not affect the outcome of this case. That is, a declaration that the factoring agreement was invalid would not alter our conclusion that the valid HOA foreclosure sale extinguished Nationstar's deed of trust.

Nationstar's argument relies upon *Edelstein v. Bank of New York Mellon*, 128 Nev. 505, 508, 286 P.3d 249, 252 (2012). In that case, David Edelstein financed a home purchase by executing a promissory note in favor of a lender. *Id.* at 509, 286 P.3d at 252. That promissory note was secured by a deed of trust, which authorized the lender to foreclose on the house should Edelstein default on the note. *Id.* The note and the deed of trust were subsequently transferred to separate entities, but both ultimately fell under the control of Bank of New York Mellon (BNYM), which sought to foreclose on the house. *Id.* at 509-10, 286 P.3d at 252-53. Edelstein argued that BNYM could not foreclose because it failed to demonstrate that it simultaneously held both the promissory note and the deed of trust. *Id.* at 511-12, 286 P.3d at 253-54. While this court ultimately ruled against Edelstein, we agreed with his legal analysis regarding the foreclosure requirement:

To enforce the obligation by nonjudicial foreclosure and sale, [t]he deed and note must be held together because the holder of the note is only entitled to repayment, and does not have the right under the deed to use the property as a means of satisfying repayment. Conversely, the holder of the deed alone does not have a right to repayment and, thus, does not have an interest in foreclosing on the property to satisfy repayment.

*Id.* at 512, 286 P.3d at 254 (internal citation and quotation marks omitted) (alteration in original). In short: "to have standing to foreclose, the current

beneficiary of the deed of trust and the current holder of the promissory note must be the same.”<sup>4</sup> *Id.* at 514, 286 P.3d at 255.

Nationstar analogizes the present situation to *Edelstein* by comparing the HOA’s superpriority lien to a deed of trust, and the HOA’s right to receive payment on past assessments to a promissory note. Therefore, Nationstar argues, in selling the right to collect past assessments on the Property, the HOA severed its lien from the underlying debt and lost its ability to foreclose until the two become reunified.

Nationstar accurately analogizes the HOA’s superpriority lien to a deed of trust, but the analogy collapses when Nationstar attempts to equate the HOA’s factoring agreement with *Edelstein*’s transfer of a promissory note. Unlike the transfer of a promissory note, the factoring agreement did not affect the relationship between debtor and lender. That is, the Property owner remained indebted to the HOA (as opposed to becoming indebted to First 100), and the HOA retained the exclusive right to collect that debt. Indeed, the factoring agreement obliges the HOA, through its agent, to continue its collection efforts on the past-due assessments. The agreement merely instructs that agent to remit all payments directly to First 100. In short, unlike the transfer of a promissory note in *Edelstein*, the factoring agreement at issue did not affect the HOA’s right to foreclose on the property.

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<sup>4</sup>Nothing in this discussion affects our holding in *In re Montierth*, 131 Nev. 543, 547, 354 P.3d 648, 651 (2015) (“[F]oreclosure is not impossible if there is either a principal-agent relationship between the note holder and the mortgage holder, or the mortgage holder ‘otherwise has authority to foreclose in the [note holder]’s behalf.” (alteration in original) (quoting Restatement (Third) of Property: Mortgages § 5.4 cmts. c, e (1997))). To the extent that *In re Montierth* is relevant here, it indicates that Nevada disfavors an expansion of the *Edelstein* no-splitting rule.

While the foregoing is sufficient to reject Nationstar's *Edelstein* argument, we offer one final observation on this matter. Nationstar has provided no argument as to why, as a practical or policy matter, we should discourage HOAs from executing factoring agreements. Such agreements serve the valid purpose of providing HOAs with immediate access to cash, thus helping them meet their perpetual upkeep obligations. See *In re Straightline Invs.*, 525 F.3d at 876 n.1. Extending *Edelstein* to this situation would complicate HOAs' decisions to execute such agreements and thereby frustrate their efforts to attain cash needed to maintain their communities. Absent a theory as to how these factoring agreements result in harm, we are disinclined to so interfere with HOAs' financing practices.

#### CONCLUSION

Given that Nationstar's rights were not prejudiced by the HOA's failure to serve the NOD upon Bank of America, the district court erred in holding that defective notice allowed Nationstar's deed of trust to survive the HOA foreclosure sale. We reject Nationstar's *Edelstein* argument as inapplicable to this HOA-factoring agreement scenario. Accordingly, and having carefully considered the parties' remaining arguments,<sup>5</sup> we reverse

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<sup>5</sup>That is, we reject Nationstar's argument that "gross inadequacy of price" invalidated the HOA sale. See *Nationstar Mortg., LLC v. Saticoy Bay LLC Series 2227 Shadow Canyon*, 133 Nev., Adv. Op. 91, 405 P.3d 641, 643 (2017) ("[I]nadequacy of price, however gross, is not in itself a sufficient ground for setting aside a trustee's sale." (internal quotation marks omitted)). Moreover, because we conclude that the HOA sale was valid, we need not resolve the parties' additional dispute as to whether West Sunset was a *bona fide* purchaser.

the entry of summary judgment and remand for further proceedings consistent with this opinion.

Stiglich, J.  
Stiglich

We concur:

Douglas, C.J.  
Douglas

Cherry, J.  
Cherry

Gibbons, J.  
Gibbons

Pickering, J.  
Pickering

Hardesty, J.  
Hardesty

Parraguirre, J.  
Parraguirre

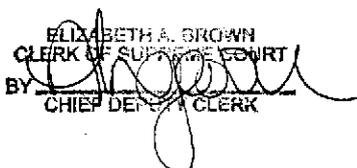
IN THE SUPREME COURT OF THE STATE OF NEVADA

CARRINGTON MORTGAGE  
HOLDINGS, LLC,  
Appellant,  
vs.  
R VENTURES VIII, LLC, A NEVADA  
SERIES LIMITED LIABILITY  
COMPANY OF THE CONTAINER R  
VENTURES, LLC, UNDER NRS 86.296,  
Respondent.

No. 71437

**FILED**

JUN 14 2018

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY   
CHIEF DEPUTY CLERK

Appeal from a district court order awarding costs and attorney fees in a quiet title action. Eighth Judicial District Court, Clark County; Elissa F. Cadish, Judge.

*Reversed.*

Akerman LLP and Natalie L. Winslow, Ariel E. Stern, and Tenesa S. Scaturro, Las Vegas,  
for Appellant.

Cooper Coons, Ltd., and Thomas Miskey and J. Charles Coons, Las Vegas,  
for Respondent.

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BEFORE PICKERING, GIBBONS and HARDESTY, JJ.

*OPINION*

By the Court, GIBBONS, J.:

The solitary issue in this case concerns the proper interpretation and application of former NRS 116.3116(8).<sup>1</sup> Respondent

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<sup>1</sup>The 2015 Legislature revised NRS Chapter 116 substantially. Any references in this opinion to statutes codified in NRS Chapter 116 are to the

acquired interest in a property pursuant to a homeowners' association foreclosure sale and successfully obtained a judgment quieting title against appellant. Thereafter, respondent requested costs and attorney fees pursuant to NRS 116.3116(8), which the district court granted. NRS 116.3116(8) provided that "[a] judgment or decree in any action brought under this section must include costs and reasonable attorney's fees for the prevailing party." We conclude that "any action brought under this section" refers to an action by a homeowners' association to enforce its assessment lien, not a quiet title and declaratory judgment action by a third-party purchaser at such a sale. Thus, the district court erred in awarding respondent costs and attorney fees pursuant to NRS 116.3116(8).

#### *BACKGROUND*

The facts underlying the instant appeal are undisputed by the parties. Appellant Carrington Mortgage Holdings, LLC, was assigned a deed of trust on a property located in Las Vegas. The former owner of the property became delinquent on her payments to the Southern Terrace Homeowners Association. As a result, the homeowners' association initiated nonjudicial foreclosure proceedings pursuant to NRS 116.3116, which culminated in the property being sold to respondent R Ventures VIII, LLC. Respondent then filed an action to quiet title pursuant to NRS 30.010 *et seq.* against several nonparty entities, claiming that the NRS 116.3116 foreclosure sale at which it acquired title extinguished all junior liens. The parties stipulated to add appellant as a defendant. Both parties filed

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version of the statutes in effect in 2013, when the dispute between the parties arose. The 2015 Legislature retained the costs and attorney fees provision in former NRS 116.3116(8), but it is now codified as NRS 116.3116(12).

motions for summary judgment. The district court granted respondent's motion and denied appellant's motion.

Thereafter, respondent requested costs and attorney fees pursuant to NRS 116.3116(8). The district court granted respondent's request on the basis that respondent's claims were brought under NRS 116.3116 and are the type of claims contemplated by NRS 116.3116(8). This appeal followed.

### *DISCUSSION*

Appellant argues that the district court erred in awarding respondent costs and attorney fees pursuant to NRS 116.3116(8), asserting that such an award is available only to a party who prevails in an action brought by a homeowners' association to enforce its assessment lien. Respondent argues that NRS 116.3116(8) allowed a prevailing party to recover its costs and attorney fees in any action involving claims that relate to an NRS 116.3116 lien foreclosure. By its terms, NRS 116.3116(8) mandates the award of costs and attorney fees only in an "action brought under this section" by a homeowners' association to enforce its lien, not collateral litigation between third parties following an NRS 116.3116 foreclosure sale.

When issues concerning attorney fees implicate questions of law, such as statutory construction, the proper review is *de novo*. *In re Estate & Living Tr. of Miller*, 125 Nev. 550, 552-53, 216 P.3d 239, 241 (2009). "This court has established that when it is presented with an issue of statutory interpretation, it should give effect to the statute's plain meaning." *MGM Mirage v. Nev. Ins. Guar. Ass'n*, 125 Nev. 223, 228, 209 P.3d 766, 769 (2009). Therefore, "when the language of a statute is plain and unambiguous, such that it is capable of only one meaning, this court

should not” look beyond the plain meaning of the statute. *Id.* at 228-29, 209 P.3d at 769.

Nevada’s HOA lien statute, NRS Chapter 116.3116, is modeled after the Uniform Common Interest Ownership Act of 1982, § 3-116, 7 U.L.A., part II 121-24 (2009) (amended 1994, 2008) (UCIOA), which Nevada adopted in 1991, *see* NRS 116.001. NRS Chapter 116 confers to a homeowners’ association a superpriority lien on a homeowner’s unit for unpaid assessments and fines levied against the unit. *See* NRS 116.3116(1)-(2). The specific statute at issue, NRS 116.3116(8), stated that “[a] judgment or decree in any action brought under this section must include costs and reasonable attorney’s fees for the prevailing party.” Throughout NRS 116.3116 *et seq.*, the Legislature used the term “action” to refer to an action by a homeowners’ association to enforce its lien, whether by judicial or nonjudicial foreclosure sale. *See* NRS 116.3116(2) (“The lien is also prior to all security interests . . . to the extent of the assessments for common expenses . . . which would have become due in the absence of acceleration during the 9 months immediately preceding institution of an action to enforce the lien . . . .”); NRS 116.3116(7) (“This section does not prohibit actions to recover sums for which subsection 1 creates a lien or prohibit an association from taking a deed in lieu of foreclosure.”); NRS 116.3116(11) (“In an action by an association to collect assessments or to foreclose a lien created under this section . . . .”).<sup>2</sup> Thus, we conclude that NRS 116.3116(8) plainly and unambiguously granted to a prevailing party costs and attorney

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<sup>2</sup>Although NRS 116.3116 permitted both nonjudicial and judicial foreclosure sales, NRS 116.3116(8) appears limited to the latter, given its reference to a “judgment” or “decree.”

fees in an action initiated by the homeowners' association to enforce its lien pursuant to NRS 116.3116's superpriority lien provision.

Here, the homeowners' association foreclosed on the property pursuant to NRS 116.3116's superpriority provision. However, NRS 116.3116 does not authorize appellant's quiet title action even though appellant may have relied on the statute in framing its quiet title complaint. Thus, appellant's action was not brought under NRS 116.3116, which is required to receive attorney fees pursuant to NRS 116.3116(8). Rather, appellant's action was brought under NRS 30.010 *et seq.*, which authorizes actions to quiet title.

Caselaw from other jurisdictions also supports our conclusion. The purpose of the UCIOA is "to make uniform the law with respect to the subject of this chapter among states enacting it." NRS 116.1109(2). Vermont's Common Interest Ownership Act, modeled after the UCIOA, contains an identical costs and attorney fees provision. See Vt. Stat. Ann. 27A Art. 3, § 3-116(h) (2012) (providing "[a] judgment or decree in any action brought under this section shall include an award of costs and reasonable attorney fees to the prevailing party"). In *Will v. Mill Condominium Owners' Ass'n*, the Vermont Supreme Court addressed whether a condominium owner could receive costs and attorney fees pursuant to Vt. Stat. Ann. 27A Art. 3, § 3-116(g) (2006).<sup>3</sup> 898 A.2d 1264, 1266, 1269 (Vt. 2006). The owner had successfully initiated a suit against the homeowners' association challenging the validity of the foreclosure sale and requested

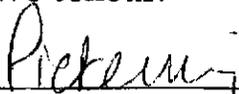
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<sup>3</sup>At the time of the Vermont Supreme Court decision, Vt. Stat. Ann. 27A Art. 3, § 3-116(h) (2012), was codified as Vt. Stat. Ann. 27A Art. 3, § 3-116(g) (2006).

costs and attorney fees pursuant to § 3-116(g). *Id.* Like NRS 116.3116(1), Vermont's statute permits "homeowners' associations to assert a lien over property where the property owner is delinquent in paying assessments." *Id.* at 1269. The court explained, "[g]enerally, a party must proceed under the applicable statute to recover statutory attorneys' fees." *Id.* Thus, "[w]hile it is true that the Association foreclosed on [the owner's] condominium under this statute," the owner's suit challenging the validity "of the foreclosure did not take place in the context of a § 3-116 proceeding." *Id.* As a result, the court held that the owner was not entitled to attorney fees under § 3-116(g). *Id.* Accordingly, we conclude that respondent was not entitled to costs and attorney fees pursuant to NRS 116.3116(8). Thus, we reverse the district court's order awarding respondent costs and attorney fees.

  
Gibbons J.

We concur:

  
Pickering J.

  
Hardesty J.

**134 Nev., Advance Opinion 36**  
IN THE SUPREME COURT OF THE STATE OF NEVADA

SATICOY BAY LLC SERIES 9641  
CHRISTINE VIEW,  
Appellant,  
vs.  
FEDERAL NATIONAL MORTGAGE  
ASSOCIATION,  
Respondent.

No. 69419

**FILED**

MAY 17 2018

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY *[Signature]*  
CHIEF DEPUTY CLERK

Appeal from a district court order granting a motion for summary judgment in a quiet title action. Eighth Judicial District Court, Clark County; Elissa F. Cadish, Judge.

*Affirmed.*

Kim Gilbert Ebron and Karen L. Hanks and Jacqueline A. Gilbert, Las Vegas; Law Offices of Michael F. Bohn, Ltd., and Michael F. Bohn, Las Vegas,  
for Appellant.

Lemons, Grundy & Eisenberg and Robert L. Eisenberg, Reno; Aldridge Pite, LLP, and Jory C. Garabedian, Laurel I. Handley, and Anthony R. Sassi, Las Vegas,  
for Respondent.

Arnold & Porter LLP and Michael A.F. Johnson and Howard N. Cayne, Washington, D.C.; Fennemore Craig P.C. and Leslie L. Bryan-Hart and John D. Tennert, Reno,  
for Amicus Curiae Federal Housing Finance Agency.

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BEFORE THE COURT EN BANC.

## OPINION

By the Court, DOUGLAS, C.J.:

In 2008, the Federal Housing Finance Agency (FHFA) placed respondent Federal National Mortgage Association (Fannie Mae) into conservatorship pursuant to the Housing and Economic Recovery Act (HERA). As conservator, the FHFA is authorized to take over and preserve Fannie Mae's assets and property. When the FHFA is acting as a conservator, 12 U.S.C. § 4617(j)(3) (the Federal Foreclosure Bar) protects its property from nonconsensual foreclosure. In this case, we must decide whether a regulated entity like Fannie Mae has standing to assert the Federal Foreclosure Bar in a quiet title action and, if so, whether the Federal Foreclosure Bar preempts NRS 116.3116, which allows a homeowners' association foreclosure on a superpriority lien to extinguish a first deed of trust. We answer both questions in the affirmative and further hold that the Federal Foreclosure Bar invalidates any purported extinguishment of a regulated entity's property interest while under the FHFA's conservatorship unless the FHFA affirmatively consents. We therefore affirm.<sup>1</sup>

### FACTS AND PROCEDURAL HISTORY

Don and Rieta Moreno (the Morenos) obtained a home loan in the amount of \$174,950 from Countrywide Home Loans, Inc., that was secured by a deed of trust on a property located in Las Vegas. The deed of trust was recorded and named Mortgage Electronic Registration Systems,

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<sup>1</sup>We previously issued our decision in this matter in an unpublished order. Cause appearing, we grant Fannie Mae and its amicus curiae FHFA's motion to reissue the order as an opinion, *see* NRAP 36(f), and issue this opinion in place of our prior order.

Inc., as the beneficiary. Respondent Fannie Mae was subsequently assigned the deed of trust.

Appellant Saticoy Bay LLC Series 9641 Christine View (Saticoy Bay) purchased the property at an HOA foreclosure sale for \$26,800 after the Morenos failed to pay their HOA dues. Thereafter, Saticoy Bay brought suit against Fannie Mae, among others, to quiet title. Both parties filed motions for summary judgment. The district court granted Fannie Mae's counter-motion for summary judgment, concluding that 12 U.S.C. § 4617(j)(3) preempts NRS 116.3116, and thus, the foreclosure sale did not extinguish Fannie Mae's deed of trust without the FHFA's consent. Because the district court found that the FHFA did not consent to the foreclosure sale, Saticoy Bay's interest in the property was subject to the deed of trust. Saticoy Bay now appeals the district court's order.

### DISCUSSION

#### *Standard of review*

Issues of standing and whether a federal statute preempts state law are questions of law subject to de novo review. *Arguello v. Sunset Station, Inc.*, 127 Nev. 365, 368, 252 P.3d 206, 208 (2011); *Nanopierce Techs., Inc. v. Depository Tr. & Clearing Corp.*, 123 Nev. 362, 370, 168 P.3d 73, 79 (2007). In addition, a district court's grant of summary judgment is reviewed de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is proper if the pleadings and all other evidence on file demonstrate that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. *Id.*; see also NRCP 56(c). When deciding a summary judgment motion, all evidence "must be viewed in a light most favorable to the nonmoving party." *Wood*, 121 Nev. at 729, 121 P.3d at 1029. General allegations and

conclusory statements do not create genuine issues of fact. *See id.* at 731, 121 P.3d at 1030-31.

*Fannie Mae has standing to invoke the Federal Foreclosure Bar*

Saticoy Bay argues that Fannie Mae lacks standing to assert that the Federal Foreclosure Bar preempts NRS 116.3116 because (1) HERA only protects the property of the FHFA, and (2) the FHFA is not a party to this case. Fannie Mae argues that it has standing to assert the Federal Foreclosure Bar because private parties routinely invoke federal statutory protections in purely private litigation. We conclude that Fannie Mae has standing to invoke the Federal Foreclosure Bar.

“To have standing, the party seeking relief [must have] a sufficient interest in the litigation, so as to ensure the litigant will vigorously and effectively present his or her case against an adverse party.” *Nationstar Mortg., LLC v. SFR Invs. Pool 1, LLC*, 133 Nev., Adv. Op. 34, 396 P.3d 754, 756 (2017) (internal quotation marks omitted). This court has already addressed Saticoy Bay’s arguments by necessary implication in *Nationstar Mortgage*. This court held that the servicer of a loan owned by a regulated entity may argue that the Federal Foreclosure Bar preempts NRS 116.3116, even though the FHFA was not a party to the case. *Id.* at 756, 758. Certainly, a regulated entity whose property interest *is* at stake is entitled to assert that the Federal Foreclosure Bar preempts NRS 116.3116 on its own behalf.

Moreover, we must afford a statute its plain meaning if its language is clear and unambiguous. *D.R. Horton, Inc. v. Eighth Judicial Dist. Court*, 123 Nev. 468, 476, 168 P.3d 731, 737 (2007). HERA’s statutory language is clear. The statute’s plain language provides that when the FHFA is acting as a conservator, it shall “immediately succeed to . . . the

assets of the regulated entity.” 12 U.S.C. § 4617(b)(2)(A)(i). Another provision of HERA states that the Federal Foreclosure Bar applies “with respect to the [FHFA] in any case in which the [FHFA] is acting as a conservator or a receiver.” 12 U.S.C. § 4617(j)(1). According to the plain language of the statute, Fannie Mae’s property interest effectively becomes the FHFA’s while the conservatorship exists. Thus, the Federal Foreclosure Bar protects Fannie Mae’s deed of trust while Fannie Mae is under the conservatorship.

Based on the foregoing, the district court properly concluded that Fannie Mae had standing to assert that the Federal Foreclosure Bar preempts NRS 116.3116.

*The Federal Foreclosure Bar preempts NRS 116.3116*

Saticoy Bay argues that the Federal Foreclosure Bar does not preempt NRS 116.3116.<sup>2</sup> Fannie Mae argues that NRS 116.3116 conflicts with Congress’s clear purpose of the Federal Foreclosure Bar to protect the operations of Fannie Mae while under conservatorship.<sup>3</sup> We agree with Fannie Mae.

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<sup>2</sup>Saticoy Bay also contends that the Federal Foreclosure Bar protects the FHFA’s assets from state taxation and not foreclosure sales. We reject Saticoy Bay’s argument according to the plain language of the Federal Foreclosure Bar, which states that “[n]o property of the [FHFA] shall be subject to . . . foreclosure.” 12 U.S.C. § 4617(j)(3); see *Berezovsky v. Moniz*, 869 F.3d 923, 929 (9th Cir. 2017) (holding that the Federal Foreclosure Bar applies to foreclosure sales).

<sup>3</sup>Fannie Mae also argues that NRS 116.3116 violates the Due Process Clause of the United States and Nevada Constitutions. This court’s decision in *Saticoy Bay LLC Series 350 Durango 104 v. Wells Fargo Home Mortg.*, 133 Nev., Adv. Op. 5, 388 P.3d 970, 971 (2017), forecloses that argument.

“The preemption doctrine, which provides that federal law supersedes conflicting state law, arises from the Supremacy Clause of the United States Constitution.” *Nanopierce Techs., Inc. v. Depository Tr. & Clearing Corp.*, 123 Nev. 362, 370, 168 P.3d 73, 79 (2007). Federal law may preempt state law even when federal statutory language does not expressly say so. *Id.* at 371, 168 P.3d at 79. That is, preemption may be implied when the federal law actually conflicts with the state law. *Id.* at 371, 168 P.3d at 80. “Even when implied, Congress’s intent to preempt state law, . . . must be clear and manifest.” *Id.* at 371-72, 168 P.3d at 79 (internal quotation marks omitted). “Conflict preemption analysis examines the federal statute as a whole to determine whether a party’s compliance with both federal and state requirements is impossible or whether, in light of the federal statute’s purpose and intended effects, state law poses an obstacle to the accomplishment of Congress’s objectives.” *Id.* at 371-72, 168 P.3d at 80.

We first must assess whether the Federal Foreclosure Bar expressly preempts NRS 116.3116 through clear and explicit preemption language, and we conclude that it does not. *See Davidson v. Velsicol Chem. Corp.*, 108 Nev. 591, 596, 834 P.2d 931, 934 (1992) (“Congress’ silence cannot be ignored—it is inimical to a finding of express pre-emption.”).

Therefore, the question is whether the Federal Foreclosure Bar implicitly preempts NRS 116.3116. The Federal Foreclosure Bar states that

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In addition, Fannie Mae asserts that the foreclosure sale was commercially unreasonable. This court has long held that inadequacy of price alone is not sufficient to set aside a foreclosure sale. *Shadow Wood HOA v. N.Y. Cmty. Bancorp.*, 132 Nev., Adv. Op. 5, 366 P.3d 1105, 1112 (2016). Instead, the party seeking to set aside a foreclosure sale must demonstrate some element of fraud, unfairness, or oppression. *Id.* Here, we conclude that equitable grounds do not exist to warrant setting aside the foreclosure sale.

“[n]o property of the [FHFA] shall be subject to . . . foreclosure, . . . without the consent of the [FHFA].” 12 U.S.C. § 4617(j)(3). As a conservator, the FHFA is tasked with taking action “necessary to put the regulated entity in a sound and solvent condition” and “appropriate to carry on the business of the regulated entity and preserve and conserve the assets and property of the regulated entity.” 12 U.S.C. § 4617(b)(2)(D). In contrast, NRS 116.3116 allows homeowners’ association foreclosures to automatically extinguish Fannie Mae’s property interest without the FHFA’s consent by granting the association a superpriority lien. *See* NRS 116.3116(2). NRS 116.3116 is in direct conflict with Congress’s clear and manifest goal to protect Fannie Mae’s property interest while under the FHFA’s conservatorship from threats arising from state foreclosure law. As the two statutes conflict, the Federal Foreclosure Bar implicitly preempts NRS 116.3116 to the extent that a foreclosure sale extinguishes the deed of trust. Thus, the district court did not err in concluding so.

*The FHFA did not consent to the extinguishment of Fannie Mae’s property interest*

Saticoy Bay argues that the FHFA implicitly consented to the extinguishment of Fannie Mae’s deed of trust during the foreclosure sale by failing to act. We disagree.

The Federal Foreclosure Bar cloaks the FHFA’s “property with Congressional protection unless or until [the FHFA] affirmatively relinquishes it.” *Berezovsky v. Moniz*, 869 F.3d 923, 929 (9th Cir. 2017). In other words, “the Federal Foreclosure Bar does not require [the FHFA] to actively resist foreclosure.” *Id.* Here, the FHFA did not consent to the extinguishment of the deed of trust.

CONCLUSION

Because Fannie Mae was under the FHFA's conservatorship at the time of the homeowners' association foreclosure sale, the Federal Foreclosure Bar protected the deed of trust from extinguishment. Absent the FHFA's affirmative relinquishment, Saticoy Bay's interest in the property is subject to Fannie Mae's deed of trust. Therefore, we conclude the district court properly granted summary judgment in favor of Fannie Mae.

Douglas, C.J.  
Douglas

We concur:

Cherry, J.  
Cherry

Gibbons, J.  
Gibbons

Pickering, J.  
Pickering

Hardesty, J.  
Hardesty

Parraguirre, J.  
Parraguirre

Stiglich, J.  
Stiglich

134 Nev., Advance Opinion 32  
IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES J. COTTER, JR.,  
INDIVIDUALLY AND DERIVATIVELY  
ON BEHALF OF READING  
INTERNATIONAL, INC.,  
Petitioner,  
vs.  
THE EIGHTH JUDICIAL DISTRICT  
COURT OF THE STATE OF NEVADA,  
IN AND FOR THE COUNTY OF  
CLARK; AND THE HONORABLE  
ELIZABETH GOFF GONZALEZ,  
DISTRICT JUDGE,  
Respondents,  
and  
MARGARET COTTER; ELLEN  
COTTER; GUY ADAMS; EDWARD  
KANE; DOUGLAS MCEACHERN;  
WILLIAM GOULD; JUDY CODDING;  
MICHAEL WROTNIAK; AND READING  
INTERNATIONAL, INC.,  
Real Parties in Interest.

No. 71267

FILED

MAY 03 2018

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY *[Signature]*  
CHIEF DEPUTY CLERK

Original petition for a writ of mandamus or prohibition  
challenging a district court order requiring disclosure of certain documents.

*Petition granted.*

Morris Law Group and Steve L. Morris and Akke Levin, Las Vegas; Yurko,  
Salvesen & Remz, P.C., and Mark G. Krum, Boston, Massachusetts,  
for Petitioner.

Cohen Johnson Parker Edwards and H. Stan Johnson, Las Vegas; Quinn  
Emanuel Urquhart & Sullivan, LLP, and Marshall M. Searcy and  
Christopher Tayback, Los Angeles, California,  
for Real Parties in Interest Margaret Cotter, Ellen Cotter, Guy Adams,  
Edward Kane, Douglas McEachern, Judy Coddling, and Michael Wrotniak.

Greenberg Traurig, LLP, and Mark E. Ferrario, Kara B. Hendricks, and Tami D. Cowden, Las Vegas,  
for Real Party in Interest Reading International, Inc.

Maupin, Cox & LeGoy and Donald A. Lattin and Carolyn K. Renner, Reno; Bird, Marella, Boxer, Wolpert, Nessim, Drooks, Lincenberg & Rhows, P.C., and Ekwan E. Rhow, Hernán D. Vera, and Shoshana E. Bannett, Los Angeles, California,  
for Real Party in Interest William Gould.

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BEFORE THE COURT EN BANC.<sup>1</sup>

*OPINION*

By the Court, DOUGLAS, C.J.:

In this original petition for extraordinary relief, we consider whether documents disclosed to third parties constitute waiver of the work-product privilege. In considering this petition, we adopt the common interest rule that allows attorneys to share work product with third parties that have common interest in litigation without waiving the work-product privilege. Petitioner shared assertedly work-product material through emails with third parties who were intervening plaintiffs in the litigation, suing the same defendants on similar issues. Without reviewing the emails, the district court ruled that petitioner must disclose them based on his insufficient showing of common interest between him and the intervening plaintiffs. Because we conclude that petitioner and the intervening plaintiffs share common interest in litigation, the district court erred in

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<sup>1</sup>The Honorable Kristina Pickering, Justice, voluntarily recused herself from participation in the decision of this matter.

concluding otherwise. We therefore grant petitioner's petition for extraordinary relief and direct the district court to refrain from compelling disclosure of the emails before it conducts an *in camera* review of the emails to establish clear findings concerning the work-product privilege.

### *FACTS AND PROCEDURAL HISTORY*

From approximately 2000 to 2014, petitioner James Cotter served as the CEO and Chairman of the Board of Directors of Reading International, Inc. (Reading). After Reading terminated petitioner, he filed a complaint in the district court alleging breach of fiduciary duty against the following members of the Board of Directors of Reading: Margaret Cotter, Ellen Cotter, Guy Adams, Edward Kane, Douglas McEachern, William Gould, Judy Coddling, and Michael Wrotniak (collectively, real parties in interest). Numerous Reading shareholders (the intervening plaintiffs) filed a derivative action in the district court against real parties in interest, asserting breach of fiduciary duty. Similar to petitioner, the intervening plaintiffs included allegations concerning petitioner's termination and other related events. The district court consolidated the two actions.

During discovery, real parties in interest filed a motion to compel petitioner to produce a supplemental privilege log. The district court granted the motion and ordered petitioner to revise his privilege log and reserved a ruling on the production of any of the communications between the attorneys for petitioner and the intervening plaintiffs. Petitioner subsequently produced 350 communications, as well as a supplemental privilege log. The log labeled approximately 150 emails between Lewis Roca Rothgerber LLP, counsel for petitioner, and Robertson & Associates, counsel for the intervening plaintiffs, as work product. According to

petitioner, these emails, dated from August 2015 to June 2016, constituted work product because they contained mental impressions of matters related to the case.

Real parties in interest filed a motion to compel production of these emails, arguing that petitioner waived his claim of work-product protection by sharing these communications with the intervening plaintiffs. Real parties in interest also noted that there was no joint prosecution agreement or confidentiality agreement between the parties. The district court held oral arguments on the motion, though it did not conduct an *in camera* review of the emails. Ultimately, the district court determined that petitioner failed to show common interest between him and the intervening plaintiffs and, thus, ordered petitioner to produce the emails.<sup>2</sup> This petition for writ relief followed.

### DISCUSSION

Writ relief is an extraordinary remedy, available when the petitioner has “no plain, speedy and adequate remedy at law other than to petition this court.” *Wardleigh v. Second Judicial Dist. Court*, 111 Nev. 345, 350, 891 P.2d 1180, 1183 (1995). This court may exercise its discretion to consider writ relief when presented with a situation where “the assertedly privileged information would irretrievably lose its confidential and privileged quality and petitioners would have no effective remedy, even by later appeal.” *Id.* at 350-51, 891 P.2d at 1183-84. Furthermore, a writ of

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<sup>2</sup>Approximately one week after the hearing on the motion to compel, petitioner filed an emergency motion for stay pending resolution of his writ petition, pursuant to NRAP 8 and 27(e). Later that same day, this court granted the emergency motion. *See Cotter v. Eighth Judicial Dist. Court*, Docket No. 71267 (Order Directing Answer and Granting Motion for Stay, Sept. 15, 2016). In light of this opinion, we lift this court’s prior stay.

prohibition is a more appropriate remedy than mandamus to correct an order that compels the disclosure of privileged information. *See id.* at 350, 891 P.2d at 1183. Although this court rarely entertains writ petitions challenging pretrial discovery, “there are occasions where, in the absence of writ relief, the resulting prejudice would not only be irreparable, but of a magnitude that could require the imposition of such drastic remedies as dismissal with prejudice or other similar sanctions.” *Id.* at 351, 891 P.2d at 1184.

In this case, without writ relief, compelled disclosure of petitioner’s assertedly privileged communication will occur and petitioner would have no effective remedy, even by subsequent appeal. Accordingly, we exercise our jurisdiction to entertain this writ petition.

In considering this petition, discovery rulings are reviewed for an abuse of discretion. *Club Vista Fin. Servs., LLC v. Eighth Judicial Dist. Court*, 128 Nev. 224, 228, 276 P.3d 246, 249 (2012). “A manifest abuse of discretion is ‘[a] clearly erroneous interpretation of the law or a clearly erroneous application of a law or rule.’” *State v. Eighth Judicial Dist. Court*, 127 Nev. 927, 932, 267 P.3d 777, 780 (2011) (quoting *Steward v. McDonald*, 958 S.W.2d 297, 300 (Ark. 1997)). In addition, when considering a writ petition, this court reviews legal questions de novo and “gives deference to the district court’s findings of fact.” *Williams v. Eighth Judicial Dist. Court*, 127 Nev. 518, 525, 262 P.3d 360, 365 (2011).

Petitioner asserts that the work-product privilege is applicable and that he did not waive the privilege because he shares common interest in litigation with the intervening plaintiffs. In response, real parties in interest claim that the district court correctly concluded that no common interest exists between petitioner and the intervening plaintiffs. We

conclude the district court erred and that common interest exists between petitioner and the intervening plaintiffs.

The work-product privilege “protects an attorney’s mental impressions, conclusions, or legal theories concerning the litigation, as reflected in memoranda, correspondence, interviews, briefs, or in other tangible and intangible ways.” *Wardleigh*, 111 Nev. at 357, 891 P.2d at 1188; *see also* NRCP 26(b)(3). Rather than protecting the confidential relationship between attorney and client, the work-product privilege exists “to promote the adversary system by safeguarding the fruits of an attorney’s trial preparations from the discovery attempts of the opponent.” *United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1299 (D.C. Cir. 1980) (emphasis omitted). Thus, “[u]nlike the attorney-client privilege, selective disclosure of work product to some, but not to others, is permitted,” and disclosure to third parties does not automatically waive the privilege. *Wynn Resorts, Ltd. v. Eighth Judicial Dist. Court*, 133 Nev., Adv. Op. 52, 399 P.3d 334, 349 (2017).

In particular, numerous jurisdictions have recognized a broad common interest rule, allowing attorneys to share work product with other counsel for clients with the same interest without waiving the privilege. *See, e.g., United States v. Gonzalez*, 669 F.3d 974, 978 (9th Cir. 2012); *In re Grand Jury Subpoenas*, 902 F.2d 244, 249 (4th Cir. 1990); *Castle v. Sangamo Weston, Inc.*, 744 F.2d 1464, 1466 (11th Cir. 1984); *Am. Tel. & Tel. Co.*, 642 F.2d at 1299. We take this opportunity to adopt the common interest rule as an exception to waiver of the work-product privilege.

For the common interest rule to apply, the “transferor and transferee [must] anticipate litigation against a common adversary on the same issue or issues” and “have strong common interests in sharing the

fruit of the trial preparation efforts.” *Am. Tel. & Tel. Co.*, 642 F.2d at 1299. The rule is not narrowly limited to co-parties. *Id.* In addition, a written agreement is not required, and common interest “may be implied from conduct and situation, such as attorneys exchanging confidential communications from clients who are or potentially may be codefendants or have common interests in litigation.” *Gonzalez*, 669 F.3d at 979. However, waiver of the privilege is “usually found when the material is disclosed to an adversary.” *Wynn Resorts*, 133 Nev., Adv. Op. 52, 399 P.3d at 349. As a result, disclosure to third parties will waive the privilege “when ‘it has substantially increased the opportunities for potential adversaries to obtain the information.’” *Id.* (quoting 8 Charles A. Wright, Arthur R. Miller & Richard L. Marcus, *Federal Practice and Procedure* § 2024, at 532 (3d ed. 2010)).

Here, the record demonstrates that petitioner and the intervening plaintiffs, whose actions were consolidated, were all shareholders of Reading and asserted derivative claims against real parties in interest. The intervening plaintiffs have never filed claims against petitioner in this case. It is also unlikely that the intervening plaintiffs would disclose the work-product material to the real parties in interest given that petitioner and the intervening plaintiffs filed similar claims against the real parties in interest. Thus, we conclude that petitioner and the intervening plaintiffs anticipated litigation against a common adversary—real parties in interest—on similar issues concerning breaches of fiduciary duty, and they shared a sufficiently strong common interest in litigation as a matter of law.

As a result, we conclude that the district court erred in ruling that petitioner must disclose the emails based on finding an insufficient

showing of common interest between him and the intervening plaintiffs. Accordingly, we grant petitioner's writ of prohibition and direct the clerk of this court to issue a writ instructing the district court to refrain from compelling disclosure of the emails until it reviews the emails *in camera* to evaluate whether they contain impressions, conclusions, opinions, and legal theories of counsel, as required pursuant to the work-product privilege.

Douglas, C.J.  
Douglas

We concur:

Cherry, J.  
Cherry

Gibbons, J.  
Gibbons

Hardesty, J.  
Hardesty

Parraguirre, J.  
Parraguirre

Stiglich, J.  
Stiglich

134 Nev., Advance Opinion 33  
IN THE SUPREME COURT OF THE STATE OF NEVADA

LAS VEGAS DEVELOPMENT GROUP,  
LLC, A NEVADA LIMITED LIABILITY  
COMPANY,  
Appellant,

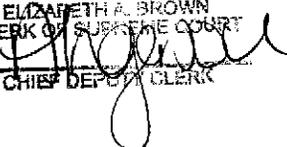
vs.

JAMES R. BLAHA, AN INDIVIDUAL;  
BANK OF AMERICA, N.A., A  
NATIONAL BANKING ASSOCIATION,  
AS SUCCESSOR BY MERGER TO BAC  
HOME LOANS SERVICING, LP;  
RECONTRUST COMPANY, N.A., A  
TEXAS CORPORATION; EZ  
PROPERTIES, LLC, A NEVADA  
LIMITED LIABILITY COMPANY; K&L  
BAXTER FAMILY LIMITED  
PARTNERSHIP, A NEVADA LIMITED  
PARTNERSHIP; AND NOBLE HOME  
LOANS, INC., F/K/A FCH FUNDING,  
INC., AN UNKNOWN CORPORATE  
ENTITY,  
Respondents.

No. 71875

FILED

MAY 03 2018

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY   
CHIEF DEPUTY CLERK

Appeal from a district court order granting summary judgment  
in a quiet title action. Eighth Judicial District Court, Clark County; Jerry  
A. Wiese, Judge.

*Affirmed in part, reversed in part, and remanded.*

Roger P. Croteau & Associates, Ltd., and Roger P. Croteau and Timothy E.  
Rhoda, Las Vegas,  
for Appellant.

Kolesar & Leatham and Aaron R. Maurice and Brittany Wood, Las Vegas,  
for Respondents James R. Blaha and Noble Home Loans, Inc.

Akerman, LLP, and Darren T. Brenner and William S. Habdas, Las Vegas, for Respondents Bank of America, N.A., and Recontrust Company, N.A.

Law Offices of Kevin R. Hansen and Kevin R. Hansen, Las Vegas, for Respondents EZ Properties, LLC, and K&L Baxter Family Limited Partnership.

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BEFORE THE COURT EN BANC.

*OPINION*

By the Court, HARDESTY, J.:

In this opinion, we consider whether the time limitations in NRS 107.080(5)-(6) (2010)<sup>1</sup> bar an action challenging an NRS Chapter 107 nonjudicial foreclosure where it is alleged that the deed of trust had been extinguished before the sale. Because such an action challenges the authority to conduct the sale, rather than the manner in which the foreclosure was conducted, we conclude that the time limitations set forth in NRS 107.080(5)-(6) do not apply to such an action.

*FACTS AND PROCEDURAL HISTORY*

This case involves a residential property located in a common-interest community governed by the Nevada Trails II Community

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<sup>1</sup>NRS 107.080 was amended after 2010. *See, e.g.*, 2011 Nev. Stat., ch. 81, § 9, at 332. However, because a notice of default and election to sell was recorded in April 2011 in this case, prior to the effective date of the amendments, all references in this opinion are to the 2010 statute in effect at the time of the notice. *See* 2010 Nev. Stat. 26th Spec. Sess., ch. 10, § 31, at 77-79.

Association (HOA). The former homeowner, who is not a party to this case, purchased the property for \$456,000 with a loan secured by a first deed of trust that was assigned to respondent Bank of America, N.A. (BANA).<sup>2</sup> By 2010, the homeowner had fallen delinquent on both his loan obligations and his HOA assessments. The HOA and BANA each initiated separate nonjudicial foreclosure sales.

On April 12, 2011, the HOA held a nonjudicial foreclosure sale pursuant to NRS Chapter 116. Appellant Las Vegas Development Group, LLC (LVDG) purchased the property at the HOA foreclosure sale for \$5,200, and recorded the deed on April 13, 2011. Approximately five months later, on August 29, 2011, BANA conducted a foreclosure sale pursuant to NRS Chapter 107, at which respondent EZ Properties, LLC, purchased the property for \$151,300. EZ then sold the property to respondent James R. Blaha for \$208,000, and Blaha recorded his deed on September 30, 2011.<sup>3</sup> Both LVDG and Blaha have recorded title to the property.

On March 19, 2015, LVDG filed a complaint in the district court, asserting five causes of action against all of the respondents: (1) quiet title, (2) equitable mortgage, (3) slander of title, (4) wrongful foreclosure, and (5) rescission. LVDG also asserted a cause of action for unjust

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<sup>2</sup>The loan was initially secured through Countrywide Bank, FSB, and was then assigned to BAC Home Loans Serving, LP, which eventually merged with BANA.

<sup>3</sup>Respondents Blaha and his lender, Noble Home Loans, Inc., filed a joint answering brief. Respondents BANA and Recontrust Company, N.A., the trustee of the first deed of trust, filed a joinder to the answering brief. We refer to these respondents collectively as Blaha. We note that respondents EZ and K&L Baxter Family Limited Partnership failed to file an answering brief, and we treat this failure as a confession of error as to these respondents. *See* NRAP 31(d)(2).

enrichment against BANA, Recontrust Company, N.A., and EZ, and a cause of action for conversion against BANA and Recontrust. LVDG relied on *SFR Investments Pool I, LLC v. U.S. Bank, N.A.*, 130 Nev. 742, 334 P.3d 408 (2014), to argue that the HOA foreclosure sale extinguished the first deed of trust and therefore BANA lacked authority to conduct a nonjudicial foreclosure sale on the property. Thus, according to LVDG, BANA's foreclosure sale and all subsequent transfers of the property were void and LVDG is the rightful owner of the property.

Blaha moved for summary judgment, arguing primarily that LVDG's claims were barred by the statute of limitations in NRS 107.080(5)-(6) because LVDG failed to file the complaint within 90 or 120 days of the deed-of-trust foreclosure sale. Blaha also argued that the slander of title claim should be dismissed as untimely under NRS 11.190(4)(c) (2010). In response, LVDG contended that the time limitations in NRS 107.080(5)-(6) did not apply to its claims because the deed-of-trust foreclosure sale was void ab initio. LVDG did not oppose summary judgment for the slander of title claim. The district court granted Blaha's motion for summary judgment on the slander of title claim and concluded that the 90- or 120-day statute of limitations in NRS 107.080(5)-(6) barred all of LVDG's remaining causes of action.

LVDG appeals from the grant of summary judgment. Accordingly, the narrow issue we consider is whether NRS 107.080(5)-(6) applies to challenges to the authority behind a NRS Chapter 107 nonjudicial foreclosure sale.<sup>4</sup>

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<sup>4</sup>LVDG also argues that the district court erred by entering a written order that contained factual issues not discussed at the hearing on the

## DISCUSSION

Summary judgment shall be granted “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” NRCP 56(c). “This court reviews a district court’s grant of summary judgment de novo, without deference to the findings of the lower court.” *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Here, the parties do not dispute the operative facts, and we are presented only with a question of statutory interpretation and application, which “is a question of law subject to our de novo review.” *Las Vegas Sands Corp. v. Eighth Judicial Dist. Court*, 130 Nev. 118, 123, 319 P.3d 618, 621 (2014).

“When a statute’s language is plain and unambiguous, we will give that language its ordinary meaning.” *McGrath v. State, Dep’t of Pub. Safety*, 123 Nev. 120, 123, 159 P.3d 239, 241 (2007). “We only look beyond the plain language if it is ambiguous or silent on the issue in question.” *Allstate Ins. Co. v. Fackett*, 125 Nev. 132, 138, 206 P.3d 572, 576 (2009). Thus, we begin with the plain language of NRS 107.080.

LVDG argues that NRS 107.080(5)-(6) governs only procedural defects in the manner in which an NRS Chapter 107 nonjudicial foreclosure sale is conducted, and thus does not apply to LVDG’s action, which challenges the authority behind the foreclosure sale. LVDG contends that

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motion for summary judgment. LVDG does not provide authority for its argument; thus, LVDG fails to cogently argue the issue and we decline to decide it. *See Edwards v. Emperor’s Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (concluding that this court need not address issues not cogently argued and supported by relevant authority).

because the HOA foreclosure sale extinguished the first deed of trust, BANA had no security interest in the property and thus no authority to foreclose on the property. LVDG argues that the plain language of NRS 107.080(5) presumes that the individual conducting the sale has authority to do so, which further demonstrates that NRS 107.080(5)-(6) does not apply to situations where the foreclosing entity lacks the proper authority to foreclose. Blaha contends that the time limitations in NRS 107.080(5)-(6) apply to all challenges to NRS Chapter 107 nonjudicial foreclosure sales. Blaha argues that the legislative history, which demonstrates that the Legislature's intent in enacting NRS 107.080(5)-(6) was to ensure that individuals could not overturn foreclosure sales indefinitely, supports this position.

NRS 107.080 governs nonjudicial deed-of-trust foreclosure sales and sets forth the substantive requirements and procedures for such sales. Subsection 5(a) states that a sale under "this section may be declared void" if the individual "authorized to make the sale does not substantially comply with the provisions of this section or any applicable provision of NRS 107.086 and 107.087."<sup>5</sup> 2010 Nev. Stat. 26th Spec. Sess., ch. 10, § 31, at 78. Subsection 5(b) requires that such an action be commenced "within 90 days after the date of the sale." *Id.* Subsection 6 allows 120 days to commence an action if proper notice is not given. *Id.* Thus, if the person authorized to conduct the sale fails to substantially comply with NRS 107.086, NRS 107.087, or one of NRS 107.080(5)'s provisions, it can render the sale void.

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<sup>5</sup>NRS 107.086 (2010) included "[a]dditional requirements for sale of owner-occupied housing: Notice; form; election of mediation; adoption of rules concerning mediation; applicability." NRS 107.087 (2010) provided the requirements for the notice of default and election to sell and the notice of sale for a residential foreclosure.

By the statute's plain language, challenges to those violations are subject to the time limitations in subsections 5 and 6. However, the language of NRS 107.080 presumes that the person making this sale is authorized to do so as trustee or as the person designated under the terms of the deed of trust or transfer in trust. In this case, it is alleged that the security interest of the deed of trust was extinguished by the prior HOA foreclosure sale leaving the person to conduct the sale without authority to do so.

According to Blaha, we previously determined that NRS 107.080 applies to all challenges to a nonjudicial foreclosure sale in *Building Energetix Corp. v. EHE, LP*, 129 Nev. 78, 85-86, 294 P.3d 1228, 1234 (2013).<sup>6</sup> We disagree. *Building Energetix* involved a delinquent-tax certificate issued to the county treasurer prior to a nonjudicial foreclosure sale. *Id.* at 79-80, 294 P.3d at 1230. The issue was “whether, consistent with NRS 107.080(5), a trust-deed beneficiary who acquires such property on credit bid at the foreclosure sale can later redeem, or obtain reconveyance of, the property from the county treasurer.” *Id.* at 79, 294 P.3d at 1230. Thus, we were not confronted with, nor did we decide, whether NRS 107.080

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<sup>6</sup>Blaha also contends that we previously held that all challenges to a nonjudicial foreclosure sale are subject to NRS 107.080's time limitations in *Michniak v. Argent Mortgage Co., LLC*, Docket No. 56334 (Order of Affirmance, Dec. 14, 2012). First, we caution counsel that pursuant to NRAP 36(c)(3), parties can only cite to unpublished dispositions as persuasive authority if they were “issued by the Supreme Court on or after January 1, 2016.” Nevertheless, we emphasize that in *Michniak*, the appellant focused its appeal, including its claim for quiet title, only on the provisions of NRS 107.080. Thus, we held that his claims were barred by the time limitations in NRS 107.080. Here, LVDG does not focus its claims on the procedural provisions of NRS 107.080. Thus, Blaha's reliance on *Michniak* is misplaced.

applies to all challenges to an NRS Chapter 107 nonjudicial foreclosure sale.<sup>7</sup>

Blaha also contends that the application of NRS 107.080(5)-(6) to all claims challenging an NRS Chapter 107 foreclosure sale is consistent with the legislative history of the statute, which indicates that the legislators were concerned about individuals having the ability to reverse a foreclosure sale indefinitely. While that concern was stated at the hearing on the legislation, it was in the context of the statutory violations of NRS 107.080. *See* Hearing on S.B. 217 Before the Senate Judiciary Comm., 74th Leg. (Nev., March 21, 2007); Hearing on S.B. 217 Before the Assembly Judiciary Comm., 74th Leg. (Nev., May 2, 2007). The legislators did not discuss scenarios where the deed of trust is void. Thus, we conclude that the legislative history supports the plain language of NRS 107.080 and demonstrates that the legislators were not contemplating challenges to a foreclosing entity's authority. *See* Hearing on S.B. 217 Before the Senate Judiciary Comm., 74th Leg. (Nev., March 21, 2007).

After our consideration of the issue in this case, we agree with LVDG that there are instances apart from those enumerated in NRS 107.080(5) in which a court may set aside a nonjudicial foreclosure sale. *See, e.g., Shadow Wood Homeowners Ass'n, Inc. v. N.Y. Cmty. Bancorp, Inc.*, 132 Nev., Adv. Op. 5, 366 P.3d 1105, 1112 (2016) (acknowledging that a

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<sup>7</sup>Similarly, Blaha's reliance on *Tai-Si Kim v. Kearney*, 838 F. Supp. 2d 1077 (D. Nev. 2012), is misplaced. In *Kearney*, the plaintiffs sought quiet title under the theory that they were subsequent good faith purchasers without knowledge of another's interest in the disputed property. *Id.* at 1088. The court held that "a *valid* trustee's foreclosure sale terminates legal and equitable interests in the property" and noted that the plaintiffs had notice of the sale. *Id.* at 1089 (emphasis added). Thus, the court did not consider the same issue that is before us in this case.

court may set aside a nonjudicial foreclosure sale if equitable grounds exist for doing so). Accordingly, we conclude that NRS 107.080(5) only applies to actions challenging the procedural aspects of a nonjudicial deed-of-trust foreclosure sale.

LVDG's complaint primarily sought to quiet title to the property and have BANA's foreclosure sale of the property declared void because the first deed of trust had been extinguished by the earlier HOA foreclosure sale. Based on LVDG's arguments under *SFR Investments Pool*, 130 Nev. 742, 334 P.3d 408, in which we held that a valid HOA foreclosure sale extinguishes a first deed of trust on the property, it is clear that LVDG is not challenging the procedural aspects of the foreclosure sale, such as BANA's failing to meet the requirements for the notice of default and election to sell, which would invoke the time limitations in NRS 107.080. Rather, LVDG's claim challenges the authority behind the foreclosure sale, which requires a determination of "who holds superior title to a land parcel." See *McKnight Family, LLP v. Adept Mgmt. Servs., Inc.*, 129 Nev. 610, 616, 310 P.3d 555, 559 (2013). This claim, seeking to quiet title and have its rights determined on the merits, is governed by NRS 11.080, which provides for a five-year statute of limitations.<sup>8</sup> *Saticoy Bay LLC Series 2021 Gray Eagle Way v. JPMorgan Chase Bank, N.A.*, 133 Nev., Adv. Op. 3, 388 P.3d 226, 232 (2017). Accordingly, we conclude that LVDG's action for quiet title is appropriately governed by NRS 11.080.

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<sup>8</sup>The parties do not argue, nor do we reach, whether LVDG's remaining causes of action may be time-barred under other statutes of limitations. Rather, our holding is limited to concluding that, because the remaining causes of action are dependent on the validity of BANA's foreclosure sale, those causes of action are not governed by NRS 107.080(5)-(6).

Our decision aligns with Nevada’s federal courts that have considered this same issue. For example, in *Las Vegas Development Group, LLC v. Yfantis*, the defendant similarly argued that the plaintiff’s claims for wrongful foreclosure were time-barred by NRS 107.080(5). 173 F. Supp. 3d 1046, 1060-61 (D. Nev. 2016). The court determined that the “wrongful foreclosure claim [wa]s not based on a violation of [NRS] 107.080’s procedural aspects of foreclosure, and thus [NRS] 107.080(5)’s limitation period d[id] not apply. Rather, [the plaintiff] contends [the defendant] had no authority to conduct the foreclosure sale because its security interest in the property had been extinguished.” *Id.* at 1061; *see also Las Vegas Dev. Grp., LLC v. Steven*, No. 2:15-CV-01128-RCJ-CWH, 2016 WL 3381222, at \*5 (D. Nev. June 14, 2016) (“[NRS] 107.080(5) does not apply to [the plaintiff’s] wrongful foreclosure claim because the claim is not based on the procedural requirements of that section. Instead, [the plaintiff] challenges the authority behind the foreclosure, not the foreclosure act itself.” (internal quotation marks omitted)). Similarly, here, LVDG is challenging the authority behind the sale, not the foreclosure procedure itself. Therefore, we agree that NRS 107.080(5) does not govern LVDG’s action to quiet title. Accordingly, we reverse in part the district court’s grant of summary judgment and remand for further proceedings consistent with this opinion.

We further affirm in part the district court's grant of summary judgment on LVDG's slander of title claim.

Hardesty, J.  
Hardesty

We concur:

Douglas, C.J.  
Douglas

Cherry, J.  
Cherry

Gibbons, J.  
Gibbons

Pickering, J.  
Pickering

Parraguirre, J.  
Parraguirre

Stiglich, J.  
Stiglich

134 Nev., Advance Opinion 25  
IN THE SUPREME COURT OF THE STATE OF NEVADA

U.S. HOME CORPORATION, A  
DELAWARE CORPORATION,  
Appellant,  
vs.  
THE MICHAEL BALLESTEROS  
TRUST; RODRIGO ASANION,  
INDIVIDUALLY; FEDERICO AGUAYO,  
INDIVIDUALLY; FELIPE ENRIQUEZ,  
INDIVIDUALLY; JIMMY FOSTER, JR.,  
INDIVIDUALLY; THE GARCIA  
FAMILY TRUST; ARNULFO ORTEGO-  
GOMEZ, INDIVIDUALLY; ELVIRA  
GOMEZ-ORTEGA, INDIVIDUALLY;  
JOHN J. OLSON, INDIVIDUALLY;  
IRMA A. OLSON, INDIVIDUALLY;  
OMAR PONCE, INDIVIDUALLY;  
BRANDON WEAVER, INDIVIDUALLY;  
JON YATES, INDIVIDUALLY; AND  
MINTESNOT WOLDETSADIK,  
INDIVIDUALLY,  
Respondents.

No. 68810

FILED

APR 12 2018

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY   
CHIEF DEPUTY CLERK

Appeal from a district court order denying a motion to compel arbitration. Eighth Judicial District Court, Clark County; Joanna Kishner, Judge.

*Reversed and remanded with instructions.*

Payne & Fears LLP and Gregory H. King, Sarah J. Odia, and Chad D. Olsen, Las Vegas,  
for Appellant.

Shinnick, Ryan & Ransavage P.C. and Duane E. Shinnick, Courtney K. Lee, Melissa Orr, and Bradley S. Rosenberg, Las Vegas,  
for Respondents.

Canepa Riedy Abele and Scott K. Canepa, Las Vegas,  
for Amicus Curiae Nevada Justice Association.

Wood, Smith, Henning & Berman, LLP, and Janice M. Michaels, T. Blake  
Gross, and Anthony S. Wong, Las Vegas,  
for Amicus Curiae Nevada Home Builders Association.

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BEFORE THE COURT EN BANC.

*OPINION*

By the Court, PICKERING, J.:

This is an appeal from an order denying a motion to compel arbitration in a construction defect action. The Federal Arbitration Act (FAA) declares written arbitration agreements “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2. In this appeal, we must determine whether the FAA governs the arbitration agreement contained in the common-interest community’s Covenants, Conditions, and Restrictions (CC&Rs). Because the underlying transaction involved interstate commerce, we hold that it does and that, to the extent Nevada case law concerning procedural unconscionability singles out and disfavors arbitration of disputes over transactions involving interstate commerce, that case law is preempted by the FAA. We therefore reverse and remand for entry of an order directing the parties to arbitration.

I.

This construction defect action concerns 12 single-family homes located in a southern Nevada common-interest community. Appellant U.S. Home Corporation is the developer. The community is subject to CC&Rs

that define U.S. Home as a “declarant.” The CC&Rs include a section entitled “Arbitration,” which states in relevant part:

**Arbitration.** Any dispute that may arise between: (a) the . . . Owner of a Unit, and (b) the relevant Declarant, or any person or entity who was involved in the construction of any . . . Unit, shall be resolved by submitting such dispute to arbitration before a mutually acceptable arbitrator who will render a decision binding on the parties which can be entered as a judgment in court pursuant to NRS 38.015, et seq.

Three of the respondents are original purchasers who contracted directly with U.S. Home to build and sell them homes. These respondents each signed a Purchase and Sales Agreement (PSA). The PSAs include an arbitration clause, in addition to that contained in the CC&Rs, in which the parties “specifically agree that this transaction involves interstate commerce and that any dispute . . . shall first be submitted to mediation and, if not settled during mediation, shall thereafter be submitted to binding arbitration as provided by the Federal Arbitration Act (9 U.S.C. §§ 1 *et seq.*) or, if inapplicable, by similar state statute, and not by or in a court of law.” The remaining ten respondents are subsequent purchasers who took title subject to the CC&Rs but did not sign a PSA.

Between August 2013 and February 2015, U.S. Home received construction defect pre-litigation notices on behalf of all respondents (the Homeowners). U.S. Home responded with letters demanding arbitration. The Homeowners then filed, in the district court, an NRS Chapter 40 construction defect complaint against U.S. Home seeking damages for breach of contract, breach of implied warranties, and negligence. U.S. Home filed a motion to compel arbitration based on the arbitration clauses in the CC&Rs and PSAs. The district court denied the motion. It held that

the underlying transaction did not involve interstate commerce so the FAA did not apply. Applying state law, the district court invalidated the arbitration agreements as unconscionable. This appeal followed.

## II.

Before considering whether the FAA controls, there is a threshold question we must resolve: Does the arbitration clause in the CC&Rs bind the Homeowners?<sup>1</sup> The Homeowners maintain that U.S. Home cannot compel arbitration based on the CC&Rs because “CC&Rs are not ‘contracts,’ but covenants that run with the land.” Citing *Pinnacle Museum Tower Association v. Pinnacle Market Development, LLC*, 282 P.3d 1217 (Cal. 2012), where the California Supreme Court held that an arbitration provision contained in recorded CC&Rs was enforceable against a non-signatory homeowners’ association, U.S. Home argues that, by purchasing homes in a common-interest community, the Homeowners assented to the obligations the CC&Rs impose, including, in this case, the obligation to arbitrate their construction defect claims. To resolve these issues we must consider the nature and purpose of CC&Rs and whether arbitration agreements can properly be contained in CC&Rs.

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<sup>1</sup>We decline to address U.S. Home’s assertion that an arbitrator should determine arbitrability, as it did not raise that issue in district court. See *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 75-76 (2010) (refusing to review delegation-clause argument first raised on appeal); *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (deeming waived any issue that was not raised before the district court). We also note that the Homeowners do not dispute that, if enforceable, the arbitration clause in the CC&Rs is broadly worded enough to encompass their claims.

NRS 116.2101 permits the creation of a common-interest community “by recording a declaration executed in the same manner as a deed and, in a cooperative, by conveying the real estate subject to that declaration to the association.” A declaration must contain a number of required statements, NRS 116.2105(1), and “may contain any other matters the declarant considers appropriate.” NRS 116.2105(2). “CC&Rs become a part of the title to [a homeowner’s] property.” NRS 116.41095(2). By law, a person who buys a home subject to CC&Rs must receive an information statement warning that “[b]y purchasing a property encumbered by CC&Rs, you are agreeing to limitations that could affect your lifestyle and freedom of choice” and that the CC&Rs “bind you and every future owner of the property whether or not you have read them or had them explained to you.” *Id.* The statement must further advise the prospective homebuyer that “[t]he law generally provides for a 5-day period in which you have the right to cancel the purchase agreement.” NRS 116.41095(1).

The Uniform Arbitration Act of 2000 (UAA), adopted in Nevada as NRS 38.206-.248, does not require any particular formality to create an enforceable arbitration agreement. Rather, it states simply: “An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable and irrevocable except upon a ground that exists at law or in equity for the revocation of a contract.” UAA § 6(a), 7 U.L.A. 25 (part 1A) (West 2009), *codified in substantially similar form at* NRS 38.219(1). Though arbitration agreements often appear in conventional two-party contracts, they can also arise from other written records where signatures are not required. *See Tallman v. Eighth Judicial Dist. Court*, 131 Nev., Adv. Op. 71, 359 P.3d 113, 119 (2015) (“While NRS 38.219(1) requires that

the arbitration agreement be ‘contained in a record,’ it does not require that the written record of the agreement to arbitrate be signed.”). Indeed, the UAA provides an example of a valid unsigned arbitration agreement—“arbitration provisions contained in the bylaws of corporate or other associations”—and notes that “[c]ourts that have addressed whether arbitration provisions contained in [an organization’s] bylaws . . . are enforceable under the UAA have unanimously held that they are.” UAA § 6(a), 7 U.L.A. 25 part 1A & cmts.

The same principle—that arbitration agreements can exist in a document not labeled “contract”—has been applied to arbitration clauses in CC&Rs. Thus, in *Pinnacle*, the California Supreme Court compelled arbitration of a dispute between a developer and a homeowners’ association based on an arbitration clause in the CC&Rs. 282 P.3d at 1221. In doing so, the court emphasized the contractual nature of terms contained in a recorded declaration of CC&Rs. *Id.* at 1225-26. By purchasing a unit within the common-interest community, the homebuyer manifests acceptance of the CC&Rs. *Id.* “Having a single set of recorded covenants and restrictions that applies to an entire common interest development protects the intent, expectations, and wishes of those buying into the development and the community as a whole by ensuring that promises concerning the character and operation of the development are kept.” *Id.* at 1225. It thus comes as “no surprise that courts have described recorded declarations as contracts” and enforced them as such, as between developer/declarants and homeowners. *Id.* at 1227 (collecting cases).

The proposition that CC&Rs create contractual obligations, in addition to imposing equitable servitudes, is widely accepted. See Restatement (Third) of the Law of Prop.: Servitudes, ch. 4 intro. note (Am.

Law Inst. 2000) (“One of the basic principles underlying the Restatement is that the function of the law is to ascertain and give effect to the likely intentions and legitimate expectations of the parties who create servitudes, *as it does with respect to other contractual arrangements.*”) (emphasis added). By accepting the deed or other possessory interest in a unit, the homeowner manifests his or her assent to the CC&Rs.<sup>2</sup> Thus, even apart from the arbitration setting, numerous cases, including at least one from Nevada, recognize the contractual nature of the obligations imposed by a common-interest community’s CC&Rs, which cover such diverse subjects as indemnification, restrictions on resale or use, and dispute resolution. See *Sandy Valley Assocs. v. Sky Ranch Estate Owners Ass’n*, 117 Nev. 948, 954, 35 P.3d 964, 968 (2001), *receded from on other grounds by Horgan v. Felton*, 123 Nev. 577, 170 P.3d 982 (2007) (“the CC&Rs constituted a written contract to convey land”); see also *Ahwatukee Custom Estates Mgmt. Ass’n v. Turner*, 2 P.3d 1276, 1279 (Ariz. Ct. App. 2000) (recognizing that CC&Rs impose contractual obligations); *Harbour Pointe, LLC v. Harbour Landing Condo. Ass’n*, 14 A.3d 284, 288 (Conn. 2011) (same); *Marino v. Clary Lakes Homeowners Ass’n*, 770 S.E.2d 289, 293 (Ga. Ct. App. 2015) (construing a homeowners’ association declaration as a contract); *Chase v. Bearpaw Ranch Ass’n*, 133 P.3d 190, 197 (Mont. 2006) (analyzing a provision for

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<sup>2</sup>Section 17.8 of the CC&Rs at issue in this case provides:

Every Person who owns, occupies or acquires any right, title, estate or interest in or to any Unit or other portion of the Property does hereby consent and agree, and shall be conclusively deemed to have consented and agreed, to every limitation, restriction, easement, reservation, condition and covenant contained herein . . . .

attorney fees included in CC&Rs under principles of contract law); *Diaz v. Ferne*, 120 Nev. 70, 73, 84 P.3d 664, 665-66 (2004) (using contract interpretation rules to interpret CC&Rs).

As *Pinnacle* recognizes, accepting the premise that CC&Rs can impose contractual obligations to which a homeowner assents by purchasing a unit leads to the conclusion that CC&Rs can state agreements to arbitrate, enforceable under the UAA or the FAA. See 282 P.3d at 1231 (since “the FAA precludes judicial invalidation of an arbitration clause based on state law requirements that are not generally applicable to other contractual clauses . . . . [i]t stands to reason that the FAA would preempt state decisional law singling out an arbitration clause as the only term in a recorded declaration [of CC&Rs] that may not be regarded as contractual in nature”). There may be defenses to the arbitration agreement—including unconscionability if such can be shown—but the agreement itself exists. Consistent with this general law, both treatises and case law alike have deemed CC&Rs an appropriate repository of an agreement to arbitrate. Thomas H. Oehmke & Joan M. Brovins, 1 *Commercial Arbitration* § 17:10 (3d ed. 2015) (recognizing that “master deed[s],” or declarations, are “good instruments within which to place an arbitration clause” because they are “recorded” and “widely available”); *Graziano v. Stock Farm Homeowners Ass’n*, 258 P.3d 999, 1006-07 (Mont. 2011) (enforcing an arbitration clause in CC&Rs under a contract analysis).

The Homeowners distinguish and would have us reject *Pinnacle* as dependent on California’s unique statutory scheme. We disagree, for two reasons. First, close comparison of California’s and Nevada’s statutory schemes shows them to be far more alike than unlike. The most salient difference appears to be that California has an administrative regulation

authorizing CC&Rs to include alternative dispute resolution provisions, *see* Cal. Code Regs., tit. 10, § 2791.8, while Nevada does not. But Nevada statutorily requires mediation of disputes arising under CC&Rs, *see* NRS 38.300-.360, suggesting Nevada's legislative endorsement of alternative dispute resolutions in this setting. Further, NRS 116.2105(2) states, without limitation, "[t]he declaration [of CC&Rs] may contain any other matters the declarant considers appropriate." California had the same provision, Cal. Civ. Code § 1353(b) (West 2007) (repealed 2014), which *Pinnacle* construed as permitting the inclusion of an arbitration clause in CC&Rs. 282 P.3d at 1228-29. Second, if *Pinnacle* were analytically an outlier, there would be other cases holding that arbitration clauses in CC&Rs do not qualify as agreements under the UAA or FAA, but no such authority has been cited or found. We recognize that *Pinnacle* addressed whether a homeowners' association, rather than a homeowner, was bound by the arbitration agreement contained in the CC&Rs. But this is a distinction without a difference because, as the *Pinnacle* court emphasized, the CC&Rs bind the homeowner equally with the homeowners' association. *See id.* at 1226-27; *cf.* NRS 116.41095(2) (providing that, by purchasing property within a common-interest community, a purchaser agrees to be bound by the declaration of CC&Rs).

We are not persuaded that adopting *Pinnacle* will result in parties unwittingly entering into arbitration agreements. Whether to purchase property in a common-interest community is a choice that requires consideration of the CC&Rs, which are binding on the developer, association, and individual owners and reflect the expectations of those buying into the community. Nevada law includes strict notice provisions respecting CC&Rs. *See* NRS 116.4101-.4109. The Homeowners do not

dispute that they received the CC&Rs when they purchased their homes, along with the information statements required by NRS 116.41095. By law, the information statements advised the Homeowners that the “CC&Rs become a part of the title of your property,” that the CC&Rs “bind you and every future owner of the property, whether or not you have read them or had them explained to you,” and, perhaps most importantly, that the Homeowners had 5 days to cancel the purchase. *See also* NRS 116.4103(1)(l); NRS 116.4108; NRS 116.4109(1)(a); NRS 116.41095. These safeguards ensure that a person who buys a home in a common-interest community will abide by the CC&Rs and can fairly expect that others in the community will do so too.

### III.

Having concluded that the CC&Rs properly included an arbitration agreement, we next consider whether the FAA applies to that agreement. U.S. Home argues that the underlying transactions affect interstate commerce, so the FAA controls. The Homeowners disagree. In their view, the FAA does not apply because the underlying transaction concerns the purchase and sale of individual homes, a local issue that does not affect or involve interstate commerce.

#### A.

By its terms, the FAA applies to contracts “evidencing a transaction involving [interstate] commerce.” 9 U.S.C. § 2 (2012). The word “involving” in the FAA is broad and functionally equivalent to the word “affecting” for purposes of determining the FAA’s reach. *Allied-Bruce Terminex Cos. v. Dobson*, 513 U.S. 265, 274-75 (1995). A transaction affects or involves interstate commerce if Congress could regulate the transaction through the Commerce Clause. *See id.* at 273-75, 282. Thus, in *Allied-Bruce Terminix*, the Supreme Court applied the FAA to a dispute between

a pest-control company and a homeowner over substandard termite-control services, citing the company's multistate presence and the fact that termite-eradication supplies traveled across state lines. *Id.* at 268, 282. Even contracts evidencing intrastate economic activities are governed by the FAA if the activities, when viewed in the aggregate, "substantially affect interstate commerce." *United States v. Lopez*, 514 U.S. 549, 556 (1995); see *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56-57 (2003) ("Congress' Commerce Clause power 'may be exercised in individual cases without showing any specific effect upon interstate commerce' if in the aggregate the economic activity in question would represent 'a general practice . . . subject to federal control.'") (quoting *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219 (1948)). So it was that, in *Katzenbach v. McClung*, 379 U.S. 294 (1964), the Supreme Court declared that whether a person could sit at a local lunch counter so substantially affected interstate commerce that Congress could regulate the matter under its Commerce Clause power. See *id.* at 302-05 (upholding as a proper exercise of Commerce Clause powers a statute prohibiting racial discrimination in restaurants, including family-owned Ollie's Barbeque, which did business in one location in Birmingham, observing that local restaurants serve interstate travelers and food that moves through interstate commerce). What this means in the context of arbitration is that "[s]o long as 'commerce' is involved, the FAA applies." *Tallman*, 131 Nev., Adv. Op. 71, 359 P.3d at 121. There must be evidence, however, that interstate commerce was actually involved. See *Allied-Bruce Terminex*, 513 U.S. at 281 (adopting the commerce-in-fact test to determine whether a transaction subject to an arbitration agreement is governed by the FAA).

In applying the commerce-in-fact test, the Supreme Court has interpreted “involving commerce” in 9 U.S.C. § 2 as “the functional equivalent of the more familiar term ‘affecting commerce’—words of art that ordinarily signal the broadest permissible exercise of Congress’ Commerce Clause power.” *Alafabco*, 539 U.S. at 56. And, “[b]ecause the statute provides for the enforcement of arbitration agreements within the full reach of the Commerce Clause, it is perfectly clear that the FAA encompasses a wider range of transactions than those actually ‘in commerce’—that is, within the flow of interstate commerce.” *Id.* (internal quotation marks and citations omitted).

B.

In support of their argument that the underlying transaction involves purely intrastate—rather than interstate—commerce, the Homeowners stress that the CC&Rs address residential real estate and that land, unlike money or goods, is traditionally a local concern. But this observation fails to take into account that the CC&Rs were recorded to allow the declarant “to subdivide, develop, construct, market and sell a single family detached residential neighborhood in a common-interest planned community.” It also does not account for the CC&Rs’ larger purpose: to facilitate the creation and governance of a common-interest community consisting of common areas and multiple homes with stable uses and amenities that protect the purchasers’ investments and expectations. The underlying complaint is for construction defects, and the arbitration agreement specifically provides that it governs any dispute between any entity or person “involved in the construction of any [home].” According to the affidavits U.S. Home submitted in district court, multiple out-of-state businesses provided supplies and services in constructing the homes.

These facts demonstrate that the transactions underlying the CC&Rs' arbitration agreement—the construction and sale of multiple homes by out-of-state contractors using out-of-state supplies and suppliers—affect interstate commerce, meaning the FAA controls. See *Greystone Nev., LLC v. Anthem Highlands Cmty. Ass'n*, 549 Fed. App'x 621 (9th Cir. 2013) (applying the FAA to arbitration agreements contained in PSAs in construction defect litigation arising out of the “development by an out-of-state-developer, construction by an out-of-state contractor, and the sale of homes assembled with out-of-state materials”); *Elizabeth Homes, LLC v. Cato*, 968 So. 2d 1, 4 n.1 (Ala. 2007) (“Evidence that a builder obtained materials and components for a house from out-of-state suppliers is sufficient to establish that a transaction for the construction and sale of a house sufficiently involved interstate commerce for purposes of the FAA.”); *Anderson v. Maronda Homes, Inc.*, 98 So. 3d 127, 129-30 (Fla. Dist. Ct. App. 2012) (per curiam) (LaRose, J., specially concurring) (emphasizing that the FAA applies “to contracts for the construction, financing, and sale of homes” when interstate commerce is involved in those transactions) (citing cases); *R.A. Bright Constr., Inc. v. Weis Builders, Inc.*, 930 N.E.2d 565, 569 (Ill. App. Ct. 2010) (holding that evidence demonstrating that an out-of-state supplier provided materials for a building proved the requisite interstate commerce for the arbitration provision to be governed by the FAA); *Zabinski v. Bright Acres Assocs.*, 553 S.E.2d 110, 117-18 (S.C. 2001) (applying the FAA to a land development partnership dispute because, while “the development of land within South Carolina’s borders is the quintessential example of a purely intrastate activity . . . the transaction involved interstate commerce as contemplated by the FAA because the partnership utilized out-of-state materials, contractors, and investors”);

*Satomi Owners Ass'n v. Satomi, LLC*, 225 P.3d 213, 226 (Wash. 2009) (“[T]he substantial use of out-of-state materials places the transactions [of purchasing the homes at issue] within the reach of the FAA.”).

The cases relied on by the Homeowners and the district court are not to the contrary. They involved the purchase and sale of unimproved land, *see SI V, LLC v. FMC Corp.*, 223 F. Supp. 2d 1059, 1062 (N.D. Cal. 2002), or of a single residence, *see Cecala v. Moore*, 982 F. Supp. 609, 611-12 (N.D. Ill. 1997); *Saneii v. Robards*, 289 F. Supp. 2d 855, 858-59 (W.D. Ky. 2003); *Bradley v. Brentwood Homes, Inc.*, 730 S.E.2d 312, 318 (S.C. 2012), not the construction, development, and governance of a multi-unit residential community.

#### IV.

Because it has been established that the CC&Rs evidenced transactions involving interstate commerce, the FAA applies. The Supreme Court has made unmistakably clear that, when the FAA applies, it preempts state laws that single out and disfavor arbitration. *See, e.g., AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341 (2011). Applying state law, the district court invalidated the CC&Rs’ arbitration agreement as procedurally and substantively unconscionable. The district court did not consider whether the FAA preempted its unconscionability determination, because it erroneously determined that the underlying transactions only involved intrastate commerce, such that the FAA did not apply. The final question we must consider, then, is whether the FAA preempts the bases for the district court’s decision to invalidate the arbitration agreement in the CC&Rs as unconscionable.

#### A.

Our analysis begins with the FAA. It provides that an arbitration agreement is “valid, irrevocable, and enforceable, save upon

such grounds as exist at law or in equity for the revocation of *any* contract.” 9 U.S.C. § 2 (emphasis added). Under the FAA, “[s]tates may regulate contracts, including arbitration clauses, under general contract law principles,” which include fraud, duress, and unconscionability. *Allied-Bruce*, 513 U.S. at 281; see also *Doctor’s Assocs. v. Casarotto*, 517 U.S. 681, 687 (1996). What a state may not do is “decide that a contract is fair enough to enforce all of its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause.” *Allied-Bruce*, 513 U.S. at 281. This is true whether the state law is of judicial or legislative origin. *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987); *Doctor’s Assocs.*, 517 U.S. at 685 (reaffirming the *Perry* holding). Under the FAA, a state must place arbitration provisions on the same footing as other contractual provisions rather than “singling out arbitration provisions for suspect status.” *Doctor’s Assocs.*, 517 U.S. at 687.

FAA-preempted state laws generally fall into two categories. First, the FAA preempts state laws that outright prohibit arbitration of a specific claim. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341 (2011); see *Doctor’s Assocs.*, 517 U.S. at 687 (“Courts may not . . . invalidate arbitration agreements under state laws applicable *only* to arbitration provisions.”). Second, FAA preemption arises when a “doctrine normally thought to be generally applicable, such as duress or, as relevant here, unconscionability, is alleged to have been applied in a fashion that disfavors arbitration.” *Concepcion*, 563 U.S. at 341. In assessing this second type of law, “a court may not ‘rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what . . . the state legislature cannot.’” *Id.* (alteration in original) (quoting *Perry*, 482 U.S. at 492 n.9).

Such laws may be preempted by the FAA even though they do not mention arbitration, if they rely on the defining features of an arbitration as the basis for invalidating the agreement. *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 581 U.S. \_\_\_, 137 S. Ct. 1421, 1426 (2017) (“The Act also displaces any rule that covertly accomplishes the same objective [of discriminating against arbitration] by disfavoring contracts that (oh so coincidentally) have the defining features of arbitration agreements.”). For example, the FAA preempts laws that invalidate an arbitration agreement as unconscionable for failing to provide for judicially monitored discovery, not heeding the Federal Rules of Evidence, or not affording a right to jury trial. *Concepcion*, 563 U.S. at 341-42.

B.

Nevada law requires both procedural and substantive unconscionability to invalidate a contract as unconscionable. *See Burch v. Second Judicial Dist. Court*, 118 Nev. 438, 443, 49 P.3d 647, 650 (2002) (“Generally, both procedural and substantive unconscionability must be present in order for a court to exercise its discretion to refuse to enforce a contract or clause as unconscionable.”). Here, the district court deemed the CC&Rs’ arbitration agreement procedurally unconscionable, first, because it was inconspicuous and, second, because it abrogated procedural rights provided under NRS Chapter 40. *See D.R. Horton, Inc. v. Green*, 120 Nev. 549, 553, 96 P.3d 1159, 1162 (2004) (discussing procedural unconscionability and providing that it generally involves the failure to reasonably inform a person of a contract’s consequences). U.S. Home asserts that the rules relied on by the district court and the Homeowners are preempted by the FAA. We agree.

The district court deemed the CC&Rs’ arbitration agreement fatally inconspicuous because it was written using the same size type as the

rest of the CC&Rs, not bolded or capitalized, and it did not “draw an average homebuyer’s attention to the waiver of important legal rights.” *See id.* at 556, 96 P.3d at 1164 (invalidating an arbitration clause for procedural unconscionability in part because “nothing drew attention to the arbitration provision”). If the arbitration clause were actually inconspicuous—that is to say, in smaller print than the rest of the CC&Rs or buried in an endnote or exhibit—this argument might have merit. *See Tandy Computer Leasing v. Terina’s Pizza, Inc.*, 105 Nev. 841, 844, 784 P.2d 7, 8 (1989) (invalidating a forum selection clause because it was in very fine print, was on the back of the agreement while the signature lines were on the front of the agreement, and was buried in a paragraph labeled “miscellaneous”). But here no such infirmity appears. The arbitration provision is in the same size font as the other provisions in the CC&Rs. Requiring an arbitration clause to be more conspicuous than other contract provisions, *D.R. Horton*, 120 Nev. at 557, 96 P.3d at 1164 (“to be enforceable, an arbitration clause must at least be conspicuous”); *see also Gonski v. Second Judicial Dist. Court*, 126 Nev. 551, 559, 245 P.3d 1164, 1170 (2010) (same), is exactly the type of law the Supreme Court has held the FAA preempts because it imposes stricter requirements on arbitration agreements than other contracts generally. In *Doctor’s Associates v. Casarotto*, the Court invalidated a Montana statute declaring an arbitration clause unenforceable unless the first page of the contract stated in typed and underlined capital letters that the contract was subject to arbitration, because it governed “not ‘any contract’ but specifically and solely contracts ‘subject to arbitration’ [and thus] conflicts with” and is preempted by the FAA. 517 U.S. at 683, 687 (citing 9 U.S.C. § 2). Similar to the first-page, all-capital-letter, underlined notice-of-arbitration statute struck down in

*Doctor's Associates*, the “conspicuousness” requirement applied by the district court to invalidate the arbitration clause in the CC&Rs singles out and disfavors arbitration and thus is preempted by the FAA.

The Homeowners next assert—and the district court found—that the CC&Rs’ arbitration agreement is unconscionable because it abrogates procedural rights provided by NRS Chapter 40 by “requiring different timelines and/or additional procedures to bring construction defect claims.” *See Gonski*, 126 Nev. at 560, 245 P.3d at 1170 (invalidating an arbitration agreement in part because it failed to notify the parties “that they were agreeing to forego important rights under Nevada law”). Specifically, the district court faulted the CC&Rs’ arbitration agreement for requiring that “the arbitration hearing is to be convened no later than one hundred eighty (180) days from the date the arbitrator is appointed,” an expedited “timeline and procedure . . . not mandated under NRS Chapter 40.” But giving up procedural rights provided by other laws is a “defining feature[ ]” and a “primary characteristic” of arbitration. *Kindred*, 581 U.S. at \_\_\_, 137 S. Ct. at 1426-27. The FAA protects arbitration agreements from invalidation on the grounds that they trade the procedural protections litigation affords for the more streamlined process arbitration provides. So it was that, in *Concepcion*, the Supreme Court reversed a state court decision invalidating as unconscionable an arbitration agreement that prohibited class arbitration. 563 U.S. at 338. It held that the FAA preempted the state’s unconscionability determination because requiring class arbitration was inconsistent with the FAA’s object of “ensur[ing] the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings.” *Id.* at 344.

Nearly all arbitration agreements forgo some procedural protections, such as the right to a trial by jury or court-monitored discovery. *See id.* at 341-42 (noting that the FAA would preempt a state law invalidating as procedurally unconscionable an arbitration agreement requiring waiver of the rights to judicially monitored discovery or a jury trial). The FAA and UAA suggest that public policy favors such waivers in the arbitration setting because arbitration provides a quicker and less costly means for settling disputes. Thus, although the rule that an abrogation of other legal rights makes a clause procedurally unconscionable arguably applies to any contractual clause, “[i]n practice, of course, the rule would have a disproportionate impact on arbitration agreements.” *Id.* at 342.

The FAA preempts the only bases on which the district court and the Homeowners relied to establish procedural unconscionability. We do not address substantive unconscionability, since both must exist to invalidate a contract as unconscionable. *See Burch*, 118 Nev. at 443, 49 P.3d at 650.

#### V.

Although CC&Rs are not conventional two-party contracts, they create contractual obligations that bind the parties subject to them. In this case, the CC&Rs bound the Homeowners to arbitrate their construction defect claims against the developer. And, because the CC&Rs in this case evidence “transaction[s] involving commerce,” 9 U.S.C. § 2, the FAA controls. To the extent our holdings in *D.R. Horton* and *Gonski* regarding the unconscionability of arbitration agreements disfavor arbitration in cases controlled by the FAA, they are overruled because they do not establish rules that “exist at law or in equity for the revocation of *any*

contract." 9 U.S.C. § 2 (emphasis added). Rather, the procedural unconscionability rules established in those cases either apply only to arbitration agreements or, in practice, have a disproportionate effect on arbitration agreements. Because the district court relied on these preempted rules to find that the CC&Rs' arbitration agreement was unconscionable, we reverse and remand for entry of an order directing the parties to arbitration in accordance with the CC&Rs.

Pickering, J.  
Pickering

We concur:

Douglas, C.J.  
Douglas

Cherry, J.  
Cherry

Gibbons, J.  
Gibbons

Hardesty, J.  
Hardesty

Parraguirre, J.  
Parraguirre

Stiglich, J.  
Stiglich

134 Nev., Advance Opinion 26

IN THE SUPREME COURT OF THE STATE OF NEVADA

PEGGY CAIN, AN INDIVIDUAL;  
JEFFREY CAIN, AN INDIVIDUAL;  
AND HELI OPS INTERNATIONAL,  
LLC, AN OREGON LIMITED  
LIABILITY COMPANY,  
Appellants,

vs.

RICHARD PRICE, AN INDIVIDUAL;  
AND MICKEY SHACKELFORD, AN  
INDIVIDUAL,  
Respondents.

PEGGY CAIN, AN INDIVIDUAL;  
JEFFREY CAIN, AN INDIVIDUAL;  
AND HELI OPS INTERNATIONAL,  
LLC, AN OREGON LIMITED  
LIABILITY COMPANY,  
Appellants,

vs.

RICHARD PRICE, AN INDIVIDUAL;  
AND MICKEY SHACKELFORD, AN  
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LIABILITY COMPANY,  
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vs.

RICHARD PRICE, AN INDIVIDUAL;  
AND MICKEY SHACKELFORD, AN  
INDIVIDUAL,  
Respondents.

No. 69333

FILED

APR 12 2018

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY *[Signature]*  
CHIEF DEPUTY CLERK

No. 69889

No. 70864

Consolidated appeals from a district court summary judgment and post-judgment orders awarding attorney fees and sanctions in a

contract and tort action. Ninth Judicial District Court, Douglas County; Thomas W. Gregory, Judge.

*Affirmed in part, reversed in part, and remanded.*

Lemons, Grundy & Eisenberg and Robert L. Eisenberg, Reno; Matuska Law Offices, Ltd., and Michael L. Matuska, Carson City, for Appellants.

Oshinski & Forsberg, Ltd., and Mark Forsberg, Carson City, for Respondents.

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BEFORE HARDESTY, PARRAGUIRRE and STIGLICH, JJ.

*OPINION*

By the Court, STIGLICH, J.:

In these appeals, we consider whether one party's material breach of a contract releases the non-breaching party's contractual obligation to a third-party beneficiary. We conclude that it does. Because the promisor in this case failed to fulfill its contractual obligations to appellants under a settlement agreement, respondents as third-party beneficiaries were not entitled to the contract's release from liability. We therefore reverse the district court's orders granting summary judgment and other relief and remand with instructions.

*FACTS AND PROCEDURAL HISTORY*

Appellants Peggy and Jeffrey Cain, as owners of Heli Ops International, entered into a joint venture agreement (JVA) with C4 Worldwide, Inc. The JVA provided that Heli Ops would loan \$1,000,000 to C4 for the purpose of acquiring and then leveraging Collateralized

Mortgage Obligations (CMOs). In return, Heli Ops would receive the first \$20,000,000 in profits from C4's leveraging of the assets, while retaining a 49 percent security interest in the CMOs until C4 had paid out that amount. The Cains transferred \$1,000,000 to C4, but C4 did not distribute any profits to the Cains.

The Cains subsequently entered into a "Settlement Agreement and Release of All Claims" with C4 and its CEO. In the Settlement Agreement, C4 agreed to pay the Cains \$20,000,000 "no later than 90 days from February 25, 2010." In return, the Cains agreed to release C4 and its officers from any liability for C4's "financial misfortunes and resultant inability to timely pay." The Agreement further provided that California law governed its construction and interpretation and that the prevailing party in any action arising under the Settlement Agreement would be entitled to fees and costs.

C4 failed to pay \$20,000,000 by the date specified in the Settlement Agreement. Consequently, the Cains sued C4 and six of its officers, including the respondents in this case: Richard Price and Mickey Shackelford. The Cains alleged breach of the Settlement Agreement, fraud, civil conspiracy, negligence, conversion, and intentional interference with contractual relations. After extended litigation, the district court awarded default judgment against C4, its CEO, and two other C4 officers on all claims in the amount of \$20,000,000, plus costs and fees. Following the default judgment, only Price, Shackelford, and a third officer remained as defendants. The third officer subsequently settled with the Cains.

Price and Shackelford moved for summary judgment, claiming that the Settlement Agreement released them from liability for C4's actions and precluded the Cains' suit. The Cains opposed, arguing that the

Settlement Agreement was invalid for lack of consideration. The district court granted summary judgment to Price and Shackelford, reasoning that the Settlement Agreement was supported by consideration and that the Cains bound themselves to that Agreement's release provision when they elected to seek damages for C4's breach of contract.

The Cains appeal from that order granting summary judgment. They also appeal several interlocutory and post-judgment orders, as described further below.

### *DISCUSSION*

*The district court erred in granting summary judgment because the Cains are not bound by the Settlement Agreement's release provision*

The Cains argue that summary judgment was inappropriate for two reasons. First, the Cains argue that the Settlement Agreement was invalid, so the release provision had no effect. Second, the Cains argue that, even if the Settlement Agreement was valid, C4's material breach of that Agreement released the Cains from their obligation under that Agreement not to sue C4's officers. Reviewing the district court's order granting summary judgment de novo, *see Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005), we conclude that summary judgment was improper.

*The Settlement Agreement was a valid contract*

The Cains first argue that the Settlement Agreement does not release Price and Shackelford from liability, because the Settlement Agreement was invalid for lack of consideration.<sup>1</sup> They argue that the

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<sup>1</sup>The Cains also argue that the Settlement Agreement is invalid due to fraud in the inducement. The facts underlying this issue were not adequately developed at the district court level for this court to review.

Settlement Agreement merely acknowledged C4's preexisting obligation to pay the Cains \$20,000,000 and thus provided no consideration to the Cains in exchange for the release of liability. We disagree and affirm the district court's ruling that the Settlement Agreement was supported by consideration—namely, removal of a condition precedent to payment.

To be legally enforceable, a contract “must be supported by consideration.”<sup>2</sup> *Jones v. SunTrust Mortg., Inc.*, 128 Nev. 188, 191, 274 P.3d 762, 764 (2012). “Consideration is the exchange of a promise or performance, bargained for by the parties.” *Id.* A party's affirmation of a preexisting duty is generally not adequate consideration to support a new agreement. See *Cty. of Clark v. Bonanza No. 1*, 96 Nev. 643, 650, 615 P.2d 939, 943 (1980). However, where a party's promise, offered as consideration, differs from that which it already promised, there is sufficient consideration to support the subsequent agreement. 3 *Williston on Contracts* § 7:41 (4th ed. 2008).

When contracting, a promisor may incorporate into the agreement a “condition precedent”—that is, an event that must occur before the promisor becomes obligated to perform. *McCorquodale v. Holiday, Inc.*, 90 Nev. 67, 69, 518 P.2d 1097, 1098 (1974). An implicit condition precedent can be inferred from a contract's terms and context, even when the contract

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<sup>2</sup>We note that the Settlement Agreement's choice-of-law clause potentially raises a question as to whether California law or Nevada law governs this and other issues in this case. However, neither party's briefings address this choice-of-law issue; they both cite Nevada caselaw as governing, as does the district court's relevant orders. Therefore, we treat the choice-of-law provision as waived by mutual consent of both parties and apply Nevada law throughout this opinion.

does not explicitly so provide. *Las Vegas Star Taxi, Inc. v. St. Paul Fire & Marine Ins. Co.*, 102 Nev. 11, 12, 714 P.2d 562, 562 (1986).

Here, the JVA provided that C4 would pay the Cains “[t]he first twenty million USD (\$20,000,000) received from the proceeds and profits of leveraging the CMOs.” Implicit in that statement is that there must be \$20,000,000 in “proceeds and profits” for the Cains to receive that money. Thus, the existence of \$20,000,000 in “proceeds and profits” was a condition precedent to the Cains receiving \$20,000,000 from C4.<sup>3</sup>

The Settlement Agreement, by contrast, contains no condition precedent. It unconditionally obligates C4 “to pay the sum of \$20,000,000, plus all accumulated interest, to Cains no later than 90 days from February 25, 2010.” Thus, the effect of the Settlement Agreement was to remove the condition precedent from C4’s \$20,000,000 obligation. Elimination of that condition precedent constitutes adequate consideration for the Settlement Agreement to be legally enforceable. *See Jones*, 128 Nev. at 191, 274 P.3d at 764. Therefore, the district court correctly held that the Settlement Agreement was a valid contract.

*C4’s breach of the Settlement Agreement releases the Cains from their obligation under that Agreement*

The Cains next contend that, assuming the Settlement Agreement was a valid contract, the district court nonetheless erred in holding that the Settlement Agreement released Price and Shackelford

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<sup>3</sup>At oral argument before this court, the Cains’ counsel argued that, the JVA’s language notwithstanding, a promissory note attached to the JVA unconditionally obligated C4 to pay \$20,000,000. That argument is untenable given this language within the promissory note: “C4 . . . promises to pay . . . the amount of Twenty Million USD . . . *as per the terms specified in the Joint Venture Agreement.*” (Emphasis added.)

from liability. In particular, they attack the district court's conclusion that the Cains bound themselves to the terms of the Settlement Agreement when they declined to rescind that Agreement and instead sought damages for C4's breach. The Cains argue that their suit for damages does not bind them to the terms of the Settlement Agreement. We agree with the Cains.

When parties exchange promises to perform, one party's material breach of its promise discharges the non-breaching party's duty to perform. Restatement (Second) of Contracts § 237 (Am. Law Inst. 1981). If the non-breaching party's duty was to a third-party beneficiary, the same principle applies: the breaching party's "failure of performance" discharges the beneficiary's right to enforce the contract.<sup>4</sup> *Id.* at § 309(2) & cmt. b. Moreover, a material breach of contract also "gives rise to a claim for damages." *Id.* at § 243(1). Thus, the injured party is both excused from its contractual obligation *and* entitled to seek damages for the other party's breach. *See id.* § 243 cmt. a, illus. 1.

Here, the Settlement Agreement was an exchange of one promise to perform for another promise to perform. That is, C4 promised the Cains \$20,000,000 in exchange for the Cains' promise to release C4's officers from liability for C4's conduct. The Cains were bound by their promise until C4 materially breached the contract 90 days after February 25, 2010, the date on which C4's \$20,000,000 was due. At that point, the

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<sup>4</sup>While there are several possible exceptions to this rule—for example, where the beneficiary changes its position in reliance on the agreement, or where the contract expressly or implicitly guarantees a beneficiary's right regardless of other parties' performance, *see* Restatement (Second) of Contracts § 309 cmt. b—the facts of this case do not implicate those exceptions.

Cains were released from their promise not to sue C4's officers. *See id.* at § 309(2).

The complication in this case stems from the \$20,000,000 default judgment previously awarded to the Cains. In briefing before the district court, the Cains elected to enforce that default judgment and rejected the possibility of rescinding the Settlement Agreement. Based on those facts, the district court reasoned that the Cains elected to honor the Agreement and therefore bound themselves to its terms—namely, the promise not to hold C4's officers liable.

In so reasoning, the district court conflated two remedy concepts: specific performance and damages for total breach of contract. Specific performance requires the parties to perform as they promised in the original agreement. *See Mayfield v. Koroghli*, 124 Nev. 343, 351, 184 P.3d 362, 367-68 (2008) (discussing when it is appropriate for a court to order specific performance). Damages for total breach, by contrast, awards the non-breaching party a monetary award sufficient to place that party in the position it expected to find itself had all parties honored the contract. *See Restatement (Second) of Contracts* § 347.

In the present case, the district court erroneously interpreted the \$20,000,000 default judgment to be an order for specific performance. That misinterpretation likely occurred because \$20,000,000 would have been the appropriate amount had the district court ordered specific performance. But the Cains never sought specific performance of the Settlement Agreement, and that is not what the district court ordered when it granted default judgment to the Cains. Rather, the district court awarded *damages* for breach of contract, fraud, and other claims. While \$20,000,000 may greatly exceed the amount of damages the Cains actually suffered, the

propriety of that amount is not presently before this court. Because the default judgment awarded damages rather than specific performance, it did not bind the Cains to their original promise within the Settlement Agreement. See Restatement (Second) of Contracts § 243 cmt. a, illus. 1.

In sum, C4's breach of the Settlement Agreement relieved the Cains of their obligation to Price and Shackelford, third-party beneficiaries under that Agreement. We therefore reverse the district court's order granting summary judgment to Price and Shackelford. We also vacate the district court's order awarding \$95,843.56 in attorney fees to Price and Shackelford as prevailing parties. They are no longer prevailing parties, so that award is inappropriate. See *Wheeler Springs Plaza, LLC v. Beemon*, 119 Nev. 260, 268, 71 P.3d 1258, 1263 (2003) (involving the reversal of an award of attorney fees where the district court's judgment on the verdict was overturned).

*The district court abused its discretion when it denied the Cains' motion to compel discovery of Price and Shackelford's personal financial documents*

Prior to the district court's grant of summary judgment, the Cains moved to compel discovery of Price and Shackelford's personal financial documents. The Cains sought those documents as evidence to support their fraud claim against Price and Shackelford. In denying the Cains' request, the district court found that the Cains presented an inadequate factual basis for fraud to support a punitive damages claim, so discovery of personal financial documents was inappropriate under *Hetter v. Eighth Judicial District Court*, 110 Nev. 513, 519-20, 874 P.2d 762, 765-66 (1994).

This court generally reviews discovery orders for an abuse of discretion. *Club Vista Fin. Servs., LLC v. Eighth Judicial Dist. Court*, 128 Nev. 224, 228, 276 P.3d 246, 249 (2012). However, this court reviews

whether a district court has applied the proper legal standard de novo. *Staccato v. Valley Hosp.*, 123 Nev. 526, 530 n.4, 170 P.3d 503, 506 n.4 (2007).

Discovery is proper for any matter that is not privileged and is relevant to the subject matter of the action before the court. NRCp 26(b)(1). However, due to privacy concerns and the potential for “abuse and harassment,” a defendant’s personal financial information can “not be had for the mere asking.” *Hetter*, 110 Nev. at 520, 874 P.2d at 766. To discover that information, a “plaintiff must demonstrate some factual basis for [a] punitive damage claim.” *Id.* To succeed on a punitive damage claim in this contractual context, the plaintiff must show by clear and convincing evidence that the defendant was guilty of “oppression, fraud or malice.” NRS 42.005(1).

Here, the Cains pursued punitive damages on claims of fraud, civil conspiracy, and conversion. The Cains presented evidence showing that their loan proceeds were distributed to C4 officers rather than being used to purchase CMOs, as per the JVA. While that evidence might not amount to “clear and convincing” evidence that Price and Shackelford committed “oppression, fraud, or malice,” NRS 42.005(1), such alleged misuse of funds contrary to the JVA constitutes “some factual basis” for those claims such that discovery was proper. *Hetter*, 110 Nev. at 520, 874 P.2d at 766; *see also Sherwin v. Infinity Auto Ins. Co.*, No. 2:11-CV-00043-JCM-LRL, 2011 WL 4500883, at \*3 (D. Nev. Sept. 27, 2011) (distinguishing plaintiffs’ burdens at the discovery stage from their burdens at the trial stage). We therefore conclude that the district court improperly denied discovery of Price and Shackelford’s personal financial documents.

*The Cains’ remaining claims are without merit*

The Cains appeal several additional orders entered by the district court. First, they argue that the district court abused its discretion

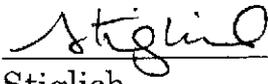
in bifurcating trial and resolving issues of personal jurisdiction and alter ego in a pretrial evidentiary hearing. Reviewing the district court's decision to bifurcate for an abuse of discretion, *see Awada v. Shuffle Master, Inc.*, 123 Nev. 613, 621, 173 P.3d 707, 712 (2007), we find no abuse and therefore affirm.

Second, the Cains appeal post-judgment orders from the district court related to subpoenas and sanctions. In those orders, the district court found that the Cains had abused the discovery process by serving subpoenas on Price and Shackelford after the case was dismissed, so the district court quashed the subpoenas and awarded \$9,514 in attorney fees to Price and Shackelford pursuant to NRS 18.010(2)(b) (authorizing courts to award attorney fees for claims "maintained without reasonable ground or to harass the prevailing party"). Having reviewed the court's decisions for an abuse of discretion, *see Bahena v. Goodyear Tire & Rubber Co.*, 126 Nev. 243, 249, 235 P.3d 592, 596 (2010) (stating the standard of review for a district court's order imposing sanctions); *Consol. Generator-Nev., Inc. v. Cummins Engine Co.*, 114 Nev. 1304, 1312, 971 P.2d 1251, 1256 (1998) (same for an order to quash subpoenas), we see no cause to reverse the district court's orders. We agree with the district court's conclusion that there was no "reasonable ground" to serve subpoenas on the defendants after the case was dismissed. NRS 18.010(2)(b). We reject the Cains' argument that our reversal of summary judgment also requires reversal of these post-judgment orders.

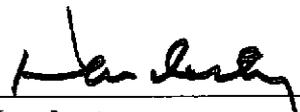
While our reversal of the district court's final disposition requires us to reverse a grant of attorney's fees to the extent that the fees were granted *because* a party prevailed,<sup>5</sup> see *Gibby's, Inc. v. Aylett*, 96 Nev. 678, 681, 615 P.2d 949, 951 (1980), we may reverse a district court's final disposition while affirming a district court's award of sanctions pursuant to NRS 18.010(2)(b). Thus, we affirm the district court's order granting Price and Shackelford \$9,514 as a litigation sanction against the Cains.

### CONCLUSION

Absent exceptions not relevant here, one party's material breach of a contract discharges the non-breaching party's duty to perform under that contract. In this case, C4's failure to pay the Cains the promised sum released the Cains from their promise not to hold C4's officers liable. Therefore, we reverse the district court's grant of summary judgment and remand this matter to the district court for proceedings consistent with this opinion.

  
\_\_\_\_\_, J.  
Stiglich

We concur:

  
\_\_\_\_\_, J.  
Hardesty

  
\_\_\_\_\_, J.  
Parraguirre

<sup>5</sup>As noted above, we reverse the order granting attorney fees to Price and Shackelford *as prevailing parties*.

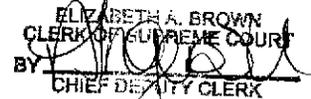
134 Nev., Advance Opinion 20  
IN THE SUPREME COURT OF THE STATE OF NEVADA

PETER M. SOUTHWORTH,  
Petitioner,  
vs.  
THE EIGHTH JUDICIAL DISTRICT  
COURT OF THE STATE OF NEVADA,  
IN AND FOR THE COUNTY OF  
CLARK; AND THE HONORABLE ROB  
BARE, DISTRICT JUDGE,  
Respondents,  
and  
LAS VEGAS PAVING CORPORATION,  
Real Party in Interest.

No. 73655

FILED

MAR 29 2018

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY   
CHIEF DEPUTY CLERK

Original pro se petition for a writ of mandamus or prohibition  
challenging the denial of a motion to dismiss for lack of jurisdiction.

*Petition granted.*

Peter M. Southworth, Ridgecrest, California,  
in Pro Se.

Emerson Law Group and Phillip R. Emerson, Henderson,  
for Real Party in Interest.

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BEFORE THE COURT EN BANC.

OPINION

By the Court, GIBBONS, J.:

This petition asks this court to determine whether the time to  
appeal outlined in the Justice Court Rules of Civil Procedure (JCRCP),  
specifically the time set forth in JCRCP 98, is jurisdictional and mandatory,

therefore removing from the district court's jurisdiction an untimely appeal from justice court.

### *FACTS AND PROCEDURAL HISTORY*

This case arose originally as a small claims action in the Las Vegas Justice Court Township. Petitioner Peter Southworth filed a small claims complaint against real party in interest Las Vegas Paving Corporation (LVPC). The matter was first heard by a referee appointed by the justice of the peace in accordance with NRS 4.355 and as incorporated by Rule 48 of the Justice Court Rules of Las Vegas Township. After the referee made his findings of fact, conclusions of law, and recommendations, recommending that Southworth receive only a portion of his requested relief, Southworth filed a formal objection. A de novo formal objection hearing was held, and the justice of the peace pro tempore entered a final judgment granting Southworth full relief on March 22, 2017. Notice of the judgment was mailed to the parties on March 24, 2017. On April 7, 2017, LVPC appealed that final judgment to the district court.

Southworth moved to have the appeal dismissed under JCRCP 98, which states that a notice of appeal from a small claims action in justice court to district court must be filed within five days of entry of judgment. LVPC first argued JCRCP 72, which allows for 20 days to appeal, governed the proceeding.<sup>1</sup> Alternatively, LVPC argued that the district court should exercise its discretion under JCRCP 1 to expand the time to appeal outlined in JCRCP 98, as the procedure used in the justice court was confusing and the notice of appeal was filed only two days late. The district court agreed with this latter argument and denied Southworth's motion to dismiss,

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<sup>1</sup>The district court found, and we agree, that this matter was clearly a small claims proceeding governed by JCRCP 98, not JCRCP 72. Thus, we reject this argument as being without merit.

thereby exerting jurisdiction to hear the matter despite an untimely appeal. Southworth now petitions this court for a writ of mandamus or prohibition arresting the district court's improper exercise of jurisdiction or compelling the district court to grant his motion to dismiss.

### DISCUSSION

The issue before this court is whether the time to appeal outlined in JCRCP 98 is jurisdictional and mandatory, or whether a district court may exercise discretion to expand the time to appeal where "literal application of [the] rule would work hardship or injustice." JCRCP 1. Southworth asks this court to hold that JCRCP 98 is jurisdictional and mandatory and to issue a writ of prohibition arresting the district court from entertaining an appeal that is untimely under that rule.

First, we examine whether writ relief is available in this context. "Because the district court has final appellate jurisdiction over cases arising in justice's court, [petitioners] cannot appeal to [the appellate] court and may seek relief only through a writ petition." *Sellers v. Fourth Judicial Dist. Court*, 119 Nev. 256, 257, 71 P.3d 495, 496 (2003) (footnotes omitted). As a general rule, we decline to entertain writ petitions that request review of a decision of the district court acting in its appellate capacity; however, where the district court has improperly refused to exercise its jurisdiction, has exceeded its jurisdiction, or has exercised its discretion in an arbitrary or capricious manner, we make exception to that general rule. *State v. Eighth Judicial Dist. Court (Hedland)*, 116 Nev. 127, 134, 994 P.2d 692, 696 (2000). Where a district court has exercised jurisdiction over an untimely appeal from a justice court, a petition for a writ prohibiting the district court from hearing that matter is properly before this court and may issue. *City of Las Vegas v. Eighth Judicial Dist. Court*, 107 Nev. 885, 887, 822 P.2d 115, 116 (1991); see also NRS 34.320.

Accordingly, we determine that, because Southworth alleges that the district court exceeded its jurisdiction, the matter is properly before us and a writ of prohibition is the appropriate form of relief.

Second, we hold that the rule governing timeliness of appeal from small claims actions in justice court to district court is “clear and absolute to give parties and counsel fair notice of the procedures for vesting jurisdiction in” the district court. *See Phelps v. State*, 111 Nev. 1021, 1022, 900 P.2d 344, 345 (1995). The rules state that JCRCP 98 governs the time to appeal from small claims actions in justice court and that a notice of appeal *must* be filed in district court within five days of entry of judgment. JCRCP 98; *see also* JCRCP 2, 72. The rules further provide that “[f]ailure of an appellant to take any step *other than* the timely filing of a notice of appeal does not affect the validity of the appeal.” JCRCP 72 (emphasis added). In other words, failure to file a notice of appeal from a small claims action in justice court within five days clearly affects the validity of the appeal.

Moreover, while JCRCP 1 gives the district court discretion to act outside the scope of the rules where “literal application of [the] rule[s] would work hardship or injustice,” we further hold that such a broad, discretionary rule cannot be used to expand the time to appeal. *See Scherer v. State*, 89 Nev. 372, 374, 513 P.2d 1232, 1233 (1973) (“The timely filing of a notice of appeal is jurisdictional and is an essential prerequisite to the perfection of an appeal.”). We have repeatedly indicated in analogous settings that exercising such discretionary authority is inappropriate in the context of appeal time limits. *See, e.g., City of Las Vegas*, 107 Nev. at 887, 822 P.2d at 116 (holding a district court exceeds its jurisdiction and can be arrested by writ for entertaining untimely appeals from judgments of conviction entered in municipal court); *Walker v. Scully*, 99 Nev. 45, 46, 657

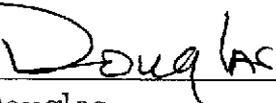
P.2d 94, 94 (1983) (holding that a district court lacks authority to extend the 30-day period to file a notice of appeal set forth by the Nevada Rules of Appellate Procedure).

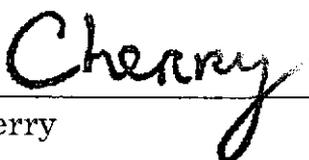
*CONCLUSION*

We hold that the appeals time limit set forth in JCRCP 98 is jurisdictional and mandatory. Because LVPC filed its appeal outside the allotted five-day period, the district court did not have jurisdiction to entertain the untimely appeal. We therefore grant the petition and direct the clerk of this court to issue a writ of prohibition instructing the district court to arrest its exercise of jurisdiction over LVPC's appeal.

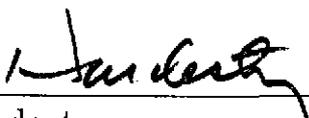
  
\_\_\_\_\_, J.  
Gibbons

We concur:

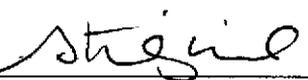
  
\_\_\_\_\_, C.J.  
Douglas

  
\_\_\_\_\_, J.  
Cherry

  
\_\_\_\_\_, J.  
Pickering

  
\_\_\_\_\_, J.  
Hardesty

  
\_\_\_\_\_, J.  
Parraguirre

  
\_\_\_\_\_, J.  
Stiglich

134 Nev., Advance Opinion 9

IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID DEZZANI; AND ROCHELLE  
DEZZANI,  
Appellants,  
vs.  
KERN & ASSOCIATES, LTD.; AND  
GAYLE A. KERN,  
Respondents.

No. 69410

FILED

MAR 01 2018

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY *[Signature]*  
CHIEF DEPUTY CLERK

DAVID DEZZANI; AND ROCHELLE  
DEZZANI,  
Appellants,  
vs.  
KERN & ASSOCIATES, LTD.; AND  
GAYLE A. KERN,  
Respondents.

No. 69896

Consolidated pro se appeals from orders dismissing a complaint in a tort action and awarding attorney fees and costs. Second Judicial District Court, Washoe County; Elliott A. Sattler, Judge.

*Affirmed in Docket No. 69410; affirmed in part and reversed in part in Docket No. 69896.*

David Dezzani and Rochelle Dezzani, San Clemente, California,  
in Pro Se.

Kern & Associates, Ltd., and Gayle A. Kern and Veronica A. Carter, Reno;  
McDonald Carano LLP and Debbie A. Leonard, Reno,  
for Respondents.

Marquis Aurbach Coffing and Micah S. Echols and Adele V. Karoum, Las Vegas,  
for Amicus Curiae State Bar of Nevada.

BEFORE THE COURT EN BANC.

*OPINION*

By the Court, HARDESTY, J.:

In these consolidated appeals, we consider whether an attorney can be held liable for a claim under NRS 116.31183 as an agent of a common-interest community homeowners' association. We also consider whether attorneys litigating pro se and/or on behalf of their law firms can recover attorney fees and costs.

We conclude that an attorney is not an "agent" under NRS 116.31183 for claims of retaliatory action where the attorney is providing legal services for a common-interest community homeowners' association. We further conclude that attorneys litigating pro se and/or on behalf of their law firms cannot recover fees because those fees were not actually incurred by the attorney or the law firm. However, we conclude that attorneys litigating pro se and/or on behalf of their law firms can recover taxable costs in the action. Accordingly, we affirm in part and reverse in part.

*FACTS AND PROCEDURAL HISTORY*

Appellants David and Rochelle Dezzani own a condominium in Incline Village, Nevada. Like all unit owners, the Dezzanis are members of the McCloud Condominium Homeowners' Association (HOA), which is governed by a board of directors and subject to the Revised Declaration of Limitations, Covenants, Conditions, and Restrictions of McCloud Condominium Homeowners' Association (CC&Rs). Respondents Gayle Kern, a Nevada attorney, and her law firm, Kern & Associates (collectively, Kern), represent the HOA and provide legal advice to its governing board.

In 2013, a dispute arose between the Dezzanis and the HOA regarding an extended deck on the Dezzanis' unit. The previous unit owner installed the deck extension with board approval in 2002. The board issued the Dezzanis a notice of violation (NOV) with drafting assistance from Kern informing the Dezzanis that the deck encroached into the common area and thus violated the CC&Rs. The NOV indicated that the Dezzanis had two choices: (1) submit an architectural application to the board to revert the deck back to its original size; or (2) execute a covenant for the deck extension, which would allow it to remain for the Dezzanis' ownership and one subsequent conveyance.

After the Dezzanis responded to the NOV, Kern sent the Dezzanis a letter stating that she represented the HOA and restating the board's position on the deck extension. Kern and the Dezzanis exchanged several letters wherein Kern communicated the board's position regarding the deck and the Dezzanis challenged the NOV and criticized Kern's legal advice, understanding of Nevada law, and competency. The board held a hearing and ultimately upheld the NOV. Throughout this time, Kern advised the HOA regarding the Dezzanis' and other members' deck extensions.

The Dezzanis filed a complaint against Kern and board member Karen Higgins.<sup>1</sup> The complaint alleged retaliation based on NRS 116.31183. This statute allows a unit owner to "bring a separate action" for compensatory damages, attorney fees, and costs. NRS 116.31183(2)(a), (b). Such an action is permissible when "[a]n executive board, a member of an

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<sup>1</sup>Due to service of process issues, the claims against Higgins were dropped.

executive board, a community manager or an officer, employee or agent of an association” takes

retaliatory action against a unit’s owner because the unit’s owner has:

(a) Complained in good faith about any alleged violation of [NRS Chapter 116] or the governing documents of the association;

(b) Recommended the selection or replacement of an attorney, community manager or vendor; or

(c) Requested in good faith to review the books, records or other papers of the association.

NRS 116.31183(1). The Dezzanis alleged that Kern retaliated against them because they requested that the HOA retain a new attorney; however, the Dezzanis did not specify how Kern retaliated against them other than furnishing advice to the HOA and communicating with the Dezzanis on behalf of the HOA.

The district court granted Kern’s NRCP 12(b)(5) motion to dismiss with prejudice after finding that NRS 116.31183 does not permit attorneys to be held personally liable for action taken on behalf of a client, and that “to permit such causes of action against Kern would result in a chilling effect on individuals’ ability to hire and retain counsel.”<sup>2</sup> The district court awarded fees and costs to Kern pursuant to NRS 18.010(2)(b) and NRCP 11, finding that the Dezzanis’ claims were intended to harass

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<sup>2</sup>We note that although the district court cited NRS 116.3118 in its order, the surrounding discussion makes it clear that the court was actually referring to NRS 116.31183.

Kern because Kern informed the Dezzanis that their claims were meritless. The Dezzanis appealed both orders.

The Dezzanis' appeals were consolidated and assigned to the Court of Appeals, where that court affirmed the order dismissing the complaint and reversed the attorney fees and costs award because the Dezzanis failed to submit their claim to mediation under NRS 38.310(1).<sup>3</sup> See *Dezzani v. Kern & Assocs.*, Docket Nos. 69410 & 69896 (Order Affirming in Part and Reversing in Part, Nev. Ct. App., Nov. 16, 2016). Kern filed a petition for review with this court, which we granted.

#### DISCUSSION

NRS 116.31183 permits "a separate action" when an "agent" of a homeowners' association takes certain retaliatory action against a unit's owner. The issue here is whether the term "agent" in the statute includes an attorney who is providing legal services to and acting on behalf of a homeowners' association.

*The district court did not err in dismissing the Dezzanis' complaint*

We review an order granting an NRCP 12(b)(5) motion to dismiss de novo. *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008). Issues of statutory construction are reviewed de novo. *Pub. Emps.' Benefits Program v. Las Vegas Metro. Police Dep't*, 124

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<sup>3</sup>NRS 38.310(1) requires civil actions that relate to "[t]he interpretation, application or enforcement of any covenants, conditions or restrictions [(CC&R's)]" to be submitted to mediation prior to a civil action being filed in court. NRS 38.310(1) is not implicated in this case because the question before this court involves an interpretation of NRS 116.31183, not an interpretation of the HOA's CC&Rs. See *Hamm v. Arrowcreek Homeowners' Ass'n*, 124 Nev. 290, 296, 183 P.3d 895, 900 (2008) (concluding that NRS 38.310 applies where interpreting the CC&Rs is necessary to resolve the merits of the case).

Nev. 138, 146, 179 P.3d 542, 548 (2008). “The leading rule of statutory construction is to ascertain the intent of the legislature in enacting the statute.” *McKay v. Bd. of Supervisors of Carson City*, 102 Nev. 644, 650, 730 P.2d 438, 443 (1986). To determine legislative intent, we first consider and give effect to the statute’s plain meaning because that is the best indicator of the Legislature’s intent. *Pub. Emps.’ Benefits Program*, 124 Nev. at 147, 179 P.3d at 548. “[I]t is the duty of this court, when possible, to interpret provisions within a common statutory scheme harmoniously with one another in accordance with the general purpose of those statutes and to avoid unreasonable or absurd results, thereby giving effect to the Legislature’s intent.” *Torrealba v. Kesmetis*, 124 Nev. 95, 101, 178 P.3d 716, 721 (2008) (internal quotation marks omitted).

The word “agent” is not defined in NRS 116.31183 or otherwise in NRS Chapter 116. See NRS 116.31183; NRS 116.003-.095 (definitions). Kern points to NRS 116.31164, which governs foreclosure of liens, and argues that because NRS 116.31164 uses the words “agent” and “attorney” distinctly, it demonstrates that the Legislature purposefully distinguished an attorney from an agent under NRS Chapter 116. Therefore, Kern contends that the Legislature specifically omitted attorneys from NRS 116.31183, and the term “agent” does not include attorneys.

We agree. NRS 116.31164(4) states that a foreclosure sale can be “conducted by the association, its agent *or* attorney.” (Emphasis added.) This distinction demonstrates that the Legislature used the term “attorney” when it intended to address situations applying to attorneys and the term “agent” when it intended to generically address the duties owed by agents. See *Coast Hotels & Casinos, Inc. v. Nev. State Labor Comm’n*, 117 Nev. 835, 841, 34 P.3d 546, 550 (2001) (“Generally, when the [L]egislature

has employed a term or phrase in one place and excluded it in another, it should not be implied where excluded.”); *Allstate Ins. Co. v. Fackett*, 125 Nev. 132, 138, 206 P.3d 572, 576 (2009) (“We read statutes within a statutory scheme harmoniously with one another to avoid an unreasonable or absurd result.”); *McGrath v. State Dep’t of Pub. Safety*, 123 Nev. 120, 123, 159 P.3d 239, 241 (2007) (concluding that “we presume that the Legislature intended to use words in their usual and natural meaning”); see also *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (concluding that courts must interpret statutes “as a symmetrical and coherent regulatory scheme” (internal quotation marks omitted)); *Davis v. Mich. Dep’t of Treasury*, 489 U.S. 803, 809 (1989) (“It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.”). Accordingly, given the Legislature’s distinction between “agent” and “attorney,” we conclude that the Legislature did not intend for attorneys to be included in the term “agent” for the purposes of NRS 116.31183.

The dissent is dismissive of the fact that the Legislature distinguished between the terms “agent” and “attorney” in another statute within the same statutory scheme as NRS 116.31183. Notably, the Dezzanis did not raise the statutory interpretation arguments that the dissent puts forth, and therefore, we should not consider them *sua sponte*. See, e.g., *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981). Additionally, because the Dezzanis failed to respond to Kern’s arguments regarding the Legislature’s distinction between “agent” and “attorney,” they have waived the issue. *Bates v. Chronister*, 100 Nev. 675,

682, 691 P.2d 865, 870 (1984) (treating the failure to respond to the opposing party's arguments as a confession of error).

Regardless, the dissent's statutory analysis ignores fundamental rules of statutory construction that begin with analyzing a statute's plain language and its context in the statutory framework, and instead, emphasizes rules of statutory construction involving grammar and punctuation use that are generally resorted to only when they can be employed consistently with the legislative intent. See 1A Norman J. Singer & J.D. Shambie Singer, *Sutherland Statutes & Statutory Construction* § 21.15 (7th ed. 2009) (stating that grammar and punctuation use are statutory interpretation aids, but "neither is controlling unless the result is in harmony with the *clearly* expressed intent of the Legislature," and acknowledging that "[c]ourts have indicated that punctuation will not be given much consideration in interpretation because it often represents the stylistic preferences of the printer or proofreader instead of the considered judgment of the drafter or legislator" (emphasis added)).

Additionally, the dissent suggests that we read the word "or" too strictly. But "[t]he word 'or' is typically used to connect phrases or clauses representing alternatives." *Coast Hotels & Casinos, Inc.*, 117 Nev. at 841, 34 P.3d at 550. Moreover, "courts presume that 'or' is used in a statute disjunctively unless there is *clear* legislative intent to the contrary." 1A Norman J. Singer & J.D. Shambie Singer, *Sutherland Statutes & Statutory Construction* § 21.14 (7th ed. 2009) (emphasis added). The dissent concludes that the lack of a comma separating the words "agent" and "attorney" in NRS 116.31164(4) is sufficient to demonstrate that the Legislature intended the phrase "agent or attorney" to mean that "an attorney is merely a subset or an example of an agent, as opposed to not-an-

agent.” Dissenting opinion *post.* at 5. However, there is no indication that the Legislature intended to use the word “or” in any manner other than disjunctively, and we will not give the absence of a comma decisive weight where doing so would render the word “attorney” in NRS 116.31164(4) redundant and meaningless. *See Bd. of Cty. Comm’rs of Clark Cty. v. CMC of Nev., Inc.*, 99 Nev. 739, 744, 670 P.2d 102, 105 (1983) (concluding that we avoid “[a] reading of legislation which would render any part thereof redundant or meaningless, where that part may be given a separate substantive interpretation”); *see also* 1A Norman J. Singer & J.D. Shambie Singer, *Sutherland Statutes & Statutory Construction* § 21.14 (7th ed. 2009) (noting that “when a list exists, the ‘or’ between two subsections makes it necessary to read ‘or’ as a disjunctive”).

Under the dissent’s reasoning, the Legislature’s use of the word “agent” in NRS Chapter 116 should always include attorneys. But this interpretation is contrary to the plain language of NRS Chapter 116 and overlooks the Legislature’s distinct use of the term “agent” when intending to address matters concerning agents and not attorneys. *See, e.g.*, NRS 116.3107(1) (requiring unit owners to allow “agents” to pass through their units in order for the association to uphold its duty to maintain the common elements); NRS 116.31073(3)(a) (allowing “[t]he association, the members of its executive board and its officers, employees, agents and community manager” to enter a unit to repair a security wall). Thus, such a broad interpretation of the word “agent” does not comport with the statutory framework as a whole. Accordingly, we conclude that the Legislature did not intend to include attorneys in the term “agent” for purposes of NRS 116.31183. Public policy does not support including attorneys as agents under NRS 116.31183.

Notwithstanding the statutory language and interpretation, the Dezzanis ask us to conclude as a matter of public policy that attorneys are included in the term “agent” in NRS 116.31183. Based on the unique characteristics of an attorney-client relationship that distinguish it from a general agent-principal relationship, we decline to do so.

*Black’s Law Dictionary* defines “agent” as “[s]omeone who is authorized to act for or in place of another; a representative.” *Agent, Black’s Law Dictionary* (10th ed. 2014). Generally, “[a]n agency relationship results when one person possesses the contractual right to control another’s manner of performing the duties for which he or she was hired.” *Hamm*, 124 Nev. at 299, 183 P.3d at 902. Agency law typically creates liability for a principal for the conduct of his agent that is within the scope of the agent’s authority. *Nev. Nat’l Bank v. Gold Star Meat Co.*, 89 Nev. 427, 429, 514 P.2d 651, 653 (1973). Conversely, “[a]n agent’s breach of a duty owed to the principal is not an independent basis for the agent’s tort liability to a third party.” Restatement (Third) of Agency § 7.02 (2006). But this definition of “agent” describes a general agent-principal relationship, which, as discussed below, is distinguishable from an attorney-client relationship. And the legislative history of the statute, which was passed into law in 2003, see 2003 Nev. Stat., ch. 385, § 41, at 2218, and its recent amendments, offer no insight into the intended meaning of the word.<sup>4</sup>

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<sup>4</sup>See, e.g., Hearing on S.B. 182 Before the Senate Judiciary Comm., Exhibit D8, 75th Leg. (Nev., March 18, 2009) (discussing NRS 116.31183’s inclusion of community managers and stating that “they are probably already covered under ‘agents’” but providing no further definition); Senate Daily Journal, 75th Leg. 449 (Nev., April 16, 2009) (stating that the purpose of the amendments to NRS 116.31183 was to “provide certain additional

This court has recognized that the attorney-client relationship is an agent-principal relationship in the context of whether the client is responsible for the acts of the attorney. For example, in *Estate of Adams v. Fallini*, we considered whether the district court erred in granting an NRCP 60(b) motion to set aside the judgment based on fraud upon the court. 132 Nev., Adv. Op. 81, 386 P.3d 621, 625 (2016). In resolving the issue, we noted that the respondent's lawyer's "abandonment of his client and his professional obligations to his client . . . alone . . . might not warrant relief, as the lawyer is the client's agent and the acts and omissions of an agent ordinarily return to the principal who hired the faithless agent, not those who dealt with the agent in his representative capacity." *Id.* Similarly, in a case where the lawyer fraudulently entered into a settlement agreement on behalf of his clients without authority, we concluded that the clients were not bound to the agreement because the lawyer's fraud negated his authority as an agent. *NC-DSH, Inc. v. Garner*, 125 Nev. 647, 656-57, 218 P.3d 853, 860 (2009). Other courts that have concluded that the attorney-client relationship is an agent-principal relationship have similarly focused on whether the client could be liable for the attorney's actions under agency law. *See, e.g., Horwitz v. Holabird & Root*, 816 N.E.2d 272, 277 (Ill. 2004) ("In the attorney-client relationship, clients are generally bound by their attorneys' acts or omissions during the course of the legal representation that fall within the apparent scope of their attorneys' authority."); *Koutsogiannis v. BB & T*, 616 S.E.2d 425, 428 (S.C. 2005) (concluding that an attorney is an agent of the client, and, therefore, the client can be liable

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rights to units' owners by . . . increasing the scope and definition of prohibited retaliatory action," without discussing the intended meaning of the word "agent").

for the attorney's conduct that falls within the scope of representation); *see also* Grace M. Giesel, *Client Responsibility for Lawyer Conduct: Examining the Agency Nature of the Lawyer-Client Relationship*, 86 Neb. L. Rev. 346, 348 (2007).

However, whether the attorney, as opposed to the client, can be personally liable as an agent for actions the attorney took in representing his or her client is distinguishable from cases involving client liability for attorney actions. It does not follow that because an agency relationship has been recognized in the context of client liability for attorney actions that the same notion applies in the context of attorney liability to an adverse or third party from actions taken in representing a client. Rather, an attorney providing legal services to a client generally owes no duty to adverse or third parties. *Fox v. Pollack*, 226 Cal. Rptr. 532, 536 (Ct. App. 1986); *Cantey Hanger, LLP v. Byrd*, 467 S.W.3d 477, 481 (Tex. 2015). Whether an attorney is liable under an agency theory hinges on whether the attorney is acting solely as an agent for the client, i.e., as a debt collector, or whether the attorney is providing legal services to a client. *Cantey Hanger*, 467 S.W.3d at 481-83.

Moreover, we have previously noted that “the attorney-client relationship involves much more than mere agency, and is subject to established professional standards.” *Molezzo Reporters v. Patt*, 94 Nev. 540, 542, 579 P.2d 1243, 1244 (1978). Additionally, we have recognized that courts treat the attorney-client relationship differently from other agent-principal relationships based on the unique characteristics of the attorney-client relationship and the different factual circumstances present in an attorney-client relationship. *See NC-DSH, Inc.*, 125 Nev. at 656, 218 P.3d at 860 (observing that courts “do not treat the attorney-client relationship

as they do other agent-principal relationships” in the context of settlement agreements (quoting Grace M. Giesel, *Client Responsibility for Lawyer Conduct: Examining the Agency Nature of the Lawyer-Client Relationship*, 86 Neb. L. Rev. 346, 348 (2007)); see also *Rucker v. Schmidt*, 794 N.W.2d 114, 120 (Minn. 2011) (“[A]lthough attorneys in the discharge of their professional duties are, in a restricted sense, agents of their clients, this agency is distinguishable from other agency relationships . . .”). The attorney’s role is to not only communicate on behalf of his client, but also to counsel, render candid advice, and advocate for his client. RPC 2.1; *Greenberg Traurig, LLP v. Frias Holding Co.*, 130 Nev. 627, 631-32, 331 P.3d 901, 904 (2014). Further, attorneys are limited by ethical obligations that are not typically present in other agent-principal relationships. See RPC 1.4(a)(5) (attorney assistance limited by Rules of Professional Conduct); accord RPC 1.1 (competence); RPC 1.6 (confidentiality).

Given an attorney’s ethical obligations to be candid with a client and zealously represent his or her client, and the general presumption that an attorney providing legal services to a client is generally not subject to third-party liability for that representation, we agree with Kern and the amicus curiae State Bar of Nevada that the two relationships should not be treated the same in NRS 116.31183. Doing so, and imposing liability on an attorney for representing his or her HOA client, would impermissibly intrude on the attorney-client relationship and interfere with an HOA’s ability to retain an attorney and the attorney’s ability to ethically represent the HOA. Therefore, we conclude that the term “agent” in NRS 116.31183 does not include an attorney who is providing legal services to, and acting on behalf of, a common-interest community homeowners’ association.

Although the Dezzanis argue that the attorney-client relationship is different when an attorney and an HOA are involved because the HOA members' fees are used to pay the HOA's attorneys, we disagree. Kern represented the HOA, not its individual members. Thus, similar to counsel for a corporation, Kern owed fiduciary duties only to the HOA, not to the individual members of the HOA. *See Skarbrevik v. Cohen, England & Whitfield*, 282 Cal. Rptr. 627, 635 (Ct. App. 1991) (“[C]orporate counsel’s direct duty is to the client corporation, not to the shareholders individually, even though the legal advice rendered to the corporation may affect the shareholders.”).

Considering NRS Chapter 116 as a whole and giving harmonious effect to both NRS 116.31183 and NRS 116.31164, we conclude that the Legislature did not intend to use the term “agent” to include attorneys. Additionally, given the unique characteristics of the attorney-client relationship that distinguish the attorney-client relationship from a general agent-principal relationship, we agree with Kern that the two relationships should not be treated the same in NRS 116.31183. Thus, because an attorney who is providing legal services and acting on behalf of a common-interest community homeowners’ association is not an “agent” of the association for purposes of NRS 116.31183, there can be no cause of action against that attorney pursuant to NRS 116.31183 and the district court did not err when it dismissed the Dezzanis’ action against Kern.

*The district court erred in awarding Kern attorney fees*

The Dezzanis also challenge the district court’s award of attorney fees to Kern for the services she performed on behalf of herself and her firm. The Dezzanis assert that Kern cannot collect attorney fees because she was representing herself, whereas Kern argues that she is able

to collect attorney fees because she was representing her law firm. The district court awarded attorney fees under NRS 18.010(2)(b) and as sanctions under NRCP 11, because it found that the Dezzanis initiated their suit to harass Kern. The district court noted that David Dezzani “has been an attorney for several years and is aware of the obligation to proceed in good faith in all causes of action,” and that Kern notified the Dezzanis pursuant to NRCP 11(b) and (c) that their claim was meritless, but they decided to pursue it regardless.

We review a district court’s award of attorney fees pursuant to NRS 18.010(2)(b) for an abuse of discretion. *Semenza v. Caughlin Crafted Homes*, 111 Nev. 1089, 1095, 901 P.2d 684, 687 (1995). We have consistently held that attorney litigants who proceed pro se may not be awarded attorney fees because when attorneys represent themselves or their law firms, no fees are actually incurred. *See Frank Settlemeyer & Sons, Inc. v. Smith & Harmer, Ltd.*, 124 Nev. 1206, 1220-21, 197 P.3d 1051, 1060-61 (2008) (concluding that a law firm could not recover fees for itself when an attorney within the firm represented it); *Sellers v. Fourth Judicial Dist. Court*, 119 Nev. 256, 259, 71 P.3d 495, 497-98 (2003) (determining that a pro se attorney litigant is entitled to attorney fees only when he or she is genuinely obligated to pay an attorney for the services that the attorney performed). However, where pro se attorney litigants incur costs associated with the action, they can collect those costs. *See Sellers*, 119 Nev. at 258, 71 P.3d at 497.

The Dezzanis instituted suit against Kern and her law firm, and Kern’s district court filings indicated that she proceeded pro se. Because Kern represented herself and her law firm, and thus did not actually incur any attorney fees, we conclude that the district court erred in

awarding attorney fees to Kern. However, because Kern actually incurred costs defending this action, we conclude that the district court did not err in awarding Kern costs.<sup>5</sup>

### CONCLUSION

Having concluded that the Legislature did not intend the word “agent” in NRS 116.31183 to encompass an attorney who is providing legal services to and acting on behalf of a common-interest community homeowners’ association client, we conclude that the district court did not err in dismissing the Dezzanis’ complaint for failure to state a claim upon which relief can be granted. We thus affirm the district court’s judgment in Docket No. 69410. We further conclude that attorneys representing themselves or their law firms cannot recover attorney fees because those fees are not actually incurred. Therefore, we conclude that the district court abused its discretion in awarding Kern attorney fees, and we reverse that

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<sup>5</sup>Regardless of whether Kern actually incurred costs associated with the action, appellate review of this issue has been waived. *See Sheehan & Sheehan v. Nelson Malley & Co.*, 121 Nev. 481, 493, 117 P.3d 219, 227 (2005) (deeming waived the issue of whether costs awarded to a party were reasonably incurred where the opposing party did not move the district court to retax and settle the costs). Kern served the Dezzanis with a copy of her memorandum of costs, but the Dezzanis did not move the district court to retax and settle those costs. Therefore, the Dezzanis waived appellate review of this issue.

portion of the district court's order, but affirm the portion of the district court's order awarding costs to Kern, in Docket No. 69896.

Hardesty, J.  
Hardesty

We concur:

Douglas, C.J.  
Douglas

Cherry, J.  
Cherry

Gibbons, J.  
Gibbons

Parraguirre, J.  
Parraguirre

Stiglich, J.  
Stiglich

PICKERING, J., dissenting:

NRS 116.31183 gives a homeowner who is wrongfully retaliated against for demanding that the HOA fire its attorney the right to sue the HOA *or its agent* for compensatory damages. An attorney is, by definition, the “agent” of the client he or she represents. Since NRS 116.31183 applies to an HOA’s agent—and makes no exception for attorney-agents—I cannot agree with the majority’s decision to dismiss the homeowners’ wrongful retaliation complaint against the HOA board’s attorney *with prejudice*. This decision effectively exempts attorneys from NRS 116.31183, granting them an absolute immunity from suit that neither the statute’s text nor the common law supports.

To recover compensatory damages for violation of NRS 116.31183, a homeowner must establish a compensable injury, i.e., that the retaliation was wrongful and caused harm. Here, the wrongfulness of the retaliation alleged substantially depends on the covenants, conditions and restrictions (CC&Rs) and whether they justified the measures the HOA’s attorney pursued against the homeowners. As the court of appeals correctly held, NRS 38.310’s mandatory mediation requirements therefore apply. Under NRS 38.310, this case should have been dismissed *without prejudice*, pending mediation. If mediation failed, the district court would then have to decide whether wrongful retaliation occurred. This is a merits-based determination, not a matter of absolute immunity.

I.

A.

The district court decided this case on an NRCP 12(b)(5) motion to dismiss. The complaint alleges that, as homeowners in a Nevada common-interest community, the Dezzanis complained to their HOA board about its attorney, Kern, demanding that she be fired, and that Kern

retaliated by causing the HOA to pursue the Dezzanis for bogus CC&R violations. Nevada has not adopted the federal “plausibility” standard for assessing a complaint’s sufficiency, *see Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007), instead following the rule that a “complaint cannot be dismissed for failure to state a claim unless it appears beyond a doubt that the plaintiff could prove no set of facts [that], if accepted by the trier of fact, would entitle him to relief.” *Washoe Med. Ctr., Inc. v. Reliance Ins. Co.*, 112 Nev. 494, 496, 915 P.2d 288, 289 (1996) (citation omitted).

Judged by Nevada’s motion-to-dismiss standards, the Dezzanis’ complaint sufficiently states an NRS 116.31183-based claim. NRS 116.31183 gives a homeowner who complains about her HOA board or its attorney and is retaliated against for doing so the right to sue for compensatory damages:

1. An executive board, a member of an executive board, a community manager or an officer, employee or *agent of an association shall not take, or direct or encourage another person to take, any retaliatory action against a unit’s owner because the unit’s owner has:*

(a) *Complained in good faith about any alleged violation of any provision of this chapter or the governing documents of the association; [or]*

(b) *Recommended the selection or replacement of an attorney, community manager or vendor . . . .*

. . . .

2. In addition to any other remedy provided by law, *upon a violation of this section, a unit’s owner may bring a separate action to recover:*

(a) *Compensatory damages; and*

(b) Attorney's fees and costs of bringing the separate action.

NRS 116.31183 (emphases added).

Etymologically and by definition, the word “attorney” means “agent.” *Attorney, Oxford English Dictionary* (2d ed. 1989) (tracing *attorney* to the Old French *atourné*, past participle of *attourner*, “to attorn, in sense of ‘one appointed or constituted’”; defining *attorney* as “[o]ne appointed or ordained to act for another; *an agent*”) (emphasis added); *attorney, Black’s Law Dictionary* (9th ed. 2009) (defining *attorney* as, “[s]trictly, one who is designated to transact business for another; *a legal agent*”) (emphasis added); *attorney, American Heritage Dictionary of the English Language* (3d ed. 1996) (defining *attorney* as “[a] person legally appointed by another to act as his or her agent in the transaction of business”). Black-letter law and our cases agree. Restatement (Third) of the Law Governing Lawyers ch. 2, intro. note (Am. Law. Inst. 2000) (“A lawyer is an agent.”); Restatement (Second) of Agency § 14 cmt. b (Am. Law Inst. 1958) (characterizing attorneys as “recognized agents”); *NC-DSH, Inc. v. Garner*, 125 Nev. 647, 656, 218 P.3d 853, 860 (2009) (“a client who hires a lawyer establishes an agency relationship”).

By its plain terms, NRS 116.31183 imposes statutory liability on an “agent” of an HOA who “take[s] retaliatory action” against a homeowner for recommending the “replacement of an [HOA board’s] attorney”—precisely what the Dezzanis allege Kern did here. “[T]he meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, . . . the sole function of the courts is to enforce it according to its terms.” *Caminetti v. United States*, 242 U.S. 470, 485 (1917). Since attorneys are agents and NRS 116.31183 applies to HOA agents without exception for attorneys, the Dezzanis’

complaint sufficiently stated a statute-based claim for relief against Kern and should not have been dismissed with prejudice under NRCP 12(b)(5).

B.

In the teeth of the statute's plain meaning, the majority insists that "the Legislature did not intend for attorneys to be included in the term 'agent' for the purposes of NRS 116.31183." Majority opinion *ante* at 7. As support, the majority relies first on NRS 116.31164(4), then on public policy.

The statute the majority relies on for the proposition attorneys are not agents, NRS 116.31164(4), concerns HOA lien foreclosure sales. It provides that an HOA foreclosure sale "may be conducted by the association, *its agent or attorney*, or a title insurance company or escrow agent licensed to do business in this state." (Emphasis added.) To the majority, NRS 116.31164(4)'s use of the word "or" between "agent" and "attorney" signifies that, for purposes of all of NRS Chapter 116, the Legislature has redefined "agent" to exclude "attorneys." Majority opinion *ante* at 6-7 (accepting Kern's argument that "because NRS 116.31164 uses the words 'agent' and 'attorney' distinctly, it demonstrates that the Legislature purposefully distinguished an attorney from an agent under NRS Chapter 116"). Continuing, the majority credits Kern's position that the Legislature should be seen as having "specifically omitted attorneys from NRS 116.31183"—though it did no such thing—so that, for purposes of NRS Chapter 116, "the term 'agent' does not include attorneys." Majority opinion *ante* at 6.

Respectfully, this reads more into the word "or" than it can support. Doubtless, an "or" preceded by a comma can indicate a disjunctive, such that two words that are separated by an "or" have two alternative definitions. But an "or" is not always disjunctive, and "it is important not to read the word 'or' too strictly where to do so would render the language

of the statute dubious.” 1A Norman J. Singer & J.D. Shambie Singer, *Sutherland Statutes & Statutory Construction* § 21.14 (7th ed. 2009). As shown above, “attorney” is universally understood to mean “agent.” To read the “or” in NRS 116.31164(4) as redefining “attorney” for purposes of NRS Chapter 116 to mean not-an-agent renders the language of the statute “dubious” indeed. *Id.* Also, NRS 116.31164(4) refers to an association or “its agent or attorney” and not “its agent, or attorney.” The lack of a comma suggests that, in this context, an attorney is merely a subset or an example of an agent, as opposed to not-an-agent. *See Sutherland Statutes & Statutory Construction*, at § 21.15 (“A comma should always separate each member of a class.”). The phrase that follows “agent or attorney” in NRS 116.31164(4)—“a title insurance company or escrow agent”—reinforces this reading, as a “title insurance company” can serve as an “escrow agent,” and those terms, too, are joined by “or” in NRS 116.31164(4), with no comma separating them.

The true basis for the majority’s decision to exempt attorneys from NRS 116.31183 seems policy-driven, not textual. It is the majority’s view that

...imposing liability on an attorney for representing his or her HOA client[] would impermissibly intrude on the attorney-client relationship and interfere with an HOA’s ability to retain an attorney and the attorney’s ability to ethically represent the HOA [so, we] conclude that the term “agent” in NRS 116.31183 does not include an attorney who is providing legal services to, and acting on behalf of, a[n HOA].

Majority opinion *ante* at 13; *see id.* at 12-13 (citing and quoting from *Greenberg Traurig v. Frias Holding Co.*, 130 Nev. 627, 331 P.3d 901 (2014),

*Cantey Hanger, LLP v. Byrd*, 467 S.W.3d 477, 481 (Tex. 2015), and *Fox v. Pollack*, 226 Cal. Rptr. 532 (Ct. App. 1986)).

These cases express some of the same policy concerns the majority has with NRS 116.31183 but they arise in the common-law setting and do not justify judicially exempting attorneys from a statute that, by its plain terms, applies to them. Thus, the majority's cited cases stand for one of two unexceptionable common-law propositions—first, “that communications uttered or published in the course of judicial proceedings are absolutely privileged, rendering those who made the communications[, including attorneys,] immune from civil liability,” *Greenberg Traurig*, 130 Nev. at 630, 331 P.3d at 903 (quotation omitted); see *Cantey Hanger*, 467 S.W.3d at 481 (“as a general rule, attorneys are immune from civil liability to non-clients *for actions taken in connection with representing a client in litigation*”) (quotation omitted; emphasis added); and second, that “an attorney’s duty of care in giving legal advice to a client [normally does not extend] to persons with whom the client in acting upon the advice deals,” *Fox*, 226 Cal. Rptr. at 536 (quotation omitted). Though both propositions are sound as a matter of common law, neither supports exempting attorneys from statutory obligations and liabilities like those imposed by NRS 116.31183.

In general, “a lawyer is subject to liability to a client or nonclient when a nonlawyer would be in similar circumstances.” Restatement (Third) of the Law Governing Lawyers § 56 (Am. Law Inst. 2000). Thus, a lawyer who commits wrongful acts in the name of representing a client outside the litigation setting does *not* enjoy absolute immunity from suit. See *Dutcher v. Matheson*, 733 F.3d 980, 988-89 (10th Cir. 2013) (reversing district court order deeming a lawyer immune from

liability in tort merely because the lawyer committed the tort alleged while representing a client; “like all agents, the lawyer would be liable for torts he committed while engaged in work for the benefit of a principal”); accord *Chalpin v. Snyder*, 207 P.3d 666, 677 (Ariz. Ct. App. 2008) (noting that “lawyers have no special privilege against civil suit” and that “[w]hen a lawyer advises or assists a client in acts that subject the client to civil liability to others, those others may seek to hold the lawyer liable along with or instead of the client”) (quoting *Safeway Ins. Co. v. Guerrero*, 106 P.3d 1020, 1025 (Ariz. 2005), and Restatement (Third) of the Law Governing Lawyers § 56 cmt. c). While statements attorneys make representing clients in court are privileged, and a third party ordinarily may not sue a lawyer for malpractice committed against a client, these propositions do not immunize lawyers from liability in other settings.

Lawyers are subject to the general law. If activities of a nonlawyer in the same circumstances would render the nonlawyer civilly liable or afford the nonlawyer a defense to liability, the same activities by a lawyer in the same circumstances generally render the lawyer liable or afford the lawyer a defense.

Restatement (Third) of the Law Governing Lawyers § 56 cmt. b.

Absent express exemption, a lawyer who violates a statute while representing a client faces the same sanctions anyone else would face. Consider the extreme hypothetical posed in *Dutcher*: A lawyer is hired by a client “to commit a murder. Certainly, the lawyer would not be immune from [prosecution] simply because he was executing the principal’s wishes in his capacity as a lawyer.” 733 F.3d at 989 (quotation and editing marks omitted). And so it is that lawyers and law firms representing clients have been held liable under the federal securities, RICO, and civil rights statutes,

as well as certain federal and state consumer protection statutes. *See* Restatement (Third) of the Law Governing Lawyers § 56 cmts. i & j.

The Legislature rationally could have exempted attorneys from NRS 116.31183, for the policy reasons the majority identifies. But it did not. Instead, it passed a statute prohibiting retaliation against homeowners who complain about, among other things, an HOA's attorney and imposing civil liability on HOAs and agents of HOAs who engage in prohibited conduct.

The legislative history behind NRS 116.31183 is sparse but what there is confirms that NRS 116.31183 and its companion statute, NRS 116.31184, apply to attorneys equally with any other HOA agent. Thus, in 2009, the Legislature amended NRS 116.31183 to add subparagraph (1)(b), prohibiting retaliation against a homeowner who seeks to have the HOA's attorney replaced, S.B. 182, 75th Leg. (Nev. 2009), and the remedial provisions codified in subparagraph (2), A.B. 350, 75th Leg. (Nev. 2009). Among the concerns expressed by S.B. 182's sponsor, Senator Mike Schneider, were the "immensely chilling effect" HOA attorney retaliation against homeowners can have—and an FBI report suggesting that "such conduct may also be another means to perpetuate [the] self-dealing between corrupt managers *and attorneys*" that befell Nevada homeowners in the years preceding the amendment. Hearing on S.B. 182 Before the Senate Judiciary Comm., Exhibit D 8-9, 75th Leg. (Nev., March 18, 2009) (emphasis added). And in 2013, the Legislature added NRS 116.31184, which makes it a misdemeanor to "threaten, harass or otherwise engage in a course of conduct against," *inter alia*, unit owners or their guests, so as to cause them "harm or serious emotional distress" or to create "a hostile environment for [such] person." 2013 Nev. Stat., ch. 437, § 1. Like NRS

116.31183, NRS 116.31184 applies to, among others, “an officer, employee or agent of an association,” without exception for attorneys. The majority’s interpretation of NRS 116.31183 would necessarily immunize HOA attorneys from NRS 116.31184 as well as NRS 116.31183, which is, I submit, unreasonable.

## II.

The majority also holds that NRS 38.310 does not apply “because the question before this court involves an interpretation of NRS 116.31183, not an interpretation of the HOA’s CC&Rs.” Majority opinion *ante* at 5, n.3. Again, I disagree. In my view, a homeowner does not have a claim for compensatory damages for violation of NRS 116.31183 unless the retaliation was wrongful and caused improper harm. It is in this context that the policy concerns that lead the majority to confer absolute immunity on Kern apply, for I interpret NRS 116.31183 to say that if all Kern did was fairly demand that the Dezzanis comply with the CC&Rs, wrongful retaliation did not occur. *Compare McKnight Family, LLP v. Adept Mgmt. Servs., Inc.*, 129 Nev. 610, 615, 310 P.3d 555, 558 (2013) (recognizing contractual nature of CC&Rs), *with* Restatement (Third) of the Law Governing Lawyers § 57 (“[A] lawyer who . . . assists a client to . . . break a contract . . . is not liable to a nonclient for interference with contract . . . if the lawyer acts to advance the client’s objectives without using wrongful means.”). Determining whether wrongful retaliation occurred requires interpreting portions of the CC&Rs that relate to the dispute between the Dezzanis and the HOA regarding the extended deck on the Dezzanis’ unit, including but not limited to the Dezzanis’ obligations by virtue of purchasing the unit, the HOA’s enforcement rights, and CC&R-based dispute-resolution requirements. Since the Dezzanis’ claims call for interpretation of the CC&Rs, by law they must proceed to mediation before



**134 Nev., Advance Opinion ||**  
**IN THE SUPREME COURT OF THE STATE OF NEVADA**

PAUL PAWLIK,  
Appellant,  
vs.  
SHYANG-FENN DENG AND LINDA  
HSIANG-YU CHIANG DENG,  
TRUSTEES OF THE SHYANG-FENN  
AND LINDA HSIANG-YU CHIANG  
DENG REVOCABLE TRUST DATED  
AUGUST 18, 2006; VANETTA  
APPLEYARD, TREASURER OF THE  
CITY OF LAS VEGAS; AND THE CITY  
OF LAS VEGAS, A POLITICAL  
SUBDIVISION,  
Respondents.

No. 71055

**FILED**

MAR 01 2018

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY *Angela*  
CHIEF DEPUTY CLERK

Appeal from a district court order granting a motion to dismiss and denying a petition for a writ of mandamus in an action to quiet title. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

*Affirmed.*

Walsh, Baker & Rosevear P.C. and James M. Walsh, Reno,  
for Appellant.

Black & LoBello and Steven J. Mack, Las Vegas,  
for Respondents Shyang-Fenn Deng and Linda Hsiang-Yu Chiang Deng,  
Trustees of the Shyang-Fenn and Linda Hsiang-Yu Chiang Deng Revocable  
Trust dated August 18, 2006.

Bradford R. Jerbic, City Attorney, and John A. Curtas, Deputy City  
Attorney, Las Vegas,  
for Respondents Vanetta Appleyard, Treasurer of the City of Las Vegas, and  
the City of Las Vegas.

BEFORE THE COURT EN BANC.

*OPINION*

By the Court, GIBBONS, J.:

In this appeal we are asked to interpret NRS 271.595, a statute governing redemption of property sold for default on city tax assessments. The issue is how to interpret two distinct redemption periods in NRS 271.595: one that creates a clear redemption period of two years for residential properties, and a second that creates an ambiguous 60-day redemption window after notice that the certificate of sale holder will demand a deed for the property. The parties dispute whether the 60-day period begins at the end of the first two-year redemption period, or whether the 60-day period may run concurrently at the end of the two-year period. The district court read NRS 271.595 as creating two distinct redemption periods that cannot overlap and dismissed appellant Paul Pawlik's quiet title action and petition for a writ of mandamus. We agree with the district court, and, to protect the redemption rights of former owners, we hold that NRS 271.595 creates two consecutive redemption periods.

*FACTS AND PROCEDURAL HISTORY*

Respondents Shyang-Fenn Deng and Linda Hsiang-Yu Chiang Deng, as trustees of their revocable trust (the Dengs), defaulted on special assessments on their Las Vegas residential real property, which entered delinquency. As a result, the property underwent a duly noticed and authorized sale, under NRS Chapter 271. On January 27, 2014, Pawlik (or his predecessor-in-interest) purchased the real property at the sale and was issued a sales certificate. Under NRS 271.595(1), the Dengs were then

entitled to a two-year redemption period from that date.<sup>1</sup> On January 7, 2016, Pawlik began attempting to serve the Dengs with notice of the upcoming expiration of the redemption period and Pawlik's intent to apply for a deed pursuant to NRS 271.595(3).

On March 14, 2016, 47 days after the Dengs' two-year redemption period expired and 67 days after Pawlik began attempting service, Pawlik applied to respondent the Las Vegas City Treasurer for issuance of a deed to the property. The Treasurer refused to issue the deed

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<sup>1</sup>NRS 271.595 states in relevant part:

1. Any property sold for an assessment . . . is subject to redemption by the former owner . . . (a) If there was a permanent residential dwelling unit . . . on the property at the time [of] sale . . . , at any time within 2 years . . . after the date of the certificate of sale . . . .

. . . .

3. If no redemption is made within the [2-year] period of redemption . . . the treasurer shall, on demand of the purchaser . . . execute . . . a deed to the property. No deed may be executed until the holder of the certificate of sale has notified the owners of the property that he or she holds the certificate, and will demand a deed therefor. The notice must be given by personal service upon the owner. However, if an owner is not a resident of the State or cannot be found within the State after diligent search, the notice may be given by publication. . . .

4. If redemption is not made within 60 days after the date of service, or the date of the first publication of the notice, as the case may be, the holder of the certificate of sale is entitled to a deed. . . .

to Pawlik, and the Dengs later redeemed on April 6, 2016, by making full payment to the City of Las Vegas. Pawlik subsequently filed a complaint to quiet title and applied for a writ of mandamus in the district court compelling the Treasurer to issue the deed. In turn, the Dengs filed a motion to dismiss. The district court granted the Dengs' motion to dismiss and denied Pawlik's petition for a writ of mandamus, interpreting NRS 271.595 to require that the 60-day notice and additional redemption period begin after the end of the two-year redemption period. Because Pawlik had attempted service on the Dengs prior to the end of the two-year redemption period and because this provided the Dengs with less than two years and 60 days of redemption, the district court found Pawlik had provided the Dengs with premature and ineffective notice. Accordingly, the Dengs were allowed to redeem their property. Pawlik now appeals that order.

#### *DISCUSSION*

*NRS 271.595(3) creates an additional 60-day notice and redemption period*

This court reviews questions of statutory interpretation *de novo*. *Pankopf v. Peterson*, 124 Nev. 43, 46, 175 P.3d 910, 912 (2008); *City of Las Vegas v. Eighth Judicial Dist. Court*, 124 Nev. 540, 554, 188 P.3d 55, 58 (2008) (“Even in the context of a writ proceeding, we review questions of statutory interpretation *de novo*.”). “When the language of a statute is clear on its face, this court will not go beyond the statute’s plain language.” *J.E. Dunn Nw., Inc. v. Corus Constr. Venture, LLC*, 127 Nev. 72, 79, 249 P.3d 501, 505 (2011) (internal quotations and alterations omitted). However, if the statutory language is subject to two or more reasonable interpretations, the statute is ambiguous, and we then look beyond the statute to the legislative history and interpret the statute in a reasonable manner “in light

of the policy and the spirit of the law.” *Id.* (internal quotations omitted); see *Pankopf*, 124 Nev. at 46, 175 P.3d at 912.

Pawlik argues the district court’s interpretation of NRS 271.595 is incorrect because the statute contains no language mandating that the 60-day notice period begin only after the two-year redemption period expires. In response, the Dengs argue Pawlik’s interpretation would allow a certificate holder to completely overlap the 60-day period with the two-year period, thus rendering the additional 60-day redemption period meaningless. However, Pawlik counters that attaching the 60-day period to the end of the two-year period causes “at least 26 mandatory months to exist in a statute that contemplates 24 months of redemption period.”

NRS 271.595(3) states “[i]f no redemption is made within the period of redemption as determined pursuant to subsection 1, the treasurer shall, on demand of the purchaser or the purchaser’s assigns, . . . execute to the purchaser or the purchaser’s assigns a deed to the property.” This provision is plainly a mandate to the treasurer to execute a deed once the certificate holder has fulfilled the requirements of NRS 271.595. Additionally, “[n]o deed may be executed until the holder of the certificate of sale has notified the owners of the property that he or she holds the certificate, and will demand a deed therefor.” This plainly mandates that the owners of the property must be notified prior to execution of the deed and the treasurer may not act until that notice has been given. Based on this provision alone, it would appear that a certificate holder could notify the owners at any time subsequent to obtaining the certificate of sale that he intends to demand the deed at the expiration of the redemption period set forth in subsection 1.

However, NRS 271.595(4) further states as follows:

If redemption is not made within 60 days after the date of service, or the date of the first publication of the notice as the case may be, the holder of the certificate of sale is entitled to a deed.

This provision creates ambiguity. As Pawlik argues, it is a reasonable interpretation of this statute that the entire notice period could take place during the redemption period prescribed in subsection 1, thus making the property owner automatically eligible for a deed at the end of that prescribed redemption period. However, the Dengs are also correct that this interpretation ignores portions of NRS 271.595(4) as they relate to the rest of the statute. Under the other provisions of NRS 271.595, the holder of the certificate of sale is *not* entitled to a deed after giving 60 days of notice, rather he must wait the remainder of the period outlined in subsection 1. Thus, the only way the certificate holder would be entitled to a deed at the end of a 60-day notice period is if the redemption period prescribed in subsection 1 had already expired. Additionally, under the other provisions of NRS 271.595, owners are given the full period outlined in subsection 1 to redeem, not 60 days. The only way property owners seeking redemption would be limited to a 60-day window is if that 60-day window exists outside the window prescribed in subsection 1. Therefore, it is also a reasonable interpretation of NRS 271.595 that the 60-day notice and redemption period outlined in subsection 4 must occur after the end of the redemption period outlined in subsection 1.

Thus, when viewing NRS 271.595 as a whole, both parties' interpretations of subsection 4 are reasonable, and so we look beyond NRS 271.595 to resolve this ambiguity. In doing so, we recognize that "[a] statute must be construed as to give meaning to all of [its] parts and

language . . . [and] a statute should not be read in a manner that renders a part of a statute meaningless.” *V & S Ry. LLC v. White Pine Cty.*, 125 Nev. 233, 239, 211 P.3d 879, 882 (2009) (internal quotations omitted) (citations omitted) (quoting *Harris Assocs. v. Clark Cty. Sch. Dist.*, 119 Nev. 638, 642, 81 P.3d 532, 534 (2003)).

We determine the meaning of a statute’s words by “examining the context and the spirit of the law” by looking to “the statute’s multiple legislative provisions as a whole.” *Leven v. Frey*, 123 Nev. 399, 405, 168 P.3d 712, 716 (2007). NRS Chapter 271 states in relevant part that its provisions should be “broadly construed” and that the “notices herein provided are reasonably calculated to inform each interested person of his or her legally protected rights.” NRS 271.020(5)-(6). NRS 271.595 carves out a redemption period for the former owners of the property who have become delinquent on city tax assessments. The statute outlines a number of hurdles the certificate holder must overcome to divest the former owners of their power of redemption and rights to the property. While the certificate holder does indeed have a right to an eventual deed upon compliance with NRS 271.595, the overriding interest of the statute is to create a process designed to protect the redemption rights of the former owner. Thus, NRS 271.595 should be “broadly construed” so that “notices . . . are reasonably calculated to inform [the former owners of their] legally protected rights.”

Beyond the statutory context, when interpreting ambiguous statutes, this court also “look[s] to the statute’s legislative history and construe[s] the statute in a manner that conforms to reason and public policy.” *Zohar v. Zbiegien*, 130 Nev. 733, 737, 334 P.3d 402, 405 (2014) (internal quotations omitted). The legislative minutes for the 1969 adoption

of NRS 271.595 indicate the statute was based on similar Idaho and Wyoming statutes. *Meeting on S.B. 74 Before the Committee on Federal, State and Local Governments*, 169 Leg., 55th Sess. (Nev. 1969) (Minutes of the Meeting—March 6, 1969) (“The remedy of summary sale is based on existing Idaho and Wyoming statutes and only applies when the municipal treasurer is collecting assessment.”). The relevant Wyoming statute mirrors NRS 271.595’s language almost verbatim, and Wyoming has expressly identified the 60-day period as an additional redemption period as well as a notice period. Wyo. Stat. Ann. 1977 § 15-6-418 (1965); *Collier v. Hilltop Nat’l Bank*, 920 P.2d 1241, 1243 (Wyo. 1996) (“In addition to this two year redemption period, it also provides owners with a *final sixty day window within which they can redeem their property.*” (emphasis added)).

Further, the Nevada Legislature has contemplated an additional redemption window in another similar, but distinguishable, municipal redemption statute. “[U]nder NRS 361.603, if a local government wishes to purchase property *which was not redeemed during the two-year redemption period*, notice must first be given to the last known owner of the property. The owner is *then given an additional 90 days in which to redeem the property* by paying the delinquent taxes, plus penalties, interest and costs.” *Casazza v. A-Allstate Abstract Co.*, 102 Nev. 340, 346, 721 P.2d 386, 390 (1986) (interpreting NRS 361.585 and NRS 361.603 together) (emphases added); see NRS 361.603(3) (“The last known owner may, within 90 days after the notice, redeem the property by paying to the treasurer the amount of the delinquent taxes, plus penalties, interest and costs.”). NRS 361.603 and NRS 361.585 thus demonstrate some evidence of the Legislature’s intent to create a second chance redemption window in certain circumstances.

Considering the legislative history and the context of the statute, the district court's interpretation of NRS 271.595 is the most reasonable.<sup>2</sup> See *Stockmeier v. Psychological Review Panel*, 122 Nev. 534, 540, 542; 135 P.3d 807, 810, 812 (2006) (explaining that this court's statutory interpretation should reach a reasonable result). We have long recognized the importance of a former owner's right to redeem and have held that such a right "will not be taken away except upon strict compliance with steps necessary to divest it." *Robinson v. Durston*, 83 Nev. 337, 355, 432 P.2d 75, 86 (1967). Thus, we hold the district court did not err in its interpretation and NRS 271.595(3) and (4) create a 60-day notice and redemption period, notice of which may only be given and which may only begin after the end of the redemption period described in NRS 271.595(1).

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<sup>2</sup>This court and another Nevada district court have arguably interpreted NRS 271.595 to mean the 60-day period is an additional redemption period; however, neither case hinged on the issue. *Las Vegas Paving Corp. v. RBC Real Estate Fin., Inc.*, Nos. 60599, 60822, \*3 (Order of Reversal and Remand, Sept. 21, 2015) ("NRS 271.595(3) requires the treasurer to provide a deed to the purchaser at the tax sale, but only after *notice of a demand* for the deed has been given by the holder of the certificate of the tax sale to the owners of the property. Further, if redemption is not made within 60 days after the date of service of the notice required in NRS 271.595(3), the deed may issue." (emphasis added)); see also *Weiner v. Kramer*, No. 15A715904 (Decision and Order, Eighth Judicial Dist. Court, Sept. 16, 2015) (wherein certificate holders were issued a certificate of sale on July 24, 2012, but deed was not recorded until February 27, 2015, after "60 days lapsed with no redemption under NRS [Chapter] 271"). This court's interpretation of the notice as "notice of a demand" rather than notice of the intent to demand indicates that notice would occur after the two-year window, once the certificate holder is capable of demanding a deed from the treasurer. Additionally, the district court order clearly reads the 60-day period as an additional redemption period.

Applying this holding to this case, Pawlik (or his predecessor-in-interest) purchased the real property at a January 27, 2014, sale and the Dengs' initial two-year redemption period ran until January 26, 2016. NRS 271.595(1)(a). After the end of that two-year redemption period, Pawlik was permitted to serve the Dengs with a 60-day notice that he was the holder of the certificate of sale and that he would demand a deed from the City Treasurer. NRS 271.595(3). The Dengs were then entitled to redeem within that 60-day notice period. NRS 271.595(4). Upon expiration of that 60-day notice and redemption period, Pawlik would have been entitled to a deed and the City Treasurer would have been compelled to issue it. NRS 271.595(3)-(4). Pawlik, however, began his attempts to serve the Dengs with notice on January 7, 2016, and finished his attempts before the expiration of the two-year redemption period on January 26, 2017. He then requested a deed from the Treasurer on March 14, 2016, less than 60 days after the Dengs' two-year redemption period expired. Thus, under NRS 271.595, Pawlik provided premature notice to the Dengs and was not entitled to a deed at the time of his application.

While not in strict compliance with our interpretation of NRS 271.595, Pawlik argues that he substantially complied with NRS 271.595 and that the notice he provided was sufficient to start the 60-day period running at the end of the initial two-year period. Thus, he argues the Treasurer's issuance of the deed should have been automatically compelled upon expiration of the two-year and 60-day period. We find this argument unpersuasive.

*NRS 271.595 requires strict compliance*

As we have explained, “[a] [statute] may contain both mandatory and directory provisions.” *Markowitz v. Saxon Special*

*Servicing*, 129 Nev. 660, 664, 310 P.3d 569, 571 (2013) (citing *Leven*, 123 Nev. at 408 n.31, 168 P.3d at 718 n.31; see also *Einhorn v. BAC Home Loans Servicing, LP*, 128 Nev. 689, 696, 290 P.3d 249, 254 (2012)). A statute's provisions are mandatory "when its language states a specific time and manner for performance." *Id.* at 664, 310 P.3d at 572 (internal quotation omitted). "Time and manner refers to when performance must take place and the way in which the deadline must be met." *Id.* In contrast, directory provisions are those governing "form and content," which "dictate who must take action and what information that party is required to provide" and "do not implicate notice." *Id.* at 664-65, 310 P.3d at 572 (internal quotations omitted). An additional consideration is that "the right to redeem . . . will not be taken away except upon strict compliance with steps necessary to divest it." *Robinson*, 83 Nev. at 355, 432 P.2d at 86.

In this case, we interpret NRS 271.595(3) and (4) to require a 60-day notice and redemption period occurring after the initial redemption period in NRS 271.595(1). NRS 271.595(3) and (4) require certain notice and provide a specific time and manner of performance to complete that notice and inform the City Treasurer of its completion. Further, NRS 271.595(3) and (4) operate to divest a former owner of his or her right to redeem. Thus, we hold that NRS 271.595, implicating both notice *and* redemption, contains mandatory provisions.

"[I]n determining whether strict or substantial compliance is required, [we] examine . . . policy and equity considerations" in addition to the statute's provisions. *Leven*, 123 Nev. at 406-07, 168 P.3d at 717. In the context of relevant notice, we have held that substantial compliance may be appropriate when providing notice of mechanics' liens or notice of default. *Las Vegas Plywood & Lumber, Inc. v. D & D Enters.*, 98 Nev. 378, 380, 649

P.2d 1367, 1368 (1982) (holding substantial compliance is appropriate under NRS 108.227); *see also Schleining v. Cap One, Inc.*, 130 Nev. 323, 330, 326 P.3d 4, 8 (2014) (holding substantial compliance is appropriate under NRS 107.095). However, we have not applied the same analysis to notice under NRS Chapter 271, and we decline to do so now.

The assessments here, imposed by the city after making improvements benefiting the homeowner, are somewhat analogous to a mechanic's lien under NRS Chapter 108 in that they secure payment for those improvements. *See In re Fontainebleau Las Vegas Holdings, LLC*, 128 Nev. 566, 574-75, 289 P.3d 1199, 1210 (2012). The policy rationale behind NRS Chapter 271 is to facilitate the city's ability to levy taxes for necessary improvements brought on by population growth. NRS 271.020(1)-(4). The statutes within the chapter are to be construed broadly "for the accomplishment of [that] purpose[.]" NRS 271.020(5). However, that purpose is served whether the city receives payment through the former homeowner or the certificate holder. Thus, the purpose of NRS Chapter 271, protecting the city's right to repayment, is still served by protecting the rights of the former homeowner through strict compliance with NRS 271.595. Here, the City of Las Vegas suffered no injury by requiring strict compliance from Pawlik, as it eventually received full payment through the Dengs' redemption. Thus, while this court has held "mechanic's lien statutes are remedial in character and should be liberally construed," the remedial nature of NRS 271.595 is limited and the substantial compliance analysis inapposite where the City of Las Vegas itself denied Pawlik's application and is joined in this matter as a respondent. *See In re Fontainebleau Las Vegas Holdings*, 128 Nev. at 574-75, 289 P.3d at 1210.

Additionally, our analysis in *Schleining*, wherein we applied substantial compliance to notice under NRS 107.095, was primarily driven by the fact that the language “substantially comply” was located elsewhere within the chapter and showed “the Legislature specifically envisioned that the purposes behind NRS 107.080’s notice and timing requirements could be achieved even if these requirements were not strictly adhered to.” 130 Nev. at 330, 326 P.3d at 8. No such express language exists within NRS Chapter 271, and we decline to insert it. Furthermore, the notice here concerns a relatively obscure assessment levied by the city, not a loan default or a mechanic’s lien levied by a private party. Additionally, rather than the first notice of a default or perfection of a lien, NRS 271.595 governs the final notice required to completely divest a former owner of any right to redeem his or her property.

Here, no legislative intent or policy considerations compel us to divert from the interpretation that the requirements in NRS 271.595 implicate notice, are mandatory, and require strict performance.<sup>3</sup> Pawlik attempted to give premature notice prior to the expiration of the two-year redemption period in NRS 271.595(1)(a). Thus, Pawlik failed to strictly comply with NRS 271.595, and his attempted notice was ineffective to trigger the second 60-day redemption period.

### CONCLUSION

We hold that NRS 271.595(3) and (4) create a 60-day notice and redemption period that must occur after the redemption period described in NRS 271.595(1) and that NRS 271.595 mandates strict compliance.

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<sup>3</sup>Accordingly we need not address appellant’s arguments that respondents were not prejudiced by early notice.

Accordingly, Pawlik's notice did not comply with the statutory provisions, and we affirm the district court's order.

L. Gibbons, J.  
Gibbons

I concur:

Douglas, C.J.  
Douglas

Cherry, J.  
Cherry

Parraguirre, J.  
Parraguirre

HARDESTY, J., with whom PICKERING and STIGLICH, JJ., agree, dissenting:

I respectfully dissent to the majority's interpretation of NRS 271.595. Contrary to the plain language of NRS 271.595 and the statutory scheme found in NRS 271.540 to 271.630, the Dengs argue, and the majority accepts, that two additional months are added to the two-year redemption period following a Municipal Treasurer's sale for defaulted tax assessments. I disagree.

"When a statute is clear on its face, we will not look beyond the statute's plain language." *Washoe Med. Ctr. v. Second Judicial Dist. Court*, 122 Nev. 1298, 1302, 148 P.3d 790, 792-93 (2006).

NRS 271.595 states, in relevant part:

1. Any property sold for an assessment . . . is subject to redemption by the former owner . . . :

(a) If there was a permanent residential dwelling unit or any other significant permanent improvement on the property at the time the sale was held . . . at any time *within 2 years . . . after the date of the certificate of sale . . . .*

. . . .

3. *If no redemption is made within the period of redemption as determined pursuant to subsection 1, the treasurer shall, on demand of the purchaser or the purchaser's assigns, and the surrender to the treasurer of the certificate of sale, execute to the purchaser or the purchaser's assigns a deed to the property. No deed may be executed until the holder of the certificate of sale has notified the owners of the property that he or she holds the certificate, and will demand a deed therefor. The notice must be given by personal service upon the owner. However, if an owner is not a resident of the State or cannot be found within the State after diligent search, the notice may be given by publication. . . .*

4. If redemption is not made within 60 days after the date of service, or the date of the first publication of the notice, as the case may be, the holder of the certificate of sale is entitled to a deed.

(Emphasis added.)

The plain language of NRS 271.595(1)(a) creates a two-year redemption period for the former owner to redeem the property. And, NRS 271.595(3) mandates the Treasurer to issue a deed to the certificate holder “[i]f no redemption is made within the period of redemption as determined pursuant to subsection 1 . . . .” (Emphasis added.)

The Dengs argue that the notice provision in subsection 4 provides the owner an additional 60 days to redeem the property. While NRS 271.595(3) and NRS 271.595(4) require the certificate holder to provide notice to the owner that he or she holds the certificate and will seek a deed, nothing in those subsections requires that notice be given after the two-year redemption period expires. Instead, the notice assures that the owner is informed that the certificate holder possesses the certificate and intends to seek a deed to the property. See NRS 271.020(6) (stating that notices provided in NRS Chapter 271 “are reasonably calculated to inform each interested person of his or her legally protected rights”) The Dengs’ argument ignores the function and purpose of the notice provision in the statutory scheme, which is to alert the former owner that the purchaser will seek a deed. The 60-day period measures the time that must elapse before the Treasurer is compelled to issue the deed and recognizes the obvious—if redemption has already occurred, no deed issues. But, nothing in that process allows for an extra two months to redeem the property.

The majority maintains that NRS 271.595 is ambiguous. But to be ambiguous, each party must provide a reasonable interpretation of the statute. See *Irving v. Irving*, 122 Nev. 494, 496, 134 P.3d 718, 720 (2006).

“Where alternative interpretations of a statute are possible, the one producing a reasonable result should be favored.” *G & H Assocs. v. Ernest W. Hahn, Inc.*, 113 Nev. 265, 272, 934 P.2d 229, 233 (1997) (internal quotation marks omitted).

However, neither party argues that the statute is ambiguous. Instead, the Dengs argue that subsection 4’s “clear language” is susceptible to only one interpretation and allowing the 60-day notice to be given within the two-year redemption period renders the 60-day notice requirement meaningless. Pawlik argues that interpreting the statute to require that notice be given after the two-year period expires effectively creates a two-year and sixty-day redemption period, which is contrary to the express language in NRS 271.595(1)(a). But the fundamental defect in the parties’ and majority’s interpretations is reading NRS 271.595 to require that notice be given at a certain time in conjunction with the two-year redemption period. Neither subsection 3 nor 4 states when the notice must be given, only that the notice be given before the Treasurer must issue a deed to the certificate holder. Thus, notice could be given during the two-year redemption period specified in subsection 1(a), or it could be given after that period expires. If the notice is given during the two-year period specified in subsection 1(a), the 60-day notice period may overlap the two-year redemption period, and the deed may not be issued if redemption occurs within that overlapping time. However, any length of time beyond the two-year redemption period that remains for the 60-day notice requirement to run does not extend the time of redemption; rather, it delays the issuance of the deed until the 60 days expires. It would be absurd to conclude that the 60-day notice given during the two-year statutory redemption period shortens the redemption period, and it is equally absurd to conclude that

the 60-day period is a mandatory extension of the statutory redemption period. Whether the owner may redeem within the 60 days after service of the notice is governed by the length of the redemption period, not the length of the notice after service. Therefore, if notice is given after the redemption period, it simply delays the issuance of the deed but does not add time to the redemption period because that period has already expired.

“Statutory provisions should, whenever possible, be read in harmony provided that doing so does not violate the ascertained spirit and intent of the legislature.” *City Council of City of Reno v. Reno Newspapers, Inc.*, 105 Nev. 886, 892, 784 P.2d 974, 978 (1989). The statutory framework makes clear that NRS 271.595 creates a two-year redemption period. First, NRS 271.570, which governs the requirements for the certificate of sale, mandates that the certificate of sale state “that the purchaser is entitled to a deed upon the expiration of the applicable period of redemption as determined pursuant to subsection 1 of NRS 271.595, unless redemption is made.” (Emphasis added.) If the 60-day period in NRS 271.595(4) was meant to be a second redemption period, NRS 271.570’s express reference to NRS 271.595(1) would be illogical. Second, NRS 271.575 twice refers to the “period of redemption as determined pursuant to subsection 1 of NRS 271.595.” Thus, the specific references to the single redemption period in subsection 1 of NRS 271.595 throughout the statutory framework demonstrate that the notice provision in subsection 4 is not an additional redemption period.

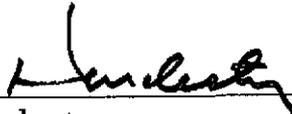
The only reasonable interpretation of the statute is the one that gives full effect to the plain language of all of the provisions of the statute, by recognizing that an owner has two years to redeem his or her property from the date of the certificate of sale; a certificate holder must serve notice

to the owner that he or she has the certificate and intends to seek a deed; and the Treasurer must issue a deed if the property has not been redeemed 60 days before the expiration of the notice. Had the Legislature intended a different redemption period, it would have created that time period in subsection 1(a). *See McGrath v. State Dep't of Pub. Safety*, 123 Nev. 120, 123, 159 P.3d 239, 241 (2007) (“[W]e presume that the Legislature intended to use words in their usual and natural meaning.”). Indeed, as the majority points out, the Legislature knows how to create an additional redemption period, as it has expressly done so in a municipal redemption statute. *Cf.* NRS 361.603(3) (“The last known owner may, within 90 days after the notice, redeem the property by paying to the treasurer the amount of the delinquent taxes, plus penalties, interest and costs.”). Notably, the Legislature did not do so in NRS Chapter 271.

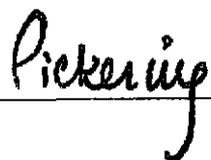
Finally, the district court concluded, and the majority agrees, that Pawlik’s notice of intent to seek the deed was premature and ineffective because he began his attempts to serve notice prior to the expiration of the two-year redemption period. However, this determination is contrary to the plain language of NRS 271.595. As noted earlier, there is nothing in NRS 271.595(3) or NRS 271.595(4) that states when the 60-day notice must be given. Further, subsection 4 of NRS 271.595 expressly provides that “[i]f redemption is not made within 60 days after the date of service, *or the date of the first publication of the notice*, . . . the holder of the certificate of sale is entitled to a deed.” (Emphasis added.) The district court’s invalidation of the service of the 60-day notice in this case runs contrary to the plain language of subsection 4. In this case, Pawlik first published his notice of intent to seek the deed on January 13, 2016. Thus, under NRS 271.595(4), the 60-day period began running on that date and concluded on March 13,

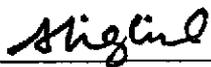
2016. However, the Dengs did not redeem until April 6, 2016. Even if NRS 271.595 creates two consecutive redemption periods, neither the district court nor the majority explain how the notice was ineffective or how they determine that the 60-day period can only commence after the two-year redemption period expires. Accordingly, I conclude that the district court erred in finding Pawlik's notice ineffective because nothing in NRS 271.595(3) or (4) requires the 60-day notice to be given after the two-year redemption period expires.

Because NRS 271.595(1)(a)'s plain language creates a statutory two-year period of redemption, and the Dengs failed to redeem the property within that period, I would reverse the district court's order dismissing Pawlik's quiet title action.

  
\_\_\_\_\_, J.  
Hardesty

We concur:

  
\_\_\_\_\_, J.  
Pickering

  
\_\_\_\_\_, J.  
Stiglich

134 Nev., Advance Opinion 3

IN THE SUPREME COURT OF THE STATE OF NEVADA

LUCIA CASTILLO, AN INDIVIDUAL,  
Appellant,  
vs.  
UNITED FEDERAL CREDIT UNION, A  
FEDERAL CREDIT UNION,  
Respondent.

No. 70151

FILED

FEB 01 2018

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY   
CHIEF DEPUTY CLERK

Appeal from a district court order granting a motion to dismiss in an action under the Uniform Commercial Code. Second Judicial District Court, Washoe County; Elliott A. Sattler, Judge.

*Reversed and remanded.*

Robert W. Murphy, Ft. Lauderdale, Florida; Michael Lehnert, Reno; Nathan R. Zeltzer, Reno,  
for Appellant.

Howard & Howard Attorneys PLLC and James A. Kohl and Robert Hernquist, Las Vegas,  
for Respondent.

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BEFORE DOUGLAS, C.J., GIBBONS and PICKERING, JJ.

*OPINION*

By the Court, DOUGLAS, C.J.:

The issue in this appeal concerns whether the justice court or the district court had original jurisdiction over this matter, and thus, we are asked whether the district court erred in granting respondent's motion to dismiss based on lack of subject matter jurisdiction. In particular, we

consider (1) whether aggregation of putative class member claims is permitted to determine jurisdiction, (2) whether a claim for statutory damages can be combined with a claim for the elimination of the deficiency amount asserted to determine jurisdiction, and (3) whether an assertion of injunctive relief establishes jurisdiction. First, we conclude that in Nevada, aggregation of putative class member claims is not permitted to determine jurisdiction. Second, we conclude that a claim for statutory damages can be combined with a claim for the elimination of the deficiency amount demanded by respondent to determine jurisdiction. Finally, we conclude that because appellant sought appropriate injunctive relief, the district court possessed original jurisdiction. We therefore reverse the district court's order granting respondent's motion to dismiss based on lack of subject matter jurisdiction.

### *FACTS AND PROCEDURAL HISTORY*

On March 11, 2014, appellant Lucia Castillo and a co-buyer entered into a vehicle and security agreement with respondent United Federal Credit Union.<sup>1</sup> After respondent repossessed and sold the vehicle, respondent notified appellant that she owed a deficiency balance in the amount of \$6,841.55.

On March 3, 2015, appellant and the co-buyer, as individuals, filed a complaint against respondent, alleging that respondent's notice of sale violated the Uniform Commercial Code (UCC). In the complaint, appellant further alleged that her case met the prerequisites for a class

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<sup>1</sup>We note that the co-buyer died during the pendency of this appeal, and because no personal representative was timely submitted, Castillo is the sole appellant. *See Castillo v. United Fed. Credit Union*, Docket No. 70151 (Order Partially Dismissing Appeal, April 11, 2017).

action under NRCP 23(a) and that the class was maintainable under NRCP 23(b). Although appellant sought an order for class action certification pursuant to the complaint, appellant never subsequently requested that the court certify the class due to the anticipation of discovery.

Appellant amended her complaint by reducing the number of causes of action. In her amended complaint, appellant asserted that the district court had jurisdiction because “each [c]lass [m]ember is entitled to the elimination of the deficiency balance and the statutory damages [pursuant to NRS 104.9625(3)(b)],” and thus, “the amount in controversy exceeds \$10,000.00.” Accordingly, appellant sought statutory damages under the UCC for each putative class member. Appellant also sought injunctive relief to eliminate appellant’s deficiency balance and “to remove any adverse credit information which may have been wrongfully reported on the consumer reports of the class members.”

Respondent filed a motion to dismiss appellant’s amended complaint, contending that the district court lacked subject matter jurisdiction because appellant and the co-buyer failed to demonstrate that they were individually entitled to damages in excess of \$10,000. At the hearing for respondent’s motion to dismiss, the parties additionally argued about whether appellant’s request for injunctive relief divested the justice court of jurisdiction. Although the district court never reached a determination on this additional issue, the court ultimately granted respondent’s motion by finding that (1) appellant could not aggregate the putative class member claims because the court did not order that the class action could be maintained, and (2) NRS 104.9625(4) precluded appellant from combining the deficiency amount she sought to eliminate with her statutory damages. This appeal followed.

## DISCUSSION

Appellant argues that the district court erred in dismissing the action based on lack of subject matter jurisdiction because (1) the damages of each individual class member should have been aggregated to determine the amount in controversy, (2) appellant's claim for statutory damages should have been combined with the deficiency amount she owed respondent to determine jurisdiction, and (3) the court had original jurisdiction due to the injunctive relief appellant requested. Although we disagree with appellant's first contention, we agree with her two latter contentions.

### *Standard of review*

This court reviews an order dismissing a complaint rigorously. *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 323, 130 P.3d 1280, 1284 (2006). Accordingly, we accept all factual allegations in the complaint as true and construe all inferences in the complainant's favor. *Id.*

Additionally, a lower court's decision concerning subject matter jurisdiction is subject to de novo review. *Am. First Fed. Credit Union v. Soro*, 131 Nev., Adv. Op. 73, 359 P.3d 105, 106 (2015). The plaintiff has the burden of proving subject matter jurisdiction. *See Morrison v. Beach City LLC*, 116 Nev. 34, 36, 991 P.2d 982, 983 (2000). "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." NRCP 12(h)(3).

*Whether the district court erred in granting respondent's motion to dismiss based on lack of subject matter jurisdiction*

*The district court did not err in declining to aggregate putative class member claims to determine subject matter jurisdiction*

Appellant argues that the amount in controversy should be determined based on the class as a whole rather than individual class

member claims.<sup>2</sup> Appellant also asserts that aggregation of claims promotes the purpose of class action litigation. Conversely, respondent argues that the district court properly declined to aggregate appellant's claims with potential class member claims to satisfy its jurisdictional threshold. We agree with respondent.

Justice courts only have original jurisdiction as specified by statute, whereas district courts "have original jurisdiction in all cases excluded by law from the original jurisdiction of justices' courts." Nev. Const. art. 6, § 6(1); *see also* NRS 4.370(1) (2017). In pertinent part, justice courts have original jurisdiction in actions where "the damage claimed does not exceed \$10,000." NRS 4.370(1)(b) (2013); 2013 Nev. Stat., ch. 172, § 2(1)(b), at 597.<sup>3</sup>

The novel issue before this court is whether the district court should aggregate putative class member claims to effectively divest the justice court of jurisdiction for class actions. Other jurisdictions have allowed for aggregation; however, we are not persuaded by such distinguishable authority. Notably, those courts have recognized the lack

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<sup>2</sup>Appellant contends that aggregation is appropriate in this case because "plaintiffs are 'claimants under a common right.'" Although appellant failed to raise this particular argument below, this point goes to the jurisdiction of the district court. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) ("A point not urged in the trial court, *unless it goes to the jurisdiction of that court*, is deemed to have been waived and will not be considered on appeal." (emphasis added)). Upon consideration of appellant's argument, we decline her invitation to adopt the common interest exception to allow aggregation in class actions.

<sup>3</sup>The Legislature raised the jurisdictional amount to \$15,000, effective June 8, 2017. *See* 2017 Nev. Stat., ch. 484, § 7(1)(b), at 3023. The 2013 version of NRS 4.370 is the statute at issue in this case.

of an adequate forum for class actions in their respective jurisdictions if aggregation was not permitted. *See Thomas v. Liberty Nat'l Life Ins. Co.*, 368 So. 2d 254, 257 (Ala. 1979) (“There is no plain and adequate remedy for numerous small claims involving similar questions of law and fact in the district court.”); *Judson Sch. v. Wick*, 494 P.2d 698, 699 (Ariz. 1972) (“Were we to hold that claims of less than \$200.00 cannot be aggregated in Arizona, there would be no forum where class actions potentially involving millions of dollars and hundreds, possibly thousands of parties could find effective relief.”); *Galen of Fla., Inc. v. Arscott*, 629 So. 2d 856, 857 (Fla. Dist. Ct. App. 1993) (“Our circuit courts are designed to hear such complex cases; our county courts are not.”); *Dix v. Am. Bankers Life Assurance Co. of Fla.*, 415 N.W.2d 206, 210-11 (Mich. 1987) (holding “that class actions may be maintained in the circuit court, and only in the circuit court, without regard to the amount in controversy” because “[t]he circuit court is the trial court of general jurisdiction in this state and is better equipped to adjudicate class actions than is the district court”).

Nevada, unlike other jurisdictions, recognizes that justice courts have the ability to hear class actions. *See* JCRCP 23. Accordingly, because class action members with small claims still have a forum to litigate, we distinguish our state from other jurisdictions and decline to aggregate individual class member claims to determine the amount necessary for the district court to establish subject matter jurisdiction. Therefore, we conclude that the district court did not err by rejecting this claim.

*The district court erred in precluding appellant from combining her claim for statutory damages with the deficiency amount demanded by respondent to determine subject matter jurisdiction*

Appellant argues that the district court erred by not combining the amount she sought for statutory damages with the deficiency amount she sought to prohibit respondent from collecting. Conversely, respondent argues that appellant may not recover for damages *and* a claim for a release of the deficiency. Respondent further argues that the deficiency is an anticipated counterclaim appellant is prohibited from combining with her claim for statutory damages. We agree with appellant.

Appellant sought statutory relief under NRS 104.9625(3)(b), which states as follows:

If the collateral is consumer goods, a person that was a debtor or a secondary obligor at the time a secured party failed to comply with this part may recover for that failure in any event an amount not less than the credit service charge plus 10 percent of the principal amount of the obligation or the time-price differential plus 10 percent of the cash price.

Accordingly, appellant could potentially recover \$6,330.28 or \$6,140.59, respectively. Appellant combined her higher statutory claim for \$6,330.28 with the deficiency amount of \$6,841.55 demanded by respondent to assert that the amount in controversy was \$13,171.83. The district court determined that NRS 104.9625(4) precluded appellant from adding the statutory damages she sought with the deficiency amount respondent claimed.

NRS 104.9625(4) states in part that “a debtor or secondary obligor whose deficiency is eliminated or reduced under [NRS 104.9626] may not otherwise recover under [NRS 104.9625(2)].” Notably, NRS 104.9626 does not apply to consumer transactions. *See* NRS 104.9626(1).

In this case concerning consumer transactions, appellant never sought recovery under NRS 104.9625(2); rather, appellant sought recovery under NRS 104.9625(3). Therefore, the district court erred in determining that appellant could not seek elimination of the deficiency and statutory damages. Accordingly, appellant could combine her higher statutory claim with the deficiency amount asserted to determine the jurisdictional amount. Moreover, irrespective of whether the monetary threshold was met to establish jurisdiction with the district court, the court independently acquired jurisdiction due to appellant's request for injunctive relief.

*The district court erred in declining to assert original jurisdiction on the basis that appellant sought injunctive relief*

Appellant argues that regardless of whether her alleged monetary damages exceeded \$10,000, because she requested injunctive relief in her complaint, the district court erred in not asserting original jurisdiction. Conversely, respondent argues that appellant's claim for injunctive relief was improper. We agree with appellant.

In her complaint, appellant asserted that “[she] and the class members will suffer irreparable injury if [respondent] is not enjoined from the future wrongful collection and reporting of adverse information to the [consumer reporting agencies, i.e., Equifax, Experian, and TransUnion].” Thus, appellant sought injunctive relief to prevent respondent from collecting any deficiency and she also sought to expunge any adverse credit information that may have been wrongfully reported.

“The district court possesses original jurisdiction . . . over claims for injunctive relief.” *Edwards*, 122 Nev. at 324, 130 P.3d at 1284. When monetary damages *and* injunctive relief are sought, “the district court has jurisdiction over all portions of the complaint, even if the damages sought fail to meet the district court's monetary jurisdictional threshold.”

*Id.* at 321, 130 P.3d at 1282. An injunction is appropriate when monetary damages are inadequate. *See Czipott v. Fleigh*, 87 Nev. 496, 499, 489 P.2d 681, 683 (1971). However, “injunctive relief is not available in the absence of actual or threatened injury, loss or damage.” *Berryman v. Int’l Bhd. of Elec. Workers*, 82 Nev. 277, 280, 416 P.2d 387, 388 (1966). “There should exist the reasonable probability that real injury will occur if the injunction does not issue.” *Id.* at 280, 416 P.2d at 389.

In appellant’s amended complaint, she sought an injunction based on the following allegations:

Since the repossession of the vehicles of [appellant] and the class members, [respondent] has wrongfully collected and/or reported credit information to the [consumer reporting agencies] with respect to the consumer reports of [appellant] and the class members.

....

[Appellant] and the class members will suffer irreparable injury if [respondent] is not enjoined from the future wrongful collection and reporting of adverse information to the [consumer reporting agencies].

Because we must accept all factual allegations in the complaint as true and construe all inferences in the complainant’s favor, *Edwards*, 122 Nev. at 323, 130 P.3d at 1284, appellant alleged actual and threatened injury. Therefore, in light of pleading injunctive relief, we conclude that the district court erred in granting respondent’s motion to dismiss based on lack of subject matter jurisdiction. Accordingly, we reverse the district court’s

order and remand this matter to the district court for further proceedings consistent with this opinion.

Douglas, C.J.  
Douglas

We concur:

Gibbons, J.  
Gibbons

Pickering, J.  
Pickering

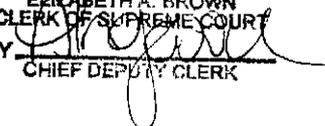
134 Nev., Advance Opinion 4  
IN THE SUPREME COURT OF THE STATE OF NEVADA

SFR INVESTMENTS POOL 1, LLC, A  
NEVADA LIMITED LIABILITY  
COMPANY,  
Appellant,  
vs.  
FIRST HORIZON HOME LOANS, A  
DIVISION OF FIRST TENNESSEE  
BANK, N.A., A NATIONAL  
ASSOCIATION,  
Respondent.

No. 71325

FILED

FEB 01 2018

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY   
CHIEF DEPUTY CLERK

Appeal from summary judgment in an action to quiet title.  
Eighth Judicial District Court, Clark County; Gloria Sturman, Judge.

*Reversed and remanded.*

Kim Gilbert Ebron and Howard C. Kim, Diana S. Cline Ebron, and  
Jacqueline A. Gilbert, Las Vegas,  
for Appellant.

Akerman LLP and Ariel E. Stern, Melanie D. Morgan, and Brett M.  
Coombs, Las Vegas,  
for Respondent.

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BEFORE THE COURT EN BANC.

OPINION

By the Court, STIGLICH, J.:

This dispute seeks clarification of how the notice provisions of  
NRS 116.31162 apply amidst competing foreclosure sales by a bank and a

homeowner's association. Two days after Silver Springs Homeowner's Association recorded a notice of foreclosure sale, First Horizon Home Loans recorded its own notice of foreclosure sale. First Horizon was the first to hold its foreclosure sale and bought the property on a credit bid. However, before First Horizon recorded its trustee's deed, Silver Springs held its own foreclosure sale, at which SFR Investments purchased the same property. SFR Investments then filed suit against First Horizon to quiet title.

Both parties filed motions for summary judgment. The district court granted First Horizon's motion, finding that Silver Springs' foreclosure sale was invalid because Silver Springs had not provided the statutorily required notices pursuant to NRS 116.31162 and NRS 116.311635. Because NRS 116.31162 requires a homeowner's association ("HOA") foreclosing on its interest to record its notice of foreclosure sale, we conclude that any subsequent buyer purchases the property subject to that notice that a foreclosure may be imminent. Therefore, an HOA need not restart the entire foreclosure process each time the property changes ownership so long as the HOA has provided the required notices to all parties who are entitled. Accordingly, the district court erred in finding Silver Springs' foreclosure sale invalid, and we reverse the resulting entry of summary judgment.

### *BACKGROUND*

The former homeowner in this matter purchased the subject property for approximately \$140,000, having financed the property with a loan from First Horizon Home Loans and executed a deed of trust in favor of First Horizon. The property was part of a planned unit development governed by Silver Springs Homeowner's Association.

In 2011, the homeowner became delinquent on both her mortgage and her HOA dues. Silver Springs tendered a notice of delinquent

assessment lien and on April 20, 2012, recorded a notice of default and election to sell. Silver Springs then recorded a notice of foreclosure sale on February 5, 2013. Both the notice of default and the notice of foreclosure sale were mailed to First Horizon in its capacity as mortgagee. First Horizon does not dispute that it received the notices *in its capacity as mortgagee* and was aware of the delinquent assessments. Nevertheless, on October 30, 2012, First Horizon recorded its own notice of default and election to sell, and on February 7, 2013, two days after Silver Springs recorded its notice of foreclosure sale, First Horizon recorded its own notice of foreclosure sale.

First Horizon completed the foreclosure sale with respect to First Horizon's deed of trust on February 26, 2013. First Horizon purchased the property for a credit bid of \$151,283.09, and recorded the deed on March 7, 2013. One day before First Horizon recorded its deed, Silver Springs conducted the foreclosure sale with respect to its superpriority HOA lien. Appellant SFR Investments Pool 1, LLC, purchased the property for \$7,000, and on March 18, 2013, SFR recorded its deed.

SFR filed suit against First Horizon to quiet title, and both parties moved for summary judgment.<sup>1</sup> The district court granted First Horizon's motion for summary judgment and denied SFR's cross-motion. The district court determined that Silver Springs failed to provide First Horizon, *in its capacity as owner*, with copies of the notice of delinquent assessment, notice of default, and notice of sale, as required by NRS 116.31162 and NRS 116.311635. Furthermore, the district court found that Silver Springs failed to comply with its own CC&Rs, which required the

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<sup>1</sup>SFR filed additional claims not relevant to this opinion.

HOA to provide an owner with 30 days' written notice prior to any foreclosure. Accordingly, the district court deemed Silver Springs' foreclosure sale void and entered summary judgment in favor of First Horizon.

### *DISCUSSION*

We review a district court's grant of summary judgment de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is appropriate when, viewed in the light most favorable to the nonmoving party, the pleadings and other evidence on file demonstrate that there is no genuine issue of material fact, such that the moving party is entitled to judgment as a matter of law. *Id.*

NRS 116.3116 provides HOAs a superpriority lien on up to nine months of unpaid HOA dues. In *SFR Investments Pool 1, LLC v. U.S. Bank, N.A.*, this court concluded that a lien pursuant to NRS 116.3116 is a "true priority lien such that its foreclosure extinguishes a first deed of trust on the property." 130 Nev. 742, 743, 334 P.3d 408, 409 (2014). The primary question presented by this case is whether the foreclosure sale by Silver Springs was valid when First Horizon acquired title to the property at its own foreclosure sale shortly before the HOA sale.

*The HOA foreclosure sale did not violate the notice provisions of NRS Chapter 116*

Prior to foreclosing on a superpriority lien, an HOA is first required to send a homeowner a notice of delinquent assessment by way of registered mail. NRS 116.31162(1)(a). "Not less than 30 days after mailing the notice of delinquent assessment," the HOA must record a "notice of default and election to sell," specifically detailing the amounts owing and warning the property owner that failure to pay could result in the loss of the home. NRS 116.31162(1)(b). At least 90 days after recording the notice

of default and election to sell, the HOA must also publish notice of the time and place of the sale in a newspaper of record, post the notice of sale in a public place, and serve the notice upon “the unit’s owner or his or her successor in interest.” NRS 116.311635(1).

In many respects, this case is factually similar to that addressed in this court’s recent decision: *Shadow Wood Homeowners Ass’n, Inc. v. New York Community Bancorp*, 132 Nev., Adv. Op. 5, 366 P.3d 1105 (2016). In *Shadow Wood*, the bank holding the first deed of trust on a parcel of property foreclosed and acquired the property. *Id.* at 1107. The property was subject to both a superpriority lien by the Shadow Wood HOA and a subpriority lien. *Id.* This court concluded that the bank’s foreclosure of the property eliminated the subpriority portion of Shadow Wood’s lien, but that the bank took the property subject to the superpriority portion of the lien. *Id.* Accordingly, this court found that a subsequent foreclosure sale by Shadow Wood to a third-party purchaser could be valid. *Id.* at 1116.

However, Shadow Wood provided a new notice of delinquent assessment, notice of default and election to sell, and notice of foreclosure sale after the bank acquired the property at the first foreclosure sale. *Id.* at 1108. But, in this case, no new notices were provided after First Horizon acquired the property because Silver Springs had already provided those notices to the previous owner. First Horizon does not dispute that it received the notices *in its capacity as mortgagee* nor does it challenge the sufficiency of the notices to the previous owner. Rather, First Horizon argues that the district court properly determined that the foreclosure sale was void because Silver Springs did not provide First Horizon the required notices *in its capacity as owner*.

The very purpose of recording statutes is to impart notice to a subsequent purchaser. The statutory language of NRS 111.320 is instructive:

Every such conveyance or instrument of writing, acknowledged or proved and certified, and recorded in the manner prescribed in this chapter or in NRS 105.010 to 105.080, inclusive, must from the time of filing the same with the Secretary of State or recorder for record, impart notice to all persons of the contents thereof; and subsequent purchasers and mortgagees shall be deemed to purchase and take with notice.

Considering the purpose of recording statutes, we conclude that a foreclosing party need not start the entire foreclosure process anew each time the subject property transfers ownership. Imposing such a requirement could incentivize the transfer of title to a given property simply in order to avoid a foreclosure sale. Therefore, while a new owner is entitled to statutory notices from a foreclosing entity that had not previously been served, the foreclosing party is not required to re-serve any notices that were properly recorded and served on the previous owner.<sup>2</sup>

*Silver Springs' foreclosure sale did not violate the HOA CC&Rs*

The district court determined that Silver Springs conducted its foreclosure sale in violation of its own HOA guidelines, specifically, section 7.7 of the CC&Rs. Section 7.7 of the CC&Rs for Silver Springs provides:

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<sup>2</sup>First Horizon also complains that the notices had become “meaningless or stale” once First Horizon’s own foreclosure extinguished the subpriority portion of Silver Springs’ lien. This argument is unavailing. First Horizon could have made efforts to determine the remaining (superpriority) amount or paid the entire amount and requested a refund. *See SFR Invs. Pool 1, LLC v. U.S. Bank, N.A.*, 130 Nev. 742, 757, 334 P.3d 408, 418 (2014).

The failure of the Association to send a bill to a Member shall not relieve any member of his liability for any Assessment or charge under this Declaration, but the Assessment Lien therefor shall not be foreclosed as set forth in Section 7.10 below until the Member has been given not less than thirty (30) days written notice prior to such foreclosure that the Assessment or any installation thereof is or will be due and of the amount owing.

Regarding compliance with this section, the district court relied on the deposition testimony of David Alessi, a representative of the agent for Silver Springs. When asked if Silver Springs would have pursued the HOA foreclosure if it was aware that First Horizon had recently foreclosed, Alessi responded that "in general, we would not." He further clarified that Silver Springs "probably would have restarted the collection process *if there had been a trustee's deed recorded into the bank's name.*" (Emphasis added.) The district court failed to note that Silver Springs' foreclosure sale was conducted one day before First Horizon recorded the trustee's deed following its purchase of the property. Alessi's testimony was inapplicable to the circumstances present here because the trustee's deed was not recorded into the bank's name at the time of the HOA foreclosure sale.

First Horizon does not allege that the prior owner was improperly noticed pursuant to either statute or the CC&Rs. When First Horizon purchased the property, it stepped into the shoes of the prior owner.<sup>3</sup> For the same reason that Silver Springs was not statutorily

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<sup>3</sup>We recognize that First Horizon, as successor in interest, did not have a *personal* obligation to pay the previous owner's past due assessments.

required to re-start the foreclosure process once ownership changed, we conclude that the CC&Rs did not require Silver Springs to re-notice or postpone the HOA foreclosure sale.<sup>4</sup>

*Silver Springs' foreclosure sale was not void as commercially unreasonable*

First Horizon offers alternative bases to invalidate Silver Springs' foreclosure sale, but our caselaw regarding similar HOA foreclosures undermines each of the proffered bases. First Horizon contends that Silver Springs' sale for \$7,000 was commercially unreasonable. During the pendency of this appeal, this court unequivocally held that inadequacy of price alone is not sufficient to set aside a foreclosure sale. *See Nationstar Mortg. LLC v. Saticoy Bay LLC Series 2227 Shadow Canyon*, 133 Nev., Adv. Op. 91, 405 P.3d 641, 647-49 (2017) (discussing cases and reaffirming that inadequate price alone is insufficient to set aside a foreclosure sale). To set aside a foreclosure sale, a party must demonstrate some element of fraud, unfairness, or oppression. *Id.*

A grossly inadequate price may require only slight evidence of fraud, unfairness, or oppression to set aside a foreclosure sale, *id.*, and First Horizon argues that \$7,000 should be deemed "grossly inadequate." Before the district court, First Horizon argued that it had not received adequate notice as the new homeowner, that the first foreclosure sale rendered the prior HOA notices "meaningless or stale," and that Alessi's testimony

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<sup>4</sup>The parties submitted arguments regarding SFR's position as a bona fide purchaser, but our determination that Silver Springs' foreclosure sale was valid renders SFR's status as a bona fide purchaser a moot point.

demonstrated that Silver Springs had violated their own policy.<sup>5</sup> In accordance with our foregoing analysis, we reject First Horizon's arguments.

In light of our recent opinion in *Nationstar Mortgage*, and considering that First Horizon had actual and constructive notice of the HOA foreclosure sale while it was pending, we conclude that First Horizon fails to provide sufficient evidence of fraud, unfairness, or oppression.<sup>6</sup> Therefore, we have no basis to conclude that the Silver Springs' foreclosure sale should be set aside.

### CONCLUSION

Based on the foregoing, we hold that a foreclosing party is not required to re-serve any notices that were properly served prior to a transfer of ownership. Furthermore, the district court erred in finding that Silver Springs had violated section 7.7 of the CC&Rs. We conclude there was no basis to invalidate the HOA foreclosure sale. Accordingly, we reverse the entry of summary judgment in this matter, direct the district court to enter

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<sup>5</sup>To the extent First Horizon raises new arguments on appeal to support a finding of "fraud, unfairness, or oppression," we decline to address them in the first instance. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981).

<sup>6</sup>As an alternative basis to uphold the district court order, First Horizon contends that the application of NRS 116.3116 should be preempted in the instant case because the underlying loan by First Horizon was insured through the FHA insurance program. We recently rejected this argument in *Renfro v. Lakeview Loan Servicing, LLC*, 133 Nev., Adv. Op. 50, 398 P.3d 904 (2017).

summary judgment in favor of SFR regarding its quiet title claim, and remand for further proceedings consistent with this opinion.

Stiglich, J.  
Stiglich

We concur:  
Douglas, C.J.  
Douglas

Cherry, J.  
Cherry

Gibbons, J.  
Gibbons

Pickering, J.  
Pickering

Hardesty, J.  
Hardesty

Parraguirre, J.  
Parraguirre

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

LN MANAGEMENT LLC SERIES 440  
SARMENT,  
Appellant,  
vs.  
WELLS FARGO BANK, N.A.,  
Respondent.

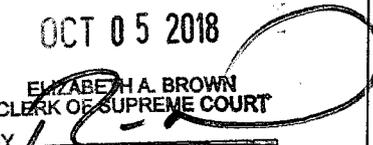
No. 72979

LN MANAGEMENT LLC SERIES 440  
SARMENT,  
Appellant,  
vs.  
WELLS FARGO BANK, N.A.,  
Respondent.

No. 73451

FILED

OCT 05 2018

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY  DEPUTY CLERK

*ORDER OF AFFIRMANCE*

In these consolidated appeals, LN Management LLC Series 440 Sarment appeals from district court orders denying its motion to set aside dismissal in a quiet title action and dismissing its complaint in a subsequent related action. Second Judicial District Court, Washoe County; Lynne K. Simons, Judge.

LN purchased property at an HOA foreclosure sale in 2013. LN then filed a quiet title action against respondent Wells Fargo Bank, N.A., and others. Wells Fargo moved to dismiss LN's suit, arguing that the HOA foreclosure did not eliminate Wells Fargo's deed of trust. The district court granted Wells Fargo's motion to dismiss. No other action occurred until three years later, when LN moved to set aside the dismissal pursuant to

18-902345

NRCP 60.<sup>1</sup> The district court denied the motion, and LN filed an appeal of that decision. LN then filed an independent action to challenge the final order in the quiet title action. Wells Fargo again moved to dismiss the independent action. The district court dismissed the independent action as well, and LN filed its second appeal. Both appeals are now before this court.

In deciding these appeals, we must consider the district court's decisions regarding the application of NRCP 60(b) both by motion and independent action. First, we look at the district court's broad discretion in deciding LN's NRCP 60(b) motion to set aside a judgment. *See Cook v. Cook*, 112 Nev. 179, 181-82, 912 P.2d 264, 265 (1996). The district court's sua sponte order determined that LN was time-barred from raising a challenge pursuant to NRCP 60(b) (1)-(3), and that its order on Wells Fargo's motion was not a final judgment to warrant consideration under NRCP 60(b) (4) or (5). While we agree that LN was time-barred from moving to set aside the order under NRCP 60(b) (1)-(3), the district court's determination regarding the applicability of NRCP 60(b) (4) and (5) to the order is incorrect and inconsistent as the order was final due to all actionable claims being dismissed as recognized in the district court's later order in the independent action.<sup>2</sup> That, however, does not prevent us from affirming the district court's denial of the motion to set aside.

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<sup>1</sup>LN simultaneously sought a preliminary injunction, but any such action would necessarily be dependent on the district court setting aside its order dismissing LN's claims.

<sup>2</sup>LN argues extensively that the district court's order dismissing the original quiet title action was not final. But the subject order ended all litigation involving the parties that had appeared in the action and, thus, was a final appealable judgment pursuant to NRAP 3A(b)(1). *See Rae v. All Am. Life & Cas. Co.*, 95 Nev. 920, 922-23, 605 P.2d 196, 197 (1979).

LN's argument in its motion to set aside the district court's order is based upon NRCP 60(b)(4) which allows for a court to set aside a judgment when the judgment is void. "For a judgment to be void, there must be a defect in the court's authority to enter judgment through either lack of personal jurisdiction or jurisdiction over subject matter in the suit." *Gassett v. Snappy Car Rental*, 111 Nev. 1416, 1419, 906 P.2d 258, 261 (1995), *superseded by rule on other grounds as stated in Fritz Hansen A/S v. Eighth Judicial Dist. Court*, 116 Nev. 650, 6 P.3d 982 (2000). But the record and appellate argument do not include any challenge by LN to the district court's jurisdiction over it or the subject matter. As such, we affirm the district court's denial of the motion to set aside the judgment in the first matter. *See Saavedra-Sandoval v. Wal-Mart Stores, Inc.*, 126 Nev. 592, 599, 245 P.3d 1198, 1202 (2010) ("This court will affirm a district court's order if the district court reached the correct result, even if for the wrong reason.").

In the second matter, we first note that a party may seek to vacate a judgment by motion or by bringing an independent action, but not both. *See NC-DSH, Inc. v. Garner*, 125 Nev. 647, 652-53, 218 P.3d 853, 857-58 (2009) (citing 11 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2868 (2d ed. 1995) (noting that "[d]enial of relief [by motion] in th[e rendering] court will bar an independent equitable action in another court, unless the denial was on a ground that precluded reaching the merits of the motion, or the circumstances have changed")). Regardless, in reviewing the district court's order granting Wells Fargo's motion to dismiss the independent action *de novo*, *see Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008), we determine that the district court properly dismissed the independent action.

Accepting all of the alleged facts in the complaint as true, LN's independent action fails to present facts that warrant the extraordinary remedy of setting aside the district court's prior order. *See id.* at 228, 181 P.3d at 672. Specifically, "[t]o obtain relief by independent action after a judgment has become final and otherwise unreviewable, a claimant must meet the traditional requirements of such an equitable action." *Bonnell v. Lawrence*, 128 Nev. 394, 399, 282 P.3d 712, 715 (2012). The elements of such an action are lacking in LN's independent action complaint as it does not present a defense on the merits to the judgment lost to LN without attribution to LN by its own omission, neglect, or default. *See id.* at 399 n.4, 282 P.3d at 715 n.4 (setting forth the elements for an equitable action to set aside a final judgment). LN fails to allege any facts that explain the three year delay in seeking to set aside the prior judgment, a required showing for a defense on the merits to the judgment not lost by LN's own action or inaction. *See id.* at 399, 282 P.3d at 715. As such, the complaint lacks the necessary elements to set forth any "set of facts, which, if true, would entitle [the claimant] to relief." *Buzz Stew*, 124 Nev. at 228, 181 P.3d at 672.

Accordingly, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, C.J.  
Silver

  
\_\_\_\_\_, J.  
Tao

  
\_\_\_\_\_, J.  
Gibbons

cc: Hon. Lynne K. Simons, District Judge  
Kerry P. Faughnan  
Snell & Wilmer, LLP/Las Vegas  
Washoe District Court Clerk

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

PIONEER AVE 201 TRUST,  
Appellant,  
vs.  
THE BANK OF NEW YORK MELLON  
F/K/A THE BANK OF NEW YORK, A  
NATIONAL ASSOCIATION; AND  
SEASIDE TRUSTEE, INC., A NEVADA  
CORPORATION,  
Respondents.

No. 73134

**FILED**

AUG 30 2018

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

*ORDER OF REVERSAL AND REMAND*

Pioneer Ave 201 Trust appeals from a district court summary judgment in a quiet title action. Eighth Judicial District Court, Clark County; J. Charles Thompson, Senior Judge.

Pioneer purchased property as a homeowners' association (HOA) foreclosure sale conducted pursuant to NRS Chapter 116. Respondent The Bank of New York Mellon (BNYM) held a first deed of trust on the property. Pioneer filed suit against BNYM to establish that Pioneer now held the property free and clear of any encumbrances such as BNYM's deed of trust. The parties filed competing motions for summary judgment. The district court granted partial summary judgment in favor of BNYM, finding that the HOA did not comply with the notice requirements in NRS Chapter 116 and, therefore, the HOA sale was defective and did not extinguish BNYM's deed of trust. This appeal followed.

This court reviews a district court's order granting summary judgment de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is proper if the pleadings and all other evidence on file demonstrate that no genuine issue of material fact exists

and that the moving party is entitled to judgment as a matter of law. *Id.* When deciding a summary judgment motion, all evidence must be viewed in a light most favorable to the nonmoving party. *Id.* General allegations and conclusory statements do not create genuine issues of fact. *Id.* at 731, 121 P.3d at 1030-31.

The single basis upon which the district court granted summary judgment here is that BNYM did not receive the notice of default pursuant to NRS 116.31163 and NRS 107.090. To determine sufficient notice pursuant to statute, the Nevada Supreme Court has said, “we examine whether the purpose of the statute or rule can be adequately served in a manner other than by technical compliance with the statutory or rule language.” *Schleining v. Cap One, Inc.*, 130 Nev. 323, 329, 326 P.3d 4, 8 (2014) (internal quotation marks omitted). In the context of notice requirements, this court, like the supreme court, therefore applies substantial compliance. *See id.* at 329-30, 326 P.3d at 8 (determining that, under NRS 107.095, the purpose of notifying interested parties in a party’s default is met by substantial compliance).

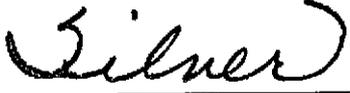
Substantial compliance requires that the interest holder has actual knowledge and is not prejudiced. *See id.* at 330, 326 P.3d at 8; *see also Hardy Cos. v. SNMARK, LLC*, 126 Nev. 528, 536, 245 P.3d 1149, 1155 (2010) (discussing notice requirements for mechanic’s liens); *In re Estate of Ivester*, 812 P.2d 1141, 1145 (Ariz. Ct. App. 1991) (concluding in the context of an estate settlement that “[t]he general rule is that one having actual notice is not prejudiced by and may not complain of the failure to receive statutory notice”). The district court’s order here did not adequately address substantial compliance. It failed to determine whether genuine issues of material fact exist as to respondent’s actual knowledge of the

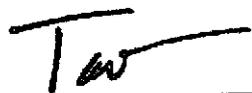
default and as to whether respondent was prejudiced by a lack of statutory notice (*i.e.*, that respondent's failure to save the property from foreclosure was a result of the lack of statutory notice). Without this analysis, summary judgment was improper.

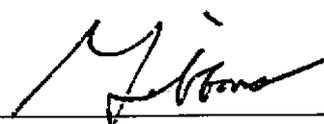
Moreover, the parties have both sought to resolve competing claims to the subject property via the equitable claim of quiet title. *See Shadow Wood Homeowners' Ass'n v. N.Y. Cmty. Bancorp, Inc.*, 132 Nev. 49, 58, 366 P.3d 1105, 1111 (2016). Sitting in equity requires the district court to consider the entirety of the circumstances that bear upon the equities. *See id.* at 63, 366 P.3d at 1114. And here, the district court failed to address whether Pioneer had any knowledge of the HOA's alleged non-compliance with the statutory notice provisions such that the equitable result of the district court's order was warranted. *See id.* at 64-66, 366 P.3d at 1115-16. Under the circumstances, it is unclear whether BNYM was entitled to the equitable relief granted. *See id.*

In light of the foregoing, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.

  
\_\_\_\_\_, C.J.  
Silver

  
\_\_\_\_\_, J.  
Tao

  
\_\_\_\_\_, J.  
Gibbons

cc: Chief Judge Linda Marie Bell, Eighth Judicial District Court  
Hon. J. Charles Thompson, Senior Judge  
Allison R. Schmidt, Esq, LLC  
Ayon Law, PLLC  
Wright, Finlay & Zak, LLP/Las Vegas  
Eighth District Court Clerk

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

BRIAN E. CODY,  
Appellant,  
vs.  
WILMINGTON SAVINGS FUND  
SOCIETY, FSB, D/B/A CHRISTIANA  
TRUST, NOT IN ITS INDIVIDUAL  
CAPACITY, BUT SOLELY AS  
TRUSTEE FOR BCAT 2015-14BTT,  
Respondent.

No. 72603

**FILED**

AUG 27 2018

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

*ORDER OF AFFIRMANCE*

Brian E. Cody appeals from a district court order denying a petition for judicial review in a foreclosure mediation matter. Eighth Judicial District Court, Clark County; Kathleen E. Delaney, Judge.

After defaulting on his home loan, Cody elected to participate in Nevada's Foreclosure Mediation Program (FMP) with respondent Bank of Wilmington Savings Fund Society, FSB, D/B/A Christiana Trust, which participated in the mediation through its servicer. While the mediation was unsuccessful, the mediator found that Wilmington complied with the requirements set forth in NRS 107.086(5)<sup>1</sup> and FMR 13(7),<sup>2</sup> and, as a result, the FMP administrator recommended that a foreclosure certificate issue.

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<sup>1</sup>NRS 107.086 was amended effective June 12, 2017, 2017 Nev. Stat. ch. 571, § 2, at 4091-96, but that amendment does not affect the disposition of this appeal, as it was enacted after the underlying mediation.

<sup>2</sup>The FMRs became effective on June 30, 2009, and have been amended and renumbered numerous times since. For clarity, the citations in the text are to the FMRs that went into effect on January 13, 2016, and were the FMRs in effect at the time the underlying mediation occurred.

*See Leyva v. Nat'l Default Servicing Corp.*, 127 Nev. 470, 475-76, 255 P.3d 1275, 1278-79 (2011) (explaining that compliance with the rules set forth in NRS 107.086(5) and the FMRs is a predicate to the issuance of a foreclosure certificate).

Cody then petitioned for judicial review alleging, as relevant here, that he previously accepted a loan modification from Wilmington's predecessor in interest, that Wilmington refused to acknowledge that modification at the mediation, that Wilmington presented an incorrect loan balance at the mediation, and that Wilmington therefore did not participate in the mediation in good faith. Wilmington opposed Cody's petition on both grounds. Following supplemental briefing and two hearings on the matter, the district court denied Cody's petition, concluding that his allegations were outside the scope of a petition for judicial review and lacking in evidentiary support. This appeal followed.

On appeal, Cody challenges the denial of his petition for judicial review, arguing that the district court should have conducted an evidentiary hearing with regard to his loan balance and that the court mistakenly focused on whether he accepted a loan modification rather than determining whether Wilmington was adequately apprised of the status of his loan at the time of the mediation. But one of the district court's alternate bases for denying Cody's petition was that his allegations surrounding the loan balance and loan modification were outside the scope of a petition for judicial review. *See* FMR 23(2) (setting forth the scope of a petition for judicial review in an FMP matter). And Cody does not argue that the

district court's decision in this regard was erroneous.<sup>3</sup> See *Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) (providing that arguments not raised on appeal are deemed waived); see also *Edelstein v. Bank of N.Y. Mellon*, 128 Nev. 505, 521-22, 286 P.3d 249, 260 (2012) (reviewing legal questions de novo). Consequently, Cody failed to demonstrate that the district court abused its discretion in denying his petition for judicial review. See *Leyva*, 127 Nev. at 480, 255 P.3d at 1281 (reviewing the denial of a petition for judicial review in an FMP matter for an abuse of discretion). Accordingly, we

ORDER the judgment of the district court AFFIRMED.<sup>4</sup>

 \_\_\_\_\_, C.J.

Silver

 \_\_\_\_\_, J.  
Tao

 \_\_\_\_\_, J.  
Gibbons

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<sup>3</sup>Insofar as Cody contends that the district court could consider whether Wilmington was adequately apprised of the status of his loan, we decline to consider that contention as it is unsupported by cogent argument or relevant legal authority. See *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (declining to consider issues that are not supported by cogent argument or relevant legal authority).

<sup>4</sup>Given our disposition of this appeal, we need not consider Cody's remaining arguments.

cc: Hon. Kathleen E. Delaney, District Judge  
Janet Trost, Settlement Judge  
Brian E. Cody  
Wright, Finlay & Zak, LLP/Las Vegas  
Eighth District Court Clerk

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ARGO NEVADA, LLC, A NEVADA  
LIMITED LIABILITY COMPANY,  
Appellant,  
vs.  
BAYVIEW LOAN SERVICING, LLC, A  
DELAWARE LIMITED LIABILITY  
COMPANY,  
Respondent.

No. 71215

**FILED**

AUG 27 2018

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

*ORDER OF AFFIRMANCE*

Argo Nevada, LLC, appeals from a district court order granting a motion to dismiss for failure to state a claim in a real property action. Eighth Judicial District Court, Clark County; Stefany Miley, Judge.

Argo purchased property subject to a first deed of trust at a bankruptcy trustee sale. Respondent Bayview Loan Servicing, LLC, was the loan servicer for the deed of trust beneficiary. When the deed of trust owner sought to foreclose its interest on the subject property, Argo sued for declaratory relief, injunctive relief, and unjust enrichment. Argo later amended its complaint to name Bayview, as the loan servicer to the deed of trust beneficiary. Bayview filed a motion to dismiss the amended complaint which the district court granted. This appeal followed.

An order granting an NRCP 12(b)(5) motion to dismiss is reviewed de novo. *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008). A decision to dismiss a complaint under

NRCP 12(b)(5) is rigorously reviewed on appeal with all alleged facts in the complaint presumed true and all inferences drawn in favor of the complaint. *Id.* Dismissing a complaint is appropriate “only if it appears beyond a doubt that [the plaintiff] could prove no set of facts, which, if true, would entitle [the plaintiff] to relief.” *Id.* at 228, 181 P.3d at 672. All legal conclusions are reviewed de novo. *Id.*

Our review of the record supports the district court’s decision dismissing Argo’s complaint against Bayview. *Id.* at 227-28, 181 P.3d at 672. Argo’s complaint sought to enjoin Bayview from completing a foreclosure of the property Argo claimed an interest in that was subject to Bayview’s first deed of trust. Bayview, however, argues that Argo failed to timely record its interest in the subject property pursuant to an order from the bankruptcy court, rendering Argo’s interest void.<sup>1</sup> We agree with the

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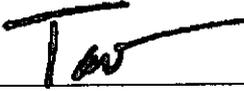
<sup>1</sup>Argo argues that it was improper for the district court to consider the bankruptcy order or other documents outside the complaint. *See* NRCP 12(b)(5) (restricting motions to dismiss for failure to state a claim to matters presented in the complaint). But Argo attached the bankruptcy order to the complaint, thereby incorporating it into the complaint. *See Breliant v. Preferred Equities Corp.*, 109 Nev. 842, 847, 858 P.2d 1258, 1261 (1993) (noting a court may take into account any exhibits attached to the complaint when ruling on a motion to dismiss for failure to state a claim upon which relief can be granted). And the district court order at issue in this case only references the bankruptcy order. As such, there is no reason to treat this decision under the NRCP 56 standard and require the order to set forth undisputed material facts and legal determinations on which the court ruled. *See* NRCP 56(c).

district court that failure to comply with the recording requirements eliminated Argo's interest in the subject property.<sup>2</sup> As such, the claims raised by Argo must fail. *Id.* at 228, 181 P.3d at 672.

Accordingly, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, C.J.  
Silver

  
\_\_\_\_\_, J.  
Tao

  
\_\_\_\_\_, J.  
Gibbons

cc: Hon. Stefany Miley, District Judge  
Janet Trost, Settlement Judge  
Akerman LLP/Las Vegas  
Argo Nevada, LLC  
Eighth District Court Clerk

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<sup>2</sup>We determine that the district court had jurisdiction to consider the effects of the bankruptcy order in the suit Argo commenced in the district court. *See Hinduja v. Arco Products Co.*, 102 F.3d 987, 989-90 (9th Cir. 1996) (noting that "the mere fact that a bankruptcy decree has issued" does not mean that only the bankruptcy court controls all further proceedings).

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JACK FERM,  
Appellant,  
vs.  
THE STATE OF NEVADA, OFFICE OF  
THE ATTORNEY GENERAL,  
Respondent.

No. 72753

**FILED**

JUL 13 2018

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

*ORDER OF AFFIRMANCE*

Jack Ferm appeals from a district court order dismissing his amended complaint. Eighth Judicial District Court, Clark County; Nancy L. Alf, Judge.

Ferm filed an amended complaint against respondent, the State of Nevada, Office of the Attorney General, for, among other things, breach of contract and breach of the covenant of good faith and fair dealing. The claims arise out of allegations that the Attorney General's office falsely identified Ferm as a person convicted of a felony in relation to mortgage fraud to a media researcher. Ferm alleged this communication was a breach of contract where the plea agreement he entered into with the Attorney General's office provided that he was pleading nolo contendere to a felony, but that adjudication would be held in abeyance while he paid \$192,168.00 in restitution and that, if he paid restitution, the State would allow him, with court approval, to withdraw his plea and enter a plea of guilty to a gross misdemeanor. He further alleged that this was a breach of the covenant of good faith and fair dealing because the Attorney General's office provided the media with false information for publication on the internet, knowing it was untrue, and for the purpose of creating an atmosphere

where Ferm would not be able to pay restitution and would thereafter be convicted of a felony. The Attorney General's office filed a motion to dismiss, which was granted over Ferm's opposition. This appeal followed.<sup>1</sup>

An order granting an NRCP 12(b)(5) motion to dismiss is reviewed de novo. *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008); see also *Alcantara v. Wal-Mart Stores, Inc.*, 130 Nev. 252, 256, 321 P.3d 912, 914 (2014). A decision to dismiss a complaint under NRCP 12(b)(5) is rigorously reviewed on appeal with all alleged facts in the complaint presumed true and all inferences drawn in favor of the plaintiff. *Buzz Stew*, 124 Nev. at 227-28, 181 P.3d at 672. Dismissing a complaint is appropriate "only if it appears beyond a doubt that [the plaintiff] could prove no set of facts, which, if true, would entitle [the plaintiff] to relief." *Id.* at 228, 181 P.3d at 672. While the court generally may not consider matters outside of the complaint when ruling on a motion to dismiss for failure to state a claim, it can take into account any exhibits attached to the complaint. *Breliant v. Preferred Equities Corp.*, 109 Nev. 842, 847, 858 P.2d 1258, 1261 (1993).

A breach of contract arises when there is a "material failure to perform a duty arising under or imposed by agreement." *State Dep't of Transp. v. Eighth Judicial Dist. Court*, 133 Nev. \_\_\_, \_\_\_, 402 P.3d 677, 682 (2017) (internal quotation marks omitted). A contract will be enforced as written. *Id.* Courts cannot "interpolate in a contract what the contract does

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<sup>1</sup>Ferm's amended complaint contained numerous causes of action, all of which were dismissed; however, on appeal Ferm only challenges the dismissal of his breach of contract and breach of the covenant of good faith and fair dealing claims and therefore, this order only addresses those claims.

not contain.” *Id.* Here, even assuming Ferm could bring a civil action for money damages arising out of an alleged breach of a criminal plea agreement,<sup>2</sup> his claim fails as a matter of law. Ferm failed to identify any duty imposed by the plea agreement which the Attorney General’s office breached. Contrary to Ferm’s arguments on appeal, the Attorney General’s office’s communication with the media did not work to adjudicate his plea. Further, the plea agreement, which was attached to Ferm’s amended complaint, does not contain a non-disclosure provision and Ferm does not allege that it does. Because Ferm failed to identify a promise that was breached by the Attorney General’s office, he failed to state a claim for breach of contract and dismissal was proper. *See id.*; *Buzz Stew*, 124 Nev. at 228, 181 P.3d at 672.

Similarly, because the plea agreement did not contain a non-disclosure provision, the Attorney General’s office did not breach the covenant of good faith and fair dealing by communicating with the media regarding Ferm. The covenant of good faith and fair dealing requires each party to act in a manner that is faithful “to the purpose of the contract and the justified expectations of the other party.” *Hilton Hotels Corp. v. Butch Lewis Prods., Inc.*, 107 Nev. 226, 234, 808 P.2d 919, 923 (1991). While the covenant of good faith and fair dealing can be breached even if the terms of the contract are literally complied with, *see id.* at 232, 808 P.2d at 922-23, the covenant “cannot be extended to create obligations not contemplated by the contract.” *Pasadena Live, LLC v. City of Pasadena*, 8 Cal. Rptr. 3d 233, 237 (Ct. App. 2004) (internal quotation marks omitted). The plea

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<sup>2</sup>Because Ferm’s claims otherwise fail, we need not address and therefore make no comment on the propriety of a civil damages suit relating to an alleged breach of a criminal plea agreement.

agreement did not require the Attorney General's office to refrain from disclosing information regarding Ferm or his plea agreement and to impose such a requirement would contradict the terms of the agreement. Therefore, Ferm had no justified expectation that the Attorney General's office would refrain from engaging in the communication at issue here. See *Hilton Hotels*, 107 Nev. at 234, 808 P.2d at 923. Thus, his claim fails as a matter of law and dismissal was proper. See *Buzz Stew*, 124 Nev. at 228, 181 P.3d at 672.

Accordingly, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, C.J.  
Silver

  
\_\_\_\_\_, J.  
Tao

  
\_\_\_\_\_, J.  
Gibbons

cc: Hon. Nancy L. Allf, District Judge  
Jack Ferm  
Attorney General/Carson City  
Attorney General/Las Vegas  
Eighth District Court Clerk

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

TRACY LEE CASTL,  
Appellant,  
vs.  
PENNYMAC HOLDINGS, LLC,  
Respondent.

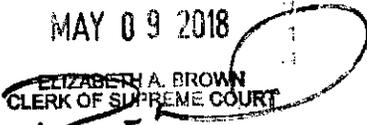
No. 71082

TRACY LEE CASTL,  
Appellant,  
vs.  
PENNYMAC HOLDINGS, LLC,  
Respondent.

No. 71990

FILED

MAY 09 2018

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY  DEPUTY CLERK

*ORDER OF AFFIRMANCE (DOCKET NO. 71082) AND AFFIRMING IN PART, REVERSING IN PART AND REMANDING (DOCKET NO. 71990)*

Tracy Lee Castl appeals from district court orders denying her petition for judicial review in a foreclosure mediation matter and dismissing her complaint in a real property and torts action. These appeals are consolidated. Eighth Judicial District Court, Clark County; Kathleen E. Delaney and Michelle Leavitt, Judges.

When she purchased her home, Castl executed a deed of trust naming Washington Mutual Bank, F.A. (WaMu), as the beneficiary. Castl eventually defaulted on her loan and elected to participate in Nevada's Foreclosure Mediation Program (FMP). PennyMac Holdings, LLC, appeared at the mediation and, to establish that it was the beneficiary, produced an assignment of the deed of trust from the Federal Deposit Insurance Corporation (FDIC), as receiver for WaMu, to JPMorgan Chase

Bank, N.A. (Chase), and another assignment from Chase to PennyMac. After the mediation ended unsuccessfully, the mediator found that PennyMac complied with the FMP's requirements, and the FMP administrator recommended that a foreclosure certificate issue.

Castl then petitioned for judicial review, arguing, among other things, that PennyMac failed to produce a necessary assignment of the deed of trust and that PennyMac produced a note on which her signature was forged. PennyMac opposed Castl's petition on both grounds. After the resulting hearing, the district court summarily found that PennyMac satisfied all of the FMP's requirements and, as a result, it denied Castl's petition. That decision is the subject of the appeal in Docket No. 71082.

Castl later brought an independent action against PennyMac, asserting claims for trespass, quiet title, and declaratory and injunctive relief. For support, Castl alleged that PennyMac unlawfully entered her property, that it presented the forged note referenced above at the mediation, and that the statute of limitations barred it from foreclosing on her property. PennyMac moved to dismiss Castl's complaint under NRCP 12(b)(5), asserting that she failed to state a claim for relief for assorted reasons, and Castl opposed that motion. Following a hearing on the matter, the district court entered a written order summarily dismissing Castl's complaint. That decision gave rise to the appeal in Docket No. 71990.

*Docket No. 71082*

On appeal, Castl argues that an assignment from WaMu to the FDIC was missing, *see* NRS 107.086(5)<sup>1</sup> (requiring the beneficiary to produce each assignment at the mediation); FMR 12(7)(a)<sup>2</sup> (mandating the same at least 10 days before the mediation), while PennyMac counters that no such assignment was needed because the FDIC was the receiver for WaMu. Castl does not dispute that the FDIC was appointed as WaMu's receiver. And under federal law, when the FDIC became WaMu's receiver, it acquired "all rights, titles, powers, and privileges" with respect to WaMu's assets along with the power to transfer them "without any approval, assignment, or consent." 12 U.S.C. 1821(d)(2)(A), (G)(i). Thus, no written assignment was necessary for the FDIC to effect a transfer of WaMu's beneficial interest in the deed of trust to Chase notwithstanding state law.<sup>3</sup> *See Demelo v. U.S. Bank Nat'l Ass'n*, 727 F.3d 117, 125 (1st Cir. 2013)

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<sup>1</sup>NRS 107.086 was amended effective June 12, 2017, 2017 Nev. Stat., ch. 571, § 2, at 4091-96, but those amendments do not affect the disposition of this appeal, as they were enacted after the underlying mediation.

<sup>2</sup>The FMRs became effective on June 30, 2009, and have been amended and renumbered numerous times since. For clarity, the citations in the text are to the FMRs that went into effect on April 1, 2014, and were the FMRs in effect at the time the underlying mediation occurred.

<sup>3</sup>Insofar as Castl asserts that WaMu may have assigned her deed of trust to a third-party before the FDIC became its receiver, we discern no basis for relief, as Castl has not identified any documentation to indicate that such an assignment occurred. To the contrary, Castl produced a report from the Clark County Recorder's office, which reflects that WaMu was the beneficiary when it went into receivership with the FDIC.

(applying 12 U.S.C. § 1821(d)(2)(G)(i) and reasoning that “a transfer of a mortgage, authorized by federal law, obviates the need for the specific written assignment that state law would otherwise require”).

Castl next argues that, in denying her petition, the district court improperly failed to address whether her signature was forged on the note that PennyMac produced at the mediation.<sup>4</sup> Initially, the district court’s written order is unclear as to how it handled the forgery issue, but a review of the transcript from the hearing on Castl’s petition reflects that the court determined that the matter was outside the scope of a petition for judicial review. *See Pease v. Taylor*, 86 Nev. 195, 197, 467 P.2d 109, 110 (1970) (explaining that “even in the absence of express findings, if the record is clear and will support the judgment, findings may be implied”). The propriety of that decision is called into question by *Wood v. Germann*, 130 Nev. 553, 555 n.3, 331 P.3d 859, 860 n.3 (2014), where the supreme court explained that certain unspecified challenges to the veracity of a lender’s loan documents can fall within the scope of a petition for judicial review since those challenges can implicate the lender’s authority to foreclose.

But PennyMac argues that the district court’s decision was proper under the more recent case of *Nationstar Mortg., LLC v. Rodriguez*,

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<sup>4</sup>Castl also asserts that PennyMac failed to produce an original or certified copy of the note at the mediation. But the mediator and district court both found that PennyMac complied with the FMP’s document production requirements and, consistent with those findings, our review of the record reveals a copy of the note along with the necessary information to certify that document as a copy of the original. *See* NRS 107.086(5); FMR 12(7)(a); *see also* FMR 12(8) (setting forth the requirements to certify a document as a copy of an original for purposes of the FMRs).

132 Nev. \_\_\_, \_\_\_ n.2, 375 P.3d 1027, 1029 n.2 (2016), where the supreme court, in addressing a fraud allegation, explained that “[a] petition for judicial review is not meant as an avenue to bring original claims.” And while Castl argued in her reply brief that PennyMac had an affirmative duty to establish its authority to negotiate a loan under *Leyva v. Nat’l Default Servicing Corp.*, 127 Nev. 470, 255 P.3d 1275 (2011), she failed to address PennyMac’s assertion with regard to *Nationstar* and thereby waived any challenge to the applicability of that case. *See Colton v. Murphy*, 71 Nev. 71, 72, 279 P.2d 1036, 1036 (1955) (concluding that when respondents’ argument was not addressed in appellants’ opening brief, and appellants declined to address the argument in a reply brief, “such lack of challenge cannot be regarded as unwitting and in our view constitutes a clear concession by appellants that there is merit in respondents’ position”).

Given the foregoing, Castl failed to demonstrate that the district court abused its discretion in refusing to hold an evidentiary hearing on the issues discussed above and in denying her petition for judicial review. *See FMR 22(2)* (providing the district court with discretion to determine the extent to which an evidentiary hearing is warranted); *see also Leyva*, 127 Nev. at 480, 255 P.3d at 1281 (reviewing the denial of a petition for judicial review in an FMP matter for an abuse of discretion). Accordingly, we affirm the district court’s decision in Docket No. 71082.

*Docket No. 71990*

Turning to the appeal in Docket No. 71990, Castl asserts that the district court dismissed her complaint, under the issue-preclusion doctrine, based on the order denying her petition in the FMP matter. Although the district court’s written order did not include findings in

support of dismissal, the associated transcript strongly suggests that the court dismissed the case on issue-preclusion grounds, and PennyMac effectively conceded as much by failing to dispute Castl's characterization of the court's decision. *See Bates v. Chronister*, 100 Nev. 675, 682, 691 P.2d 865, 870 (1984) (concluding that respondents confessed error by failing to respond to appellant's argument). Accordingly, we proceed to consider the propriety of the district court's application of the issue preclusion doctrine.

As to that matter, Castl asserts that the district court erred in relying on issue preclusion to dismiss each of her claims on the ground that the statute of limitations, trespass, and forgery issues were not actually and necessarily litigated in the FMP matter. *See Alcantara v. Wal-Mart Stores, Inc.*, 130 Nev. 252, 256, 321 P.3d 912, 914 (2014) (reviewing a district court's dismissal of a complaint on issue-preclusion grounds de novo); *see also Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 1055, 194 P.3d 709, 713 (2008) (explaining that an issue must be actually and necessarily litigated in the first proceeding to be barred by the issue-preclusion doctrine in the second proceeding). Initially, because PennyMac does not dispute that the statute of limitations and trespass issues were not actually and necessarily litigated in the FMP matter, it effectively conceded that the district court erred in dismissing Castl's associated claims on issue preclusion grounds. *See Bates*, 100 Nev. at 682, 691 P.2d at 870.

With regard to forgery, however, PennyMac argues that the district court in the present matter properly applied the issue-preclusion doctrine on the ground that the district court in the FMP matter found that Castl signed the note even though it also concluded that her forgery allegation was beyond the scope of a petition for judicial review. But

nothing in the record from the FMP matter indicates that the district court there found that Castl signed the subject note despite concluding that it could not consider her allegations that she did not do so. Accordingly, we conclude that the district court in the present matter erred in relying on the issue-preclusion doctrine to dismiss Castl's forgery-based claims.

Lastly, PennyMac effectively turns to the harmless-error doctrine, *see* NRCP 61 (requiring the court, at every stage of a proceeding, to disregard errors that do not affect a party's substantial rights), arguing that dismissal was necessary as to the trespass and statute of limitations based claims on the merits. Turning first to trespass, while PennyMac asserts that dismissal was required because Castl authorized it to make certain reasonable entries, resolution of that issue requires factual findings as to reasonableness, which this court is "not particularly well-suited to make . . . in the first instance." *See Ryan's Express Transp. Servs., Inc. v. Amador Stage Lines, Inc.*, 128 Nev. 289, 299, 279 P.3d 166, 172 (2012).

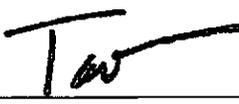
As to the statute of limitations issue, PennyMac argues that dismissal of Castl's associated claims was proper because they were based on her assertion that foreclosure was barred by the limitations period set forth in NRS 11.190(1)(b), which PennyMac maintains does not apply to nonjudicial foreclosures. In this regard, despite Castl's appellate contentions to the contrary, NRS 11.190(1)(b)'s limitations period does not prevent PennyMac from pursuing a nonjudicial foreclosure, even if that statute otherwise prevents PennyMac from asserting a breach of contract claim based on the note. *See Facklam v. HSBC Bank USA*, 133 Nev. \_\_\_, \_\_\_, 401 P.3d 1068, 1071 (2017) (holding that "a lender may recover on a deed of trust even after the statute of limitations for contractual remedies

on the note has passed"). Accordingly, we conclude that, although the district court erred in dismissing Castl's statute of limitations based claims on preclusion grounds, that error was harmless. See NRCP 61.

Thus, in Docket No. 71990, we affirm the dismissal of Castl's statute of limitations based claims, but reverse and remand the dismissal of her trespass and forgery-based claims.<sup>5</sup>

It is so ORDERED.<sup>6</sup>

  
\_\_\_\_\_, C.J.  
Silver

  
\_\_\_\_\_, J.  
Tao

  
\_\_\_\_\_, J.  
Gibbons

cc: Hon. Kathleen E. Delaney, District Judge  
Hon. Michelle Leavitt, District Judge  
Tracy Lee Castl  
Hafter Law  
Akerman LLP/Las Vegas  
Eighth District Court Clerk

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<sup>5</sup>Given our disposition of this matter, we need not address the parties' remaining arguments.

<sup>6</sup>We note that Castl's attorney of record, Jacob Hafter, was suspended in 2017 and later passed away. Consequently, we direct counsel for PennyMac to ascertain, to the best of their ability, an appropriate address for service of documents on Castl and to serve her with a copy of this order within 10 days of its entry. Counsel for PennyMac shall then file proof of service of the order with this court within 10 days of the date of service. If counsel for PennyMac cannot ascertain an appropriate service address for Castl, counsel shall notify this court within that same period.

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

WELLS FARGO BANK, N.A., AS  
AGENT,  
Appellant,

vs.

BRADLEY J. MOORE II; AND  
CHARITA PANGELIAN-MOORE,  
INDIVIDUALS,  
Respondents.

No. 70844

**FILED**

DEC 18 2017

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

*ORDER OF AFFIRMANCE*

Wells Fargo Bank, N.A., appeals from a district court order granting a petition for judicial review in a foreclosure mediation matter. Eighth Judicial District Court, Clark County; Kathleen E. Delaney, Judge.

Wells Fargo participated in Nevada's Foreclosure Mediation Program (FMP) with respondents Bradley J. Moore II and Charita Pangelian-Moore. During the mediation, Wells Fargo produced a copy of respondents' deed of trust, which it obtained from the county recorder's office. That document included a certification by the county recorder indicating that it was a true and correct copy of the recorded deed of trust. When the mediation later ended unsuccessfully, the mediator found that Wells Fargo had satisfied all of the FMP's requirements, including those set

forth in NRS 107.086(5)<sup>1</sup> and FMR 13(7)(a),<sup>2</sup> which both required it to produce an “original or a certified copy of the deed of trust.” As a result, the FMP administrator recommended that a foreclosure certificate issue.

The Moores then petitioned for judicial review, arguing that Wells Fargo did not produce a certified copy of the deed of trust for purposes of NRS 107.086(5) and FMR 13(7)(a) because it failed to certify that it was in possession of the original document in accordance with FMR 13(8)(a)(2). Wells Fargo in turn filed an answer to the petition, asserting, among other things, that it satisfied its document production requirement, as set forth in NRS 107.086(5) and FMR 13(7)(a), by producing the copy of the deed of trust from the county recorder’s office. The district court disagreed with Wells Fargo, however, finding that it failed to certify that it was in possession of the original deed of trust as required by FMR 13(8)(a)(2) and that it therefore did not produce a certified copy of the deed of trust for purposes of NRS 107.086(5) and FMR 13(7)(a). And because Wells Fargo did not otherwise produce an original copy of the deed of trust, the district court granted the Moore’s petition. This appeal followed.

Initially, to the extent Wells Fargo challenges the order granting the Moore’s petition on the ground that NRS 107.086(5) did not require it to certify that it was in possession of the original deed of trust, its

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<sup>1</sup>NRS 107.086 was amended effective June 12, 2017, 2017 Nev. Stat., ch. 571, § 2, at 4091-96, but those amendments do not affect the disposition of this appeal, as they were enacted after the underlying mediation occurred.

<sup>2</sup>The FMRs became effective on June 30, 2009, and have been amended and renumbered numerous times since. For clarity, the citations in the text are to the FMRs that went into effect on January 13, 2016, and were the FMRs in effect at the time the underlying mediation occurred.

argument fails. In particular, while NRS 107.086(5) provides that, where the beneficiary does not produce the original deed of trust, it must produce a certified copy, the statute does not explain what a party must do to certify a copy of this document. But the supreme court adopted the FMRs to implement that statute. See NRS 2.120(2) (recognizing the supreme court's inherent authority to adopt procedural rules); see also FMR 1(2) (explaining that the purpose of the FMRs "is to provide for the orderly, timely, and cost-effective mediation of owner-occupied residential foreclosures"). And as relevant here, FMR 13(8)(a)(2) provides that, when the beneficiary produces certified copies to satisfy the FMP's document production requirement, it must provide "[a] statement under oath signed before a notary public" attesting that the originals are in its possession.<sup>3</sup> Thus, to demonstrate that reversal is warranted, Wells Fargo must establish that the district court erred in concluding that it failed to comply with FMR 13(8)(a)(2). See *Edelstein v. Bank of N.Y. Mellon*, 128 Nev. 505, 521-22, 286 P.3d 249, 260 (2012) (reviewing legal questions de novo).

In this regard, Wells Fargo asserts that, under *Einhorn v. BAC Home Loans Servicing, LP*, 128 Nev. 689, 290 P.3d 249 (2012), it satisfied FMR 13(8)(a)(2), and, by extension, NRS 107.086(5), by producing a copy of

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<sup>3</sup>Citing NRS 2.120(2), which recognizes that procedural rules adopted by the supreme court cannot "abridge, enlarge or modify any substantive right" or otherwise offend the Nevada constitution, Wells Fargo contends that the supreme court exceeded its rulemaking authority in adopting FMR 13(8)(a)(2) on the ground that the rule abridges or modifies its substantive right to foreclose. But Wells Fargo did not cite any case law explaining or applying the principles embodied by NRS 2.120, and, as a result, we decline to consider its argument in this regard. See *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (explaining that appellate courts need not consider issues that are not supported by relevant legal authority).

the deed of trust from the county recorder's office, which, according to Wells Fargo, was presumptively authentic. In *Einhorn*, the supreme court determined, as relevant here, that an assignment of the deed of trust from the county recorder's office was sufficient to satisfy the FMP's document production requirement because it carried presumptions of authenticity under NRS 52.085 (governing public records) and 52.165 (governing acknowledged documents). *See id.* at 697, 290 P.3d at 254. In reaching that decision, the supreme court reasoned, as relevant here, that the beneficiary only needed to demonstrate the existence of the assignment because the purpose of that document was simply to establish the chain of title for the deed of trust. *See id.*

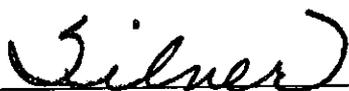
But regardless of whether the copy of the deed of trust here was presumptively authentic as Wells Fargo contends, *Einhorn* is distinguishable from the present case. In particular, this matter involves the deed of trust itself and, unlike with an assignment, it is not merely the existence of the deed of trust that is important, but also possession of the original.<sup>4</sup> *See Edelstein*, 128 Nev. at 512, 286 P.3d at 254 (recognizing that only the holder of the note and the deed of trust has authority to foreclose); *see also* FMR 13(8)(a)(2) (requiring a sworn statement indicating that the person certifying documents for purposes of the FMP is in actual possession of the originals). And although Wells Fargo obtained a copy of the deed of

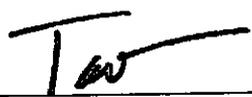
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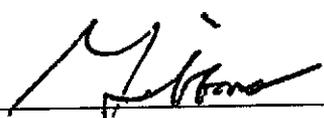
<sup>4</sup>Although Wells Fargo similarly argues that it was not required to demonstrate that it possessed the original deed of trust based on the rules governing recordation of deeds of trust, its argument fails for the same reason. Further, to the extent that Wells Fargo is concerned with the supreme court's prior application of *Edelstein* under circumstances similar to the present case, any such concerns should be addressed by seeking that court's review of this matter.

trust from the county recorder's office and produced it at the mediation, neither that copy nor the county recorder's certification thereon demonstrated that Wells Fargo possessed the original document. See FMR 13(8)(a)(2); see also *Edelstein*, 128 Nev. at 512, 286 P.3d at 254. As a result, we conclude Wells Fargo failed to demonstrate that the district court abused its discretion in granting the Moore's petition for judicial review. See *Leyva v. Nat'l Default Servicing Corp.*, 127 Nev. 470, 480, 255 P.3d 1275, 1281 (2011) (reviewing a district court's decision with regard to a petition for judicial review in an FMP matter for an abuse of discretion). Accordingly, we

ORDER the judgment of the district court AFFIRMED.<sup>5</sup>

  
\_\_\_\_\_, C.J.  
Silver

  
\_\_\_\_\_, J.  
Tao

  
\_\_\_\_\_, J.  
Gibbons

cc: Hon. Kathleen E. Delaney, District Judge  
Tiffany & Bosco, P. A.  
Legal Aid Center of Southern Nevada, Inc.  
Eighth District Court Clerk

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<sup>5</sup>Insofar as Wells Fargo raises issues that are not specifically addressed herein, we have reviewed its arguments and conclude they do not warrant relief.

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

WELLS FARGO BANK, N.A., AS  
SERVICER FOR U.S. BANK, N.A., AS  
TRUSTEE FOR BANC OF AMERICA  
FUNDING CORPORATION 2007-C,  
Appellant,  
vs.  
CHRISTINE PAPPAS, AN  
INDIVIDUAL; AND JOHN  
KUCHARCZYK, AN INDIVIDUAL,  
Respondents.

No. 70887

**FILED**

DEC 14 2017

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

*ORDER OF AFFIRMANCE*

Wells Fargo Bank, N.A., appeals from a district court order denying a petition for judicial review in a foreclosure mediation matter. Second Judicial District Court, Washoe County; Lynne K. Simons, Judge.

Wells Fargo participated in Nevada's Foreclosure Mediation Program (FMP) with respondents Christine Pappas and John Kucharczyk. During the mediation, Wells Fargo produced a copy of respondents' deed of trust, which it obtained from the county recorder's office. That document included a certification by a deputy recorder, indicating that it was a true and correct copy of the recorded deed of trust. The mediation later ended unsuccessfully, and the mediator found that the copy of the deed of trust that Wells Fargo produced at the mediation did not satisfy NRS 107.086(5)<sup>1</sup>

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<sup>1</sup>NRS 107.086 was amended effective June 12, 2017, 2017 Nev. Stat., ch. 571, § 2, at 4091-96, but those amendments do not affect the disposition of this appeal, as they were enacted after the underlying mediation occurred.

or FMR 12(7)(a),<sup>2</sup> which both required it to produce an “original or a certified copy of the deed of trust.” As a result, the FMP administrator recommended that a foreclosure certificate not issue.

Wells Fargo then petitioned for judicial review, arguing that it satisfied the FMP’s document production requirements by producing the copy of the deed of trust that it obtained from the county recorder’s office. The district court disagreed, however, finding that Wells Fargo failed to certify that it was in possession of the original deed of trust in accordance with FMR 12(8)(a)(2) and that Wells Fargo therefore did not produce a certified copy of the deed of trust for purposes of NRS 107.086(5) and FMR 12(7)(a). And because Wells Fargo did not otherwise produce an original copy of the deed of trust, the district court denied its petition. This appeal followed.

Initially, to the extent Wells Fargo challenges the denial of its petition on the ground that NRS 107.086(5) did not require it to certify that it was in possession of the original deed of trust, its argument fails. In particular, while NRS 107.086(5) provides that, where the beneficiary does not produce the original deed of trust, it must produce a certified copy, the statute does not explain what a party must do to certify a copy of this document. But the supreme court adopted the FMRs to implement that statute. *See* NRS 2.120(2) (recognizing the supreme court’s inherent authority to adopt procedural rules); *see also* FMR 1(2) (explaining that the purpose of the FMRs “is to provide for the orderly, timely, and cost-effective

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<sup>2</sup>The FMRs became effective on June 30, 2009, and have been amended and renumbered numerous times since. For clarity, the citations in the text are to the FMRs that went into effect on April 1, 2014, and were the FMRs in effect at the time the underlying mediation occurred.

mediation of owner-occupied residential foreclosures”). And as relevant here, FMR 12(8)(a)(2) provides that, when the beneficiary produces certified copies to satisfy the FMP’s document production requirement, it must provide “[a] statement under oath signed before a notary public” attesting that the originals are in its possession.<sup>3</sup> Thus, to demonstrate that reversal is warranted, Wells Fargo must establish that the district court erred in concluding that it failed to comply with FMR 12(8)(a)(2). See *Edelstein v. Bank of N.Y. Mellon*, 128 Nev. 505, 521-22, 286 P.3d 249, 260 (2012) (reviewing legal questions de novo).

In this regard, Wells Fargo asserts that, under *Einhorn v. BAC Home Loans Servicing, LP*, 128 Nev. 689, 290 P.3d 249 (2012), it satisfied FMR 12(8)(a)(2), and, by extension, NRS 107.086(5), by producing a copy of the deed of trust from the county recorder’s office, which, according to Wells Fargo, was presumptively authentic. In *Einhorn*, the supreme court determined, as relevant here, that an assignment of the deed of trust from the county recorder’s office was sufficient to satisfy the FMP’s document production requirement because it carried presumptions of authenticity under NRS 52.085 (governing public records) and 52.165 (governing acknowledged documents). See *id.* at 697, 290 P.3d at 254. In reaching that

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<sup>3</sup>Citing NRS 2.120(2), which recognizes that procedural rules adopted by the supreme court cannot “abridge, enlarge or modify any substantive right” or otherwise offend the Nevada constitution, Wells Fargo contends that the supreme court exceeded its rulemaking authority in adopting FMR 12(8)(a)(2) on the ground that the rule abridges or modifies its substantive right to foreclose. But Wells Fargo did not cite any case law explaining or applying the principles embodied by NRS 2.120, and, as a result, we decline to consider its argument in this regard. See *Edwards v. Emperor’s Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (explaining that appellate courts need not consider issues that are not supported by relevant legal authority).

decision, the supreme court reasoned, as relevant here, that the beneficiary only needed to demonstrate the existence of the assignment because the purpose of that document was simply to establish the chain of title for the deed of trust. *See id.*

But regardless of whether the copy of the deed of trust here was presumptively authentic as Wells Fargo contends, *Einhorn* is distinguishable from the present case. In particular, this matter involves the deed of trust itself and, unlike with an assignment, it is not merely the existence of the deed of trust that is important, but also possession of the original.<sup>4</sup> *See Edelstein*, 128 Nev. at 521-24, 286 P.3d at 260-62 (recognizing that only the holder of the note and the deed of trust has authority to foreclose); *see also* FMR 12(8)(a)(2) (requiring a sworn statement indicating that the person certifying documents for purposes of the FMP is in actual possession of the originals). And although Wells Fargo obtained a copy of the deed of trust from the county recorder's office and produced it at the mediation, neither that copy nor the county recorder's certification thereon demonstrated that Wells Fargo possessed the original document. *See* FMR 12(8)(a)(2); *see also Edelstein*, 128 Nev. at 521-24, 286 P.3d at 260-62. As a result, we conclude Wells Fargo failed to demonstrate that the district court abused its discretion in denying its petition for judicial review. *See Leyva v. Nat'l Default Servicing Corp.*, 127 Nev. 470, 480, 255 P.3d 1275, 1281

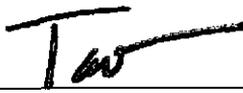
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<sup>4</sup>Although Wells Fargo similarly argues that it was not required to demonstrate that it possessed the original deed of trust based on the rules governing recordation of deeds of trust, its argument fails for the same reason. Further, to the extent that Wells Fargo is concerned with the supreme court's prior application of *Edelstein* under circumstances similar to the present case, any such concerns should be addressed by seeking that court's review of this matter.

(2011) (reviewing a district court's decision with regard to a petition for judicial review in an FMP matter for an abuse of discretion). Accordingly, we

ORDER the judgment of the district court AFFIRMED.<sup>5</sup>

  
\_\_\_\_\_, C.J.  
Silver

  
\_\_\_\_\_, J.  
Tao

  
\_\_\_\_\_, J.  
Gibbons

cc: Hon. Lynne K. Simons, District Judge  
Tiffany & Bosco, P. A.  
The Law Offices of J. Craig Demetras  
Washoe District Court Clerk

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<sup>5</sup>Insofar as the parties raise issues that are not specifically addressed herein, we have reviewed their arguments and conclude they do not warrant relief.



**Washington**

## WASHINGTON

### **Billings v. Bank of New York Mellon** (Wash.Ct.Appeals, 5/19/18, unpublished)

The court held that borrowers who failed to challenge the foreclosure prior to the trustee's sale waived their right to contest the sale. In this case, the Billings borrowed \$674,500 from Countrywide Bank in 2006. Their deed of trust named MERS as the original beneficiary. As a result of transfers the note was eventually endorsed in blank by Countrywide Home Loans. In 2015, Select Portfolio Servicing, Inc. completed a beneficiary declaration which certified that the Bank of New York Mellon (BONY), as the trustee of the securitized trust which held the plaintiffs' loan, was the holder of the note at issue.

The loan went into default and in 2015 BONY began foreclosure proceedings. In 2016, BONY acquired the property at its own foreclosure sale and moved to evict plaintiffs. The Billings sued for violation of Washington's Deed of Trust Act ("DTA") and Consumer Protection Act, as well as for fraud, breach of contract and wrongful foreclosure, largely on the basis that MERS was not a proper beneficiary and had not effectively assigned its interest to BONY.

Citing Merry v. Northwest Trustee Services, Inc. (2015) 188 Wn.App. 174, 176, the Court held that the Billings had waived their right to challenge the foreclosure post-sale. The Court reasoned that the DTA provides a means of stopping a foreclosure sale when three elements are present: (1) the borrowers received notice of their right to enjoin the sale; (2) they knew they had defenses to the foreclosure sale which they tried to present post-sale; and (3) they did not seek an injunction stopping the sale. Because the Billings knew of the foreclosure and their defenses to it but did not try to enjoin the sale, to grant post-sale relief would be based on a "hyper-technical" violation of the DTA and would produce an inequitable result.

### **Jarvis v. Federal National Mortgage Assoc.** (W.D. Wash. April 24, 2017)

In this bankruptcy related matter, the issue is what triggered Washington's six year statute of limitations on an action to foreclose to start running. Jarvis filed a Chapter 7 bankruptcy petition in 2008 and discharged personal liability on the note at issue on February 23, 2009. Of course, while Jarvis could not be forced to perform on the loan personally, the lien holder retained the right to foreclose on the property secured by that lien. On February 11, 2016, Jarvis filed a quiet title action against Fannie Mae, arguing that the statute of limitations had run on Fannie Mae's right to foreclose on the property by application of RCW 4.16.040's six year statute of limitations. Jarvis cited *Silvers v. US Bank N.A.*, No. 15-5480 RJB, 2015 WL 5024173 (W.D. Wash, Aug. 25, 2015) and *Edmundson v. Bank of America*, 194 Wn. App. 920 378 P.3d 272 (2016) for the proposition that the payment due just prior to Jarvis's discharge was the last breach of the loan agreement, which started the six year statute running. Fannie Mae countered that the six year period starts running when the last payment was due on the loan, in 2036, unless the loan is accelerated.

The Court held that the Jarvis discharge defined the last payment Jarvis owed as the one owed just prior to the discharge. Even absent acceleration, the six year limitations period began to run from the date Jarvis filed to make that payment, as no other payment could accurately said to be due post-discharge.



**Oregon**

## OREGON

### **Bayview Loan Servicing, LLC v. Chandler & Newville, Inc.** (281 Or.App. \_\_\_, Oregon Ct. of Appeals, 7/5/18)

This case involved two competing claims to property, the first resulting from a judicial foreclosure on a first deed of trust and the second resulting from an intervening non-judicial foreclosure on a junior deed of trust. Plaintiff Bayview completed a judicial foreclosure on the property at issue pursuant to its first deed of trust, received judgment in its favor, and completed a sheriff's sale of the property. While Bayview's judicial foreclosure action was pending, the junior lien holder, Chase, completed its non-judicial foreclosure on its deed of trust, with Chandler & Newville, Inc. ("Chandler") ultimately acquiring the property. In this subsequent action, both Bayview and Chandler claimed to own the property, with both moving for summary judgment.

Chandler claimed - correctly - that Bayview's judicial foreclosure had two serious flaws. First, in the underlying judicial foreclosure action Bayview failed to name Chase or Chandler as a defendant. Second, the judgment in Bayview's judicial foreclosure action incorrectly identified the lot number of the property at issue as "Lot 16" and not "Lot 6", although an amended judgment corrected that error. Chandler argued that because Chase had not been named in the judicial foreclosure action its interest had not been wiped out by Bayview's foreclosure. Chandler reasoned that Bayview could not complete a second foreclosure on its lien so it had extinguished its lien without wiping out Chandler's interest, leaving Chandler as the owner of the property. Chandler also argued that despite the amended judgment Bayview had foreclosed on Lot 16, a property different from the one on which Chandler had its lien, which was Lot 6.

The trial court agreed with Chandler and issued an order granting its motion for summary judgment. The trial court concluded that the foreclosure process is "strict" and must follow the foreclosure statutes but, because of the lot error, Bayview had not complied with the statutes and foreclosed on Lot 16, not Lot 6. The trial court also concluded that because Chase did not get notice of the foreclosure, its interest survived the foreclosure and was effectively assigned to Chandler, becoming the first priority lien.

Not surprisingly, Bayview appealed. The Court of Appeals reversed and remanded the case to the trial court. The Court concluded that when Chase recorded its lien Bayview's lien was already of record. Thus, when the junior lien was foreclosed Chase acquired the property subject to Bayview's lien. When Bayview's lien was later foreclosed, it did not wipe out Chandler's lien, but it did not change the priority of those liens, either. Chandler retained its lien, but it was vulnerable to Bayview's action for "strict" foreclosure. Chandler also obtained a right of redemption of Bayview's interest. The error in the lot number was deemed immaterial because the street address was correct, the correct borrowers were identified, and documents attached to Bayview's judicial foreclosure complaint contained the correct legal description.

### **US Bank, as Trustee v. McCoy** (290 Or App 525, Oregon Ct. of Appeals, 2/28/18)

In this judicial foreclosure action, the defendants/borrowers the McCoy's appealed the summary judgment awarded in favor of the trustee of the securitized trust which allegedly held their loan, US Bank. The underlying facts are typical. In 2005, the McCoy's borrowed funds from BNC Mortgage to buy a home. In 2009, after the McCoy's defaulted, BNC securitized the McCoy's loan; US Bank was the trustee of that trust. In

2013, US Bank, as trustee, filed the judicial foreclosure action at issue. The trial court granted US Bank's motion for summary judgment based in critical part on a declaration from Brown, an employee of loan servicer Wells Fargo. The Brown declaration recited familiar language establishing the business records exception to the hearsay rule for records attached to the motion. Paragraph 7 of the Brown Declaration read:

*"CURRENT STATUS OF NOTE AND DEED OF TRUST: [Plaintiff] directly or through an agent, has possession of the Promissory Note ('Note'), which was made, executed, and delivered for valuable consideration. [Plaintiff] was the holder at the time this foreclosure action was initiated and remains the holder of the Note and beneficiary of the Deed of Trust, and is entitled to enforce the Note under ORS 73.0301 and ORS 68A.175."*

Counsel for US Bank also represented to the Court that the Note was in his possession at the time of the hearing. The McCoys opposed the summary judgment motion on the grounds that Paragraph 7 of the Brown Declaration was inadmissible hearsay in that it simply reported what Brown had learned from her review of Wells Fargo's records and Brown lacked personal knowledge on which to base her declaration. Because Paragraph 7 was the only evidence of who held the Note at the time the foreclosure commenced, and because US Bank had to be in possession of the Note to have standing to initiate the foreclosure, unless Paragraph 7 came under some exception to the hearsay rule the motion should be denied. Without commenting on the admissibility of the Brown Declaration, the trial judge granted the motion.

The McCoys appealed and the Court of Appeals reversed. The appellate court held that in Paragraph 7, Brown simply gave her account of what Wells Fargo's records contained, but did not attach the records themselves. The court concluded that Brown's account of what the records contained constituted hearsay and, because her statements could not be considered business records themselves, the business records exception to the hearsay rule could not apply.

**Morgan v. Valley Property and Casualty Ins. Co.** (289 Or.App. 455, Oregon Ct. of Appeals, 12/28/17)

In this insurance case, the plaintiffs suffered fire damage. In preparing their claim, Plaintiffs hired Adjusters International, which in turn hired three independent contractors to list and price items lost in the fire. The work of the three contractors was concatenated into a single spreadsheet and submitted to the carrier. The carrier sought additional information and, in response, the Morgans sued for breach of contract using the spreadsheet as evidence of their damages. The trial court awarded the Morgans the damages requested on the spreadsheet.

The appellate court reversed and remanded. It held that the spreadsheet was inadmissible hearsay. First, the three independent contractors did not work for Adjusters International. As such, their records were not entitled to the same presumption of reliability. In addition, the Court held that under Oregon case law, for a business record to be admissible, not only must the entrant be under a business duty to record the event, but the informant must be under a contemporaneous business duty to report the occurrence to the entrant, as well. For example, because a police officer's report was based on hearsay statements of witnesses it did not come in under the business records exception to the hearsay rule. In this case, the prices ascribed to items on the spreadsheet were priced based on telephone conversations with vendors and internet searches. Because that information was hearsay within hearsay, the spreadsheet was not admissible.

**Streater v. Federal National Mortgage Assoc.** (Dist. Or., 8/16/17)

In this case, the issue was what constitutes a borrower's "last known address" for purposes of the Oregon Deed of Trust Act ("ODTA"). The loan at issue went into default twice. The first foreclosure

proceedings resulted in a settlement agreement between GMAC Mortgage, LLC (“GMAC”) and the borrowers. Nonetheless, by 2015 the loan was again in default. First American, as trustee, sent notices of the foreclosure to two addresses associated with the property in foreclosure and the borrowers’ physical address, as well as a post office box listed in a junior deed of trust and tax records regarding the borrowers.

The borrowers argued that notice of the foreclosure was defective. They argued that notice had not been sent to the address at which they typically received their mail, a post office box included in the settlement agreement with GMAC.

Ruling that the post office box in the settlement agreement was not the “last known address” of the borrowers for purposes of the ODTA, the court reasoned that GMAC had assigned the loan to Fannie Mae which was not a party to the settlement agreement. Even more compelling, the last known address means the last address known to the foreclosure trustee, not the lender or beneficiary. Because no evidence supported the claim that First American knew of the settlement, much less the address contained in the settlement agreement, the foreclosure did not violate the ODTA.



**California**

# U.T.A. Legal Update California Edition

November 5, 2018 - Las Vegas, Nevada

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## 2018 A Wild Ride

- A lot has happened in 2018 and in the author's opinion the legal landscape has turned subtly but decisively in favor of borrower rights.
- Trustees remain protected against most claims but danger lurks for substantial changes in the future regarding what actions constitute debt collection.
- Surplus Funds continues to provide challenges for trustees and their counsel and now delays in payment to borrowers beyond the statutory limits bears considerable risk.
- Collection of legal fees after a successful defense will be dependent upon language in loan documents and the FNMA form documents are not adequate in a number of cases.

## 2018 Key Trends Emerging

- The rush to federal court continues unabated by lenders/servicers and for good reason. Federal Courts generally but not always continue to rule favorably on key issues.
- However, federal court is no benefit to a trustee if the case is removed prior to the DNMS being finalized.
- Reason: Federal Court will require a response instead of a DNMS if a trustee is not out of the case.
- Federal Courts hold that making a simple allegation that a trustee acted with malice or ill will or spite is sufficient to overcome qualified privilege.

## ARBITRATION

- Anderson v Credit One Bank, N.A. 2018 W.L. 2287329 (S.D. Cal.)
- Suit for Rosenthal FDCPA and Telephone Consumer Protection Act. (TCPA). Note latter has a statutory violation fee of \$500.00 per phone call.)
- Consumer paid off the card but did not pay the annual card fee.
- The court initially denied Motion to Compel Arbitration because plaintiff denied that he received the Agreement to Arbitrate with the cardholder agreement.
- Plaintiff's deposition testimony contradicted his prior declaration used to oppose the motion.

## Anderson v Credit One Bank

- The Supreme Court has stated that the FAA espouses a general policy favoring arbitration agreements. *AT & T Mobility v. Concepcion*, 563 U.S. 333, 339 (2011).
- Courts are also directed to resolve any “ambiguities as to the scope of the arbitration clause itself...in favor of arbitration.” *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 476-77 (1989)
- A party moving to compel arbitration must show “(1) the existence of a valid, written agreement to arbitrate; and, if it exists, (2) that the agreement to arbitrate encompasses the dispute at issue.” *Ashbey v. Archstone Prop. Mgmt., Inc.*, 785 F.3d 1320, 1323 (9th Cir. 2015)

## Anderson v Credit One Bank

- Arbitration is a matter of consent and only those disputes that have been agreed to be arbitrated may be arbitrated.
- Thus, non parties such as trustees ordinarily cannot be compelled to arbitrate a dispute unless the trustee is a party to the agreement to arbitrate. For example the deed of trust rather than the loan agreement. However, state court judges may ignore where an arbitration agreement references a deed of trust and make the trustee a party to the arbitration.
- The Ninth Circuit has indicated that, “[a]lthough challenges to the validity of a contract with an arbitration clause are to be decided by the arbitrator, challenges to the very existence of the contract are, in general, properly directed to the court.” *Kum Tat Ltd. v. Linden Ox Pasture, LLC*, 845 F.3d 979, 983 (9th Cir. 2017)

## Anderson v Credit One Bank

- Court must first determine whether the parties entered into an agreement to arbitrate. See *Casa del Caffè Vergnano S.P.A. v. ItalFlavors, LLC*, 816 F.3d 1208, 1211 (9th Cir. 2016).
- When determining the existence of valid arbitration agreements, “federal courts ‘should apply ordinary state-law-principles that govern the formation of contracts.’ ” *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1170 (9th Cir. 2003) (quoting *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995)).
- Because plaintiff admitted at his deposition that the agreement accompanied the credit card, the motion to arbitrate was granted.

## Gadomski v Wells Fargo Bank

- 2018 W.L. 263903 (E.D. Cal).
- Class action over classification of consumer’s debt as charged off vs. discharged in bankruptcy by credit reporting services and Wells Fargo’s refusal to reclassify the debt which would allegedly help the debtor’s credit score.
- Wells contended that the dispute was subject to the arbitration provision in the credit card agreement.
- The plaintiff argued that post bankruptcy the agreement to arbitrate could not be enforced.

## Gadomski v Wells Fargo Bank

- Because the litigation involved inaccurate reporting of the debt rather than collection of the debt, the arbitration provision was a venue provision which did not interfere with the “fresh start”. See *Id.* \*3.
- The Agreement explicitly states, “[a] claim may include, but shall not be limited to, the issue of whether any particular claim must be submitted to arbitration.” (ECF No. 12–1 at 18.) (emphasis added). This is clear and unmistakable evidence that the parties intended to encompass the issue of arbitrability within the Agreement. Thus, the arbitrator will decide the question.
- Plaintiff finally argued that a “small claims” exception applied to take the claim out of arbitration.

## Gadomski v Wells Fargo Bank

- Court held that claims under BPC 17200 were effectively brought as a class and that thousands of claims were at issue not individually so the small claims exception did not apply.
- Court relied upon *Botorff v. Amerco*, No. 2:12–CV–01286–MCE, 2012 WL 6628952 (E.D. Cal. Dec. 19, 2012).

## Attorney Fees You Win but .....

- Chacker v JPMorgan Chase Bank NA (2018) 27 Cal. App. 5<sup>th</sup> 351.
- Plaintiff sues to prevent sale, quiet title and unfair debt collection and demurrers are sustained without leave. Trial court grants attorney fees to lender.
- Lender relied exclusively on paragraph 9 & 14 of FNMA/FHLMC trust deed and statutory provisions of Rosenthal.
- Plaintiff challenged Chase's right to fees because it was not the lender nor a signatory to the trust deed containing the fees agreement and the fees should be added to the debt not awarded separately.
- The foreclosure sale had not occurred.

## Chacker v JPMorgan Chase

- Section 9 of the deed of trust provides the "Lender may do and pay for whatever is reasonable or appropriate to protect Lender's interest in the Property and rights under this Security Instrument, including ... paying reasonable attorneys' fees to protect its interest in the Property and/or rights under the Security Instrument...." Section 9 further specifies, however, that any amounts disbursed by Lender for this purpose "shall become additional debt of Borrower secured by this Security Instrument".

## Chacker v JP Morgan Chase

- Under Civil Code 1717 Chase defendants stood in shoes of a signatory and were entitled to fees.
- However, Fees only added to debt.
- Paragraph 14 also only permits lender to add fees not get a separate award.
- Precedent setting case in California.
- Federal District court unpublished case held similarly. Eisenberg v. Citibank, N.A. (C.D. Cal. Oct. 11, 2017, No. 2:13-cv-01814-CAS(JPRx) ) 2017 U.S. Dist. LEXIS 169182, at \*11 [
- See also ]; Dufour v. Allen (C.D. Cal. Apr. 20, 2017, No. 14-cv-05616-CAS(SSx) ) 2017 WL 1433303, at \*, Barba v. Flagstar Bank FSB (C.D. Cal. Sept. 19, 2011, No. CV 10-8023-VBF (VBKx) ) 2011 WL 13217562, at
- Justice Scalia's observation in another context is apt: the Chase Defendants "must take the bitter with the sweet."

## Use the right provision to ask for legal fees

- Miller v Lehman Brothers Holdings. Inc. 2018 WL 12105557 (N.D. Cal)
- Lender argued paragraph 7 (E) of Note and paragraph 22 of Trust Deed as basis for legal fees.
- Court relied upon Ninth Circuit Ruling in Ng v. US Bank N.A. 712 Fed. Appx. 665 (9<sup>th</sup> Cir. 2018). Case unpublished so is not binding precedent.
- Lender entitled to award of fees even where the sole claim by borrower is based upon HOBR. See Mitchell v. Wells Fargo Bank, N.A., No. 13-04017-KAW, 2014 WL 1320295, at \*3 (N.D. Cal. Apr. 1, 2014)

## Win a Little Lose a Lot

- Marina Pacific Homeowners Assoc. v Southern California Financial Corp. (2018) 20 Cal. App. 5<sup>th</sup> 191.
- Dispute between HOA and ground lease holder over assignment fees owed to ground lessor.
- Determination of who is the prevailing party on the contract is made only upon final determination of case.
- Where both parties got declaratory relief and the ground lessor only recovered 40% of its requested transfer fee there was no prevailing party.
- This is likely to occur in title related litigation.

## Right to Fees HOBR

- Guillory vs HSBC Bank 2018 W.L. 3417484 (N.D. Cal.)
- The battle rages on as to what success a borrower must have in order to receive attorney fees under HOBR. See Cal. Civil Code § 2924.12(i).
- Guillory got a stipulated TRO to enable him to submit a loan modification. Then the application for a loan modification was approved the TRO remained in place for 7 ½ months. Guillory moved for an award of fees as the prevailing party.
- Some Federal Courts hold that getting a TRO for a long period 7-9 months is sufficient for borrower to be the prevailing party.

## Cases involving right to legal fees under Civil Code 2924.12 (h) are divided.

- (h) A court may award a prevailing borrower reasonable attorney s fees and costs in an action brought pursuant to this section. A borrower shall be deemed to have prevailed for purposes of this subdivision if the borrower obtained injunctive relief or was awarded damages pursuant to this section.”
- Does injunctive relief include a TRO?
- *Monterossa v. Superior Court of Sacramento County* (2015) 237 Cal.App.4th 747, 751, getting a preliminary injunction can make borrower a prevailing party but the award is discretionary. *Lac v. Nationstar Mortgage LLC* (E.D. Cal.2016) 2016 WL 4055041.

## Right to Legal Fees where borrower obtains injunctive relief before trial under HOBR

- In *Lac supra*, the Court awarded fees where the borrower obtained a TRO. However, the servicer was in default at the time the TRO was issued and did not respond.
- Opposing TRO if proper notice is given is now critical. See *Millman v. Wilmington Savings Fund Society FSB* 2018 W.L. 2021236 (N.D. Cal.). Issue of first impression in California courts. Both *Luc* and *Warren v Wells Fargo & Co.* 2017 U.S. Dist. Lexis 168346 (S.D. Cal.) at \* 18-19 permitted fees after a contested hearing.
- *Millman* \* 5-6 Plaintiff obtained TRO at an ex parte hearing not after a hearing thus plaintiff not entitled to fees.

## Where Borrower Obtains TRO may be entitled to an Award of Legal Fees

- See Warren v. Wells Fargo & Co., 2017 WL 4541730, at \*7 (S. D. Cal. October 11, 2017) (finding plaintiff was “prevailing borrower” where plaintiff “secure[d] a temporary restraining order enjoining the sale of the [p]roperty for over nine months”); Lac v. Nationstar Mortgage LLC, 2016 WL 4055041, at \*1-2 (E.D. Cal. July 27, 2016) (finding plaintiff was prevailing borrower where defendant did not oppose issuance of temporary restraining order, which remained in effect for sixty days).
- Borrower attorney awarded over \$34,000.00 plus costs at an hourly rate of \$400.00 per hour where this was the first mortgage case handled by attorney. Sought twice amount awarded.

## Lender may not Recover Fees against a Non Signatory Family Member

- Hart v Clear Recon Corp. (2018) 27 Cal. App. 5<sup>th</sup> 322 (same panel as Chacker 2<sup>nd</sup> Dist. Div. 8.).
- Non borrowers family members sued seeking fees from lender and lost on summary judgment. Contra Abdallah v United Savings Bank (1996) 43 Cal. App. 4<sup>th</sup> 1101, 1111.
- Another paragraph 9 decision.
- “It then provides, in the language we emphasized above, that “any amounts disbursed by Lender under this Section 9 shall become additional debt of Borrower secured by this Security Instrument.” This is not a provision that attorney’s fees “shall be awarded”; it is, instead, a provision that attorney’s fees, like any other expenses the lender may incur to protect its interest, will be added to the secured debt.”

## Hart v Clear Recon. Corp.

- Paragraph 9 is not an attorneys fee provision which permits an award of fees.
- Lender argued on appeal par. 22 of the trust deed, the acceleration provision. Court held no evidence that proper notice of acceleration was given below.
- No judicial estoppel by requesting fees in the prayer for relief by non-borrowers error for trial court to rely upon that reason as alternative to award fees.

## Trustee is not a Sham Defendant for Diversity Purposes and Heavy Burden Necessary

- Horner v Bank of New York Mellon 2017 W.L. 5311002 (C.D. Cal.).
- After trustee filed a DNMS case removed to federal court. Court issued an OSC re Remand.
- The case focused on whether the trustee was a sham defendant named solely to prevent removal.
- Key rulings relying on Sublett v. NDEX W., LLC, No. 11CV185-L WMC, 2011 WL 663745, at \*2 (S.D. Cal. Feb. 14, 2011).
- Trustee is bound by the judgment so it is not a sham party.
- Use of the words the trustee acted ““willful, oppressive, and malicious” sufficient to find that the trustee was not immune, and granting remand); Natividad v. Ocwen Loan Servicing, LLC, No. 2:14-CV-01670-MCE, 2014 WL 6611054, at \*3 (E.D. Cal. Nov. 19, 2014)

## Use of Legal Conclusions Sufficient to Defeat Non Monetary Status in Federal Court

- Horner supra continues a trend in federal court to make it easy for a plaintiff to overcome the DNMS by alleging legal conclusions which defeat the privilege.
- If the DNMS is not final when a case is removed it is highly likely to be remanded.

## CFPB Must Justify Use of Subpoena Power

- CFPB v The Source for Public Data L.P. 903 F. 3d 456 (5<sup>th</sup> Cir. 2018)
- CFPB issued an administrative subpoena (Civil Investigative Demand) for records to Public Data. Public Data insisted CFPB did not have jurisdiction.
- Public Data filed a petition with CFPB to set aside the CID and the Director denied.
- CFPB went to court to request the District Court order Public Data to turnover documents. District Court agreed with CFPB.

## CFPB must provide Fair Notice of Violation under 12 U.S.C. 5562 (e) (2).

- Section 5562(c)(2) requires that a civil investigative demand identify both: (1) “the nature of the conduct constituting the alleged violation which is under investigation;” ;
- And 2) “the provision of law applicable to such violation.”
- CFPB claimed it was investigating “unlawful acts and practices in connection with the provision or use of public records information.”
- Providing and Using Public Information does not violate Federal Law. Id. At p. 458.

## The Purpose of CID must be Clear as to Whether Recipient is a Target

- we cannot evaluate whether the CFPB requests information that is reasonably relevant to the CFPB’s inquiry because we do not know what the inquiry actually is. Likewise, we cannot assess whether the CFPB’s demand is “unreasonably broad or burdensome.” Id. P. 459.
- CFPB must identify in purpose whether entity or a client is the target.
- See also CFPB v ACICS 854 F. 3d 683, 690 ( D.C. Cir. 2017).

## Debt Collection and Trustees Not For the Weak of Heart

- Boucher v Financial Systems of Green Bay Inc. 880 F. 3d 362 (7<sup>th</sup> Cir. 2018))
- Use of Safe Harbor Language from in Miller v. McCalla, Raymer, Padrick, Cobb, Nichols, & Clark, LLC, 214 F.3d 872 (7th Cir. 2000). Does not protect against a claim under 15 USC 1692 (e) because Wisconsin law does not permit imposing late or other charges thus the statement was false even though it complied with 15 USC 1692 (g).
- we held that a dunning letter is false and misleading if it “impl[ies] that certain outcomes might befall a delinquent debtor when, legally, those outcomes cannot come to pass.” Id. p. 366-67.

## Boucher v Financial Systems of Green Bay et al.,

- This argument fails for \*371 two reasons. First, “[a]lthough the safe harbor was offered in an attempt both to bring predictability to this area and to conserve judicial resources, it is compliance with the statute, not our suggested language, that counts.

## Is a Mortgage Servicer a Debt Collector Under Rosenthal?

- Davidson v Seterus (2018) 21 Cal. App. 5<sup>th</sup> 283
- 4<sup>th</sup> District Div. 1 reverses trial court and holds that Seterus and its parent IBM
- “Id. at 289: “We ultimately agree with Davidson's contention, in no small part due to our adherence to “the general rule that civil statutes for the protection of the public are, generally, broadly construed in favor of that protective purpose.”
- A history of harassing phone calls is detailed in the complaint hundreds of calls demanding payment before grace period ended.
- Not surprising result as general consumer purpose statute trumped the absolute privilege for filing suits. See Komarova v. National Credit Acceptance, Inc. (2009) 175 Cal.App.4th 324, 340.
- Court noted specific Trustee exemption in Civil Code 2924 (b).

## HOA and its Property Manager are Debt Collectors

- Manikan v Pacific Ridge Neighborhood HOA et al., 2018 W.L. 1536734 (S.D. Cal).
- Property manager filed claim in bankruptcy proceedings and was paid in full in C-13 case. After plan completed, property manger and HOA claimed it was a mistake and tried to foreclose on owner.
- Process server broke a gate in order to serve NOD.
- The definition of debt collector under Rosenthal includes creditors collecting their own debt including HOAs and managers. See Mashiri v. Epsten Grinnell & Howell, 845 F.3d 984, 988 (9th Cir. 2017).
- Pursuit of an unauthorized foreclosure based upon facts states a claim.

## The Litigation Privilege is Defeated by a Claim under the Rosenthal Act

- Picazo et al., v Kimball Tirey et al., 2018 W.L. 1583228 (S.D. Cal).
- Tenant in HUD housing failed to provide proof of income as required by lease. Law firm filed eviction case after 60 day notice expired. After suit was filed Housing Agency asked law firm to dismiss UD.
- Plaintiff filed suit under FDCPA & Rosenthal and KTS filed a SLAPP motion because the basis for the case was the prior suit where no rental damages were sought.
- Held Komarova is binding and defeats litigation privilege. “following Komarova, “not a single federal court has found Rosenthal Act claims to be barred by the litigation privilege”); Holmes v. Elec. Document Processing, Inc., 966 F. Supp. 2d 925, 937 (N.D. Cal. 2013); Derr v. Kimball, Tirey & St. John LLP, 2012 WL 12874923, at \*3 (S.D. Cal. Aug. 14, 2012) (“Applying the litigation privilege would...eviscerate the Rosenthal Act.”).

## Failure by Loan Servicer to Rescind NOD and to Timely Credit Account Violates 1692f (1) & (6)

- Randall v Ditech Financial, LLC (2018) 23 Cal. App. 5<sup>th</sup> 804
- Borrower reinstated loan prior to foreclosure but servicer failed to cancel foreclosure sale for 39 days and continued to charge late fees. Randall filed suit to stop the sale the day before it was to be held.
- 1692f prohibits unconscionable means to collect or attempt to collect any debt. Alleging that Ditech began servicing after default was sufficient to allege Ditech was a debt collector. Perry v. Stewart Title Co. (5th Cir. 1985) 756 F.2d 1197, 1208.).
- A “ ‘debt’ ” for purposes of section 1692f(1) is an obligation of a consumer to pay money. (§ 1692a(5); Vien-Phuong Thi Ho v. ReconTrust Company, NA (9th Cir. 2017) 858 F.3d 568, 572.) “

Failure by Loan Servicer to credit account and continue to charge default charges is actionable.

- 1692f (1) covers an obligation of a consumer to pay money.
- Overcharging the borrower for default fees and costs for a loan not in default is actionable under 1692 (f) (1).
- 1692 (f) (6) is actionable where servicer takes or threatens foreclosure where creditor has no intention or right to do so. *Dowers v. Nationstar Mortgage, LLC* (9th Cir. 2017) 852 F.3d 964, 969.
- Not all actions are protected in foreclosure process.

The U.S. Supreme Court will decide if Non Judicial Foreclosure is Debt Collection

- *Obduskey v Wells Fargo et al.*, 879 F. 3d 1216 (10<sup>th</sup> Cir. 2018).
- 10<sup>th</sup> Circuit agrees with Ho decision in 9<sup>th</sup> Circuit and due to circuit split case is accepted for review by U.S. Supreme Court.
- UTA and others filing an amicus brief.
- *Obduskey* decided as a case of first impression under Colorado law.
- Servicer, law firm and entities engaged in non judicial foreclosure in Colorado not debt collectors under the FDCPA.
- 10<sup>th</sup> and 9<sup>th</sup> Circuit rule favorable, the 4<sup>th</sup> , 5<sup>th</sup> and 6<sup>th</sup> Circuits taken on opposing view. So did the Colorado Supreme Court!

## Obduskey v Wells Fargo et al., 879 F. 3d 1216

- Law Firm sent plaintiff a letter indicating it may be a debt collector and referenced the amount owed and that the law firm was instructed to commence foreclosure.
- Borrower objected to the amount due but law firm proceeded with foreclosure.
- Case decided on a motion to dismiss as a matter of law.
- Law Firm not a debt collector because “debt is synonymous with “money,” the FDCPA “imposes liability only when an entity is attempting to collect” money. 858 F.3d at 571. Because enforcing a security interest is not an attempt to collect money from the debtor, and the consumer has no “obligation ... to pay money,” non-judicial foreclosure is not covered under the FDCPA. Id. at 572 (quoting 15 U.S.C. § 1692a(5)).”

## Obduskey v Wells Fargo et al., 879 F. 3d 1216

- — “[a] non-judicial foreclosure differs from a judicial foreclosure in that the sale does not preserve to the trustee the right to collect any deficiency in the loan amount personally against the mortgagor.” Id. P. 1221.
- If law firm had induced borrower to pay money by threatening foreclosure the FDCPA might apply.
- The protection from FDCPA liability is limited to the actions covered under the foreclosure statute not all activity will qualify. See Dowers.
- The criteria will develop on a case by case basis. Engagement with the borrower carries with it the risk the activity might be considered debt collection. Thus, telling borrower to communicate with servicer/lender regarding the amount to reinstate or for loss mitigation alternatives is the only realistic way to avoid exposure.

## Obduskey v Wells Fargo et al., 879 F. 3d 1216

- 1692i does not help borrower it is a venue provision as to where the creditor must sue. Further “action” is a judicial proceeding.
- Law Firm successfully raised policy considerations.
- How can notice required by state statute be provided if borrower demands that all communications stop? 1692c (b).
- How can property be posted in accordance with statute if debtor demands all communications be with attorney? 1692c (a) (2).
- How can notices be published in the public record which involve notifying third parties about the debt.

## Violation of Civil Code 2924c is Actionable under BPC Section 17200

- Brown v Wells Fargo 2018 W.L. 1406701 (C.D. Cal)
- On summary judgment lender was unable to prove calls with borrower took place.
- Refusal to permit the borrower to reinstate loan was actionable under the unlawful prong of BPC Section 17200 even though there may not be a private right of action under Civil Code 2924c. Id. \*3-4.
- No waiver of the right to recover under CC 2924c where borrower sold property through short sale and received \$3,000.00 in moving expenses.
- Loss of equity, down payment and improvement is a loss under BPC 17200.

## Successor Liability Does Not Always Occur when a Mortgage Loan is Transferred.

- Dougherty v Bank of America 2018 W.L. 1518574 (E.D. Cal.).
- BOA was the original servicer and the parties were discussing a KYHC principal paydown.
- Before a deal was consummated, the servicing was transferred to SPS for Wells. Wells did not participate in the principal reduction program but did participate in the reinstatement program.
- During the lengthy process, borrowers missed payments twice once to protest that the loan payment was not reduced to \$1700.00 and did not make full payments of \$1952 (paid \$1700) after the end of a forbearance period.

## Successor Liability

- “Successor liability applies if (1) the successor expressly or impliedly agrees to assume the subject liability..., (2) the transaction amounts to a consolidation or merger of the successor and the predecessor, (3) the successor is a mere continuation of the predecessor, or (4) the transfer of assets to the successor is for the fraudulent purpose of escaping liability for the predecessor’s debts.” Tinker v. Aurora Loan Servs., 2015 WL 1540579, at \*6 (E.D. Cal. Apr. 7, 2015) (quoting City of Los Angeles v. Wells Fargo & Co., 2014 WL 2206368 (C.D. Cal. May 28, 2014)).
- None of which would ordinarily apply in a transfer of servicing case.

## Does Acceptance of Partial Payments Constitute a Waiver

- Standard FNMA/FHLMC trust deed contains an anti-waiver provision allowing the lender to accept the payments without waiving its rights.
- Here the waiver is that SPS and Wells “impliedly acquiesced” in the prior arrangement with BOA by implying that when Wells entered into the principal reduction program it would
- “Waiver occurs when there is ‘an existing right, a knowledge of its existence, and an actual intention to relinquish it, or conduct so inconsistent with the intent to enforce the right as to induce a reasonable belief that it has been relinquished.’ ” *Mardirosian v. Lincoln Nat. Life Ins. Co.*, 739 F.2d 474, 477 (9th Cir. 1984)

## Waiver is a Question of Fact.

- Although generally waiver is a question of fact, unless the only reasonable inference is to the contrary.
- Further, because the borrowers did not make all the payments due after the end of the forbearance period they could not compel SPS and Wells to honor an agreement to reduce payments to \$1700.00.
- One party cannot compel another to perform while he himself is in default. *Chase v. Residential Credit Sols., Inc.*, 2016 WL 7469604, at \*9 (C.D. Cal. Mar. 28, 2016)

## Does a Defaulting Borrower Lack Standing to Pursue a BPC 17200 Claim?

- Turner v Wells Fargo Bank NA et al., 839 F. 3d 1145 (9<sup>th</sup> Cir. 2017)
- Loan transferred more than 90 days after PSA created.
- Borrowers filed bankruptcy and relief from stay was obtained and then an adversary proceeding was filed which was dismissed without leave to amend.
- The usual arguments were made and dismissed. Transfer Void and lack of borrower standing to attack late transfer to PSA.
- Yvanova v. New Century Mortg. Corp., (2016) 62 Cal.4th 919, and Glaski v Bank of America (2013) 218 Cal. App. 4<sup>th</sup> 1079. NY law reversed.
- Saterbak v. JP Morgan et al., (2016) 245 Cal. App. 4<sup>th</sup> 848 late transfer voidable

## Alleged Illegal execution of Assignments and Foreclosure Documents was not actionable under BPC 17200

- To have standing to assert a Section 17200 claim, the plaintiff must “(1) establish a loss or deprivation of money or property sufficient to qualify as injury in fact, i.e., economic injury, and (2) show that that economic injury was the result of, i.e., caused by, the unfair business practice or false advertising that is the gravamen of the claim.”  
Kwikset Corp. v. Superior Court, (2011) 51 Cal.4th 310.
- Turners cannot show the causation element. Turner's home would be foreclosed upon regardless of the alleged deficiencies in the timing of the assignment and the NOS. The SOT for the NOS was not done until after the NOD.
- Default triggered foreclosure not allegedly improper assignment.

## Borrower Must Allege Specific Facts Connecting the RESPA Violation with Damages.

- Judan v Wells Fargo Bank 2017 W.L. 6405615 (N.D. Cal).
- Borrower sued due to an alleged failure to make a determination on an appeal of a denial of a loan modification.
- Borrower claimed violations of 12 C.F.R. 1041 (g) and (h). CFPB Loss Mitigation procedures.
- Id \* 4 “. RESPA requires plausibly alleging a “colorable relationship” between Defendant’s conduct (here, Defendant’s failure to provide a timely determination on Plaintiffs’ loan modification application) and Plaintiffs’ actual damages.”
- RESPA claims dismissed without leave to amend.

## Claiming in Bankruptcy Court a Property Would be Surrendered Estops a Claim to Stop Sale.

- Razzak v Wells Fargo Bank 2018 W.L. 1524002 (C.D. Cal.).
- Debtor C-13 Plan confirmed 6 days after suit filed against lender in state court. In amended plan debtor agreed to surrender property.
- Failure to list lawsuit in schedules is not fatal where based upon inadvertence or mistake. See Ah Quin v. Cty. of Kauai Dep’t of Transp., 733 F.3d 267, 270 (9th Cir. 2013) (quoting New Hampshire v. Maine, 532 U.S. 742, 749-50 (2001)).
- Thus, determination is fact driven and court may consider evidence outside the pleadings. Id. \*4.

## Read the Bankruptcy File(s) when Defending a Case.

- Surrender means surrender” in Chapter 13 context as “the debtor’s relinquishment of his or her right to the property at issue, such that the secured creditor is free to accept or reject that collateral”) .
- Surrender is inconsistent with trying to prevent foreclosure.
- Did the servicer owe this borrower a duty of care when handling borrower’s loan modification application
- The court examined the duty of care issue and found that these borrowers did not state facts sufficient to qualify, relying on the fact the loan was 8 years delinquent, a rental and the surrender language in the bankruptcy pleadings.

## Duty of Care a Servicer owes a Borrower in handling a Loan Modification is a Split decision.

- Alvarez v BAC Home Loans Servicing L.P. (2014) 228 Cal. App. 4<sup>th</sup> 941-944-950 and Jolley v Chase Home Finance LLC (2013) 213 Cal. App. 4<sup>th</sup> 872-902-905 (dicta); Daniels v Select Portfolio Servicing (2016) 246 Cal. App. 4<sup>th</sup> 1150. There is a duty.
- Rufini v CitiMortgage Inc. (2014) 227 Cal. App. 4<sup>th</sup> 299; Ragland v U.S. Bank et al., (2012) 209 Cal. App. 4<sup>th</sup> 182; Lueras v BAC Home Services LP (2013) 221 Cal. App. 4<sup>th</sup> 49. No duty of care to borrower but cannot make false or misleading statements.
- Rosseta v Citimortgage (2017) 18 Cal. App. 5<sup>th</sup> 628, 640 “ Loan Modification is a new phase, lender has greater bargaining power ... encouraging borrower to default it directed borrowers acts so duty of care arises.

## Federal Courts also divided on the Duty of Care Issue.

- Yadav-Ranjan v. Rushmore Loan Management Services, LLC 2018 WL 3328499, \*10+, (N. D. Cal.). Noted split in Courts of Appeal and held pleading did not show Rushmore failed to process her application. \*10-11.
- Seitzinger v SPS 2018 W.L. 2010993 (N.D. Cal) Lueras better decided based upon a review of Biakanja factors.”
- Unpublished Ninth Circuit cases hold there is no duty. Anderson v. Deutsche Bank Nat. Tr. Co. Americas, 649 Fed. Appx. 550, 552 (9th Cir. 2016) (no duty of care where the borrower’s negligence claim is based on allegation of delay in the processing of loan modification application); see also Badame v. J.P. Morgan Chase Bank, N.A., 641 Fed. Appx. 707, 709-10 (9th Cir. 2016).
- Unpublished federal cases can be used in state cases.

## HOBR Pleading Requirements

- Cardenas v Caliber Home Loans Inc. 2018 1367372 (N.D. Cal). The Court interpreted a “material” violation to mean “one that ‘affected [the plaintiff’s] loan obligations’ or the loan modification process.” Id. at 10 (quoting Johnson v. PNC Mortg., 2014 WL 6629585, at \*9 (N.D. Cal. Nov. 21, 2014).
- Here the violation was Caliber signing the SOT and NOS where it appeared Rushmore was the servicer.
- Johnson held the alleged sham assignment did not affect the borrower’s payment obligations under the loan or disrupt the loan modification process. Id. P. 9-10.
- Court took judicial notice of relief from stay order that borrower had defaulted on its obligations to make partial payments which right was forfeited when borrower defaulted.
- Favors Pre Yvan

## SPOC Claims Courts Divided on Specificity Required.

- Crumley v U.S. Bank et al., 2018 W. L. 315641 (N.D. Cal.).
- Does a SPOC request under Civil Code 2923.7 have to be specifically alleged. Plaintiff did not do so. SPOC claim dismissed.
- SPOC Claim barred by the 3 year Statute of Limitations. “any claim for violation of § 2923.7 based on alleged events in 2013 are time-barred. Here, Wells Fargo argues that a claim for violation of § 2923.7 must be brought within three years of the alleged violation, citing Davis v. U.S. Bancorp, No. 5:15-cv-02337-PSG, 2015 WL 5676022, at \*2 (N.D. Cal., Sept. 28, 2015)

## Surplus Funds---Be Careful Who the Trustee Pays.

- Than v Quality Loan Service Corp. 2017 W.L. 6506319 (u). 2<sup>nd</sup> Dist. Div. 7.
- Niece and her attorney presented an allegedly legally insufficient (forged) POA from them.
- Check payable to borrower but sent to attorneys office.
- Trial court granted demurrer without leave to amend.
- Trial Court correct regarding negligence. Borrower claimed she could state a claim for relief for breach of statutory duties. Argued for first time on appeal and granted.

## Bidder is not a Party Entitled to Surplus Funds

- Placer Foreclosure Services v Afalo (2018) 23 Cal. App. 5<sup>th</sup> 1109.
- Borrower initially tells trustee to hold surplus pending a dispute over the validity of the foreclosure sale with lender and bidder.
- New counsel for borrower demands surplus after statutory period for use of Civil Code 2924j and 2924k ends.
- Due to pending litigation trustee files interpleader action and deposits funds with the court.
- Borrower fields a demurrer to the interpleader because borrower claims that there is no dispute as to the surplus despite the pending action to set aside the foreclosure sale.

## Parties not Entitled to Surplus by Statute Do Not Create a Conflict Permitting Deposit or Interpleader

- Because PVP was not entitled to the funds, Placer had no right to withhold the surplus funds from Afalo. The surplus funds generated by the sale of the Malibu property exceeded \$974,000.00.
- Placer contends that the interpleader complaint was proper because Placer was faced with liability from Pro Value if it distributed the surplus \*1114 funds to Afalo. We reject this contention. Placer could safely distribute the surplus funds to Afalo as required by statute without any risk of multiple liability.” Id. p. 1113-1114.
- See Banc of America Leasing and Capital, LLC, v. 3 Arch Trustee Services, Inc. (2009) 180 Cal. App. 4th 1090, 1103



# **Bankruptcy Case Updates**

**Presented by**

**Mark S. Blackman, Esq.  
Wright, Finlay & Zak**

**Lee Raphael, Esq.  
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**Dean Kirby, Esq.  
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**Mark S. Blackman, Esq.**

Mark S. Blackman is an experienced bankruptcy, business, and real estate litigator. He represents clients in all aspects of creditors' rights matters including, but not limited to, bankruptcy proceedings, judicial foreclosures, real property foreclosures, title and escrow company disputes, interpleaders, and all aspects of bankruptcy, manufactured housing and mobile home transactions and litigation. Mr. Blackman, who recently joined the law firm of Wright, Finlay & Zak, LLP, is licensed to practice law in California and Nevada.

**Memberships/Accomplishments:**

Mr. Blackman is a former president of the San Fernando Valley Bar Association. He has served as the chair for the Bar Association's annual Law Day programs, which provides free legal services to members of the community. He has also served as the chair of the Bar Association's Blanket the Homeless program for over twenty-five years and served on the Board of Directors for the Valley Community Legal Foundation (which provides grants to organizations which provide legal services to families and the poor) for over six years.

Mr. Blackman presently serves on the Board for the Clark County Bar Association and serves as co-chair of the CCBA's Community Service Committee which works with many local organizations in Las Vegas.

Mr. Blackman also serves on the Board for the California Manufactured Housing Institute.

Mr. Blackman was a board member for the Los Angeles Chapter of the California Trustees Association and has served as a member of the Loyola Law School Board of Governors. Mr. Blackman also served as a member of the Formation Committee for the Woodland Hills-Warner Center Neighborhood Council which is part of the City of Los Angeles Department of Neighborhood Empowerment. Mr. Blackman currently serves on the Board of Directors for the Valley Cultural Center.

Mr. Blackman has conducted programs on bankruptcy law unlawful detainers (evictions) and mobile home foreclosures for the San Fernando Valley Bar Association, the Los Angeles Chapter of the California Trustees Association and the United Trustees Association. Mr. Blackman is also a regular contributor to the *UTA Quarterly*.

Before joining Wright, Finlay & Zak in 2018, Mr. Blackman was a partner with Alpert, Barr & Grant, APLC for almost 30 years.

Education/Court Admissions:

- Bachelor of Arts in Political Science from UCLA
- Juris Doctor from Loyola University School of Law, 1985.
- Licensed to practice in California and Nevada and before the United States District Courts for the Central, Northern, Southern and Eastern Districts of California and the District of Nevada.

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**Lee Raphael, Esq.**

Lee S. Raphael is the Owner and Managing Attorney of Prober & Raphael where he oversees the firm's California foreclosure, civil litigation and collections practices as well and the firm's nationwide bankruptcy practice. He has extensive experience with bankruptcy, real estate and federal appellate matters.

Mr. Raphael has been a featured speaker on multiple occasions at both the United Trustees Association's Annual Education Conference and the Central District of California Bankruptcy Judge's Annual Retreat. Additionally, he has moderated and participated in webinars and training seminars for the American Legal & Financial Network (ALFN) and Legal League 100. Mr. Raphael has also been a panelist on bankruptcy lien strips for both the San Fernando Valley Bar Association and the Central District Consumer Bankruptcy Attorneys Association, on Chapter 13 Local Rule changes for the Central District of California and on How to Get Your Chapter 13 Case Confirmed for the San Fernando Valley Bar Association. Furthermore, Mr. Raphael has been both a moderator and featured panelist on various bankruptcy issues at ANSWERS, the ALFN's annual leadership conference, and their regional TEACH events.

Mr. Raphael taught Real Property law for the Legal Education Conference Center and served on both the Central District of California Bankruptcy Forms Committee and the Central District of California's Relief from Stay Task Force. Mr. Raphael also currently serves on both the ALFN's Executive Bankruptcy Committee and the National Association of Chapter Thirteen Trustee's Mortgage Committee. He has also served on various Bankruptcy Sub-Committees for the

National Association of Chapter 13 Trustees. Mr. Raphael was also a member of the Southern California Bankruptcy Inns of the Court and Central District of California's Bar Rules Advisory Group's Relief from Stay Working Group.

Mr. Raphael's professional affiliations include / have included: the Mortgage Bankers Association, ALFN, Legal League 100, American Bar Association, Los Angeles County Bar Association, San Fernando Valley Bar Association, Los Angeles Bankruptcy Forum, United Trustees Association, National Association of Chapter 13 Trustees, Central District Consumer Bankruptcy Attorney Association, and the Association of Southern California Defense Counsel.

Mr. Raphael earned his bachelor's degree in Sociology from California State University Northridge and his Juris Doctor from Southwestern University School of Law, where he received the Dean's Scholar Designation. He was admitted to the State Bar of California in 1995 and is also admitted to all California Federal District Courts as well as the Ninth Circuit Court of Appeals. In addition, Mr. Raphael has maintained a perfect 5.0 AV Preeminent peer review rating from Martindale-Hubbell for close to 20 years. He can be reached at [lraphael@pralc.com](mailto:lraphael@pralc.com).



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Mr. Kirby represents lenders, creditors and fiduciaries in bankruptcy, foreclosure commercial collection, receiverships, workouts and lending transactions. He is certified by the American Board of Certification in the field of Creditors' Rights and by the Board of Specialization of the State Bar of California in the field of Bankruptcy. He is one of two California lawyers to have achieved certification in both Creditor Rights and Bankruptcy. Mr. Kirby has been appointed to serve as an examiner, a chapter 11 trustee; and as counsel for trustees and official creditor committees, in chapter 7 and 11 bankruptcy cases. He has lectured and published frequently on bankruptcy, consumer law, secured transactions and the Uniform Commercial Code.

Mr. Kirby has authored amicus briefs on behalf of the UTA and California Mortgage Association. His brief was cited and quoted by the Ninth Circuit in its recent decision in *Ho v. ReconTrust Company, NA*, 840 F.3d 618 (9th Cir. 2016),

which held that foreclosure trustees are not “debt collectors” subject to the Fair Debt Collection Practices Act.

Mr. Kirby is rated AV® by Martindale-Hubbell, their highest rating of skill and integrity, indicating very high to pre-eminent legal ability and very high ethical standards as established by confidential opinions from members of the bar. He was selected for inclusion in the 2008-2017 editions of "Super Lawyers"®, and as a San Diego “Top Lawyer” by San Diego Magazine, since 2014. He is rated “10.0 Superb” by Avvo, their highest rating.

Published Decisions (In addition to amicus cases, a recent / partial list): In re Castaic Partners II, LLC, 823 F.3d 966 (9th Cir. 2016) In re YBA Nineteen, LLC 505 B.R. 289 (S.D. Cal. 2014); In re Asset Resolution, LLC 542 Fed. Appx. 578 (9th Cir. 2013); Wilson v. Hynek, 207 Cal.App.4th 999, 144 Cal.Rptr.3d 999 (2012); USA v. Countrywide Home Loans, Inc., 408 Fed. Appx. 3 (9th Cir. 2010); Kachlon v. Markowitz, 168 Cal.App.4th 316 (2008); In re Moi, 381 BR 770 (Bankr. S.D. Cal. 2008); Bank of America, N.A. v. La Jolla Group II, 129 Cal.App.4th 706, 28 Cal.Rptr.3d 825 (2005); Nguyen v. Calhoun, 105 Cal.App.4th 428, 129 Cal.Rptr.2d 436 (2003); Satten v. Webb, 99 Cal.App.4th 365, 121; Cal.Rptr.2d 234 (2002) Federal National Mortgage Assn. v. Bugna, 57 Cal.App.4th 529, 67 Cal.Rptr.2d 233 (1997); In re Nunez, 196 B.R. 150 (Bankr. App. 9th Cir. 1996).

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Benjamin R. Levinson has been representing litigants in bankruptcy, federal and state court actions for 33 years. His clients include private mortgage lenders, institutional lenders, foreclosure trustees, receivers, third party purchasers, landlords, bankruptcy creditors, and real property litigants in all California District Courts and Bankruptcy Courts and all California state courts.

Mr. Levinson's practice emphasizes creditor bankruptcy representation, defending lenders and trustees in foreclosure-related litigation, lender and receiver representation in state court receivership actions, representing purchasers of real property in post-foreclosure evictions throughout the State of California, and lender representation in judicial foreclosure actions to seek a deficiency under the loan.

Mr. Levinson is a member of the State Bar of California, the Santa Clara County Bar Association, the Bar Association of San Francisco, the American Bankruptcy Institute, the Bay Area Bankruptcy Forum, the San Jose chapter of American Inns of Court solely dedicated to bankruptcy reorganization practice, the California Mortgage Association and is a director and member of the United Trustees Association.

Mr. Levinson has been a seminar speaker for the California Mortgage Association, the California Trustees Association and its successor organization, the United Trustees Association on various bankruptcy, foreclosure, eviction, and interpleader topics over the last thirty-three years.

Published appellate cases that Mr. Levinson has been counsel for the prevailing party include, *Melendrez v. D & I Investment, Inc.*, (2005) 127 Cal.App.4th 1238; which held that a bona fide purchaser for value at a trustee's sale could include those persons that regularly bid at such sales and which held that the conclusive presumptions of the Trustee's Deed given to BFP's only apply to the statutory procedures with respect to the default and sale notices and do not apply to other requirements of the foreclosure process; *Resolution Trust Corporation v. Bayside Developers*, 43 F.3d 1230 (9th Cir. 1994); where the 9th Circuit Court of Appeals affirmed the reversal by the District Court of the California Sixth Appellate District and held that the sale by the court appointed receiver of real property assets that was part of the lender's collateral did not violate the one-action rule of California Civil Procedure § 726; and *Pacific Loan Management v. Superior Court*, (1987) 196 Cal.App.3d 148; which specifically provided for the right of a foreclosure trustee to interplead surplus funds.

Mr. Levinson received his Juris Doctorate from the University of Santa Clara in 1984 and his Bachelor of Arts in Law and Society from the University of California Santa Barbara in 1979. He is licensed to practice in the Northern, Eastern, Central, and Southern District Bankruptcy Courts in California and he has extensive experience handling bankruptcy matters in all of these Districts.

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## 2018 BANKRUPTCY UPDATE

November 5, 2018 - 1:30 p.m. – 2:45 p.m.

Green Valley Ranch Resort, Las Vegas, Nevada

### SPEAKERS

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Mr. Levinson received his Juris Doctorate from the University of Santa Clara in 1984 and his Bachelor of Arts in Law and Society from the University of California Santa Barbara in 1979. He is licensed to practice in the Northern, Eastern, Central, and

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Published Decisions (In addition to amicus cases, a recent / partial list): *In re Castaic Partners II, LLC*, 823 F.3d 966 (9th Cir. 2016) *In re YBA Nineteen, LLC* 505 B.R. 289 (S.D. Cal. 2014); *In re Asset Resolution, LLC* 542 Fed. Appx. 578 (9th Cir. 2013); *Wilson v. Hynek*, 207 Cal.App.4th 999, 144 Cal.Rptr.3d 999 (2012); *USA v. Countrywide Home Loans, Inc.*, 408 Fed. Appx. 3 (9th Cir. 2010); *Kachlon v. Markowitz*, 168 Cal.App.4th 316 (2008); *In re Moi*, 381 BR 770 (Bankr. S.D. Cal. 2008); *Bank of America, N.A. v. La Jolla Group II*, 129 Cal.App.4th 706, 28 Cal.Rptr.3d 825 (2005); *Nguyen v. Calhoun*, 105 Cal.App.4th 428, 129 Cal.Rptr.2d 436 (2003); *Satten v. Webb*, 99 Cal.App.4th 365, 121; Cal.Rptr.2d 234 (2002) *Federal National Mortgage Assn. v. Bugna*, 57 Cal.App.4th 529, 67 Cal.Rptr.2d 233 (1997); *In re Nunez*, 196 B.R. 150 (Bankr. App. 9th Cir. 1996).

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### **Memberships/Accomplishments:**

Mr. Blackman is a former president of the San Fernando Valley Bar Association. He has served as the chair for the Bar Association's annual Law Day programs, which provides free legal services to members of the community. He has also served as the chair of the Bar Association's Blanket the Homeless program for over twenty-five years and served on the Board of Directors for the Valley Community Legal Foundation (which provides grants to organizations which provide legal services to families and the poor) for over six years.

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Mr. Blackman has conducted programs on bankruptcy law unlawful detainers (evictions) and mobile home foreclosures for the San Fernando Valley Bar Association, the Los Angeles Chapter of the California Trustees Association and the United Trustee's Association. Mr. Blackman is also a regular contributor to the UTA Quarterly.

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Mr. Raphael taught Real Property law for the Legal Education Conference Center and served on both the Central District of California Bankruptcy Forms Committee and the Central District of California's Relief from Stay Task Force. Mr. Raphael also currently serves on both the ALFN's Executive Bankruptcy Committee and the National Association of Chapter Thirteen Trustee's Mortgage Committee. He has also served on various Bankruptcy Sub-Committees for the National Association of Chapter 13 Trustees. Mr. Raphael was also a member of the Southern California Bankruptcy Inns of the Court and Central District of California's Bar Rules Advisory Group's Relief from Stay Working Group.

Mr. Raphael's professional affiliations include / have included: the Mortgage Bankers Association, ALFN, Legal League 100, American Bar Association, Los Angeles County Bar Association, San Fernando Valley Bar Association, Los Angeles Bankruptcy Forum, United Trustees Association, National Association of Chapter 13 Trustees, Central District Consumer Bankruptcy Attorney Association, and the Association of Southern California Defense Counsel.

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## I. AUTOMATIC STAY ISSUES

*In re Draudt (9th Cir. BAP March 2018)*      **NOT PUBLISHED**

- **The Ninth Circuit BAP ruled that the Bankruptcy Court properly dismissed a wrongful foreclosure action for failure to state a claim when the trustee's sale took place after dismissal of the bankruptcy, even though the Order granting relief from stay in a prior motion required lender to delay its foreclosure sale to a later date.**

**Facts:** Lender obtained an Order terminating the stay on January 7, 2015, but the Bankruptcy Court delayed the lender's ability to actually conduct the sale until on or after February 17, 2015. In the meantime, Debtor voluntarily dismissed his case on January 20, 2015. Lender conducted its trustee's sale after the dismissal but before the date allowed in the order granting relief from stay.

Debtor filed an action for wrongful foreclosure alleging that the Bankruptcy Court exercised its discretion to allow the relief from stay Order to survive the dismissal of the case. The Bankruptcy Court disagreed and held that the stay terminated upon dismissal of the case and that the relief from stay Order made no such exception to have the Order survive the dismissal. The Bankruptcy Court granted Lender's motion to dismiss without leave to amend. Debtor appealed to the Bankruptcy Appellate Panel (BAP).

**Holding:** The BAP affirmed the Bankruptcy Court ruling. The BAP reiterated that 11 U.S.C. § 349(b)(3) provides that "Unless the court, for cause, orders otherwise, a dismissal of a case ... reverts the property of the estate in the entity in which such property was vested immediately before the commencement of the case under this title". Further, 11 U.S.C. § 362(c)(1) provides that the stay of an act against property of the estate ... continues until the property is no longer property of the estate. Debtor could provide nothing in the record to show that the Bankruptcy Court was exercising its discretion to extend the relief from stay order beyond the dismissal of the case.

Further, the BAP held that the Bankruptcy Court did not abuse its discretion by dismissing the case and not allowing leave to amend. The BAP found that any amendment would be futile because the defect was based on a legal premise that was flawed, namely that the relief order extended beyond dismissal of the case.

**Reminder:** There is no requirement to delay a foreclosure sale after dismissal of a case under California law or under the Bankruptcy Code. Once the dismissal order is entered, you can immediately proceed to foreclosure sale.

***Torres v. Wells Fargo Bank N.A., 2018 WL 4334815  
(N.D. Cal. Sept. 11, 2018)***

- **Mootness rule bars appeal of a relief from stay order after the property is sold at foreclosure.**

**Facts:** In April, 2013 Ms. Torres filed a chapter 7 bankruptcy petition in the Northern District of California, and received a discharge. At that time she stopped making payments on a \$500,000 home loan secured by a first trust deed in favor of Wells Fargo Bank. In order to stave off foreclosures, she filed three chapter 13 petitions (in January, February, and December, 2017) each of which was dismissed. This case arises out of the fourth chapter 13 petition, filed on February 22, 2018.

Wells Fargo moved for relief from the automatic stay, asking for an in rem order which would apply to all other subsequent bankruptcy filings. The Bankruptcy Court granted the motion under 11 U.S.C. § 362(d)(4), making the finding required by the statute, that the most recent chapter 13 petition was “part of a scheme to delay, hinder or defraud creditors . . . .”

Ms. Torres filed a motion for reconsideration which was denied by the Bankruptcy Court, by an order entered June 4, 2018. She then appealed the ruling to the United States District Court. She filed an emergency motion asking the Bankruptcy Court to stay the foreclosure sale pending her appeal. The Bankruptcy Court declined to issue a stay, and the property was sold at foreclosure to a third party on June 8. Ms. Torres did not apply to the District Court for a stay during the interim between June 4 and June 8.

**Issue on Appeal:** After relief from the automatic stay is granted and a trustee’s sale is held, is an appeal of the stay relief order moot if no stay pending appeal is obtained?

**Holding:** The District Court dismissed the appeal as moot, citing section 363(m) of the Bankruptcy Code. Section 363(m) provides that “[t]he reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.” Citing *In re Onouli-Kona Land Co.*, 846 F.2d 1170, 1171 (9th Cir. 1988), which cited section 363(m) in applying the bankruptcy mootness rule to a foreclosure sale.

***In re Achterberg 573 B.R. 819 (Bankr. ED 2017)***

- **Failure to vacate a default judgment against debtors entered postpetition until after the filing of an Adversary action for violation of the stay five years after discharge was a knowing, intentional, and willful violation of the automatic stay and the discharge injunction.**

**Facts:** The Achterbergs ("Debtors") filed a chapter 7 bankruptcy in December 2008. The judgment creditor ("Creditor") was listed in the schedules and creditor mailing matrix. Creditor also received notice of Debtors' chapter 7 discharge. Creditor closed its file against Debtors upon filing of the case and sent it physically offsite. Before doing so, Creditor had sent a request for a default Judgment to the superior court that was entered postpetition in February 2009. Creditor took no action or investigation to further investigate the file. Debtors received their discharge in 2009 and the case was closed.

In 2015, Debtors entered into contract to purchase a real property. Escrow was opened where the 2009 judgment was discovered. Creditor was notified in writing by an attorney for Debtors of the void judgment in May 2015 and it was demanded that the judgment be vacated. Creditor took no action to vacate the judgment until August 2015 after Debtors filed an Adversary action for intentional violation of the stay and discharge injunction.

Debtors were forced to pay a loan extension fee when the purchase was stalled due to the delay in the judgment being vacated. Debtors sought reimbursement damages for the extension fee, emotional distress damages, attorney fees and costs, and punitive damages.

**Decision of Bankruptcy Court**

The Bankruptcy Court held a trial and rendered a memorandum decision. The decision discussed in detail the evidence in favor and in opposition to the adversary action. The Court further discussed the law regarding violations of the automatic stay, including that a creditor bears a burden to affirmatively take action to remedy any violation as soon as provided with knowledge of the violation.

The Bankruptcy Court first reiterated that an act taken in violation of the stay is void. The Bankruptcy Court stated that a violation of the stay is addressed as ordinary civil contempt. The standard for finding a party in civil contempt requires a moving party to show by clear and convincing evidence that the other party violated a specific order of the court. The automatic stay qualifies as a specific and definite order of the court.

The Bankruptcy Court explained that a defendant's subjective belief or intent is not relevant. Instead, the determining factor is "willfulness" – that defendant knew of the stay and its actions were intentional.

Once a debtor meets the burden and it is not rebutted, an individual debtor is entitled to actual damages, costs and attorney fees, and even punitive damages if the conduct is found to be reckless or with callous disregard for the law or rights of others. The purpose of punitive damages is to punish unlawful conduct and deter its repetition. Punitive damages must be proportional and be reasonably related to compensatory damages.

The Bankruptcy Court then examined the evidence in the case in relation to the law. Although the evidence did not show that Creditor was aware of the bankruptcy when the motion for entry of a default judgment was filed in Superior Court, the evidence showed that Creditor had knowledge of the pending bankruptcy when the judgment was entered. The Creditor also had knowledge of the discharge in 2009 and took no action to vacate the void judgment or to correct the public record thereafter for a period of 77 months. Only after the adversary action was filed did Creditor take action to vacate the judgment.

The Bankruptcy Court concluded that not only was Creditor's actions willful, but it was with reckless or callous disregard of Debtors' rights. As a result, the Bankruptcy Court awarded Debtors' economic damages due to the delay in the escrow, emotional distress damages due to the distress of having their purchase delayed, costs and attorney fees, and punitive damages.

The Bankruptcy Court also held that Creditor intentionally violated the discharge injunction resulting in additional civil contempt. The damages were the same as for violation of the stay. The Bankruptcy Court did not award additional punitive damages, stating the award for violation of the stay was sufficient in that regard.

**Reminder:** If you have taken actions postpetition to conclude your foreclosure sale, it would be a violation of the stay unless the stay does not apply under some exception set forth in the Bankruptcy Code. Additionally, you need to take action to cancel any NOD or NOTS that violates the stay except under certain circumstances. Please consult with your bankruptcy counsel to evaluate whether you need to take any affirmative act to unwind any action taken postpetition that could be determined to be a violation of the stay.

## ***In re Vazquez, 580 B.R. 526 (Bankr. C.D. Cal. 2017)***

- **In Rem Relief From “Hijacking” the Automatic Stay.**

**Facts:** James and Rose Zarian purchased their Del Mar home in 2005 with the aid of a mortgage loan from Washington Mutual Bank. They fell behind in their payments, and in 2012 allegedly retained the services of an Agent to assist in obtaining a loan modification. The Zarians claimed that since May, 2012, they began making their mortgage payments directly to the Agent’s wife’s bank account. According to the Zarians, a total of \$67,750.00 in monthly payments were made, none of which were actually received by the lender, and the Agent made no effort to obtain a loan modification.

As the foreclosure sale approached, the Agent allegedly forged a grant deed conveying a 5% ownership interest in the home to Elizabeth Vasquez. The deed was dated January 18, 2016, but the court observed that it “might well be back dated.” Ms. Vasquez, who had no relation to the Zarians or to the property, filed a chapter 13 petition on January 20. The Court noted that in the typical “hi-jacking” case a debtor in bankruptcy is chosen at random and is not aware of the scheme

The grant deed was apparently never recorded, but a copy was transmitted by facsimile to the lender. The foreclosure sale was postponed so that the lender could file a motion in the Vasquez bankruptcy case seeking relief from the automatic stay. In its motion the lender presented evidence of multiple transfers of partial interests in Zarian home as well as multiple bankruptcy filings affecting those purported interests. The lender sought an “in rem” order, i.e., one that would be effective in any future bankruptcy filing. Mr. Zarian opposed the motion.

**Issue on Appeal:** Did the Bankruptcy Court have jurisdiction to issue an “in rem” order for relief from the automatic stay, even though the Debtor disclaimed any interest in the home, which was technically not property of the bankruptcy estate? If jurisdiction exists, then was in rem relief authorized by § 362(d)(4) of the Bankruptcy Code?

**Holding:** Bankruptcy Judge Neil Bason of the Central District of California, Los Angeles Division, held that the Bankruptcy Court had jurisdiction to grant in rem relief, and that such relief was authorized under 11 U.S.C. § 362(d)(4).

The jurisdictional issue was not actually argued by any of the parties but was raised by Judge Bason *sua sponte*. He held that the court always has jurisdiction to terminate or modify the automatic stay, even if the property at issue is not part of the bankruptcy estate, citing *In re Aheong*, 276 B.R. 233 (9th Cir. BAP 2002), in which a bankruptcy court found it had jurisdiction to annul the stay even after dismissal of the case. Judge Bason also found that the Zarian’s would be estopped to argue lack of jurisdiction because their Agent’s action was intended to obtain the benefit of the automatic stay, i.e., to invoke the Bankruptcy Court’s jurisdiction.

Bankruptcy Code § 362(d)(4) authorizes the granting of in rem relief in a case of multiple filings affecting the subject property, if “the filing of the petition was part of a scheme to hinder, delay or defraud creditors.” The Court found that the Debtor, Ms. Vasquez, was without knowledge of the hi-jacking. So as the Court put it: “the question is whether Debtor’s innocence is inconsistent with finding that the filing of her bankruptcy petition was part of a scheme to hinder delay or defraud creditors. Judge Bason concluded that the statutory language “was part of a scheme” encompassed situations in which the filing of the petition has been made part of a scheme by someone other than the Debtor in bankruptcy.

Mr. Zarian argued that as the result of this ruling he had lost the right to protect the home by filing his own legitimate personal bankruptcy petition. The Court addressed this by stating that its order did not does not prevent the Zarians from filing their own bankruptcy case in the future and moving for relief from this court’s order “based upon changed circumstances or for good cause shown.

***In re Keller 568 B.R. 118 (9th Cir. BAP 2017)***

- **Reporting of adverse credit information to credit reporting agencies (CRA) post-petition is not a per se violation of the automatic stay.**

**Facts:** The Kellers (“Debtors”) filed their chapter 13 bankruptcy in February 2012. The residence loan of Debtors was over \$11,000 delinquent at that time. Debtors confirmed a fifth amended plan that provided for payment of prepetition arrears and payment of ongoing contractual loan payments through the Chapter 13 trustee’s office.

Debtors made all payments under the plan and cured prepetition arrears by March 2015. In January 2016, while the case was still ongoing, Mrs. Keller obtained a three-bureau credit report. The loan servicer had provided information to the three credit reporting agencies (CRA’s) about the loan showing payments as follows:

“Loan History: 90-120 days late for the period of March 2014  
– December 2015 (during the time period of the bankruptcy);

Payment Status: Account past due for at least 120 days or  
more than four payments;

Past Due Balance: Account as \$9,297.00 past due;

Bankruptcy Status: Servicer failed to report that the account  
was included in a or part of a chapter 13 repayment plan.”

Mr. Keller’s credit report contained similar information.

In January 2016, Debtors were denied credit in the purchase of a new vehicle. The denial letter indicated that Mr. Keller was an “unacceptable credit risk” and that credit was denied “based in whole or in part on information obtained on a report”.

### **The Bankruptcy Court Motion**

Debtors then filed a motion against the lender and loan servicer for contempt and sanctions for violation of the stay and confirmation order. They argued that reporting misleading and inaccurate information on the credit reports—that the account was severely delinquent and with a past due balance—was a willful act to collect on a debt that was subject to the automatic stay and confirmation order.

Debtors argued that reporting of an account included in the chapter 13 case as “past due” or “late” was a per se violation because it did not merely acknowledge the debt, it suggested a failure to perform in order to coerce debtors into paying the debt directly, despite the requirements of the confirmed chapter 13 plan.

The Bankruptcy Court denied the motion and Debtors appealed to the BAP.

### **The Decision of the Bankruptcy Appellate Panel (BAP)**

**Issue on Appeal:** Whether the creditor’s postpetition reporting of overdue or delinquent payments to a CRA, regardless of the information’s accuracy, is a per se violation of the stay under the Bankruptcy Code and a violation of the confirmation order.

**Holding:** The BAP affirmed the Bankruptcy Court. The BAP held that postpetition credit reporting of overdue or delinquent payments, without more, does not violate the automatic stay as a matter of law. To be recoverable, debtors would need to show that the credit reporting was done with the purpose of coercing the debtors to pay the reported debt.

The BAP reviewed multiple decisions in other jurisdictions that had held that mere negative reporting does not violate the discharge injunction nor the co-debtor stay. The BAP also reviewed multiple decisions that held that mere negative reporting does not violate the automatic stay.

The BAP rejected Debtor’s argument that mere reporting of a delinquent debt during a bankruptcy is collection activity itself because its sole purpose is to coerce debtor to pay the debt in order to have the detrimental information removed.

The BAP also rejected Debtor’s argument that the reporting of a delinquent debt violated the confirmation order because it failed to conform with the plan’s terms to pay back the debt. The confirmation order neither directed nor prohibited credit reporting and the BAP concluded that the lender and servicer could not be found in contempt.

**Reminder:** Be careful in the reporting of delinquent accounts during the bankruptcy. After any discharge in a bankruptcy case, the language used in sending any information to a CRA should not claim the debt is still due and outstanding.

***In re Zerhioun, 2017 WL 4897681 (N.D. Cal. Oct. 30, 2017), appeal dismissed sub nom. Zerhioun v. Sequoyah Heights Homeowner's Ass'n, No. 17-7416, 2018 WL 1174989 (9th Cir. Feb. 27, 2018)***

- **A debtor's third successive bankruptcy petition filed within a year results in no automatic stay. Delivering and recording the TDUS were not stay violations. Appeal was moot for failure to seek a stay.**

**Facts:** Mr. Zerhioun failed to pay HOA assessments on his home in Oakland, and an assessment lien was recorded in March, 2014. Under the threat of foreclosure, he filed a series of bankruptcy petitions. The first was a chapter 13 petition filed in December 2014, which was dismissed on February 12, 2015. The next was a chapter 7 petition, which was dismissed, and a chapter 7 petition. petition in December, 2014, which was dismissed on February 12, 2015. He filed a chapter 7 petition filed on June 9, 2015. The opinion erroneously states that this bankruptcy case was dismissed on September 2, 2015, but online court records show that there was no dismissal and that Mr. Zerhioun received his discharge on September 22, 2015. The trustee's sale under the HOA lien was held on August 19, 2015, with the HOA obtaining title via a successful credit bid. The opinion offers no explanation was to how the sale could have been held during the pendency of the chapter 7 bankruptcy. Bankruptcy Code section 362(c)(3)(A) provides that when a prior bankruptcy case was dismissed within the year preceding the current filing, the automatic stay dissolves after 30 days unless the debtor moves to continue the stay beyond the 30 day limit. The online dockets make clear that the HOA relied on this provision, and even notified Mr. Zerhioun that it would proceed to hold the foreclosure during the chapter 7 case without seeking a court order.

After receiving his chapter 7 discharge, Mr. Zerhioun filed a chapter 13 petition on November 13, 2015. The Trustee's Deed Upon sale was executed and recorded in January, 2016, while this new chapter 13 case was pending. The HOA, now seeking to evict Mr. Zerhioun, filed a motion seeking an order determining that that no automatic stay was in effect by operation of 11 U.S.C. § 362(c)(4)(A). That section provides that no automatic stay will take effect when two previous bankruptcy cases were dismissed within the preceding year. The Bankruptcy Court granted that motion, and Mr. Zerhioun appealed to the United States District Court.

**Issue on Appeal:** Was the appeal moot because a foreclosure on the subject property had already taken place?

**Holding:** The District Court denied the appeal for lack of jurisdiction, on the grounds that the appeal was moot, since the foreclosure sale had been completed before the current chapter 13 petition had even been filed. The opinion makes no distinction between the foreclosure and the eviction, even though the eviction had not been completed by the time that the latest chapter 13 petition was filed. The opinion also wrongly concluded that no automatic stay ever existed at all under Bankruptcy Code § 362(c)(4)(A), incorrectly stating that the prior chapter 7 case had been “dismissed” and conflating the difference between a bankruptcy case which has been dismissed and one that has been “discharged.”

Part of the opinion considers a purported conflict between the case of *In re Reswick*, which holds that the automatic stay “does not do into effect at all” in a multiple filings context covered by § 362(c)(3), and *In re Richter*, 525 B.R. 735, which holds (in a case where no serial filing was involved) that relief from the automatic stay is necessary to evict a chapter 13 debtor even if a foreclosure was completed prior to the filing of the bankruptcy petition.

Regardless of this confusion, the correct result was reached. Because of the first chapter 13 case was dismissed within a year before the latest chapter 13 case was filed, the stay had expired 30 days after the latest petition was filed. It was only after the expiration of the 30 day period that the Trustee’s Deed was signed and recorded. Also, the Court cited *McCarthy, Johnson & Miller v. N. Bay Plumbing, Inc. (In Re Pettit)*, 217 F.3d 1072, 1080 (9th Cir. 2000) for its holding that the post-sale execution and recording of a Trustee’s Deed Upon Sale is a “ministerial act” not subject to the automatic stay. Although the Bankruptcy Court wrongly decided that there was no stay in effect as to the eviction, that stay expired in any case after the 30 day period expired. And further, the Debtor did not seek or obtain a stay pending appeal.

### ***In re Levine 583 B.R. 231 (CD CA 2018)***

- **The automatic stay protected a contingent interest in real property of a debtor.**

**Facts:** Debtor Levine and boyfriend (Goldstein) were in a long term relationship but never married. During their relationship, they purchased multiple properties together, some individually and some in the name of the Amadeus Trust (the “Trust”). The Trust was a revocable living trust in which Debtor and Goldstein were settlors, trustees, and beneficiaries.

The relationship ended and debtor filed a palimony suit against Goldstein. Debtor alleged in the suit that she had purchased nine properties as her separate property including some in the name of the Trust and that she had previously revoked the Trust so that the separate properties reverted back to her.

## **Debtor's Bankruptcy Filing**

Debtor later a Chapter 11 bankruptcy that was converted to Chapter 7. Goldstein filed a claim for \$5.5 million for expenses the Trust paid for certain real properties.

Debtor, Goldstein, and the Chapter 7 trustee eventually entered into a settlement agreement resolving the palimony suit and Goldstein's claim in Debtor's bankruptcy. One property was to be sold and thereafter title to other remaining properties would be transferred to each of them separately.

The property sale failed and the settlement was amended to sell the property to a particular buyer and then have it resold with profits being split in a certain manner between the new buyer, debtor, Goldstein, and the estate.

In the meantime, in separate proceedings, Pacific Western Bank ("Bank") obtained two judgments against Goldstein and two of his companies. In an effort to enforce the judgments against Goldstein, Bank filed a motion for relief from stay. Bank sought to record abstracts of judgment against Goldstein's separate interest in the properties co-owned with Debtor. Bank also sought to record judgment liens against personal property of Goldstein.

The Bankruptcy Court granted relief with respect to Goldstein's personal property. The Bankruptcy Court denied relief with respect to the real properties, explaining that allowing Bank to record the abstracts may cloud title and hamper the administration of Debtor's estate.

Bank appealed to the District Court.

### **The District Court Decision**

**Issue on Appeal:** Did the automatic stay protect a non-debtor's separate interest in real property he co-owns with a debtor where the non-debtor's separate interest would be extinguished by the consummation of a settlement agreement?

**Holding:** The District Court affirmed the Bankruptcy Court. The District Court first reiterated that enforcement actions directly against property of the bankruptcy estate are protected by the bankruptcy stay. Here, Bank seeks enforcement efforts against a non-debtor. However, the actions sought by Bank here are against property in which Debtor has an interest.

Bank argued that Debtor and Goldstein held the real properties as tenants in common and therefore Goldstein possessed a separate interest in the real properties. Debtor contended that the real properties are her separate properties and that Goldstein has no interest in them. The dispute between Goldstein and Debtor resulted in a settlement requiring sale of a certain property and thereafter a division of remaining

properties, with Debtor receiving other real property that would be part of her bankruptcy estate.

The District Court held that Debtor held a contingent interest in the entirety of the real properties that would vest upon the sale of the first property. As a result, that interest of Debtor was sufficient to include all of the real properties within the scope of the automatic stay.

Additionally, Bank's enforcement action would inhibit the orderly distribution of Debtor's bankruptcy estate, an essential purpose of the Bankruptcy Code. It would also impact resolution of multiple disputes in the case. For those reasons, denial of relief from stay on the real property was affirmed.

**Reminder:** The automatic stay in bankruptcy is very broad. It prevents acts against a debtor, and a co-debtor in Chapter 13, and also against property of the estate. If you are not sure if the stay applies, discuss the facts with your bankruptcy counsel to determine a course of action. It is better to make a motion for relief from stay or that the stay does not apply and get court approval than to take a chance that your actions, such as completing a foreclosure sale, violated the automatic stay.

#### **In re: Leeds 589 B.R. 186 (Bk Nev. 2018)**

- **Retroactive relief from the automatic stay was denied to validate an act which had previously violated the automatic stay.**

The Nevada Bankruptcy Court refused to permit retroactive annulment of the automatic stay to permit the purchaser at a HOA super-priority lien sale to validate a sale which had violated the automatic stay.

**Facts:** In 2011 Debtor Myong Leeds ("Leeds") filed a chapter 7 bankruptcy case. Leeds owned residential property in Las Vegas within an HOA community, the Butler Estates Home Owners Association (the "HOA").

Leeds stated in her schedules that the Las Vegas residence was worth \$307,554. And that secured Creditor, Bank of America Home Loans ("BOA") had a \$610,000 secured deed of trust. In September, 2011, Leeds obtained a discharge in her case. In July 2012, the Trustee issued a final report which included an abandonment of Leeds' home.

On May 8, 2013, SFR Investments Pool ("SFR") purchased the property at a foreclosure sale conducted by the HOA through its foreclosure trustee, Alessi & Koenig

("A&K"). On August 1, 2013, the Trustee in the Leeds case filed a final distribution report stating that the Leeds residence was fully administered and no funds were received by the bankruptcy estate. On January 29, 2014, a final decree was entered and the Leeds bankruptcy case was closed, and the automatic stay terminated.

On September 10, 2013, A&K which was in possession of surplus funds from the sale, filed an interpleader action. In December, 2016 A&K filed for bankruptcy protection. BOA sought to remove the state court interpleader to the Bankruptcy court, which the Bankruptcy Court returned to the state court.

In the state court action, Bank of America challenged and the state court concluded that BOA had standing to challenge the HOA foreclosure (due to the HOA's violation of the automatic stay and the well settled law that an act in violation of the automatic stay was void.

SFR filed a motion in the Leeds Bankruptcy case to reopen it to retroactively annul the automatic stay and to validate the 2013 foreclosure sale. On May 3, 2018, an order was entered granting SFR's motion to reopen the Leeds case so that SFR could seek an order annulling the automatic stay that arose when Leeds filed her case. On June 13, 2018 BOA filed an opposition to the annulment motion.

On June 18, 2018, in the state Interpleader action, the Court granted BOA's Motion for Summary Judgment concluding that BOA had standing to challenge the validity of the Butler HOA foreclosure sale as a violation of the automatic stay and held that a sale in violation of the automatic stay was void *ab initio*, and that therefore the BOA lien remained valid.

In this case, the senior lien holder, BOA opposed SFR's motion to validate the HOA's foreclosure sale. Acknowledging that the HOA sale was void under *In re Schwartz*, 954 F.2d 569, 571, the Nevada Bankruptcy Court reviewed the standards for retroactive annulment of the automatic stay:

**Analysis:** Using a balancing of the equities test set forth in *In re Fjeldstedt*, the following factors should be considered:

1. Number of bankruptcy filings;
2. Whether in a repeat filing case there is an intent to delay and hinder creditors;

3. A weighing of the extent of prejudice to creditors and third parties if the stay relief is not made retroactive;
4. The debtor's overall good faith (totality of the circumstances test);
5. Whether the creditors knew about the case but took the action anyway;
6. Whether the debtor complied with Bankruptcy Court Code and Rules;
7. The relative ease of restoring the parties to their prior positions;
8. The costs of annulment to debtor and creditors;
9. How quickly the creditor moved for annulment or sought to set aside the sale;
10. Whether after learning of the bankruptcy, creditors proceeded to take steps in continued violation of the stay or whether they sought to obtain relief;
11. Whether annulment will cause irreparable injury to the debtor; and,
12. Whether stay relief will promote judicial economy.

Five of the factors focus on Debtors' behavior (1, 2, 4, 6, and 11); three of the factors (Factors 3, 5, and 10) focus on the creditors; three other factors (Factors 7, 8, and 9) are common factors focusing on debtor; and non-debtor and the twelfth and final factor (12) looks to judicial interests.

In *Leeds*, the Court focused on a factor unique to states with super-priority lien statutes, such as Nevada. Because the debtor's personal liability had been discharged, and because of the super-priority lien, the residential lender (BOA) would suffer the extreme consequences. Their lien is extinguished and BOA has no enforceable obligation from the borrower and title to the property passes free and clear of BOA's lien.

Because there was no abandonment of the real property by the trustee in Leeds' bankruptcy case, the residence was still property of the estate until the case was closed.

**Holding:** Due to the complexities of the super-priority law in Nevada, combined with some issues with the trustee in the *Leeds* bankruptcy case, some unique issues were considered in SFR's motion.

1. ***The Chapter 7 trustee also managed, controlled, or advised SFR.*** The Court held that in light of such conflict, the Chapter 7 panel trustee should have resigned.

“Under any spin of the other evidence presented, the record establishes that while serving as the trustee of the Leeds estate, the trustee permitted his private client (SFR) to obtain possession and control over property of the estate.

2. ***Service of the Annulment Motion was insufficient.*** Stating that the Ninth Circuit held that retroactive relief from the automatic stay should be granted only in extreme circumstances, a balancing of the equities approach requires that proper notice be given to all parties. The notice need not be “perfect” but must reasonably convey the required information. Notice must be reasonably calculated under all of the circumstances to apprise interested parties of the pendency of the action and afford them the opportunity to present their objections.

SFR while maintaining that BOA lacked standing to assert the protections of the automatic stay in opposition to SFR’s annulment request, asserted that the only appropriate parties with standing to object to the retroactive relief from stay are the debtor and the bankruptcy trustee.

SFR then asserted that it had hired a licensed process server to serve the debtor and that SFR had also served the Debtor’s bankruptcy counsel. The Court held that there was no evidence that Leeds was served-personally, by mail or otherwise and that there was no evidence that that Debtor’s bankruptcy counsel was retained to handle relief from stay hearings. Although SFR had purportedly served the trustee, the trustee no longer represented the estate, but still represented SFR. The Court stated that there was no notice to any of the parties, and that there was no notice reasonably calculated to apprise those parties of the requested relief or of the opportunity to object.

3. ***The doctrine of unclean hands warrants denial of the motion.*** The Court held that SFR engaged the services of the Chapter 7 trustee while the Trustee, David Rosenberg was already the Chapter 7 trustee and while SFR acquired the Leeds residence from the Leeds bankruptcy estate. Furthermore, SFR acquired the property for \$42,000 compared to the \$307,554 value claimed by the debtor. The Bankruptcy Court held that Rosenberg violated his duties as the Chapter 7 trustee and as a licensed attorney. The Court also opined that he violated his duties to SFR under the Nevada Rules of Professional Conduct. The Court held that while annulment to validate a sale during a bankruptcy has been granted in the past, under the facts in this case, SFR acquired the Leeds residence while engaging the

assistance of Rosenberg, the Chapter 7 trustee while he was violating his duties to the Bankruptcy estate.

4. ***The Fjeldsted factors.*** After essentially citing the factors for consideration of a motion to retroactively annul a stay, this Nevada Court essentially rejected the motion for other reasons, and then finally came back to the Fjeldsted factors:

- a. The Debtor factors do not favor retroactive relief. There was only one case and the debtor was not a repeat filer nor did she attempt to hinder the creditors and complied with the Bankruptcy Code and Rules. If the stay was not annulled, Leeds would be the owner of property she no longer occupies, encumbered by a deed of trust securing a discharged loan which is hopelessly in default. A foreclosure could jeopardize her “fresh start”.
- b. The non-debtor factors also fail to favor retroactive relief. No one disputes that the HOA violated the stay and that it could have sought relief during the bankruptcy proceeding. No one disputes that BOA could also have obtained relief from stay and then proceeded to sale. No one disputes that BOA could have satisfied the priority portion of the HOA lien to prevent the sale from happening. If the stay is not annulled the HOA foreclosure would proceed in accordance with the order from the state court in BOA’s Motion for Summary Judgment and BOA would still be precluded from seeking a judgment/recovery from Leeds.
- c. Most of the Common factors do not favor retroactive relief from stay as well. Annulling the stay to restore the respective parties’ positions would result in (1) Leeds returning to legal title; and (2) the HOA having an unpaid priority assessment lien and BOA having a Deed of Trust for which Leeds personal liability has been discharged. From a conceptual standpoint the process is relatively easy but that is not what SFR wants.

SFR seeks to restore the HOA to a position it never sought, never obtained and does not now seek the ability to complete: a foreclosure of its previous priority lien. Under the circumstances SFR’s request comes at little cost to the Debtor or the HOA but at a substantial cost to the Lender (BOA).

- d. Finally, the Court concluded that the outcome of SFR’s request may have an impact on the State Court interpleader in which the court concluded that

BOA has standing to challenge the HOA sale. If the Bankruptcy Court grants SFR's motion, SFR would have to seek relief from the state court summary judgment order. Therefore the retroactive relief from stay would have no effect on judicial economies.

**Conclusion:** In this case, the Court cited the standard for considering a motion to retroactively annul an automatic stay and validate a sale conducted in violation of the stay. The Court here acknowledged that it had been done in the past. Here the court used the standard factors almost as an afterthought and instead dealt with issues related to the Nevada Super-Priority cases and other issues not specifically identified in the 9<sup>th</sup> Circuit's test.

## **II. DISCHARGE INJUNCTION ISSUES**

*In re Wagabaza 582 B.R. 486 (C.D. CA 2018) (Judge Jury)*

**ON APPEAL TO DISTRICT COURT-CENTRAL DISTRICT OF CA**

- **The nonjudicial foreclosure of a senior deed of trust during a Chapter 7 case relieved Debtor of personal liability on the loan of the junior lender even when the property was reacquired by Debtor years later.**

**Facts:** Debtor Wagabaza owned a home secured by a first deed of trust with Wells Fargo Bank (WFB) and a second deed of trust with an individual named Beveridge. Debtor filed a Chapter 7 bankruptcy. WFB was granted relief from stay and conducted a trustee's sale of the home and became the owner by its credit bid. The WFB foreclosure extinguished the Beveridge junior deed of trust. Debtor received her Chapter 7 discharge and was relieved from personal liability on both the promissory notes of both lenders.

Debtor continued to reside in the home and her sister purchased the property from WFB, encumbering it with a purchase money loan with Countrywide in which the sister was the sole borrower. Seven years later, the sister transferred title to the home back to Debtor subject to the Countrywide loan. Six months later, Debtor qualified for a new mortgage for the property on her own and paid off the Countrywide loan.

Once title had transferred back to Debtor, Beveridge recorded an NOD against the home based on California Civil Code § 2930 which provided that "Title acquired by the mortgagor subsequent to the execution of the mortgage, inures to the mortgagee as security for the debt in like manner as if acquired before the execution".

### **State Court Action by Debtor**

Debtor filed a declaratory relief action in Superior Court seeking relief related to the foreclosure of Beveridge. No bankruptcy related arguments were made by Debtor in the Superior Court action. Debtor originally obtained a TRO to stop the Beveridge foreclosure but at some point in time the TRO was dissolved. Beveridge answered the complaint and filed a cross-complaint for Declaratory Relief, alleging that his foreclosure was valid. Due to the dissolution of the TRO, Beveridge conducted a trustee's sale of the home and became the successful bidder and putative owner of the home.

### **The Reopened Bankruptcy of Debtor**

When Beveridge filed an unlawful detainer action, Debtor reopened the bankruptcy and filed an adversary action for declaratory and injunctive relief, specifically seeking the remedy that the Beveridge trustee's sale and his deed of trust were both void. The Bankruptcy Court granted injunctive relief to stop the eviction conditioned upon Debtor continuing to keep current the first deed of trust holder.

Beveridge filed a motion for abstention which was denied. Beveridge then filed a motion to dismiss for subject matter jurisdiction, claiming that there was no private right of action for violation of the discharge injunction. That motion was denied as well.

Debtor then sought summary judgment, alleging that § 552 of the Bankruptcy Code preempted California Civil Code § 2930. Debtor also sought an Order to Show Cause (OSC) for Contempt based on violations of the discharge injunction. Beveridge filed a cross-motion for summary judgment, arguing consent by Debtor, no preemption, abstention, prior exclusive jurisdiction of the state court, and that the adversary action was the wrong procedure.

Debtor's OSC asserted two theories: (1) that the Request of Entry of a Default against Debtor on Beveridge's state court cross-complaint which included a request for attorney fees, was a violation of the discharge injunction; and (2) that all steps taken by Beveridge to re-impose his deed of trust, foreclose on the property, and attempt to evict Debtor were contemptuous as violations of the discharge injunction.

Beveridge opposed the OSC arguing that he could not have knowingly violated the discharge injunction because he believed he was rightfully enforcing his deed of trust that had passed through the bankruptcy unphased and with full force and effect.

### **Adversary Proceeding Decision of the Bankruptcy Court**

The issue for the Bankruptcy Court was whether Beveridge, whose junior deed of trust was extinguished by the foreclosure sale of WFB, may revive that deed of trust after discharge if Debtor reacquires title to the home 7 years later.

The Court first determined that upon the discharge of Debtor, the underlying debt owed to Beveridge disappeared. Thus, by the time Debtor reacquired title to the property 7 years after the discharge, she owed no money and had no obligation to Beveridge that would provide consideration for a lien (deed of trust). It is long settled California law that without a debt, there can be no lien and the debt was discharged in the bankruptcy.

The Court rejected Beveridge's arguments that its lien passed through the bankruptcy. That would ordinarily be true, but for the senior foreclosure during the bankruptcy that extinguished the Beveridge deed of trust. So, post-discharge, there was no longer a debt and after the WFB foreclosure there was no longer a lien (deed of trust) held by Beveridge.

The Court also rejected Beveridge's arguments and cases cited regarding revival of the loan when a former owner comes back into title as not considering the impact of the discharge injunction on that principle.

The Court held that the any steps taken by Beveridge to enforce his deed of trust, such as foreclosure and the later eviction, were void under the discharge injunction. There was no revival of the deed of trust because the obligation to pay no longer existed.

The Court then held that § 552 of the Bankruptcy Code pre-empted California Civil Code § 2930 to the extent they conflicted under the Supremacy Clause of the U.S. Constitution. Section 552 provides that property acquired by a debtor postpetition is not subject to a prepetition lien. Therefore, when Debtor obtained title to the property in 2015, well after the chapter 7 case had been filed, the title was not subject to Beveridge's 2006 prepetition deed of trust. The pre-emption was allowed because the Court determined that § 2930 was in direct conflict with the purposes of § 552.

The Court reviewed the facts surrounding the bankruptcy discharge and the WFB foreclosure. Once the WFB foreclosure and discharge took place, Beveridge held no debt owed by Debtor and held no lien on the property.

The Court rejected all arguments brought by Beveridge as to the Adversary Complaint.

### **Contempt Decision in Bankruptcy Court**

Here, the Court found that re-imposition of the Beveridge deed of trust was a violation of the discharge injunction. The question then became whether Beveridge was in contempt for the violation. The Ninth Circuit standard requires a knowing violation by the creditor and intending the actions which violated the discharge injunction by clear and convincing evidence. The Court concluded from the evidence submitted that Beveridge did not have the proper level of subjective knowledge to know that his actions of re-imposing his deed of trust violated the discharge injunction. Beveridge believed that he

was entitled under § 2930 and California case law to revive his deed of trust notwithstanding the discharge.

The Court's contempt ruling on Beveridge's filing of a Request to Enter Default on his state court cross-complaint was different. Beveridge took that action after the Bankruptcy Court had issued its preliminary injunction to stop the eviction of debtor rooted in the finding that the re-imposition of Beveridge's deed of trust violated the discharge injunction. So for Beveridge to then seek to obtain a default on a cross-complaint that sought to validate the deed of trust, he was taking action in direct contravention of the finding of the Bankruptcy Court. The Court held that Beveridge's actions in state court showed by clear and convincing evidence knowledge that such acts violated the discharge injunction.

Despite that ruling, the Court stayed its decision until a final appellate ruling is made on all issues of this case. In conclusion, the Court granted summary judgment to debtor and denied it as to Beveridge.

The Adversary Action and Contempt motion have been appealed to the District Court in the Central District of California by Beveridge. Appellant's brief is due October 29, 2018.

**Reminder:** The discharge injunction is very broad. If you are a junior lender, your personal liability is discharged. Your deed of trust will flow through the bankruptcy unless you are sold out by a senior foreclosure sale. To protect your rights, you would need to reinstate the senior loan and complete your own foreclosure of the property.

***In re Taggart, 888 F.3d 438 (9th Cir. 2018)***

- **A creditor's good faith belief that its actions do not violate the post-discharge injunction precludes an award of contempt sanctions, even if that belief was unreasonable.**

**Facts:** Mr. Taggart, a real estate developer, owned a 25% interest in Sherwood Park Business Center, LLC. He allegedly transferred that interest to his attorney, Mr. Berman. When the remaining LLC members, Messrs Brown, Jehnke, and Emmert, learned of this, they (on behalf of themselves and the LLC) sued Taggart and Berman in Oregon state court. They alleged that the transfer violated their right of first refusal, contained in the LLC operating agreement. Taggart and Berman filed a counterclaim, seeking attorney fees as provided for under the operating agreement. Shortly before the trial, Mr. Taggart filed a voluntary chapter 7 petition and received his discharge. Prior to trial, Berman moved on Taggart's behalf to dismiss the claims against Taggart in light of the bankruptcy discharge. The state court denied the motion, finding that Taggart was a

necessary party to the claims seeking to expel Taggart from the LLC. But the parties did agree that no monetary judgment would be awarded against Taggart.

Taggart did not appear at or participate in the trial. Taggart appeared, testified and argued at a post-trial hearing on the proposed judgment. The judgment was entered unwinding the transfer of Taggart's interest in LLC and expelling Taggart as a member. A post trial motion was then made seeking an award against Taggart for attorney fees incurred in litigating after the bankruptcy discharge. The state court granted the motion, ruling that Taggart had "returned to the fray." The attorney fee motion precipitated a wave of litigation in federal and state courts.

While the attorney fee motion was pending, Taggart filed a motion to reopen his bankruptcy case to seek contempt sanctions against Brown, Jehnke, Emmert, and the LLC, on the theory that the attempt to collect fees from him violated the post-discharge injunction. The Bankruptcy Court denied the motion, agreeing with the state court that Taggart had "returned to the fray." Taggart appealed that ruling to the United States District Court, which ruled that Taggart had not "returned to the fray" and remanded to the Bankruptcy Court to consider contempt sanctions. On remand, the Bankruptcy Court awarded sanctions. That ruling was appealed to the Bankruptcy Appellate Panel, which reversed, holding that Brown, Jehnke, Emmert, and the LLC did not "knowingly" violate the discharge injunction because they believed in good faith that the discharge injunction didn't apply to their claim for post-discharge attorney fees. In the meantime, the Oregon Court of Appeals reversed the attorney fee award against Taggart, holding that he had, indeed, not "returned to the fray."

**Issue on Appeal:** Does a creditor's good faith belief that its actions do not violate the post-discharge injunction preclude a finding that the creditor is in contempt of court?

**Holding:** The Court affirmed the BAP decision holding that Brown, Jehnke, Emmert, and the LLC could not be held in contempt of the post-discharge injunction. In so doing, it stated repeatedly that it was following its earlier decision in *In re Zilog*, 450 F.3d 996 (9th Cir. 2006), and that *Zilog* was "binding on the panel." *Zilog*, Inc. was a debtor which had continued in business after confirmation of a chapter 11 plan. A group of female employees sued *Zilog* in state court, claiming that the company had engaged in sex discrimination by failing to pay retention bonuses promised pre-petition. There was cause for confusion as to just when the discrimination claims accrued. The Ninth Circuit stated in its opinion that as to two of the claimants there was a substantial possibility that the discrimination claims arose after confirmation of the chapter 11 plan, in which case the claims had not been discharged. Based on what it characterized as misleading notices of claim deadlines, the Court ruled that the women should have been allowed to file untimely proofs of claim in the bankruptcy case due to "excusable neglect." Not surprisingly, the Court also reversed an order of contempt sanctions assessed against the women. In the last sentence of the last of 14 footnotes in the *Zilog* opinion, the Court added that "to the extent that the deficient [claims bar date] notices led the women to

believe, even unreasonably, that the discharge injunction did not apply to their claims because they were not affected by the bankruptcy, this would preclude a finding of willfulness.” 450 F.3d at 1010 (9th Cir. 2006)

*Zilog's* footnote 14 had previously been discredited in several published decisions. For example, in *In re Mighell*, 564 B.R. 34, 41 (Bankr. C.D. Cal. 2017), Bankruptcy Judge Mark Houle observed that “*Zilog's* footnoted comment that ‘willfulness’ can depend upon subjective intent seems to be an aberration, and it seems to have been mostly ignored in subsequent authority within the Ninth Circuit.”

Like *Zilog*, the *Taggart* case involved circumstances in which it was unclear, even to a succession of courts considering the issue, whether the claims in issue were subject to the discharge injunction at all. The Court in *Taggart* made it a point that it would follow *Zilog*, stating that a creditor's “good faith belief that the discharge injunction does not apply to the creditor's claim precludes a finding of contempt, even if the creditor's belief is unreasonable.” 888 F.3d at 444.

### ***In re Marino, 577 B.R. 772 (BAP. 9th Cir. 2017)***

- **Bankruptcy Appellate Panel (BAP) upholds award of \$119,000 in emotional distress damages for violating the post-discharge injunction, and holds that the Bankruptcy Court should have considered awarding “mild” punitive damages.**

**Facts:** Christopher and Valerie Marino filed a chapter 7 petition in the District of Nevada. They listed real property in their bankruptcy schedules that was encumbered by a second trust deed held by Deutsche Bank National Trust Company as Trustee for the GMACM Mortgage Loan Trust. The loan was serviced by Ocwen Loan Servicing, LLC. The Schedules indicated that the property was to be “surrendered” by the Marinos.

The Marinos received their discharge in June, 2013 and the bankruptcy case was closed in September, 2013. Beginning in June, 2013, and continuing through April 2015, while the property was vacant and Ocwen was delaying to foreclose, Ocwen sent a series of notices in the mail to the Marinos including, as the Court described them “account statements, notices regarding force-placed insurance, escrow statements, and other matters.” The Panel noted that “[s]ome of the items of correspondence contained disclaimers that were located at the bottom of a page or end of the letter in small font. A typical disclaimer read: ‘If you have filed for bankruptcy and your case is still active and/or if you received a discharge, please be advised that this notice is for information purposes only and is not an attempt to collect a pre-petition or discharged debt.’ Often, the disclaimers were preceded by demands for payment by a certain date or information about the amount that “you must pay” in a much more conspicuous font.”

The Bankruptcy Court found that in addition to the written communications, Ocwen telephoned the Marinos at least 100 times to request payments. Ocwen, in connection with a motion for reconsideration, belatedly produced a call log which showed only 35 such calls. The Marinos, and a third party witness, testified that the calls made Valerie Marino cry and that stomach pains, which had subsided after the bankruptcy filings, resumed. The testified that Ocwen's actions took a toll on their marriage and that they had contemplated divorce.

In November, 2015 the Marinos filed a motion to reopen their bankruptcy case and to hold Ocwen in contempt of court for violating the discharge injunction.

Ocwen argued that many of the written notices sent were required by law, including RESPA, the Fair Debt Collection Practices Act, and California Civil Code section 2924 et seq. Bankruptcy Judge Bruce Beesley rejected that argument, stating: "Ocwen could not have been doing anything but trying to get the debtor to give them some more money, either for insurance or agree to be responsible for the house that was vacant, even after they had ... received stay relief." Judge Beesley said that Ocwen purposefully waited two years to foreclose on the Property, "hoping that if they sent enough letters and gave enough calls, that the debtor would ultimately pay them some money for something."

Bankruptcy Judge Beesley found Ocwen in contempt of the post-discharge injunction provided for in § 524 of the Bankruptcy Code. It awarded \$119,000 in damages as sanctions, which it explained was computed as \$1,000 per letter and call. Bankruptcy Finally, Judge Beesley stated "as I understand the law of the Ninth Circuit, I do not have authority to impose punitive damages. If I did, I probably would, but I don't." Ocwen appealed to the Bankruptcy Appellate Panel.

**Issue on Appeal:** Did the Bankruptcy Court err in awarded \$119,000 in damages for violation of the discharge injunction, and did it err in holding that it lacked authority to award punitive damages?

**Holding:** The Bankruptcy Appellate Panel relied on its own decision in *In re Taggart*, 548 B.R. 275 (9th Cir. BAP 2016) in holding that the Bankruptcy Court could award sanctions for a willful violation of the post-discharge injunction.

**The online docket reveals that Ocwen has appealed this decision of the Bankruptcy Appellate Panel to the Ninth Circuit Court of Appeals. Very recently, the Ninth Circuit tightened the test for contempt of the post-discharge injunction, in the process of affirming the *In re Taggart* decision relied on by the BAP.**

### III. PROOF OF CLAIM ISSUES

Bankruptcy Rule 3002.1 Notice Relating to Claims Secured by Security Interest in the Debtor—

(a) **IN GENERAL.** This rule applies in a chapter 13 case to claims (1) that are secured by a security interest in the debtor's principal residence, and (2) for which the plan provides that either the trustee or the debtor will make contractual installment payments. Unless the court orders otherwise, the notice requirements of this rule cease to apply when an order terminating or annulling the automatic stay becomes effective with respect to the residence that secures the claim.

(b) **NOTICE OF PAYMENT CHANGES.** The holder of the claim shall file and serve on the debtor, debtor's counsel, and the trustee a notice of any change in the payment amount, including any change that results from an interest rate or escrow account adjustment, no later than 21 days before a payment in the new amount is due.

(c) **NOTICE OF FEES, EXPENSES, AND CHARGES.** The holder of the claim shall file and serve on the debtor, debtor's counsel, and the trustee a notice itemizing all fees, expenses, or charges (1) that were incurred in connection with the claim after the bankruptcy case was filed, and (2) that the holder asserts are recoverable against the debtor or against the debtor's principal residence. The notice shall be served within 180 days after the date on which the fees, expenses, or charges are incurred.

(d) **FORM AND CONTENT.** A notice filed and served under subdivision (b) or (c) of this rule shall be prepared as prescribed by the appropriate Official Form, and filed as a supplement to the holder's proof of claim. The notice is not subject to Rule 3001(f).

(e) **DETERMINATION OF FEES, EXPENSES, OR CHARGES.** On motion of the debtor or trustee filed within one year after service of a notice under subdivision (c) of this rule, the court shall, after notice and hearing, determine whether payment of any claimed fee, expense, or charge is required by the underlying agreement and applicable nonbankruptcy law to cure a default or maintain payments in accordance with § 1322(b)(5) of the Code.

(f) NOTICE OF FINAL CURE PAYMENT. Within 30 days after the debtor completes all payments under the plan, the trustee shall file and serve on the holder of the claim, the debtor, and debtor's counsel a notice stating that the debtor has paid in full the amount required to cure any default on the claim. The notice shall also inform the holder of its obligation to file and serve a response under subdivision (g). If the debtor contends that final cure payment has been made and all plan payments have been completed, and the trustee does not timely file and serve the notice required by this subdivision, the debtor may file and serve the notice.

(g) RESPONSE TO NOTICE OF FINAL CURE PAYMENT. Within 21 days after service of the notice under subdivision (f) of this rule, the holder shall file and serve on the debtor, debtor's counsel, and the trustee a statement indicating (1) whether it agrees that the debtor has paid in full the amount required to cure the default on the claim, and (2) whether the debtor is otherwise current on all payments consistent with § 1322(b)(5) of the Code. The statement shall itemize the required cure or postpetition amounts, if any, that the holder contends remain unpaid as of the date of the statement. The statement shall be filed as a supplement to the holder's proof of claim and is not subject to Rule 3001(f).

(h) DETERMINATION OF FINAL CURE AND PAYMENT. On motion of the debtor or trustee filed within 21 days after service of the statement under subdivision (g) of this rule, the court shall, after notice and hearing, determine whether the debtor has cured the default and paid all required postpetition amounts.

(i) FAILURE TO NOTIFY. If the holder of a claim fails to provide any information as required by subdivision (b), (c), or (g) of this rule, the court may, after notice and hearing, take either or both of the following actions:

(1) preclude the holder from presenting the omitted information, in any form, as evidence in any contested matter or adversary proceeding in the case, unless the court determines that the failure was substantially justified or is harmless; or

(2) award other appropriate relief, including reasonable expenses and attorney's fees caused by the failure.

*The above Bankruptcy Rule has resulted in a number of issues. In particular, we are seeing objections to Notice of Post-petition Fees (NPPF) filed by Debtors and Trustees. When such Objections are sustained, or settled, all the fees a servicer or creditor paid may not be collectable. We are also seeing issues with regards to responses to Notices of Final Cures, whether not timely filed or where responses are overruled. This can mean the payoff or arrears shown on a servicer or creditor's system may not be what the Bankruptcy Court has determined is owed. What does all this mean and how can it impact a foreclosure?*

#### **IV. MISCELLANEOUS ISSUES**

*In re Cresta Technology Corporation 583 B.R. 224  
(9th Cir. BAP 2018)*

- Under a matter of first impression, the BAP held that a “transfer” of an ordinary check occurs on the date of honor and not the date of delivery for purposes of the Bankruptcy Code governing postpetition transactions (11 USC § 549).

**Facts:** CFO Lewis of Debtor Cresta offered a company check to Cresta's bankruptcy attorney for representation. The attorney refused the check in favor of a cashier's check. The next day Lewis had issued a cashier's check out of his personal bank account for Cresta with the agreement that Cresta would reimburse Lewis. The cashier's check was presented to the bankruptcy attorney. The next day, Cresta, through Lewis, issued a company check to Lewis from Cresta's bank account.

Later that same day, Cresta filed a Chapter 7 bankruptcy. The check from Cresta to Lewis cleared the bank four days later, after the bankruptcy petition was filed.

##### **Decision of the Bankruptcy Court**

The chapter 7 trustee filed an adversary complaint seeking recovery of the money reimbursement check from Debtor to Lewis. Under a motion for summary judgment (the

facts were not in dispute), Lewis argued that the payment was a non-avoidable preference because it was a contemporaneous exchange of new value and so the date of delivery governed. The trustee argued that this was an ordinary transfer and therefore the date of honor applied and since it was not honored until after the bankruptcy was filed, the money was recoverable to the estate.

The Bankruptcy Court granted judgment in favor of the trustee following the trustee's line of argument. Creditor Lewis appealed the judgment.

### **Decision of Bankruptcy Appellate Panel (BAP)**

The BAP affirmed the judgment of the Bankruptcy Court. The undisputed facts established that the reimbursement check was honored postpetition. Since this was a matter of first impression with regard to § 549, the BAP first looked to the prior U.S. Supreme Court case of Barnhill v. Johnson, 503 U.S. 393 (1992), which held that under a similar section of the Bankruptcy Code, § 547 (preference actions), the date of honor of the check applied. The BAP also looked to other jurisdictions' holdings for § 549 for guidance. Other jurisdictions had held that with regard to § 549 the pertinent date for "transfer" under the Bankruptcy Code was the date the check was honored. The BAP could not find any authority to the contrary for § 549.

The BAP followed Barnhill and the other jurisdictions and held that there were no defenses to the fact that this was an avoidable postpetition transfer of money and could be recovered by the trustee for the estate.

**Reminder:** If you receive a check from a party that you suspect may file bankruptcy soon after, get that check honored and paid at the bank as soon as possible.

### ***In re Alle (2017 Bankr. LEXIS 3642 9th Cir. BAP 2017)***

#### ***NOT PUBLISHED***

- **Managing member of LLC is a fiduciary under the Bankruptcy Code for purposes of 11 U.S.C. § 523(a)(4). Defalcation by a fiduciary is grounds to make a judgment non-dischargeable under the Code.**

**Facts:** Debtor Alle and others individuals formed a California LLC to purchase and operate a 12-unit residential income property. Under the LLC operating agreement, Debtor was designated as the LLC's managing member with sole responsibility for the day to day management and operation of the property.

In 2008, the LLC encountered cash flow problems which eventually led to the property's foreclosure in 2011. Prior to foreclosure, Debtor had oral conversations with the co-members of the financial problems of the property, but the co-members refused to put more money into the property for fix-up, repairs, and other capital expenditures. Debtor, despite promising to regularly provide financial information to the co-members, failed to keep them informed of the pending foreclosure sale of the property. Debtor also made substantial withdrawals from the LLC's bank account for personal expenses and did not disclose that fact to the co-members.

The co-members discovered the property had been foreclosed and sued Debtor in state court for breach of contract, breach of fiduciary duties, fraud, conversion and for an accounting.

### **The Bankruptcy Filing**

Just prior to trial, Debtor filed chapter 7 and the co-members filed an adversary action in the bankruptcy for nondischargeability of the debt. They sought damages their initial investment plus attorney fees and costs. The co-members filed a motion for summary judgment (MSJ) and the Bankruptcy Court awarded judgment, holding Debtor had committed defalcation by a fiduciary under 11 U.S.C. § 523(a)(4) and entered a judgment for the entire investment of the co-members, interest and their attorney fees and costs.

Motions to vacate the MSJ were denied by the Bankruptcy Court. Debtor appealed to the Bankruptcy Appellate Panel (BAP).

### **The Decision of the Bankruptcy Appellate Panel (BAP)**

**Issue on Appeal:** Did the Bankruptcy Court err in granting summary judgment for defalcation of Debtor while acting in a fiduciary capacity under 11 U.S.C. § 523(a)(4)? Did the Bankruptcy Court apply the correct legal standard in awarding damages based on the initial investment of the co-members?

**Holding:** The BAP first needed to determine if Debtor was acting in a fiduciary capacity with regard to his duties under the LLC. The BAP set forth the rule that a fiduciary relationship must arise from an express or technical trust that was created. Following that rule, the BAP determined that there was not an express trust here because the operating agreement did not include language expressing an intent to create a trust.

However, the operating agreement did create an LLC and spelled out the obligations of its members, including for Debtor as manager. Under California law, a manager of an LLC owes the same fiduciary duties as a partner owes to the other partners of a partnership. Also, partners are trustees over the assets of the partnership and therefore partners are fiduciaries under § 523(a)(4). The BAP concluded the operating

agreement created a technical trust. It also concluded that Debtor was acting as a fiduciary with respect to the trust assets during all relevant times.

The BAP next needed to determine whether Debtor committed defalcation in his fiduciary capacity. Defalcation is the misappropriation of trust funds or money held in any fiduciary capacity. Defalcation includes the failure by a fiduciary to account for money or property that has been entrusted to him. Defalcation under 11 U.S.C. § 523(a)(4) requires a culpable state of mind involving either bad faith, moral turpitude or an intentional wrong. Further, the debt must have been caused by the defalcation.

The BAP held that the Bankruptcy Court did not set forth findings of a culpable state of mind for Debtor. Further, it failed to specifically find that Debtor's fiduciary breaches were the cause of damage to the co-members. Even further, the Bankruptcy Court failed to set forth the basis for awarding the original investment as damages. The BAP reasoned that the proper measure of damages was the value of what the co-members would have received had the contract been performed, not the amount of their original investment.

The BAP remanded the case back to the Bankruptcy Court for further proceedings consistent with their analysis.

**Reminder:** This case sets forth how a managing member of an LLC can be a fiduciary under the Bankruptcy Code and be subject to a nondischargeability action for breach of those fiduciary duties. However, the damages to be awarded must be related to the breach itself.



# **Differences Between Residential and Commercial Nonjudicial Foreclosures**

**Presented by**

**Keith Attlesey Esq.  
Assured Lender Services**

**DeeAnn Gregory  
First American Trustee Servicing Solutions**

**Julie O. Molteni, Esq.  
Quality Loan Service**

**Randy Newman, Esq.  
Total Lender Solutions**

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**Keith Attlesey, Esq.**

Mr. Attlesey was raised in Santa Barbara, California and earned his undergraduate degree in Political Science with a Business Minor from the University of California at Los Angeles in 1989. While at UCLA Mr. Attlesey was a member of the Bruin Volleyball team and was actively involved in Phi Kappa Psi fraternity. He went on to earn his Juris Doctor in 1993 from Golden Gate University in San Francisco, California, where he was awarded the American Jurisprudence Award for Writing and Research, served on Law Review and published an article concerning building owner rights. Mr. Attlesey is admitted to the California State Bar and U.S. District Court, Central and Southern Districts of California. From 1993 until 1995, Mr. Attlesey practiced as an associate attorney with the Santa Barbara law firm of Reetz, Fox & Bartlett, representing clients in the development, leasing and purchase and sale of residential and commercial real estate, landlord-tenant matters and collections. In 1995, Mr. Attlesey joined an Orange County, California based law firm specializing in representing REO departments of nationally recognized institutional lenders and banks, real property owners, property management companies and developers in landlord-tenant matters, including unlawful detainer actions, breach of lease cases, collections and local, state and federal governmental legal compliance issues.

In 1996, Mr. Attlesey began his solo practice and then joined with William Thomlinson in mid-1997 to form Attlesey & Thomlinson, LLP which expanded into a broad-based and sophisticated real estate and business litigation and transactional practice, leading to the 2007 merger with the well respected law firm of Miller & Clark and the formation of Attlesey | Storm, LLP. For three consecutive years Mr. Attlesey has been selected by Law and Politics Magazine as one of the top 5% of attorneys in Southern California, earning the publication's designation of "Super Lawyer."

Mr. Attlesey represents trustee services companies, institutional lenders, banks, investors, real estate brokers and agents, individual owners, property management companies, developers, start-up to publicly traded companies and service providers in:

- Foreclosure, bankruptcy and landlord-tenant matters in the default services arena (including foreclosures, defense of pre-foreclosure, foreclosure and post-foreclosure proceedings, statutory review, analysis and

implementation, title issues and lien releases, and surplus foreclosure sales proceeds distribution and recovery);

- Negotiating, drafting and reviewing residential and commercial real property purchase and sale agreements, leases and related documents and guiding clients through the entire transactional process from deal inception to closing;
- Litigating business and real estate matters ranging from unlawful detainer actions to multi-million dollar business disputes (Mr. Attlesey has tried over 100 cases and is an accomplished appellate attorney, with an important published decision to his credit); and
- Negotiating, drafting and reviewing an array of contracts from complex secured real property financing structures, acquisition and disposition of businesses, to service contracts, general corporate contracts and non-disclosure agreements.

*He can be reached at [kattlesey@attleseystorm.com](mailto:kattlesey@attleseystorm.com).*



### **DeeAnn Gregory**

DeeAnn Gregory has been with First American Trustee Servicing Solutions, LLC for 22 years and is currently the Senior Operations Manager. She has worked in all areas of the trustee office and understands the issues that are faced every day in the every changing environment. She stated her career in mortgage servicing in 1989 with Midland Mortgage Company in Oklahoma City, OK. She enjoys the changes and challenges that our industry has faced recently. She has reviewed and implemented policies and procedures to make sure that TSS is in compliance with all the new requirements in all the states that TSS provides services in (CA, NV, AZ, WA & TX). DeeAnn also ensures that TSS is compliant with all client requirements including consent orders from CFPB, audits and new residential mortgage servicing standards. She can be reached at [dsgregory@firstam.com](mailto:dsgregory@firstam.com).



**Julie O. Molteni, Esq.**

Julie O. Molteni is Associate General Counsel for Quality Loan Service Corporation. Prior to her employment at Quality, Ms. Molteni worked primarily in the area of civil litigation, with a focus on real estate litigation and complex real property transactions. Ms. Molteni received her undergraduate degree in Political Science and History from the University of California at Davis and went on to obtain a law degree from California Western School of Law. She was admitted to the State Bar of California in 2009, the State Bar of Washington in 2014, and is also licensed to practice before the California Southern, Central, Northern, and Eastern Federal District Courts. Ms. Molteni has received an AV Preeminent® rating from Martindale Hubbell, ranking her at the highest level of professional excellence for legal knowledge, communication skills and ethical standards. She can be reached at [jmolteni@qualityloan.com](mailto:jmolteni@qualityloan.com).



**Randy Newman**

Randy Newman is one of the principals of Total Lender Solutions. Licensed as an attorney in New York since 1989 and New Jersey since 1994, Randy has personally represented hundreds of buyers, sellers, owners, and lenders in connection with the sale, purchase, finance, lease, and foreclosure of residential and commercial real property throughout the United States. Randy holds a BBA in Accounting and is licensed as a real estate broker in California. Randy is certified by the United Trustees Association as a Trustee Sale Officer, Level II California. Randy has previously been an adjunct assistant professor of business law and currently teaches Real Estate Principles to aspiring new real estate licensees and trains new real estate agents on contracts and real estate transactions in California. He can be reached at [rnewman@totallendersolutions.com](mailto:rnewman@totallendersolutions.com).

## **Differences Between Residential and Commercial Nonjudicial Foreclosures**

### **Preforeclosure Considerations**

- Define 'commercial property'
- Define 'business purpose loan v. 'consumer loan' for applicability of HBOR and D-F rules
- Compliance with HBOR
- Compliance with Dodd-Frank/CFPB
- Preforeclosure default/acceleration letter
- Determining breach – maturity/installment/non-monetary
- Balloon Payment Notice
- Power of Sale provisions and other items in DOT
- Cross-collateralization & Cross default
- Multi-note / Multi- dot
- Assignment of Rents / Contemporaneous Judicial Foreclosure



# Legislative Updates

## Panelists:

**T. Robert Finlay, Esq. (moderator)**  
**Wright Finlay & Zak**

**Michael Belote, Esq.**  
**California Advocates**

**Holly Chisa**  
**HPC Advocacy**

**Brigham Lundberg, Esq.**  
**Lundberg + Associates**

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**T. Robert Finlay, Esq.**

T. Robert Finlay is one of the three founding partners of Wright, Finlay & Zak. Since 1994, Mr. Finlay has focused his legal career on consumer credit, business and real estate litigation and has extensive experience with trials, mediations, arbitrations and appeals. Mr. Finlay is at the forefront of the mortgage banking industry, handling all aspects of the ever-changing default servicing and mortgage banking litigation arena, including compliance issues for servicers, lenders, investors, title companies and foreclosure trustees. Mr. Finlay successfully guides clients through the complexities of litigation while being extremely mindful of their core values and business models. He is a regular speaker (at industry events and for clients) on a variety of loan servicing and mortgage banking issues, including key legislative and legal updates, California and Nevada Homeowner Bill of Rights (HOBR), Nevada HOA lien problems and other relevant litigation and compliance issues.

Mr. Finlay is an active member of the Mortgage Bankers Association (MBA), California Mortgage Bankers Association (CMBA), United Trustees Association (UTA), American Legal and Financial Network (ALFN), and Orange County Bar Association. For over 7 years, Mr. Finlay served as a Committee Member and Board Member of the United Trustees Association, being elected as President in 2011 and 2012. Since 2013, he has been Chair of the UTA's Legislative Committee, working closely with lobbyists in California, Nevada, Washington and Oregon on key industry issues. Mr. Finlay has also been on the Legislative Committee for the CMBA since 2013. Mr. Finlay is a regular contributor to several industry periodicals and has also authored pertinent Amicus Briefs on key issues impacting the mortgage and finance industry. His key published opinions include *Mabry v. Superior Court* (2010) 185 Cal.App.4th 208 (Amicus counsel) and *Bostanian v. Liberty Saving Bank* (1997) 52 Cal.App.4th.

Mr. Finlay's hobbies include playing tennis and woodworking. He can be reached at [rfinlay@wrightlegal.net](mailto:rfinlay@wrightlegal.net).



### **Michael Belote, Esq.**

Mike Belote is president of California Advocates, Inc., one of Sacramento's oldest contract lobbying firms. His 35-year lobbying career began with association lobbying jobs with CPAs, Realtors and title companies, and he has been a contract lobbyist since 1990. Specialties include issues relating to the judicial branch, real estate, and financial services, including judges, civil defense lawyers, employment law, and more. Mike has represented the United Trustees Association for nearly 30 years. He also represents a diverse range of other clients including new car dealers and Apple. A division of Belote's firm also is one of Sacramento's biggest association management providers. He is known for philanthropic work relating to domestic violence and veteran's services, and he sponsors a lecture series every year discussing a key issue of California policy. He can be reached at *mbelote@caladvocates.com*.



### **Holly Chisa**

Holly Chisa has been active in state, local and federal government issues for over 20 years. Currently, Holly is the owner of her own lobbying firm, HPC Advocacy, LLC and works to provide her clients with the best representation possible in the Washington state Legislature and local municipalities.

Holly's involvement in government affairs began in 1994. She has worked as a campaign consultant, and also as House and Senate staff. She also worked in the 106<sup>th</sup> Congress as District Field Representative for U.S. Congressman Adam Smith. In 2001, she began lobbying as the Governmental Affairs Manager for the Washington Food Industry (WFI), primarily representing retail grocery, pharmacy, and food manufacturers' interests. In 2003, she opened HPC Advocacy, her privately owned lobbying firm.

Through this work Holly has developed a broad-based knowledge of the issues facing employers. She focuses primarily on reforming major employer programs, including workers' compensation and health care. She also works with environmental legislation, regulatory reform, beverage and spirit issues, and

foreclosure law. In addition to working the halls of state government, Holly has also worked extensively with local governments, protecting client interests with both large and small municipalities on local ordinances, tax issues, and regulatory requirements. She can be reached at *HollyChisa@hpcadvocacy.com*.



**Brigham Lundberg, Esq.**

Brigham J. Lundberg is a shareholder and the managing attorney of Lundberg & Associates, PC in Salt Lake City, Utah. His practice includes real estate litigation; title issues; matters related to judicial and non-judicial foreclosures; appellate practice; collections; and unlawful detainer actions. He is a frequent panelist and lecturer at industry conferences and client attorney summits on topics including foreclosure, creditors' rights, regulatory compliance, evictions, and property preservation.

Mr. Lundberg received his Bachelor of Arts degree in economics, cum laude, from Brigham Young University, and his Juris Doctor degree, cum laude, from the University of Maryland School of Law. Upon graduation from law school, he served as a law clerk to the Hon. Gregory K. Orme of the Utah Court of Appeals. Mr. Lundberg is a member of the Utah, Wyoming, Idaho, and Montana State Bar associations. He is admitted to practice before all state and federal courts in Utah, Wyoming, Idaho, and Montana and the United States Court of Appeals for the Tenth Circuit. He is a Martindale-Hubbell "AV-Preeminent" rated attorney and currently serves as a member of USFN's Legal Issues Committee. He can be reached at *brigham.lundberg@lundbergfirm.com*.



**Washington**

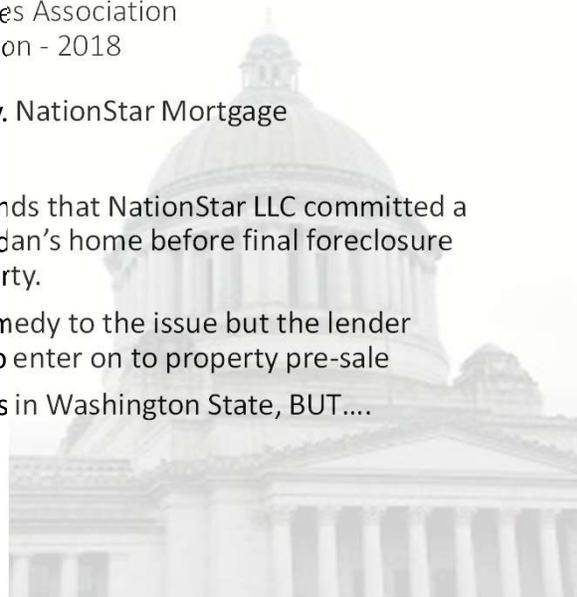
United Trustees Association  
Washington - 2018

July 7, 2016 Jordan v. NationStar Mortgage

Washington State Supreme Court finds that NationStar LLC committed a trespass and took possession of Jordan's home before final foreclosure sale by re-drilling locks at the property.

Receivership is not the exclusive remedy to the issue but the lender must have consent or court order to enter on to property pre-sale

Affected class of 3,600 homeowners in Washington State, BUT....



United Trustees Association  
Washington - 2018

July 7, 2016 Jordan v. NationStar Mortgage

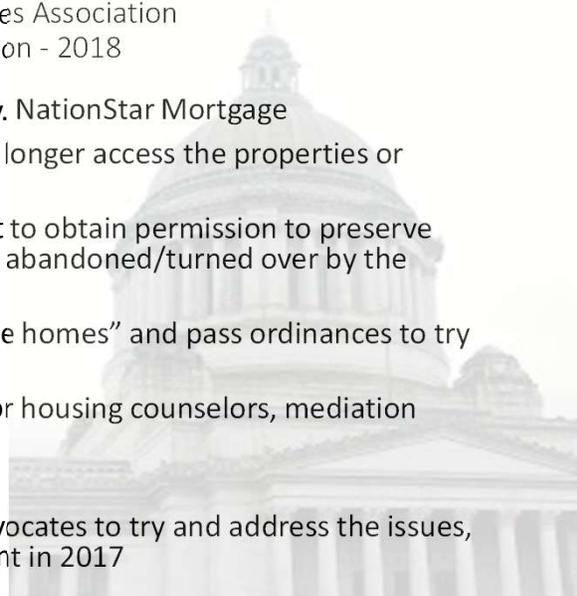
Many servicers around the state no longer access the properties or homes

Only some servicers turned to court to obtain permission to preserve and protect homes they knew were abandoned/turned over by the homeowner for legal protection

Municipalities see a jump in "zombie homes" and pass ordinances to try and address the issue

State agencies need more money for housing counselors, mediation program

Negotiations begin in 2016 with advocates to try and address the issues, but we're unable to reach agreement in 2017



United Trustees Association  
Washington - 2018

July 7, 2016 Jordan v. NationStar Mortgage

And for UTA members in Washington, there are remaining issues to address:

- Owner/Holder/Actual Holder
- Nonmonetary interest
- Deceased borrowers in non-judicial foreclosure process



United Trustees Association  
Washington - 2018

Fall of 2017 we begin negotiations again....

Financial institutions want *Jordan* fix

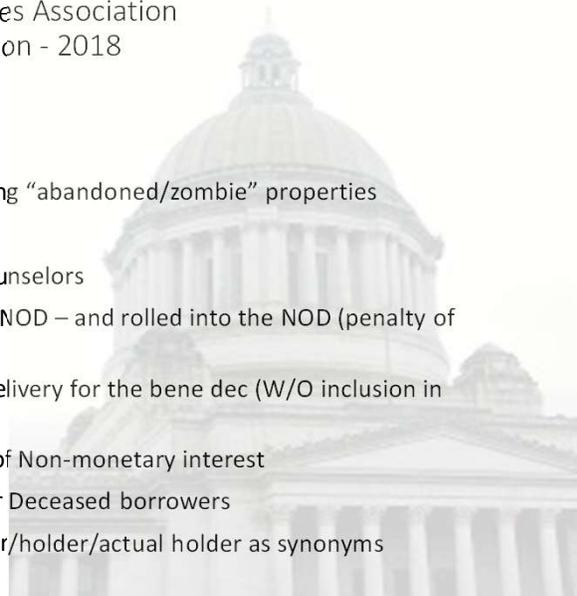
Cities want a way to identify who is servicing “abandoned/zombie” properties

Advocates want:

- More money for mediation/housing counselors
- Beneficiary declaration at the issuance NOD – and rolled into the NOD (penalty of perjury)

UTA, in agreeing to changing the time of delivery for the bene dec (W/O inclusion in the NOD) wants:

- Release from litigation by declaration of Non-monetary interest
- Non-Judicial foreclsoure mechanism for Deceased borrowers
- Fix to statutory language treating owner/holder/actual holder as synonyms



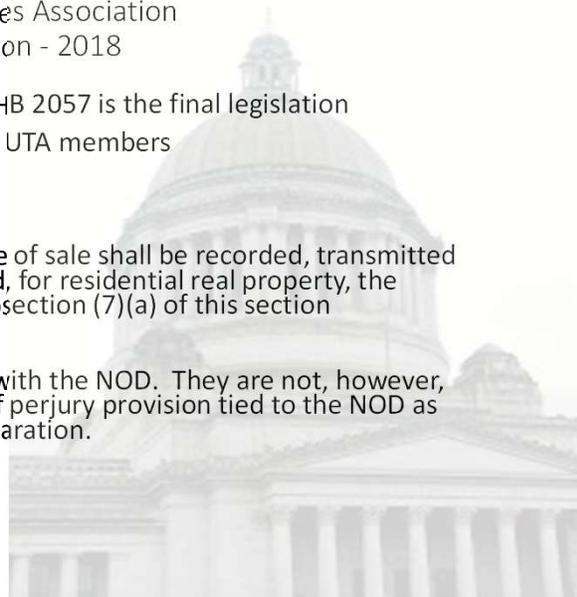
United Trustees Association  
Washington - 2018

Negotiations take five to six months – HB 2057 is the final legislation  
Section 1 – Most significant section for UTA members

Beneficiary declaration with the NOD

(8) – That at least 30 days before notice of sale shall be recorded, transmitted or served, written notice of default and, for residential real property, the beneficiary declaration specified in subsection (7)(a) of this section

Beneficiary declarations must be sent with the NOD. They are not, however, tied together, so there is not penalty of perjury provision tied to the NOD as currently exists for the beneficiary declaration.



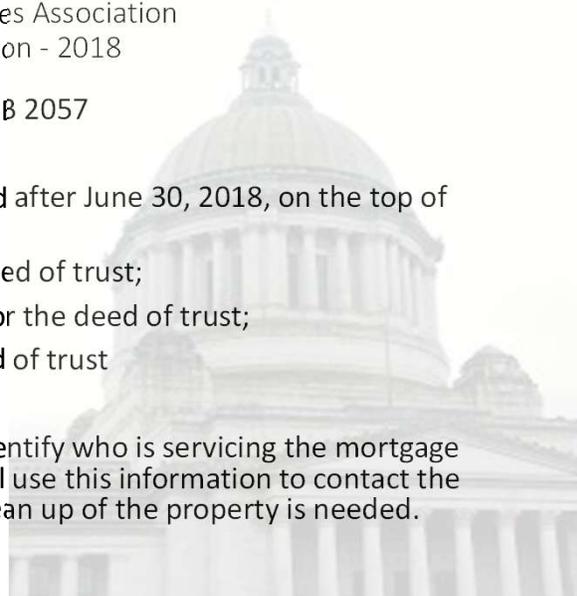
United Trustees Association  
Washington - 2018

WA HB 2057

Section 1 (8)(m) – For notices issued after June 30, 2018, on the top of the first page of the [NOD]

- (i) The current beneficiary of the deed of trust;
- (ii) The current mortgage servicer for the deed of trust;
- (iii) The current trustee for the deed of trust

This allows local governments to identify who is servicing the mortgage as a start point of contact. They will use this information to contact the servicer to determine whether a clean up of the property is needed.



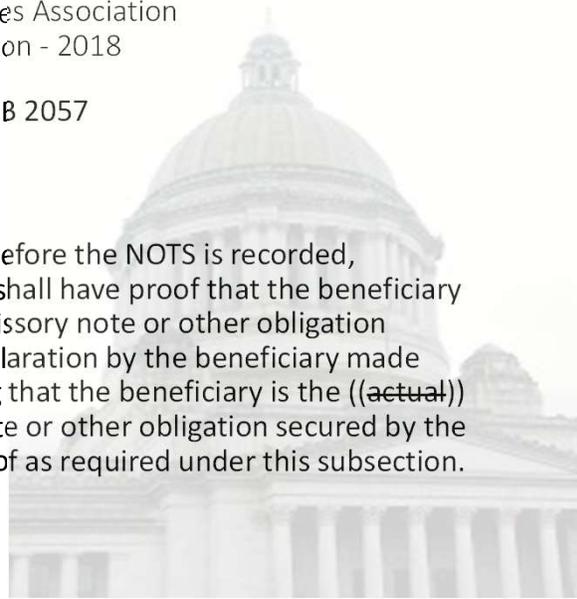
United Trustees Association  
Washington - 2018

WA HB 2057

Owner/Holder/Actual Holder

Section 1 (7)(a) now reads...

That, for residential real property, before the NOTS is recorded, transmitted, or served, the trustee shall have proof that the beneficiary is the ~~((owner))~~ holder of any promissory note or other obligation secured by the deed of trust. A declaration by the beneficiary made under the penalty of perjury stating that the beneficiary is the ~~((actual))~~ holder of ~~((the))~~ any promissory note or other obligation secured by the deed of trust shall be sufficient proof as required under this subsection.



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Washington - 2018

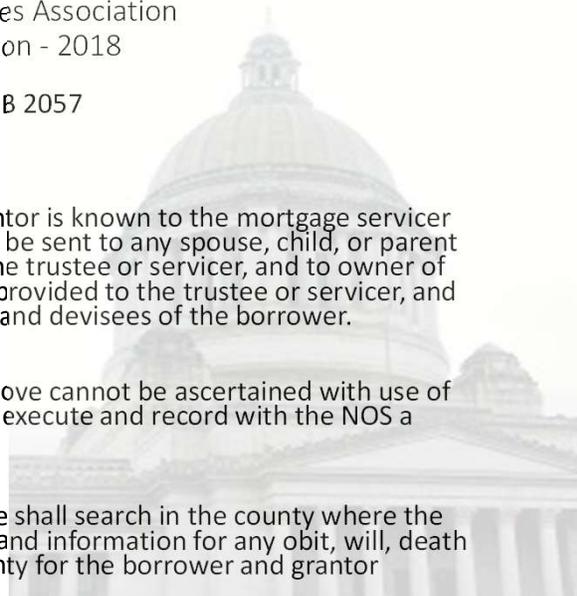
WA HB 2057

Section 1 (10) – Deceased borrower

In the case where the borrower or grantor is known to the mortgage servicer or trustee to be deceased, [NOD] must be sent to any spouse, child, or parent of the borrower or grantor known to the trustee or servicer, and to owner of record of the property, at any address provided to the trustee or servicer, and to the property addressed to the heirs and devisees of the borrower.

If the name or address of any of the above cannot be ascertained with use of reasonable diligence, the trustee must execute and record with the NOS a declaration attesting to the same.

Reasonable diligence – means a trustee shall search in the county where the property is located, the public records and information for any obit, will, death cert, or case in probate within the county for the borrower and grantor



United Trustees Association  
Washington - 2018

WA HB 2057

Deceased borrower - Section 1 (10) cont.

Upon written notice identifying the property address and the name of the borrower to the servicer or trustee by someone claiming to be a successor in interest to the borrower's or grantor's property rights, but who is not a party to the loan or promissory note or other obligation security by the deed of trust, at trustee shall not record the NOS (RCW 61.24.040) until the trustee or mortgage servicer:

Acknowledges the notice in writing and requests reasonable documentation of the death of the borrower or grantor from the claimant, including (but not limited to)

- Death certificate
- Written evidence of death of the borrower/grantor

Information must be provided within 30 days of the request by the claimant

United Trustees Association  
Washington - 2018

WA HB 2057

Deceased borrower - Section 1 (10) cont.

Once written documentation is received by the servicer/trustee of the death of the borrower, or otherwise it is independently confirmed by the servicer/trustee, then the servicer/trustee MUST request in writing documentation from the claimant demonstrating ownership interest of the claimant in the real property

60 days to present the documentation

If proof is received within 60 days, then servicer/trustee provide the claimant with:

Loan balance  
Interest rate and interest reset dates and amounts  
Balloon payments if any  
Prepayment penalties if any

Basis for default  
Monthly payment amount  
Reinstatement amounts or conditions  
Payoff amounts  
Information on how/where payments should be made

United Trustees Association  
Washington - 2018

WA HB 2057

Deceased borrower - Section 1 (10) cont.

If there is more than one successor in interest, each successor must received the same information as listed in the statute

The existence of the successor in interest does not impose an affirmative duty on a mortgage servicer or alter any obligation the mortgage servicer has to provide a loan modification to the successor in interest. If a successor in interest assumes the loan, he or she may be required to otherwise qualify for FFA programs/alternatives offered by the servicer.

Nothing in the section shall prejudice the right of the mortgage servicer or beneficiary from discontinuing any foreclosure action initiated under the DOTA in favor of other allowed methods of pursuit of foreclosure of the security interest / DOT security interest.

United Trustees Association  
Washington - 2018

WA HB 2057

Fix for NationStar

A local government can initiate the process for access to property, or a servicer can ask that the local government begin the process.

The local city/county sends a letter to the servicer that they've determined that a property has been determined to be abandoned and a nuisance, and gives the servicer 15 days to respond. If a servicer requests that a local government determine whether a property is a nuisance or abandoned, the local gov must respond within 15 days. (Servicer must provide the NOD, NOPFO, or NOTS.)

Local government can respond in four ways:

Yes - declares property is a nuisance and abandoned – gives servicer access

No – declares property still occupied – servicer cannot access the property, and local gov works with homeowner

Unclear whether someone home or not – no change, and no access to the property

The city, town or county can advise that it does not have infrastructure to respond at all

United Trustees Association  
Washington - 2018

WA HB 2057  
NationStar Fix

If the financial institution responds to the notice that a property is deemed a nuisance, they can access the property and make repairs/mitigation subject to the rules and limitations as set forth in the statute.

If the financial institution fails to respond to the local government, the local government can make repairs and put a lien on the property.

Law also amends the statute to address the one action rule. Servicer or beneficiary may now file a civil case to obtain court approval to access, secure, maintain, and preserve property from waste or nuisance without jeopardizing pursuit of non-judicial foreclosure.

United Trustees Association  
Washington - 2018

WA HB 2057  
Fee increase for the Foreclosure Fairness Act

Fees for each NOTS increase from \$250 to \$325 for each noncommercial loan on residential real property

Beginning January 1, 2020, the WA Department of Commerce can adjust the fee up or down, but to no more than \$325 per NOTS

United Trustees Association  
Washington - 2018

WA HB 2057

Declaration of Nonmonetary Interest  
(This one's for Michelle Mierzwa)

If a trustee is named as a defendant and there are no substantive allegations that seek damages from the trustee or seek to enjoin the foreclosure – a trustee can file a declaration of nonmonetary interest.

Trustee has no less than 35 days to file from date of summons - use the process set forth in Superior Court Civil Rule (CR)5

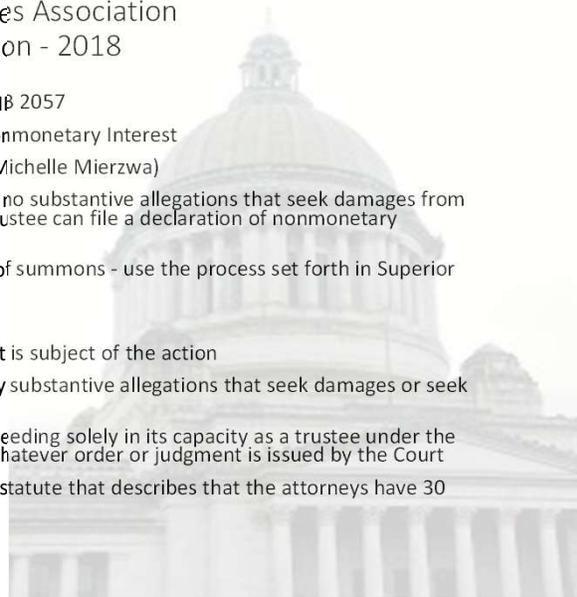
Declaration must include:

Status of the trustee as trustee under the DOT that is subject of the action

That the complaint or pleading does not assert any substantive allegations that seek damages or seek to enjoin

That it has been named as a defendant in the proceeding solely in its capacity as a trustee under the DOT and that the trustee agrees to be bound by whatever order or judgment is issued by the Court

A statement – language specifically laid out in the statute that describes that the attorneys have 30 days to respond and object



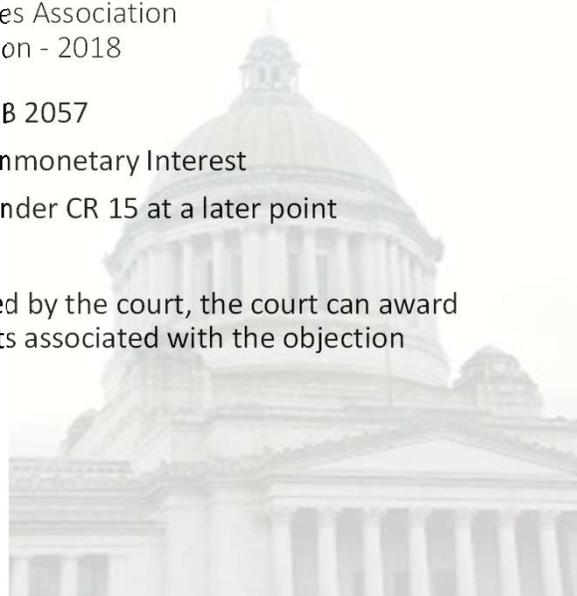
United Trustees Association  
Washington - 2018

WA HB 2057

Declaration of Nonmonetary Interest

Trustee can still get pulled back in under CR 15 at a later point

If the trustee's declaration is rejected by the court, the court can award the plaintiff attorneys' fees and costs associated with the objection along with actual damages.



United Trustees Association  
Washington - 2018

Questions?

For 2019...

State bank

State portible pension

FFA for college/student loans

Holly Chisa

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**California**



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**United Trustees Association  
 Legislative Status Report**

**AB 110** (Committee on Budget) **In-home supportive services provider wages: emergency caregiver payments for foster care: civil immigration detainees: recording fees.** ( Chaptered: 3/13/2018 [html](#) [pdf](#) )  
**Status:** 3/13/2018-Approved by the Governor. Chaptered by Secretary of State - Chapter 8, Statutes of 2018.  
**Location:** 3/13/2018-A. CHAPTERED

**Summary:** (1)Existing law, the California Values Act, prohibits state and local law enforcement agencies from contracting with the federal government for use of their facilities to house individuals as federal detainees, except as specified.This bill would specify that state and local law enforcement agencies are prohibited from contracting with the federal government for use of their facilities to house individuals as federal detainees for purposes of civil immigration custody, except as specified.

This bill contains other related provisions and other existing laws.

Organization	Assigned	Position	Priority	Subject	Group
UTA	MDB				
<b>Notes 1:</b>					

**AB 166** (Salas D) **Building Homes and Jobs Act: recording fee: hardship refund.** ( Amended: 9/8/2017 [html](#) [pdf](#) )  
**Status:** 8/31/2018-Failed Deadline pursuant to Rule 61(b)(18). (Last location was S. DESK on 1/4/2018)  
**Location:** 8/31/2018-S. DEAD

**Summary:** Existing law authorizes a fee for recording and indexing every instrument, paper, or notice required or permitted by law to be recorded, not to exceed \$10 for the first page and \$3 for each additional page, to reimburse a county for the costs of specified services relating to recording those documents. Existing law authorizes various additional recording fees for specified purposes. This bill would authorize a property owner to request a refund based on hardship of a fee, proposed to be imposed by SB 2, if he or she files a claim with the county recorder, in the county in which the fee was collected, that certifies under penalty of perjury that he or she meets specified criteria related to household income and the fee was levied and collected as part of a transaction to a refinance of the property that was the subject of the recording. By authorizing county recorders to issue a refund of this fee, this bill would make an appropriation. The bill would require the county recorder to deduct any amount issued for a refund from the amount to be remitted to the Department of Housing and Community Development and to annually report to the department on the number of hardship refunds granted pursuant to these provisions.By imposing new duties on local government officials with respect to the collection of the recording fee, and by expanding the scope of the crime of perjury, this bill would impose a state-mandated local program.

This bill contains other existing laws.

<b>Organization</b>	<b>Assigned</b>	<b>Position</b>	<b>Priority</b>	<b>Subject</b>	<b>Group</b>
UTA	MDB	Oppose - Coalition			

Notes 1:

**AB 271** **(Caballero D) Property Assessed Clean Energy program.** ( Amended: 5/10/2017 [html](#) [pdf](#) )  
**Status:** 8/31/2018-Failed Deadline pursuant to Rule 61(b)(18). (Last location was S. INACTIVE FILE on 9/16/2017)  
**Location:** 8/31/2018-S. DEAD

**Summary:** (1)Existing law authorizes applicants, defined as including specified public agencies, entities administering Property Assessed Clean Energy (PACE) financing programs on behalf of and with the written consent of public agencies, or financial institutions, to assist property owners in financing the installation of distributed generation renewable energy sources, electric vehicle charging infrastructure, or energy or water efficiency improvements through the issuance of PACE bonds that are secured by voluntary contractual assessments, voluntary special taxes, or special taxes on property, collectively known as PACE assessments. This bill would authorize the county tax collector to direct the county auditor to remove a delinquent installment based on a PACE assessment from the county's tax rolls, if it arises from a contract entered into on or after January 1, 2018. The bill would require the county tax collector, immediately upon that removal and for each parcel for which the delinquent installment was removed, to provide notice on the tax rolls of the removal.

This bill contains other related provisions and other existing laws.

<b>Organization</b>	<b>Assigned</b>	<b>Position</b>	<b>Priority</b>	<b>Subject</b>	<b>Group</b>
UTA	MDB				

Notes 1:

**AB 354** **(Calderon D) Institutional investors: housing.** ( Vetoed: 9/27/2018 [html](#) [pdf](#) )  
**Status:** 9/27/2018-Vetoed by Governor.  
**Location:** 9/27/2018-A. VETOED

**Summary:** Existing law establishes the Department of Business Oversight within the Business, Consumer Services, and Housing Agency. This bill would require an institutional investor, as defined, to register by July 1, 2019, and annually thereafter, with the Department of Business Oversight by providing a statement containing certain information, including, among other things, the total number of single-family homes in the state that are owned by the institutional investor, including the number owned in each county, and the number occupied by renters throughout the state, and in each county. The bill would authorize the department to charge a reasonable fee to process the registration. The bill would require the department to submit a report to the Legislature by July 1, 2020, and annually thereafter, regarding the information collected from institutional investors during the prior calendar year pursuant to the provisions of this bill.

This bill contains other existing laws.

<b>Organization</b>	<b>Assigned</b>	<b>Position</b>	<b>Priority</b>	<b>Subject</b>	<b>Group</b>
UTA	MDB				

Notes 1:

**AB 565** (**Bloom D**) **Building standards: live/work units.** ( Chaptered: 9/20/2018 [html](#) [pdf](#) )  
**Status:** 9/20/2018-Approved by the Governor. Chaptered by Secretary of State - Chapter 573, Statutes of 2018.  
**Location:** 9/20/2018-A. CHAPTERED

**Summary:** The California Building Standards Law provides for the adoption of building standards by state agencies by requiring all state agencies that adopt or propose adoption of any building standard to submit the building standard to the California Building Standards Commission for approval and adoption. In the absence of a designated state agency, the commission is required to adopt specific building standards, as prescribed. Existing law requires the commission to publish, or cause to be published, editions of the code in its entirety once every 3 years. This bill would require the Department of Housing and Community Development, commencing with the next triennial edition of the California Building Standards Code adopted after January 1, 2019, to develop and submit for approval by the California Building Standards Commission clarifications in the California Building Code and the California Residential Code pertaining to the requirements for the construction of live/work units.

Organization	Assigned	Position	Priority	Subject	Group
UTA	MDB				

Notes 1:

**AB 767** (**Quirk-Silva D**) **GO-Biz Information Technology.** ( Vetoed: 9/23/2018 [html](#) [pdf](#) )  
**Status:** 9/23/2018-Vetoed by Governor.  
**Location:** 9/23/2018-A. VETOED

**Summary:** Existing law authorizes various state agencies to issue permits and licenses in accordance with specified requirements to conduct business within this state. Existing law establishes the Governor's Office of Business and Economic Development (GO-Biz) to serve the Governor as the lead entity for economic strategy and the marketing of California on issues relating to business development, private sector investment, and economic growth. This bill would, among other things, provide for a GO-Biz Information Technology Unit within GO-Biz, which would create an online Internet platform, called the California Business Development Portal, that is comprised of 3 elements, including economic and business development-related digital information, the systems and processes used to manage that information, and a public interface capability, as prescribed.

This bill contains other related provisions and other existing laws.

Organization	Assigned	Position	Priority	Subject	Group
UTA	MDB				

Notes 1:

**AB 1088** (**Eggman D**) **Multifamily residential housing: energy programs.** ( Amended: 8/21/2017 [html](#) [pdf](#) )  
**Status:** 8/17/2018-Failed Deadline pursuant to Rule 61(b)(15). (Last location was S. 2 YEAR on 9/1/2017)  
**Location:** 8/17/2018-S. DEAD

**Summary:** The Warren-Alquist State Energy Resources Conservation and Development Act establishes the State Energy Resources Conservation and Development Commission (Energy Commission) and requires the Energy Commission to carry out studies, technical assessments, research projects, and data collection directed to reducing wasteful, inefficient, unnecessary, or uneconomic uses of energy. The Energy Conservation Act of 2001 states the intent of the Legislature to establish incentives in the form of grants and loans to low-income residents, small businesses, and residential property owners for constructing and retrofitting buildings to be more energy efficient. The

act requires the Energy Commission, in consultation with the Public Utilities Commission (PUC), to undertake certain actions for the purpose of full or partial funding of an eligible construction or retrofit project. The Clean Energy and Pollution Reduction Act of 2015 requires the Energy Commission to establish annual targets for statewide energy efficiency savings and demand reduction that will achieve a cumulative doubling of statewide energy efficiency savings in electricity and natural gas final end uses of retail customers by January 1, 2030, including measures specific to disadvantaged communities, as specified. Existing law requires the Energy Commission, by March 1, 2010, to establish a regulatory proceeding to develop and implement a comprehensive program to achieve greater energy savings in California's existing residential and nonresidential building stock. This bill would require the Energy Commission, by January 1, 2020, and in consultation with relevant state agencies and the public, to establish nonbinding statewide targets that are cost effective and feasible for reducing energy consumption and emissions of greenhouse gases from multifamily residential properties by January 1, 2030, taking into consideration the state's requirements for reducing emissions of greenhouse gases and the climate equity, doubling of energy efficiency, and increased use of renewable energy resources requirements set forth in the Clean Energy and Pollution Reduction Act of 2015. The bill would require the Energy Commission, as part of its ongoing comprehensive program to achieve greater energy savings in California's existing residential and nonresidential building stock, to consult with relevant entities, including, among others, an expert advisory committee established by the Energy Commission pursuant to the bill. The bill would, pursuant to that consultation, require the Energy Commission to do all of the following: (1) by January 1, 2020, develop statewide strategies and recommendations to better leverage existing and new programs and funding resources to accelerate integrated distributed energy resource, water, and health and safety improvement programs available to multifamily residential properties and low-income multifamily properties to achieve the state's requirements for reducing emissions of greenhouse gases and the climate equity, doubling of energy efficiency, and increased use of renewable energy resources requirements of the Clean Energy and Pollution Reduction Act of 2015, (2) by January 1, 2020, identify best practices from model programs, funding mechanisms, workforce development strategies, and a recommended action plan, and (3) by January 1, 2020, identify and implement ways to enhance the Energy Upgrade California Web site, or other appropriate statewide Web sites, to create a statewide Web site subcomponent for owners of multifamily residential properties and for residents of multifamily residential properties that identifies applicable distributed energy resource and water programs and points of contact. The bill would require the Energy Commission, in consultation with the expert advisory committee, to report to the Legislature, by January 1, 2019, on the strategies developed pursuant to this requirement along with any recommendations for legislative action that may need to be taken to implement those strategies. The bill would require the Energy Commission, the Department of Housing and Community Development, the PUC, the State Water Resources Control Board, the Department of Community Services and Development, and other relevant entities, to develop strategies by January 1, 2019, for standardized income eligibility verification processes for distributed energy resources and water programs and would require the Energy Commission to include the strategies and progress made in implementing them in its report to the Legislature. The bill would enact other related provisions.

This bill contains other existing laws.

Organization	Assigned	Position	Priority	Subject	Group
UTA	MDB				

Notes 1:

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**AB 1526** (Kalra D) Debt collection. ( Chaptered: 9/5/2018 [html](#) [pdf](#) )

**Status:** 9/5/2018-Approved by the Governor. Chaptered by Secretary of State - Chapter 247, Statutes of 2018.

**Location:** 9/5/2018-A. CHAPTERED

**Summary:** The Rosenthal Fair Debt Collection Practices Act regulates the practice of debt collection and the conduct of debt collectors, as defined. The act prohibits specified conduct by a debt collector in connection with the collection or attempted collection of a consumer debt. The act provides for enforcement by means of civil penalties and damages, as specified. This bill would prohibit a debt

collector from sending a written communication to a debtor attempting to collect a time-barred debt without providing specified written notices stating that the debtor may not be sued for the debt, but that the debt, depending on its age, may be reported as unpaid to credit reporting agencies, as specified.

This bill contains other related provisions and other existing laws.

Organization	Assigned	Position	Priority	Subject	Group
UTA	MDB				
<b>Notes 1:</b>					

**AB 1547 (Quirk-Silva D) State finance: financing authorities.** ( Chaptered: 9/21/2018 [html](#) [pdf](#) )

**Status:** 9/21/2018-Approved by the Governor. Chaptered by Secretary of State - Chapter 645, Statutes of 2018.

**Location:** 9/21/2018-A. CHAPTERED

**Summary:** (1)Existing law, the California Industrial Development Financing Act, authorizes cities, counties, cities and counties, and redevelopment agencies to establish industrial development authorities that are authorized to issue industrial development bonds, the proceeds of which may be used to fund capital projects of private enterprise under terms and conditions specified in the act. The act authorizes an authority to issue tax-exempt bonds, and defines "tax-exempt" for these purposes to mean that the interest on the bonds is excluded from gross income of the holders thereof for federal income tax purposes. The act establishes the California Industrial Development Financing Advisory Commission, and requires the commission to approve the issuance of industrial development bonds pursuant to these provisions. The act also authorizes the commission to carry out other specified powers related to the issuance of industrial development bonds, including authorizing the commission to act as a bond pooling agent and requires fees to be charged to cover the costs of the commission in carrying out these provisions. Existing law requires these fees to be deposited in the Industrial Development Fund, which is available, upon appropriation, to the commission for expenses. This bill would abolish the California Industrial Development Financing Advisory Commission, and would make conforming changes to that effect. The bill would also provide that "tax-exempt" for purposes of the act includes that the interest on the bonds is otherwise entitled to any federal tax advantage. The bill would transfer any moneys, including interest earned, in the Industrial Development Fund to the California Debt Limit Allocation Committee Fund, established in existing law, and appropriate those moneys to the California Pollution Control Financing Authority to reimburse this authority for its administrative costs related to the abolishment of the California Industrial Development Financing Advisory Commission, as specified, and also to the California Debt Limit Allocation Committee.

This bill contains other related provisions and other existing laws.

Organization	Assigned	Position	Priority	Subject	Group
UTA	MDB				
<b>Notes 1:</b>					

**AB 1680 (Burke D) California Consumer Privacy Act of 2018.** ( Amended: 8/24/2018 [html](#) [pdf](#) )

**Status:** 8/31/2018-Failed Deadline pursuant to Rule 61(b)(18). (Last location was S. RLS. on 8/27/2018)

**Location:** 8/31/2018-S. DEAD

**Summary:** Existing law, the California Consumer Privacy Act of 2018, grants, commencing on January 1, 2020, a consumer various rights with regard to personal information relating to that consumer that is held by a business, including the right to request a business to delete any personal

information about the consumer collected by the business, and requires the business to comply with a verifiable consumer request to that effect, unless it is necessary for the business or service provider to maintain the customer's personal information in order to carry out specified acts. This bill would, instead, prohibit a business from unreasonably discriminating against a consumer for exercising of any of the consumer's rights under the act.

This bill contains other existing laws.

<b>Organization</b>	<b>Assigned</b>	<b>Position</b>	<b>Priority</b>	<b>Subject</b>	<b>Group</b>
UTA	MDB				
<b>Notes 1:</b>					

**AB 1765 (Quirk-Silva D) Personal income taxes: credits: qualified disaster area.** ( Amended: 5/15/2018 [html](#) [pdf](#) )

**Status:** 8/31/2018-Failed Deadline pursuant to Rule 61(b)(18). (Last location was A. APPR. SUSPENSE FILE on 5/23/2018)

**Location:** 8/31/2018-A. DEAD

**Summary:** Existing law, the Personal Income Tax law, allows various credits against the taxes imposed by that law. This bill would allow a credit against that tax for each taxable year beginning on or after January 1, 2019, and before January 1, 2020, in an amount equal to 50% of the amount paid or incurred, not to exceed \$1,000, for losses sustained by a taxpayer and not compensated for by insurance or otherwise that occurred in a qualified disaster area, as defined.

This bill contains other related provisions.

<b>Organization</b>	<b>Assigned</b>	<b>Position</b>	<b>Priority</b>	<b>Subject</b>	<b>Group</b>
UTA	MDB				
<b>Notes 1:</b>					

**AB 1797 (Levine D) Residential property insurance.** ( Chaptered: 8/28/2018 [html](#) [pdf](#) )

**Status:** 8/27/2018-Approved by the Governor. Chaptered by Secretary of State - Chapter 205, Statutes of 2018.

**Location:** 8/28/2018-A. CHAPTERED

**Summary:** Existing law requires a named insured on a residential property insurance policy be provided with a copy of the California Residential Property Insurance Disclosure which sets forth a description of certain types of insurance coverage, such as actual cash value coverage and guaranteed replacement cost coverage, as specified. Existing law also requires every California Residential Property Insurance Disclosure be accompanied by a California Residential Property Insurance Bill of Rights. This bill would require an insurer that provides replacement cost coverage to provide, on an every other year basis, at the time an offer to renew a policy of residential property insurance is made to the policyholder, an estimate of the cost necessary to rebuild or replace the insured structure that complies with specified existing regulations. The bill would exempt an insurer from this requirement if either the policyholder has requested, within the 2 years prior to the offer to renew the policy, and the insurer has provided, coverage limits greater than the previous limits that the policyholder had selected, or if the insurer has made specified offers to the policyholder. The bill would state its provisions are not intended to change existing law with respect to the duty of a policyholder or applicant to select the coverage limits for a policy of residential property insurance. The bill's provisions would become operative July 1, 2019.

<b>Assigned</b>	<b>Position</b>	<b>Priority</b>	<b>Subject</b>	<b>Group</b>
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**Organization**

UTA

**Notes 1:**

**AB 1829 (Committee on Budget) National Mortgage Settlement Fund: allocations.** ( Amended: 8/14/2018 [html](#) [pdf](#) )

**Status:** 8/31/2018-Failed Deadline pursuant to Rule 61(b)(18). (Last location was S. INACTIVE FILE on 8/30/2018)

**Location:** 8/31/2018-S. DEAD

**Summary:** Existing law creates the National Mortgage Special Deposit Fund, the moneys in which are continuously appropriated and to be allocated by the Department of Finance. Existing law authorizes the Director of Finance to allocate or otherwise use the funds in the National Mortgage Special Deposit Fund to offset General Fund expenditures in the 2011–12, 2012–13, and 2013–14 fiscal years. This bill would provide legislative confirmation and ratification that allocations of funds from the National Mortgage Special Deposit Fund in the 2011–12, 2012–13, and 2013–14 fiscal years were consistent with the direction given to the Director of Finance, as specified. The bill would also confirm and ratify that, because those allocations were displayed in the Governor’s proposed budget for the 2012–13 and 2013–14 fiscal years, and left unchanged in the budget acts adopted for the 2012–13 and 2013–14 fiscal years, the Legislature was aware of, and approved, the allocation and expenditure of funds from the National Mortgage Special Deposit Fund to offset General Fund expenditures in those fiscal years. The bill would make related declarations and a statement of legislative intent. This bill would appropriate \$25,000 from the General Fund to the Department of Finance for legal fees and costs.

This bill contains other related provisions.

Organization	Assigned	Position	Priority	Subject	Group
UTA	MDB				

**Notes 1:**

**AB 1910 (Choi R) Obligations.** ( Introduced: 1/23/2018 [html](#) [pdf](#) )

**Status:** 5/11/2018-Failed Deadline pursuant to Rule 61(b)(6). (Last location was A. PRINT on 1/23/2018)

**Location:** 5/11/2018-A. DEAD

**Summary:** Existing law provides that the full performance of an obligation by the party whose duty it is to perform the obligation or by any other person on that party’s behalf and with that party’s assent, if accepted by the creditor, extinguishes the obligation. This bill would make nonsubstantive changes to that provision.

Organization	Assigned	Position	Priority	Subject	Group
UTA	MDB				

**Notes 1:**

**AB 1915 (Mathis R) Building Homes and Jobs Act: recording fee: mining claims.** ( Introduced: 1/23/2018 [html](#) [pdf](#) )

**Status:** 8/31/2018-Failed Deadline pursuant to Rule 61(b)(18). (Last location was A. H. & C.D. on 5/9/2018)

**Location:** 8/31/2018-A. DEAD

**Summary:** Existing law imposes a charge, except as provided, of \$75 to be paid at the time of the recording of every real estate instrument, paper, or notice required or permitted by law to be

recorded, per each single transaction per single parcel of real property, not to exceed \$225. Existing law defines "real estate instrument, paper, or notice" for this purpose as a document relating to real property and specifies a nonexhaustive list of documents deemed to be a "real estate instrument, paper, or notice." This bill would exclude from this definition of "real estate instrument, paper, or notice," and thereby exempt from the recording fee, any document recorded in relation to a mining claim, as provided.

This bill contains other related provisions.

Organization	Assigned	Position	Priority	Subject	Group
UTA	MDB				
<b>Notes 1:</b>					

**AB 1922 (Fong R) California Competitiveness and Innovation Act.** ( Amended: 3/1/2018 [html](#) [pdf](#) )  
**Status:** 8/31/2018-Failed Deadline pursuant to Rule 61(b)(18). (Last location was A. REV. & TAX on 2/5/2018)  
**Location:** 8/31/2018-A. DEAD

**Summary:** (1)Existing property tax law provides, pursuant to the authority of a specified provision of the California Constitution, for a homeowners' exemption in the amount of \$7,000 of the full value of a "dwelling," as defined, and authorizes the Legislature to increase this exemption. This bill, beginning with the lien date for the 2019–20 fiscal year, would increase the homeowners' exemption from \$7,000 to \$14,000 of the full value of a dwelling. This bill, for the 2020–21 fiscal year and for each fiscal year thereafter, would also require the county assessor to adjust the amount of the homeowners' exemption by the percentage change in the House Price Index for California for the first 3 quarters of the prior calendar year, as specified.

This bill contains other related provisions and other existing laws.

Organization	Assigned	Position	Priority	Subject	Group
UTA	MDB				
<b>Notes 1:</b>					

**AB 2035 (Mullin D) Affordable housing authorities.** ( Chaptered: 9/28/2018 [html](#) [pdf](#) )  
**Status:** 9/28/2018-Approved by the Governor. Chaptered by Secretary of State - Chapter 862, Statutes of 2018.  
**Location:** 9/28/2018-A. CHAPTERED

**Summary:** Existing law authorizes a city, county, or city and county to adopt a resolution creating an affordable housing authority with powers limited to providing low- and moderate-income housing and affordable workforce housing, as provided, by means of tax increment financing. Existing law defines various terms for these purposes. This bill would additionally define the terms "authorizing resolution" and "property tax increment" for these purposes. The bill would additionally revise these provisions to limit the authority to providing low- and moderate-income housing and affordable housing, as specified.

This bill contains other related provisions and other existing laws.

Organization	Assigned	Position	Priority	Subject	Group
UTA	MDB				

**Notes 1:**

**AB 2063 (Aguiar-Curry D) California Financing Law: PACE program administrators.** ( Chaptered: 9/27/2018 [html](#) [pdf](#))

**Status:** 9/27/2018-Approved by the Governor. Chaptered by Secretary of State - Chapter 813, Statutes of 2018.

**Location:** 9/27/2018-A. CHAPTERED

**Summary:** (1)Existing law, known commonly as the Property Assessed Clean Energy (PACE) program, authorizes a public agency, by making specified findings, to authorize public agency officials and property owners to enter into voluntary contractual assessments to finance the installation of distributed generation renewable energy sources or energy or water efficiency improvements that are permanently fixed to real property. This bill would clarify that the term "PACE solicitor" and "PACE solicitor agent" does not include a person who only solicits a property owner to enter into an assessment contract with a person who is not considered a program administrator within the meaning of the CFL. The bill would prohibit a person from engaging in the business of a PACE solicitor unless that person is enrolled with a program administrator. The bill would also require the program administrator to maintain the processes described above in a manner that is acceptable to the commissioner.

This bill contains other related provisions and other existing laws.

Organization	Assigned	Position	Priority	Subject	Group
UTA	MDB				

**Notes 1:**

**AB 2071 (Bloom D) Accessory dwelling units: owner occupancy.** ( Amended: 8/6/2018 [html](#) [pdf](#))

**Status:** 8/31/2018-Failed Deadline pursuant to Rule 61(b)(18). (Last location was S. INACTIVE FILE on 8/27/2018)

**Location:** 8/31/2018-S. DEAD

**Summary:** The Planning and Zoning Law authorizes a local agency to provide by ordinance for the creation of accessory dwelling units in single-family and multifamily residential zones. That law sets forth the standards that the ordinance is required to impose, including, but not limited to, parking, height, setback, lot coverage, landscape, architectural review, maximum size of a unit, and standards that prevent adverse impacts on any real property that is listed in the California Register of Historic Places. Existing law requires the local agency to ministerially approve an application for a building permit to create within a single-family zone one accessory dwelling unit per lot if the unit is contained within the existing space of a single-family residence or accessory structure. In this instance, existing law authorizes a city to require owner-occupancy for either the primary residence or the accessory dwelling unit. This bill would require, when a local agency or ordinance requires owner-occupancy pursuant to the above-described provisions, the lot that contains the accessory dwelling unit or the single family residence in which the junior accessory dwelling unit is located to be deemed to be owner-occupied if the lot or single family residence is owned by a trust in which at least one beneficiary of the trust is a person with a disability and that person occupies the primary residence, accessory dwelling unit, or any part of the single-family residence.

This bill contains other existing laws.

Organization	Assigned	Position	Priority	Subject	Group
UTA	MDB				

**Notes 1:**

**AB 2150 (Chen R) California Financing Law: Property Assessed Clean Energy program: commissioner composite report.** ( Introduced: 2/12/2018 [html](#) [pdf](#) )

**Status:** 4/27/2018-Failed Deadline pursuant to Rule 61(b)(5). (Last location was L. GOV. on 3/15/2018)

**Location:** 4/27/2018-A. DEAD

**Summary:** Existing law, the Property Assessed Clean Energy (PACE) program, authorizes public agency officials and property owners, as provided, to enter into voluntary contractual assessments, known as a PACE assessments, to finance the installation of distributed generation renewable energy sources or energy or water efficiency improvements that are permanently fixed to real property. Existing law, the California Financing Law, commencing on April 1, 2018, prohibits a program administrator administering a PACE program from approving a PACE assessment for funding and recording by a public agency unless the program administrator makes a reasonable good faith determination that the property owner has a reasonable ability to pay the PACE assessment, subject to specified factors. Under existing law, the program administrator may waive this good faith determination in the case of emergency or immediate necessity, as provided. Existing law requires the program administrator to report annually to the Commissioner of Business Oversight all PACE assessment contracts approved for funding and recording through this emergency or immediate necessity waiver. Existing law requires the commissioner to make and file annually with the Department of Business Oversight, as a public record, a composite of the annual reports, among other things, he or she deems to be in the public interest. This bill would require the commissioner to include the report from the program administrator, containing all PACE assessment contracts approved for funding and recording through the emergency or immediate necessity waiver, within the composite of the annual reports he or she is required to prepare.

Organization	Assigned	Position	Priority	Subject	Group
UTA					

Notes 1:

**AB 2159 (Chu D) Financial abuse.** ( Amended: 5/15/2018 [html](#) [pdf](#) )

**Status:** 5/25/2018-Failed Deadline pursuant to Rule 61(b)(8). (Last location was A. APPR. on 4/24/2018)

**Location:** 5/25/2018-A. DEAD

**Summary:** Existing law establishes the Money Transmission Act for the purpose of protecting the interests of persons in this state who use money transmission services. This bill would require a money transmitter to provide a consumer fraud warning on all money transmittal forms used by consumers to send money to an individual, to provide consumer fraud prevention training for its agents' to monitor its agents, activities relating to consumer transmittals, and to establish a toll-free number for consumers to call to report fraud or suspected fraud. The bill would make a failure to implement the fraud prevention measures established by the bill subject to a civil penalty not to exceed \$1,000, or if the violation is willful, a civil penalty not to exceed \$5,000.

Organization	Assigned	Position	Priority	Subject	Group
UTA	MDB				

Notes 1:

**AB 2173 (Santiago D) Commercial real property: termination of tenancy: disposition of personal property.** ( Chaptered: 7/9/2018 [html](#) [pdf](#) )

**Status:** 7/9/2018-Approved by the Governor. Chaptered by Secretary of State - Chapter 74, Statutes of 2018.

**Location:** 7/9/2018-A. CHAPTERED

**Summary:** Existing law provides an optional procedure for the disposition of personal property remaining on the premises at the termination of a commercial tenancy, as specified. Existing law requires a landlord to give written notice to the tenant if personal property remains after the end of a

tenancy. Existing law authorizes property described in the notice to be sold at public sale except if the landlord reasonably believes that the total resale value of the personal property is the lesser of \$750 or \$1 per square foot of the premises occupied by the tenant, the landlord is authorized to retain the property for his or her own use or dispose of it in any manner. This bill would change the calculation of the total resale value of the personal property, for purposes of these provisions, to either \$2,500 or an amount equal to one month's rent for the premises the tenant occupied, whichever is greater.

<b>Organization</b>	<b>Assigned</b>	<b>Position</b>	<b>Priority</b>	<b>Subject</b>	<b>Group</b>
UTA	MDB				

Notes 1:

**AB 2182** (**Levine D**) **Privacy: personal information: breach: disclosure.** ( Amended: 8/13/2018 [html pdf](#) )

**Status:** 8/31/2018-Failed Deadline pursuant to Rule 61(b)(18). (Last location was S. RLS. on 8/6/2018)

**Location:** 8/31/2018-S. DEAD

**Summary:** Existing law requires a person or business conducting business in California that owns or licenses computerized data that includes personal information, as defined, to disclose a breach in the security of the data to a resident of California whose encrypted or unencrypted personal information was, or is reasonably believed to have been, acquired by an unauthorized person, as specified. Existing law requires that disclosure to be made in the most expedient time possible and without unreasonable delay, consistent with the legitimate needs of law enforcement or any measures necessary to determine the scope of the breach and restore the reasonable integrity of the data system. This bill would, in the event that a person or business delays full disclosure of the security breach due to the determination of the scope of the breach or the restoration of the reasonable integrity of the data system, require the person or business to disclose as much information as it can, to as many affected residents as it can, and as soon as it can, on a rolling basis.

<b>Organization</b>	<b>Assigned</b>	<b>Position</b>	<b>Priority</b>	<b>Subject</b>	<b>Group</b>
UTA					

Notes 1:

**AB 2209** (**Choi R**) **Unclaimed property: time frames.** ( Introduced: 2/12/2018 [html pdf](#) )

**Status:** 4/27/2018-Failed Deadline pursuant to Rule 61(b)(5). (Last location was JUD. on 4/10/2018)

**Location:** 4/27/2018-A. DEAD

**Summary:** The Unclaimed Property Law (UPL) prescribes the circumstances under which unclaimed personal property held by a banking or financial organization, business association, or other holder of personal property escheats to the state. The UPL specifies that any demand, savings, or matured time deposit, or account subject to a negotiable order of withdrawal, made with a banking organization escheats to the state if the owner, for more than 3 years, has not had specified activity on the account, except as specified. This bill would extend this 3-year period to 5 years.

This bill contains other related provisions and other existing laws.

<b>Organization</b>	<b>Assigned</b>	<b>Position</b>	<b>Priority</b>	<b>Subject</b>	<b>Group</b>
UTA	MDB				

Notes 1:

**AB 2219** (**Ting D**) **Landlord-tenant: 3rd-party payments.** ( Chaptered: 8/28/2018 [html pdf](#) )

**Status:** 8/28/2018-Approved by the Governor. Chaptered by Secretary of State - Chapter 233, Statutes of 2018.

**Location:** 8/28/2018-A. CHAPTERED

**Summary:** Existing law regulates the terms and conditions of residential tenancies. Existing law requires a landlord or his or her agent to allow a tenant to pay rent or a security deposit by at least one form of payment that is neither cash nor electronic funds transfer, except as specified. This bill would require, subject to specified limitations, a landlord or a landlord's agent to allow a tenant to pay rent through a third party.

Organization	Assigned	Position	Priority	Subject	Group
UTA	MDB				

Notes 1:

**AB 2343** (Chiu D) Real property: possession: unlawful detainer. ( Chaptered: 9/5/2018 [html](#) [pdf](#) )

**Status:** 9/5/2018-Approved by the Governor. Chaptered by Secretary of State - Chapter 260, Statutes of 2018.

**Location:** 9/5/2018-A. CHAPTERED

**Summary:** (1)Existing law establishes a procedure, known as an unlawful detainer action, that a landlord must follow in order to evict a tenant. Existing law provides that a tenant is subject to such an action if the tenant continues to possess the property without permission of the landlord in specified circumstances, including when the tenant has violated the lease by defaulting on rent or failing to perform a duty under the lease, but the landlord must first give the tenant a 3-day notice to cure the violation or vacate. This bill would change the notice period to exclude judicial holidays, including Saturday and Sunday.

This bill contains other related provisions and other existing laws.

Organization	Assigned	Position	Priority	Subject	Group
UTA	MDB				

Notes 1:

**AB 2364** (Bloom D) Rental control: withdraw from accommodation. ( Amended: 5/9/2018 [html](#) [pdf](#) )

**Status:** 6/1/2018-Failed Deadline pursuant to Rule 61(b)(11). (Last location was A. THIRD READING on 5/10/2018)

**Location:** 6/1/2018-A. DEAD

**Summary:** Existing law, commonly known as the Ellis Act, generally prohibits public entities from adopting any statute, ordinance, or regulation, or taking any administrative action, to compel the owner of residential real property to offer or to continue to offer accommodations, as defined, in the property for rent or lease. Existing law qualifies this prohibition by, among other things, permitting a public entity for which rent control is in effect to require an owner who offers accommodations for rent or lease again within 10 years after they are withdrawn to first offer them to a tenant or lessee displaced by that withdrawal if that tenant or lessee makes a request in writing within 30 days after the owner has notified the public entity of an intention to offer the accommodations again. Existing law, for tenancies commenced during either the 5-year period after any notice of intent to withdraw accommodations is filed or within the 5-year period after the accommodations are withdrawn, requires accommodations to be offered and rented or leased at the lawful rent in effect at the time any notice of intent to withdraw the accommodations is filed, plus annual adjustments, as specified. Existing law sets forth various provisions that govern an owner who offers an accommodation for rent or lease again within 2 years of the date the accommodations were withdrawn from rent or lease. An owner who fails to comply with these requirements is liable for punitive damages not to exceed an amount equal to 6 months of rent. This bill would revise the circumstances under which an owner may

be required to offer accommodations to displaced tenants and lessees to eliminate the requirement that the request be made in writing within 30 days of notification, as described above, and would instead make the offer contingent on the tenant or lessee advising the owner of a desire to consider an offer. The bill also would require that the rental agreement or lease to be offered be the same as that in effect at the time of the displacement. The bill would extend the time period during which the various provisions govern an owner who offers an accommodation for rent or lease again after the accommodations were withdrawn from rent or lease from 2 years to 5 years, and would reduce the time that an action may be brought under these provisions to one year from 3 years of the date when the withdrawn accommodations are offered again for rent or lease. The bill would eliminate the limit on punitive damages.

This bill contains other related provisions and other existing laws.

Organization	Assigned	Position	Priority	Subject	Group
UTA	MDB				

Notes 1:

**AB 2368** (**Calderon D**) **California Online Notary Act of 2018.** ( Amended: 5/25/2018 [html](#) [pdf](#) )  
**Status:** 6/29/2018-Failed Deadline pursuant to Rule 61(b)(13). (Last location was S. JUD. on 6/13/2018)  
**Location:** 6/29/2018-S. DEAD

**Summary:** Existing law authorizes the Secretary of State to appoint and commission notaries public in the number the Secretary of State deems necessary for the public convenience. Existing law authorizes notaries public to act as notaries in any part of the state. This bill would enact the California Online Notary Act of 2018, and, commencing on January 1, 2020, would allow a notary public or an applicant for appointment as a notary public to register with the Secretary of State to be an online notary public, and would require the Secretary of State to develop an application for registration and establish rules to implement the act on or before January 1, 2020. The bill would authorize the Secretary of State to establish a fee for an application for registration as an online notary public. The bill would authorize an online notary public to perform notarial acts, and online notarizations by means of audio-video communication. The bill would establish various requirements applicable to an online notary public, including requiring an online notary public to keep one or more secure electronic journals to record online notarial acts, requiring an electronic notarial certificate to be a specified form, and requiring an online notary public to destroy certain information upon termination of a commission, as specified. The bill would make it a misdemeanor for any person who, without authorization, knowingly obtains, conceals, damages, or destroys the certificate, disk, coding, card, program, software, or hardware enabling an online notary public to affix an official electronic signature or seal. By creating a new crime, this bill would impose a state-mandated local program. The bill would also make other conforming changes.

This bill contains other related provisions and other existing laws.

Organization	Assigned	Position	Priority	Subject	Group
UTA	MDB				

Notes 1:

**AB 2376** (**Stone, Mark D**) **Civil actions: provisional remedies: injunctions.** ( Chaptered: 9/10/2018 [html](#) [pdf](#) )  
**Status:** 9/10/2018-Approved by the Governor. Chaptered by Secretary of State - Chapter 319, Statutes of 2018.  
**Location:** 9/10/2018-A. CHAPTERED

**Summary:** Existing law provides that a citizen resident or corporation who is assessed for and is liable to pay, or within one year before the commencement of the action, has paid, a tax in a county, town, city, or city and county may maintain an action to obtain a judgment restraining and preventing an illegal expenditure of, waste of, or injury to the estate, funds, or other property of the political subdivision, as specified. The California Supreme Court in *Weatherford v. City of San Rafael* (2017) 2 Cal.5th 1241 held that this tax was not restricted to payment of a property tax. This bill would expand the scope of an action described above by permitting the action to be maintained against a "local agency," defined as a city, town, county, or city and county, or a district, public authority, or any other political subdivision in the state. The bill would allow any resident of the local agency to maintain an action under those circumstances. The bill would further clarify that a tax that funds the defendant local agency is sufficient to confer standing as a taxpayer, including, but not limited to, an income tax, a sales and use tax or transaction and use tax initially paid by a consumer to a retailer, a property tax, or a business license tax. The bill would define "resident" for these purposes to mean a person who lives, works, owns property, or attends school in the jurisdiction of the defendant local agency.

<b>Organization</b>	<b>Assigned</b>	<b>Position</b>	<b>Priority</b>	<b>Subject</b>	<b>Group</b>
UTA	MDB				

Notes 1:

**AB 2413** (**Chiu D**) **Tenancy: law enforcement and emergency assistance.** ( Chaptered: 8/24/2018 [html pdf](#) )

**Status:** 8/24/2018-Approved by the Governor. Chaptered by Secretary of State - Chapter 190, Statutes of 2018.

**Location:** 8/24/2018-A. CHAPTERED

**Summary:** (1)Existing law authorizes a tenant to notify the landlord in writing that he or she or a household member, as defined, was a victim of domestic violence, sexual assault, stalking, human trafficking, or elder or dependent adult abuse and that the tenant intends to terminate the tenancy. If the tenant attaches to the notice a copy of a temporary restraining order or protective order, as specified, a report by a peace officer, as specified, or documentation from a qualified 3rd party, as specified, and satisfies other requirements, the tenant is released from paying rent and other obligations under the lease, subject to certain limitations. This bill would declare void, as contrary to public policy, a provision in a rental or lease agreement that limits or prohibits, or threatens to limit or prohibit, a tenant's, resident's, or other person's right to summon law enforcement assistance or emergency assistance as, or on behalf of, a victim of abuse, a victim of crime, or an individual in an emergency if the tenant, resident, or other person believes that the law enforcement assistance or emergency assistance is necessary to prevent or address the perpetration, escalation, or exacerbation of the abuse, crime, or emergency. The bill would also prohibit a landlord from imposing, or threatening to impose, penalties in this context as well. The bill would define various terms for these purposes. The bill would provide that a waiver of these provisions is contrary to public policy and is void and unenforceable. The bill would prescribe evidentiary presumptions in this connection to be applicable to unlawful detainer actions. The bill would authorize a tenant, resident, or other aggrieved person to seek an injunction for a violation of these provisions.

This bill contains other related provisions and other existing laws.

<b>Organization</b>	<b>Assigned</b>	<b>Position</b>	<b>Priority</b>	<b>Subject</b>	<b>Group</b>
UTA	MDB				

Notes 1:

**AB 2429** (**Caballero D**) **Insurance: time-limited demands.** ( Amended: 3/15/2018 [html pdf](#) )

**Status:** 5/11/2018-Failed Deadline pursuant to Rule 61(b)(6). (Last location was A. JUD. on 4/9/2018)

**Location:** 5/11/2018-A. DEAD

**Summary:** Existing law regulates insurance and the business of insurance in this state. Existing law specifies various acts that are defined as unfair methods of competition and deceptive acts or practices in the business of insurance, including knowingly committing or performing certain acts with such frequency as to indicate a general business practice of unfair claims settlement practices. This bill would declare that it is the policy of the state that prompt settlements of civil actions and insurance claims are encouraged as beneficial to claimants, policyholders, and insurers. The bill would require a time-limited demand, as defined, to be in writing and to include specified information, including the time period within which the offer remains open, the entire amount of monetary payment requested for a full and final settlement of the claim, and an offer of a full and final unconditional release from all present and future liability arising out of the occurrence giving rise to the claim. The bill would also require the time-limited demand to include specified documentation to support the claim for damages. The bill would authorize an insurer to accept the time-limited demand by providing written acceptance of the material terms within the time period set forth in the demand.

Organization	Assigned	Position	Priority	Subject	Group
UTA	MDB				

**Notes 1:**

**AB 2485** **(Chau D) Code enforcement: financially interested parties.** ( Chaptered: 9/5/2018 [html](#) [pdf](#) )  
**Status:** 9/5/2018-Approved by the Governor. Chaptered by Secretary of State - Chapter 263, Statutes of 2018.  
**Location:** 9/5/2018-A. CHAPTERED

**Summary:** Existing law provides for code enforcement officers employed by cities and counties who have enforcement authority for health, safety, and welfare requirements. Existing law also provides for county and city health officers to enforce orders and ordinances of the governing body of the county or city, or state statutes pertaining to public health. This bill would prohibit a local official, as defined, who inspects a commercial property or business for compliance with a state statute or regulation or local ordinance from being accompanied during the inspection by a person with a potential financial interest in the outcome of the inspection, as defined, unless the person is the owner of the property or business, is the agent or representative of the owner, is a person who has, or operates under, a specified existing contract with the local government who has been directed by a local official to perform services at the property or business, or is a contractor or consultant, or a designated representative of a contractor or consultant, that is on a publicly available list of qualified bidders that may provide inspection, abatement, or remediation services to, and receive compensation for those services from, the local government, as specified. The bill would additionally prohibit a person who has entered into a contract with a local government for inspection, abatement, or remediation services, who inspects a commercial property or business for compliance with a state statute or regulation or local ordinance without the presence of a local official from soliciting or receiving compensation from the owner to remediate any potential violations of a state statute or regulation or local ordinance found in the course of the inspection, as specified.

This bill contains other related provisions.

Organization	Assigned	Position	Priority	Subject	Group
UTA	MDB				

**Notes 1:**

**AB 2521** **(Quirk-Silva D) Reservists: active duty: deferment of financial obligations.** ( Chaptered: 7/9/2018 [html](#) [pdf](#) )  
**Status:** 7/9/2018-Approved by the Governor. Chaptered by Secretary of State - Chapter 79, Statutes of 2018.  
**Location:** 7/9/2018-A. CHAPTERED

**Summary:** Existing law, the California Military Families Financial Relief Act, authorizes a reservist who is called to active duty to defer payments on mortgages, credit cards, retail installment accounts and contracts, real property taxes and assessments, vehicle leases, and obligations owed to utility companies, for the period of active duty plus 60 calendar days, or 180 days, whichever is the lesser, as specified. Existing law requires the reservist or his or her designee to deliver to the obligor (1) a copy of his or her activation or deployment order and any other information that substantiates the duration of the service member's military service, and (2) a letter signed by the reservist, under penalty of perjury, requesting a deferment of financial obligations, in order for the obligation or liability to be subject to the provisions of the act. This bill would delete the requirement to provide a signed letter, under penalty of perjury, and instead would require the reservist or his or her designee to deliver a written request by the reservist for a deferment of financial obligations to the obligor.

Organization	Assigned	Position	Priority	Subject	Group
UTA	MDB				

Notes 1:

**AB 2588 (Chu D) Manufactured housing.** ( Vetoed: 9/27/2018 [html](#) [pdf](#) )

**Status:** 9/27/2018-Vetoed by Governor.

**Location:** 9/27/2018-A. VETOED

**Summary:** Existing law, the Manufactured Housing Act of 1980, requires the Department of Housing and Community Development to enforce various laws pertaining to the structural, fire safety, plumbing, heat-producing, or electrical systems and installations or equipment of a manufactured home, mobilehome, special purpose commercial coach, or commercial coach. Under existing law, a knowing violation of the act is punishable as a misdemeanor offense, as specified. The act, on or after January 1, 2009, requires all used manufactured homes, used mobilehomes, and used multifamily manufactured homes that are sold to have a smoke alarm installed in each room designed for sleeping that is operable on the date of transfer of title. This bill would require all used manufactured homes, used mobilehomes, and used multifamily manufactured homes that are sold or rented to have a smoke alarm that has been approved and listed by the Office of the State Fire Marshal on or after January 1, 2014. By expanding the scope of a crime, this bill would impose a state-mandated local program.

This bill contains other related provisions and other existing laws.

Organization	Assigned	Position	Priority	Subject	Group
UTA	MDB				

Notes 1:

**AB 2598 (Quirk D) Cities and counties: ordinances: violations.** ( Chaptered: 10/1/2018 [html](#) [pdf](#) )

**Status:** 9/30/2018-Approved by the Governor. Chaptered by Secretary of State - Chapter 970, Statutes of 2018.

**Location:** 9/30/2018-A. CHAPTERED

**Summary:** Existing law authorizes the legislative body of a city or a county to make, by ordinance, any violation of an ordinance subject to an administrative fine or penalty and limits the maximum fine or penalty amounts for infractions, to \$100 for the first violation, \$200 for a 2nd violation of the same ordinance within one year of the first violation, and \$500 for each additional violation of the same ordinance within one year of the first violation. For violations of city or county building and safety codes determined to be an infraction, existing law limits the amount of the fine to \$100 for a first violation, \$500 for a 2nd violation of the same ordinance within one year, and \$1,000 for each additional violation of the same ordinance within one year of the first violation. The bill would, for violations of a local building and safety code determined to be an infraction, increase the amounts of the fines to \$130 for a first violation, \$700 for a 2nd violation of the same ordinance within one year,

and \$1,300 for each additional violation of the same ordinance within one year of the first violation. The bill would additionally provide for a fine of \$2,500 for each additional violation of the same ordinance within 2 years of the first violation if the property is a commercial property that has an existing building at the time of the violation and the violation is of a local building and safety code that is an infraction and is due to failure by the owner to remove visible refuse or failure to prohibit unauthorized use of the property.

This bill contains other related provisions.

Organization	Assigned	Position	Priority	Subject	Group
UTA	MDB				

Notes 1:

**AB 2618 (Bonta D) Hiring of real property: Department of Consumer Affairs: landlords and property managers: training.** ( Amended: 4/19/2018 [html](#) [pdf](#) )

**Status:** 5/25/2018-Failed Deadline pursuant to Rule 61(b)(8). (Last location was A. APPR. SUSPENSE FILE on 5/9/2018)

**Location:** 5/25/2018-A. DEAD

**Summary:** Existing law establishes the Department of Consumer Affairs within the Business, Consumer Services, and Housing Agency. Under existing law, boards within the department are established to ensure that private businesses and professions are regulated to protect the people of California, as provided. This bill, commencing on January 1, 2020, would require the Department of Consumer Affairs to administer a certification program for landlords and property managers, as defined, to provide education to landlords and property managers on fair housing practices, obligations of landlords, and tenant rights. The bill would make this certification effective for a period of 2 years and would provide for renewal if certain requirements are met. The bill would, except as specified, authorize the department to identify and approve appropriate providers of the educational coursework, as specified. The bill would make a person who acts as a landlord or property manager without first having obtained certification from the department subject to a specified civil penalty.

This bill contains other existing laws.

Organization	Assigned	Position	Priority	Subject	Group
UTA	MDB				

Notes 1:

**AB 2631 (Allen, Travis R) Planning and zoning: affordable housing: streamlined approval process.** ( Introduced: 2/15/2018 [html](#) [pdf](#) )

**Status:** 4/27/2018-Failed Deadline pursuant to Rule 61(b)(5). (Last location was L. GOV. on 3/12/2018)

**Location:** 4/27/2018-A. DEAD

**Summary:** Existing law, until January 1, 2026, authorizes a development proponent to submit an application for a multifamily housing development, which satisfies specified planning objective standards, that is subject to a streamlined, ministerial approval process, as provided, and not subject to a conditional use permit. Existing law requires a local government to notify the development proponent in writing if the local government determines that the development conflicts with any of those objective standards by a specified time; otherwise, the development is deemed to comply with those standards. Existing law provides that if a local government approves a project pursuant to that process, that approval will not expire until a specified period of time depending on the nature of the development. This bill would authorize a development property to submit an application for a development to be subject to a streamlined, ministerial approval process provided that development

meet specified objective planning standards, such as that the development contains fewer than 25 residential units and provides housing for persons and families of low or moderate income. The bill would require a local government to notify the development proponent in writing if the local government determines that the development conflicts with any of those objective standards within 30 days of the application being submitted; otherwise, the development is deemed to comply with those standards. The bill would provide that if a local government approves a project pursuant to this process, then that approval will not expire for 5 years. By imposing new duties upon local agencies with respect to the streamlined approval process described above, this bill would impose a state-mandated local program.

This bill contains other related provisions and other existing laws.

Organization	Assigned	Position	Priority	Subject	Group
UTA	MDB				

Notes 1:

**AB 2648** **(Friedman D) Civil actions: limitations: real property.** ( Amended: 4/12/2018 [html](#) [pdf](#) )

**Status:** 5/11/2018-Failed Deadline pursuant to Rule 61(b)(6). (Last location was A. JUD. on 4/12/2018)

**Location:** 5/11/2018-A. DEAD

**Summary:** Existing law prohibits an action from being brought to recover damages from any person, or the person’s surety, who develops real property or performs or furnishes the design, specifications, surveying, planning, supervision, testing, or observation of construction or construction of an improvement to real property more than 10 years after the substantial completion of the development or improvement, as specified. Existing law provides that the 10-year statute of limitation does not apply to actions based on willful misconduct or fraudulent concealment. This bill would similarly provide that an action for personal injury resulting from water contamination must be commenced no later than 10 years after the plaintiff discovered the injury, and would make technical, nonsubstantive changes to the provisions.

Organization	Assigned	Position	Priority	Subject	Group
UTA	MDB				

Notes 1:

**AB 2658** **(Calderon D) Secretary of the Government Operations Agency: working group: blockchain technology.** ( Chaptered: 9/28/2018 [html](#) [pdf](#) )

**Status:** 9/28/2018-Approved by the Governor. Chaptered by Secretary of State - Chapter 875, Statutes of 2018.

**Location:** 9/28/2018-A. CHAPTERED

**Summary:** Existing law, the Uniform Electronic Transactions Act, specifies that a record or signature may not be denied legal effect or enforceability solely because it is in electronic form and that a contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation. Among other things, the act provides that if a law requires a record to be in writing, or if a law requires a signature, an electronic record or signature satisfies the law. This bill, until January 1, 2022, would require the Secretary of the Government Operations Agency to appoint a blockchain working group on or before July 1, 2019. The bill would define blockchain. The bill, on or before July 1, 2020, would require the working group to report to the Legislature on the potential uses, risks, and benefits of the use of blockchain technology by state government and California-based businesses, as specified.

This bill contains other existing laws.

<b>Organization</b>	<b>Assigned</b>	<b>Position</b>	<b>Priority</b>	<b>Subject</b>	<b>Group</b>
UTA	MDB				

Notes 1:

**AB 2663** (Friedman D) **Property taxation: change in ownership: exclusion: local registered domestic partners.** ( Chaptered: 9/29/2018 [html](#) [pdf](#))

**Status:** 9/29/2018-Approved by the Governor. Chaptered by Secretary of State - Chapter 919, Statutes of 2018.

**Location:** 9/29/2018-A. CHAPTERED

**Summary:** The California Constitution generally limits ad valorem taxes on real property to 1% of the full cash value of that property. For purposes of this limitation, "full cash value" is defined as, among other things, the appraised value of that real property when a change in ownership has occurred. Existing law provides that specified transfers are not deemed a change in ownership, including any transfer between registered domestic partners, as provided. This bill would also exclude from the definition of "change in ownership" any transfer of property occurring on or after January 1, 2000, to June 26, 2015, inclusive, between local registered domestic partners, as defined. The bill would require any transferee whose property was reassessed in contravention of this provision to obtain a reversal of that reassessment upon application to the county assessor, as provided. The bill would authorize the county to charge a fee related to the application and reassessment reversal. The bill would require the State Board of Equalization to prescribe the form for claiming the reassessment reversal. The bill would require any reassessment reversal to apply commencing with the lien date of the assessment year in which the claim is filed.

This bill contains other related provisions and other existing laws.

<b>Organization</b>	<b>Assigned</b>	<b>Position</b>	<b>Priority</b>	<b>Subject</b>	<b>Group</b>
UTA	MDB				

Notes 1:

**AB 2671** (Fong R) **Regulations: legislative review: regulatory reform.** ( Amended: 3/20/2018 [html](#) [pdf](#))

**Status:** 5/25/2018-Failed Deadline pursuant to Rule 61(b)(8). (Last location was A. APPR. SUSPENSE FILE on 5/9/2018)

**Location:** 5/25/2018-A. DEAD

**Summary:** The Administrative Procedure Act governs the procedure for the adoption, amendment, or repeal of regulations by state agencies and for the review of those regulatory actions by the Office of Administrative Law. That act requires an agency, prior to submitting a proposal to adopt, amend, or repeal an administrative regulation, to determine the economic impact of that regulation, in accordance with certain procedures. The act defines a major regulation as a regulation, as specified, that will have an economic impact on California business enterprises and individuals in an amount exceeding \$50,000,000, as estimated by the agency. The act requires the office to transmit a copy of a regulation to the Secretary of State for filing if the office approves the regulation or fails to act on it within 30 days. The act provides that a regulation or an order of repeal of a regulation becomes effective on a quarterly basis, as prescribed, except in specified instances. This bill would require the office to submit to each house of the Legislature for review a copy of each major regulation that it submits to the Secretary of State. The bill would add another exception to those currently provided that specifies that a regulation does not become effective if the Legislature enacts a statute to override the regulation.

This bill contains other existing laws.

<b>Organization</b>	<b>Assigned</b>	<b>Position</b>	<b>Priority</b>	<b>Subject</b>	<b>Group</b>
UTA	MDB				

Notes 1:

**AB 2678 (Irwin D) Privacy: personal information: breach: notification.** ( Amended: 6/21/2018 [html](#) [pdf](#) )  
**Status:** 8/31/2018-Failed Deadline pursuant to Rule 61(b)(18). (Last location was S. INACTIVE FILE on 8/24/2018)  
**Location:** 8/31/2018-S. DEAD

**Summary:** Existing law requires a person or business conducting business in California or an agency that owns or licenses computerized data that includes personal information, as defined, to disclose a breach in the security of the data to a resident of California whose encrypted or unencrypted personal information was, or is reasonably believed to have been, acquired by an unauthorized person, as specified. This bill would, if the security breach exposed a social security number, a driver's license number, or a California identification card number, require the notice to also include the Internet Web site address of each of the major credit reporting agencies and a notice instructing the affected person that information related to security freezes and fraud alerts is available from the major credit reporting agencies.

This bill contains other existing laws.

<b>Organization</b>	<b>Assigned</b>	<b>Position</b>	<b>Priority</b>	<b>Subject</b>	<b>Group</b>
UTA	MDB				

Notes 1:

**AB 2681 (Nazarian D) Seismic safety: potentially vulnerable buildings.** ( Vetoed: 9/28/2018 [html](#) [pdf](#) )  
**Status:** 9/28/2018-Vetoed by Governor.  
**Location:** 9/28/2018-A. VETOED

**Summary:** Existing law establishes a program within all cities and all counties and portions thereof located within seismic zone 4, as defined, to identify all potentially hazardous buildings and to establish a mitigation program for these buildings. The mitigation program may include, among other things, the adoption by ordinance of a hazardous buildings program, measures to strengthen buildings, and the application of structural standards necessary to provide for life safety above current code requirements. This bill would, upon the identification of funding by the Office of Emergency Services, require the building department of a city or county that meets specified requirements to create an inventory of potentially vulnerable buildings, as defined, within its jurisdiction, based on age and other publicly available information, and submit that inventory to the office, as specified. By increasing the duties of local officials, this bill would create a state-mandated local program. The bill would require the office to, among other things, maintain a statewide inventory, identify funding mechanisms to offset costs to building departments and building owners in complying with these provisions, and report to the Legislature on the number of potentially vulnerable buildings and compliance of building departments with these provisions. The bill would require the owner of a building identified by a building department as a potentially vulnerable building to retain a licensed professional engineer to identify whether the building meets the definition of a potentially vulnerable building, and provide a letter to the building department stating the licensed professional engineer's findings. The bill would specify the date by which each requirement must be met.

This bill contains other related provisions and other existing laws.

<b>Organization</b>	<b>Assigned</b>	<b>Position</b>	<b>Priority</b>	<b>Subject</b>	<b>Group</b>
UTA	MDB				
<b>Notes 1:</b>					

**AB 2708 (Reyes D) Contracts: translation.** ( Amended: 4/18/2018 [html](#) [pdf](#))  
**Status:** 5/25/2018-Failed Deadline pursuant to Rule 61(b)(8). (Last location was A. APPR. on 4/24/2018)  
**Location:** 5/25/2018-A. DEAD

**Summary:** Existing law requires a person engaged in a trade or business, or a supervised financial organization, that negotiates primarily in one of specified languages other than English in the course of entering into certain contracts or agreements to deliver to the other party a translation of the contract or agreement into the language other than English, as specified. This bill would also require a person engaged in a trade or business, or a supervised financial organization, to provide a translation of a contract or agreement to a consumer who primarily speaks one of specified foreign languages if the transaction is negotiated in English by a minor on behalf of the consumer.

<b>Organization</b>	<b>Assigned</b>	<b>Position</b>	<b>Priority</b>	<b>Subject</b>	<b>Group</b>
UTA	MDB				
<b>Notes 1:</b>					

**AB 2728 (Chen R) Replacement of corroded or lead-containing plumbing or service lines: loans.** ( Introduced: 2/15/2018 [html](#) [pdf](#))  
**Status:** 5/25/2018-Failed Deadline pursuant to Rule 61(b)(8). (Last location was A. APPR. SUSPENSE FILE on 5/2/2018)  
**Location:** 5/25/2018-A. DEAD

**Summary:** Existing law, the Safe Drinking Water State Revolving Fund Law of 1997, establishes the Safe Drinking Water State Revolving Fund to provide grants or revolving fund loans for the design and construction of projects for public water systems that will enable those systems to meet safe drinking water standards. This bill would, to the extent funding is made available, authorize the State Water Resources Control Board to establish a grant program to provide funding to a county or qualified nonprofit organization, as specified, to provide low-interest loans to defined property owners for the replacement of corroded or lead-containing plumbing and service lines that adversely impact drinking water standards or for the installation of a point-of-use or point-of-entry water treatment system, as specified. The bill would require a county or qualified nonprofit organization that receives a grant pursuant to these provisions to annually provide to the state board specified information relating to the loans awarded and projects funded. The bill would authorize the state board to use a funding source that is authorized for and consistent with the purposes of the program.

<b>Organization</b>	<b>Assigned</b>	<b>Position</b>	<b>Priority</b>	<b>Subject</b>	<b>Group</b>
UTA	MDB				
<b>Notes 1:</b>					

**AB 2746 (Garcia, Eduardo D) Taxation: tax-defaulted property sales.** ( Chaptered: 9/6/2018 [html](#) [pdf](#))  
**Status:** 9/6/2018-Approved by the Governor. Chaptered by Secretary of State - Chapter 284, Statutes of 2018.  
**Location:** 9/6/2018-A. CHAPTERED

**Summary:** Existing property tax law attaches, as a lien against property, taxes that are owed on that property. Existing law generally declares in default the taxes, assessments, and penalties on real property if those charges are not paid by a specified time. Existing law requires the tax collector to attempt to sell property that has become tax defaulted 5 years or more after that property has become tax defaulted, and in the case of tax-defaulted property that is also subject to a nuisance abatement lien, 3 years or more after that property becomes tax defaulted, as specified. During these

3- and 5-year periods, existing law allows a taxpayer a right of redemption whereby the taxpayer may pay specified charges to remove the lien against the property. Existing law specifies that this right of redemption terminates on the last business day prior to the date that the sale of the property begins and, if the tax collector approves a sale as a credit transaction and does not receive full payment on or before the date upon which the tax collector requires, the right of redemption is revived on the next business day following that date, as specified. Existing law also provides that the right of redemption is revived if the property is not sold. This bill would specify that the commencement of the tax sale constitutes the actual sale date, regardless of the date of the conclusion of the auction. The bill would provide that the taxpayer loses all rights in the property during the auction period for failure to redeem the property by the final redemption date. The bill would provide that if a property has not been redeemed, any person or entity with title of record to the property loses all rights in the property, including all legal and equitable interest therein, upon close of the redemption period. However, those rights return if the right of redemption is revived. The bill would specify that the provisions relating to the right of redemption do not affect the distribution of proceeds, as specified, and apply regardless of whether the tax collector or his or her designee conducts the tax sale in person.

Organization	Assigned	Position	Priority	Subject	Group
UTA	MDB				

Notes 1:

**AB 2803** (**Limón D**) **Public nuisance: residential lead-based paint.** ( Amended: 4/23/2018 [html](#) [pdf](#) )  
**Status:** 8/31/2018-Failed Deadline pursuant to Rule 61(b)(18). (Last location was S. APPR. on 6/21/2018)  
**Location:** 8/31/2018-S. DEAD

**Summary:** Existing law establishes an action for a public nuisance, which affects an entire community or neighborhood, or a considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal. Existing law authorizes a private party or a public body to bring an action to abate a public nuisance. This bill would provide that residential lead-based paint that affects the health of a considerable number of persons constitutes a public nuisance. Under the bill, a party may be subject to liability for public nuisance if that party promoted lead-based paint for a particular use with actual or constructive knowledge that such use would cause health hazards sufficiently serious to render that use unreasonable, as specified. The bill would provide that, in an action seeking solely abatement of residential lead-based paint, causation may be established without presenting evidence that a particular party caused a particular lead-based paint to be applied in a particular residence, as specified.

This bill contains other related provisions.

Organization	Assigned	Position	Priority	Subject	Group
UTA	MDB				

Notes 1:

**AB 2825** (**Jones-Sawyer D**) **Debt collection: practices.** ( Amended: 6/18/2018 [html](#) [pdf](#) )  
**Status:** 8/17/2018-Failed Deadline pursuant to Rule 61(b)(15). (Last location was S. APPR. SUSPENSE FILE on 8/6/2018)  
**Location:** 8/17/2018-S. DEAD

**Summary:** Existing law, the Rosenthal Fair Debt Collection Practices Act, is intended to prohibit debt collectors from engaging in unfair or deceptive acts or practices in the collection of consumer debts and to require debtors to act fairly in entering into and honoring those debts. Existing law prohibits a debt collector from, among other things, collecting or attempting to collect a consumer debt by means of the use, or threat of use, of physical force or violence or any criminal means to cause harm to the person, or the reputation, or the property of any person. This bill would enact analogous provisions applicable to collections or attempts to collect certain government debts and debts arising from towed

or impounded vehicles, as specified. The bill would prohibit government and towing debt collectors, as defined, from engaging in specified collection practices and would require the person collecting to provide the debtor with specified information regarding the debt, including specified language requirements for the information provided.

This bill contains other related provisions and other existing laws.

Organization	Assigned	Position	Priority	Subject	Group
UTA	MDB				

Notes 1:

**AB 2847** **(Rubio D) Commercial real property: tenancy: abandonment.** ( Chaptered: 7/16/2018 [html](#) [pdf](#) )

**Status:** 7/16/2018-Approved by the Governor. Chaptered by Secretary of State - Chapter 104, Statutes of 2018.

**Location:** 7/16/2018-A. CHAPTERED

**Summary:** Existing law provides that if a lessee of real property remains in possession after the expiration of the hiring and the lessor accepts rent from the lessee, the parties are presumed to have renewed the hiring on the same terms and for the same amount of time. This bill would make a nonsubstantive change to that provision.

This bill contains other related provisions and other existing laws.

Organization	Assigned	Position	Priority	Subject	Group
UTA	MDB				

Notes 1:

**AB 2912** **(Irwin D) Association finances.** ( Chaptered: 9/15/2018 [html](#) [pdf](#) )

**Status:** 9/14/2018-Approved by the Governor. Chaptered by Secretary of State - Chapter 396, Statutes of 2018.

**Location:** 9/14/2018-A. CHAPTERED

**Summary:** (1)Existing law, the Davis-Sterling Common Interest Development Act, limits the personal liability of a volunteer officer or director of an association of a common interest development in excess of the coverage of specified insurance if certain conditions are met. This bill would require the association to maintain fidelity bond coverage, as specified.

This bill contains other related provisions and other existing laws.

Organization	Assigned	Position	Priority	Subject	Group
UTA	MDB				

Notes 1:

**AB 2913** **(Wood D) Building standards: building permits: expiration.** ( Chaptered: 9/21/2018 [html](#) [pdf](#) )

**Status:** 9/21/2018-Approved by the Governor. Chaptered by Secretary of State - Chapter 655, Statutes of 2018.

**Location:** 9/21/2018-A. CHAPTERED

**Summary:** A provision of the California Building Standards Law specifies that a local ordinance adding or modifying building standards for residential occupancies, published in the California Building Standards Code, applies only to an application for a building permit submitted after the effective date of the ordinance and to plans and specifications for, and the construction performed under, that permit, unless, among other reasons, the permit is subsequently deemed expired because the building or work authorized by the permit is not commenced within 180 days from the date of the permit, or the permittee has suspended or abandoned the work authorized by the permit at any time after the work is commenced. This bill would instead provide that a permit would remain valid for purposes of the California Building Standards Law if the work on the site authorized by that permit is commenced within 12 months after its issuance, unless the permittee has abandoned the work authorized by the permit. The bill would also authorize a permittee to request and the building official to grant, in writing, one or more extensions of time for periods of not more than 180 days per extension. The bill would require that the permittee request the extension in writing and demonstrate justifiable cause for the extension. The bill would also make conforming changes to the above-described provisions.

<b>Organization</b>	<b>Assigned</b>	<b>Position</b>	<b>Priority</b>	<b>Subject</b>	<b>Group</b>
UTA	MDB				

Notes 1:

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**AB 2925 (Bonta D) Tenancy: eviction: for cause.** ( Amended: 5/29/2018 [html](#) [pdf](#))

**Status:** 6/1/2018-Failed Deadline pursuant to Rule 61(b)(11). (Last location was A. THIRD READING on 5/8/2018)

**Location:** 6/1/2018-A. DEAD

**Summary:** Existing law governs the hiring of residential dwelling units and establishes provisions for the renewal or termination of a hiring of residential real property for an unspecified term. Existing law requires that an owner of a residential dwelling generally give at least 60 days' notice prior to termination or, in the case of a tenant or resident that has resided in the dwelling for less than one year or if certain other conditions apply, 30 days' notice prior to termination. Existing law provides that a tenant of real property is guilty of unlawful detainer in certain circumstances, including that the tenant continues in possession of the property after the expiration of the term for which it is let to him or her, as provided. This bill would prohibit a landlord from terminating a tenancy, or seeking to recover possession from a tenant who continues in possession of property after the expiration of the term for which it is let, as described above, except for cause, as set forth with particularity in the notice. The bill would state the intent of the Legislature to encourage or incentivize cities to enact just cause eviction ordinances in order to prevent unnecessary displacement of tenants. The bill would state that its provisions are in addition to, and do not supersede or preempt, any other state or local law regulating the grounds for eviction or the termination of a tenancy.

<b>Organization</b>	<b>Assigned</b>	<b>Position</b>	<b>Priority</b>	<b>Subject</b>	<b>Group</b>
UTA	MDB				

Notes 1:

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**AB 2930 (Santiago D) Unlawful detainer: nuisance: unlawful weapons and ammunition.** ( Chaptered: 9/28/2018 [html](#) [pdf](#))

**Status:** 9/28/2018-Approved by the Governor. Chaptered by Secretary of State - Chapter 880, Statutes of 2018.

**Location:** 9/28/2018-A. CHAPTERED

**Summary:** Existing law defines a nuisance and includes within this definition anything that is injurious to health, including nuisance caused by illegal conduct involving unlawful weapons or ammunition. Existing law establishes the criteria for determining when a tenant is guilty of unlawful detainer, including conduct involving illegally selling a controlled substance, or the commission of an offense involving the unlawful possession or use of illegal weapons or ammunition or the use of the premises to further that purpose. This bill would prohibit a jurisdiction from bringing on unlawful

detainer action under these provisions unless that entity made a good faith effort to collect and report certain information to the California Research Bureau.

This bill contains other related provisions and other existing laws.

Organization	Assigned	Position	Priority	Subject	Group
UTA	MDB				

Notes 1:

**AB 2939 (Ting D) Accessory dwelling units.** ( Introduced: 2/16/2018 [html](#) [pdf](#) )

**Status:** 4/27/2018-Failed Deadline pursuant to Rule 61(b)(5). (Last location was H. & C.D. on 3/8/2018)

**Location:** 4/27/2018-A. DEAD

**Summary:** The Planning and Zoning Law authorizes a local agency to provide by ordinance for the creation of accessory dwelling units in single-family and multifamily residential zones and sets forth standards the ordinance is required to impose, including, among others, maximum unit size, parking, and height standards. Existing law requires the local agency to ministerially approve an application for a building permit to create within a single-family zone one accessory dwelling unit per lot if the unit is contained within the existing space of a single-family residence or accessory structure. In this instance, existing law authorizes a city to require owner-occupancy for either the primary residence or the accessory dwelling unit. This bill would require the local agency to ministerially approve an application for a building permit to create within a multifamily zone at least one accessory dwelling unit within an existing multifamily structure with at least 5 residential units if specified conditions are met. The bill would prohibit an application ministerially approved pursuant to this provision from having a limit on the number of accessory dwelling units created within the existing residential units or accessory structures or both. By increasing the duties of local officials, this bill would create a state-mandated local program.

This bill contains other related provisions and other existing laws.

Organization	Assigned	Position	Priority	Subject	Group
UTA	MDB				

Notes 1:

**AB 2953 (Limón D) California Financing Law: consumer loans: title loans.** ( Amended: 3/19/2018 [html](#) [pdf](#) )

**Status:** 6/29/2018-Failed Deadline pursuant to Rule 61(b)(13). (Last location was S. B. & F. I. on 6/13/2018)

**Location:** 6/29/2018-S. DEAD

**Summary:** Existing law, the California Financing Law (CFL), provides for the licensure and regulation of finance lenders and brokers and, beginning on January 1, 2019, program administrators, by the Commissioner of Business Oversight. The CFL prohibits anyone from engaging in the business of a finance lender or broker without obtaining a license. Existing law defines a finance lender as any person who is engaged in making consumer loans or commercial loans, as defined. A willful violation of the CFL is a crime, except as specified. The CFL prescribes limits on the maximum rate of charges and administrative fees that a licensee may contract for, and receive, on consumer loans of up to \$2,500. The CFL requires a licensee, with respect to loans secured by a lien on a motor vehicle, to comply with specified notice requirements related to the disposition of a repossessed or surrendered motor vehicle. The CFL requires that any person who is liable on a consumer loan secured by a lien on a motor vehicle has the right to reinstate the loan in the event of a default by the borrower, subject to certain conditions and exceptions. This bill would prohibit a licensee from receiving charges under

a title loan agreement in an amount that is greater than 3% per month on the unpaid principal balance of the title loan. Because a willful violation of the bill's provisions would be a crime, the bill would impose a state-mandated local program.

This bill contains other related provisions and other existing laws.

Organization	Assigned	Position	Priority	Subject	Group
UTA	MDB				

Notes 1:

**AB 2984** (**Limón D**) **California Financing Law.** ( Amended: 5/1/2018 [html](#) [pdf](#) )  
**Status:** 5/25/2018-Failed Deadline pursuant to Rule 61(b)(8). (Last location was A. APPR. SUSPENSE FILE on 5/9/2018)  
**Location:** 5/25/2018-A. DEAD

**Summary:** (1)Existing law, the California Financing Law (CFL), provides for the licensure and regulation of finance lenders and brokers, and, beginning on January 1, 2019, program administrators, by the Commissioner of Business Oversight. A willful violation of the CFL is a crime, except as specified. The CFL provides that it be liberally construed to promote specified purposes and policies. This bill would revise the purposes and policies of the CFL.

This bill contains other related provisions and other existing laws.

Organization	Assigned	Position	Priority	Subject	Group
UTA	MDB				

Notes 1:

**AB 2985** (**Nazarian D**) **Property taxation.** ( Introduced: 2/16/2018 [html](#) [pdf](#) )  
**Status:** 5/11/2018-Failed Deadline pursuant to Rule 61(b)(6). (Last location was A. PRINT on 2/16/2018)  
**Location:** 5/11/2018-A. DEAD

**Summary:** The California Constitution generally limits ad valorem taxes on real property to 1% of the full cash value, as defined, of that property, and provides that the full cash value base may be adjusted each year by an inflationary rate not to exceed 2% for any given year. Existing property tax law implementing this constitutional authority provides that the taxable value of real property is the lesser of its base year value compounded annually by the inflation factor not to exceed 2%, as provided, or its full cash value. This bill would make a nonsubstantive change to these provisions.

Organization	Assigned	Position	Priority	Subject	Group
UTA	MDB				

Notes 1:

**AB 2995** (**Carrillo D**) **Civil actions: injury to property: lead-based paint.** ( Amended: 5/2/2018 [html](#) [pdf](#) )  
**Status:** 6/1/2018-Failed Deadline pursuant to Rule 61(b)(11). (Last location was A. THIRD READING on 5/3/2018)  
**Location:** 6/1/2018-A. DEAD

**Summary:** Existing law provides that an injury to property consists in depriving its owner of the benefit of it, which is done by taking, withholding, deteriorating, or destroying it. Existing law requires an action seeking relief based on an injury to property to be commenced within 3 years after the time

that the cause of action has accrued. This bill would provide that the presence of lead paint on the surfaces of a residence or other building constitutes a physical injury to property. The bill would provide that an action to recover damages for that injury would not accrue until three years from the date the aggrieved party has actual knowledge of the presence of lead-based paint in or on that property, as specified. This bill would provide that the presence of lead paint on the surfaces of a residence or other building constitutes a physical injury to property. The bill would provide that an action to recover damages for that injury would not accrue until three years from the date the aggrieved party has actual knowledge of the presence of lead-based paint in or on that property, as specified.

<b>Organization</b>	<b>Assigned</b>	<b>Position</b>	<b>Priority</b>	<b>Subject</b>	<b>Group</b>
UTA	MDB				
<b>Notes 1:</b>					

**AB 3004 (Kiley R) Revocable transfer on death deeds.** ( Amended: 4/2/2018 [html](#) [pdf](#) )  
**Status:** 4/27/2018-Failed Deadline pursuant to Rule 61(b)(5). (Last location was JUD. on 3/12/2018)  
**Location:** 4/27/2018-A. DEAD

**Summary:** Existing law governs the execution, revocation, and effectiveness of a revocable transfer on death (TOD) deed, defined as an instrument that makes a donative transfer of property to a named beneficiary, as defined, that operates on the transferor's death, and remains revocable until the transferor's death. Existing law establishes statutory forms for executing and revoking a revocable TOD deed that include provisions and instructions for the forms to be notarized by the transferor and recorded with the county recorder. This bill would authorize a transferor to make a donative transfer under these provisions to a charitable organization or nonprofit entity as a beneficiary. The bill would additionally require a revocable TOD deed to be recorded during the transferor's life to be effective. The bill would remove from the statutory forms for executing and revoking a revocable TOD deed the references to an exemption for a documentary transfer tax and a preliminary change of ownership report and modify the provisions for notarization. The bill would provide that the statutory "common frequently asked questions" do not need to be recorded with the statutory form to create a revocable TOD deed and apply this provision to revocable TOD deeds executed under specified circumstances. This bill contains other related provisions and other existing laws.

<b>Organization</b>	<b>Assigned</b>	<b>Position</b>	<b>Priority</b>	<b>Subject</b>	<b>Group</b>
UTA	MDB				
<b>Notes 1:</b>					

**AB 3037 (Chiu D) Community Redevelopment Law of 2018.** ( Amended: 4/30/2018 [html](#) [pdf](#) )  
**Status:** 5/25/2018-Failed Deadline pursuant to Rule 61(b)(8). (Last location was A. APPR. SUSPENSE FILE on 5/23/2018)  
**Location:** 5/25/2018-A. DEAD

**Summary:** (1)The California Constitution, with respect to any taxes levied on taxable property in a redevelopment project established under the Community Redevelopment Law, as it then read or may be amended, authorizes the Legislature to provide for the division of those taxes under a redevelopment plan between the taxing agencies and the redevelopment agency, as provided. This bill, the Community Redevelopment Law of 2018, would authorize a city or county to propose the formation of a redevelopment housing and infrastructure agency by adoption of a resolution of intention that meets specified requirements, including that the resolution of intention include a passthrough provision and an override passthrough provision, as defined. The bill would require the city or county to submit that resolution to each affected taxing entity, and would authorize an entity that receives that resolution to elect to not receive a passthrough payment, as provided. The bill would require the city or county that adopted that resolution to hold a public hearing on the proposal to consider all written and oral objections to the formation, as well as any recommendations of the affected taxing entities, and would authorize that city or county to adopt a resolution of formation at the conclusion of that hearing. The bill would then require that city or county to submit the resolution

of formation to the Strategic Growth Council for a determination as to whether the agency would promote statewide greenhouse gas reduction goals and would require that the council recommend to the Department of Finance whether to approve the resolution. The bill would require the council to establish a program to provide technical assistance to a city or county desiring to form an agency pursuant to these provisions. The bill would then require that city or county to submit the resolution of formation to the Department of Finance for approval, subject to certain standards, including that the department determine that any passthrough provision included is consistent with certain requirements and a statewide cap on the amount of equity, as defined, received by all local agencies within the state in any fiscal year, and to consider any recommendations of the Strategic Growth Council. The bill would require the department to disapprove the resolution if the department determines that the creation of the agency will result in a state fiscal impact that exceeds a specified amount in any fiscal year. The bill would deem the agency to be in existence as of the date of the department's approval.

This bill contains other related provisions and other existing laws.

Organization	Assigned	Position	Priority	Subject	Group
UTA	MDB				

Notes 1:

**AB 3041 (Cunningham R) Real estate transfer fees: prohibition.** ( Chaptered: 9/7/2018 [html](#) [pdf](#) )

**Status:** 9/7/2018-Approved by the Governor. Chaptered by Secretary of State - Chapter 306, Statutes of 2018.

**Location:** 9/7/2018-A. CHAPTERED

**Summary:** Existing law allows various fees to be included in the price of a residential real estate transfer. Existing law defines a "transfer fee" with respect to real property as a fee payment requirement imposed in any covenant, restriction, or condition contained in any deed, contract, security instrument, or other document affecting the transfer or sale of real property that requires a fee be paid upon transfer of the real property, with specified exceptions. This bill, on or after January 1, 2019, would prohibit the creation of a transfer fee, other than excepted transfer fee covenants, as defined. The bill would provide that any transfer fee created in violation of this prohibition is void as against public policy.

This bill contains other related provisions and other existing laws.

Organization	Assigned	Position	Priority	Subject	Group
UTA	MDB				

Notes 1:

**AB 3072 (Chiu D) Income taxes: credits: low-income housing: farmworker housing.** ( Amended: 5/16/2018 [html](#) [pdf](#) )

**Status:** 8/31/2018-Failed Deadline pursuant to Rule 61(b)(18). (Last location was A. APPR. SUSPENSE FILE on 5/23/2018)

**Location:** 8/31/2018-A. DEAD

**Summary:** Existing law establishes a low-income housing tax credit program pursuant to which the California Tax Credit Allocation Committee provides procedures and requirements for the allocation, in modified conformity with federal law, of state insurance, personal income, and corporation tax credit amounts to qualified low-income housing projects that have been allocated, or qualify for, a federal low-income housing tax credit, and farmworker housing. Existing law limits the total annual amount of the state low-income housing credit for which a federal low-income housing credit is required to the sum of \$70,000,000, as increased by any percentage increase in the Consumer Price

Index for the preceding calendar year, any unused credit for the preceding calendar years, and the amount of housing credit ceiling returned in the calendar year. Existing law additionally allows a state credit, which is not dependent on receiving a federal low-income housing credit, of \$500,000 per calendar year for projects to provide farmworker housing. For purposes of determining the credit amount, existing law defines the term "applicable percentage" depending on, among other things, whether the qualified low-income building is a new building that is not federally subsidized, a new building that is federally subsidized, or is an existing building that is "at risk of conversion." This bill, under the law governing the taxation of insurers, the Personal Income Tax Law, and the Corporation Tax Law, for calendar years beginning in 2019 through the 2023 calendar year, inclusive, would increase the aggregate housing credit dollar amount that may be allocated among low-income housing projects by an additional \$300,000,000, as specified, and would allocate to farmworker housing projects \$25,000,000 per year of that amount. The bill, under those laws, would modify the definition of applicable percentage relating to qualified low-income buildings to depend on whether the building is a new or existing building and federally subsidized, or a building that is, among other things, at least 15 years old, serving households of very low income or extremely low income, and will complete substantial rehabilitation, as specified.

This bill contains other related provisions and other existing laws.

Organization	Assigned	Position	Priority	Subject	Group
UTA	MDB				

Notes 1:

**AB 3122 (Gallagher R) Property taxation: disaster relief: payment of deferred taxes.** ( Chaptered: 7/20/2018 [html](#) [pdf](#) )

**Status:** 7/20/2018-Approved by the Governor. Chaptered by Secretary of State - Chapter 149, Statutes of 2018.

**Location:** 7/20/2018-A. CHAPTERED

**Summary:** Existing law authorizes the board of supervisors of a county to provide, by ordinance, for the reassessment of property that is damaged or destroyed, without fault on the part of the assessee, by a major misfortune or calamity, upon the application of the assessee or upon the action of the county assessor with the approval of the board of supervisors. Existing law also authorizes owners of eligible property, as defined, who have applied for reassessment under that ordinance, to apply for a deferral of payment of that installment of property taxes. This bill would require that the application for a deferral of payment be made in conjunction with the claim for reassessment.

This bill contains other related provisions and other existing laws.

Organization	Assigned	Position	Priority	Subject	Group
UTA	MDB				

Notes 1:

**AB 3208 (Cooper D) Cities: ordinances: violations.** ( Amended: 3/22/2018 [html](#) [pdf](#) )

**Status:** 5/11/2018-Failed Deadline pursuant to Rule 61(b)(6). (Last location was A. PUB. S. on 4/17/2018)

**Location:** 5/11/2018-A. DEAD

**Summary:** Existing law authorizes a city legislative body to impose fines, penalties, and forfeitures for violations of city ordinances. This bill would, until January 1, 2024, specifically authorize the City of Elk Grove to adopt an ordinance authorizing the city to confiscate and seek an order of civil forfeiture of real or personal property for violations of the city's ordinances. The bill would require the ordinance to provide the owner of the property adequate notice and opportunity to challenge the forfeiture and

to ensure that the property seized is reasonable in relation to the ordinance violation. This bill would make legislative findings and declarations as to the necessity of a special statute for the City of Elk Grove.

Organization	Assigned	Position	Priority	Subject	Group
UTA	MDB				

Notes 1:

**AB 3212** (**Irwin D**) **Service member protections.** ( Chaptered: 9/19/2018 [html](#) [pdf](#) )

**Status:** 9/19/2018-Approved by the Governor. Chaptered by Secretary of State - Chapter 555, Statutes of 2018.

**Location:** 9/19/2018-A. CHAPTERED

**Summary:** (1)Existing law provides that the application by a service member for, or receipt by a service member of, a stay, postponement, or suspension in the payment of any tax, fine, penalty, insurance premium, or other civil obligation or liability of that person does not itself, without regard to other considerations, provide the basis for, among other things, a determination by any lender or other person that the service member is unable to pay any civil obligation or liability or the denial or revocation of credit by the creditor. This bill would additionally provide that an application or receipt under these provisions does not provide a basis for an annotation in a service member's record by a creditor or a person engaged in the practice of assembling or evaluating consumer credit information identifying the service member as a member of the active militia, or an active or reserve component of the Armed Forces. The bill would prohibit a person, in connection with the collection of any obligation, from falsely claiming to be a member or civilian employee of, among other things, the Armed Forces or of a component of the active militia or identifying himself or herself through the use of any military rank, rating, or title. The bill would additionally prohibit a person, in connection with the collection of any obligation from a member of the active militia or a member of the active or reserve components of the Armed Forces, from contacting the member's military unit or chain of command without the written consent of the member given after the obligation becomes due and payable. By creating a new crime, this bill would impose a state-mandated local program.

This bill contains other related provisions and other existing laws.

Organization	Assigned	Position	Priority	Subject	Group
UTA	MDB				

Notes 1:

**SB 298** (**Wieckowski D**) **Enforcement of money judgments: exemptions.** ( Amended: 8/24/2018 [html](#) [pdf](#) )

**Status:** 8/31/2018-Failed Deadline pursuant to Rule 61(b)(18). (Last location was A. RECONSIDERATION on 8/16/2018)

**Location:** 8/31/2018-S. DEAD

**Summary:** Existing law authorizes a judgment creditor to levy upon the property of a judgment debtor to satisfy a judgment, and authorizes the judgment debtor to claim that certain property is exempt from the levy by following a specified procedure. Existing law authorizes a claimant to assert an exemption by filing a claim of exemption with the levying officer within 10 days after the date the notice of levy on the property claimed to be exempt is served on the judgment debtor. This bill would authorize a claimant to file a claim of exemption with the levying officer either in person or by mail and would specify that the period for filing the claim is 15 days if the judgment debtor is personally served with a notice of levy on the property claimed to be exempt, and 20 days if the claimant is served with notice by mail. The bill would deem the filing by mail complete on the date the claim is postmarked if the mailing is assigned a tracking number. If the mailing is not assigned a tracking number, the bill would deem the filing by mail complete on the date the claim is received by the levying officer.

This bill contains other related provisions and other existing laws.

Organization	Assigned	Position	Priority	Subject	Group
UTA	MDB				

Notes 1:

**SB 327**    **(Jackson D) Information privacy: connected devices.** ( Chaptered: 9/28/2018 [html](#) [pdf](#) )

**Status:** 9/28/2018-Approved by the Governor. Chaptered by Secretary of State. Chapter 886, Statutes of 2018.

**Location:** 9/28/2018-S. CHAPTERED

**Summary:** Existing law requires a business to take all reasonable steps to dispose of customer records within its custody or control containing personal information when the records are no longer to be retained by the business by shredding, erasing, or otherwise modifying the personal information in those records to make it unreadable or undecipherable. Existing law also requires a business that owns, licenses, or maintains personal information about a California resident to implement and maintain reasonable security procedures and practices appropriate to the nature of the information, to protect the personal information from unauthorized access, destruction, use, modification, or disclosure. Existing law authorizes a customer injured by a violation of these provisions to institute a civil action to recover damages. This bill, beginning on January 1, 2020, would require a manufacturer of a connected device, as those terms are defined, to equip the device with a reasonable security feature or features that are appropriate to the nature and function of the device, appropriate to the information it may collect, contain, or transmit, and designed to protect the device and any information contained therein from unauthorized access, destruction, use, modification, or disclosure, as specified.

This bill contains other related provisions.

Organization	Assigned	Position	Priority	Subject	Group
UTA	MDB				

Notes 1:

**SB 434**    **(Galgiani D) Personal income taxes: gross income exclusion: mortgage debt forgiveness.** ( Amended: 7/17/2017 [html](#) [pdf](#) )

**Status:** 8/31/2018-Failed Deadline pursuant to Rule 61(b)(18). (Last location was A. APPR. on 8/23/2017)

**Location:** 8/31/2018-S. DEAD

**Summary:** The Personal Income Tax Law provides for modified conformity to specified provisions of federal income tax law relating to the exclusion of the discharge of qualified principal residence indebtedness, as defined, from an individual's income if that debt is discharged after January 1, 2007, and before January 1, 2014, as provided. Existing law limits the amount excludable from gross income to \$500,000 or to \$250,000 if the taxpayer is a married individual filing a separate return. The federal Tax Increase Prevention Act of 2014 extended the operation of those provisions to debt that is discharged before January 1, 2015. The federal Protecting Americans from Tax Hikes Act of 2015 extended the operation of those provisions to debt that is discharged before January 1, 2017, and provides that its discharge provisions apply to specified written agreements entered into before January 1, 2017. This bill would conform to that additional discharge provision relating to specified written agreements and the federal extensions, some of which would be applied retroactively, and would limit the amount excludable under this provision to \$250,000 or to \$125,000 if the taxpayer is a married individual filing a separate return. The bill would discharge indebtedness for related penalties and interest and would make legislative findings and declarations regarding the public purpose served by the bill.

This bill contains other related provisions.

Organization	Assigned	Position	Priority	Subject	Group
UTA	MDB				
<b>Notes 1:</b>					

**SB 477** **(Cannella R) Intercity rail corridors: extensions.** ( Amended: 5/26/2017 [html](#) [pdf](#) )  
**Status:** 8/17/2018-Failed Deadline pursuant to Rule 61(b)(15). (Last location was A. 2 YEAR on 9/1/2017)  
**Location:** 8/17/2018-S. DEAD

**Summary:** Existing law authorizes the Department of Transportation to contract with Amtrak for intercity rail passenger services and provides funding for these services from the Public Transportation Account. Existing law authorizes the department, subject to approval of the Secretary of Transportation, to enter into an interagency transfer agreement under which a joint powers board assumes responsibility for administering the state-funded intercity rail service in a particular corridor and associated feeder bus services. Existing law defines the boundaries of 3 intercity rail corridors, and requires the preparation of an annual business plan for the corridor by each participating joint powers board. This bill, at any time after an interagency transfer agreement between the department and a joint powers board has been entered into, would authorize the amendment of the agreement to provide for the extension of the affected rail corridor to provide intercity rail service beyond the defined boundaries of the corridor. The bill would require a proposed extension and intercity rail service expansion to be consistent with the State Rail Plan and to be approved through the business plan adopted by the joint powers board and then by the Secretary of Transportation, and would require the joint powers board to make a determination that the extension and intercity rail service expansion will not jeopardize or come at the expense of other existing intercity rail services.

Organization	Assigned	Position	Priority	Subject	Group
UTA	MDB				
<b>Notes 1:</b>					

**SB 721** **(Hill D) Building standards: decks and balconies: inspection.** ( Chaptered: 9/17/2018 [html](#) [pdf](#) )  
**Status:** 9/17/2018-Approved by the Governor. Chaptered by Secretary of State. Chapter 445, Statutes of 2018.  
**Location:** 9/17/2018-S. CHAPTERED

**Summary:** Existing law provides authority for an enforcement agency to enter and inspect any buildings or premises whenever necessary to secure compliance with or prevent a violation of the building standards published in the California Building Standards Code and other rules and regulations that the enforcement agency has the power to enforce. This bill would require an inspection of exterior elevated elements and associated waterproofing elements, as defined, including decks and balconies, for buildings with 3 or more multifamily dwelling units by a licensed architect, licensed civil or structural engineer, a building contractor holding specified licenses, or an individual certified as a building inspector or building official, as specified. The bill would require the inspections, including any necessary testing, to be completed by January 1, 2025, with certain exceptions, and would require subsequent inspections every 6 years, except as specified. The bill would require the inspection report to contain specified items and would require that a copy of the inspection report be presented to the owner of the building within 45 days of the completion of the inspection and would require copies of the reports to be maintained in the building owner's records for 2 inspection cycles, as specified. The bill would require that if the inspection reveals conditions that pose an immediate hazard to the safety of the occupants, the inspection report be delivered to the owner of the building within 15 days and emergency repairs be undertaken, as specified, with notice given to the local enforcement agency. The nonemergency repairs made under these provisions would be required to be completed within 120 days, unless an extension is granted by the

local authorities. The bill would authorize local enforcement agencies to recover enforcement costs associated with these requirements. The bill would require the local enforcement agency to send a 30-day corrective notice to the owner of the building if repairs are not completed on time and would provide for specified civil penalties and liens against the property for the owner of the building who fails to comply with these provisions. The bill would exclude a common interest development, as defined, from these provisions. The bill would require any building subject to these provisions that is proposed for conversion to condominiums to be sold to the public after January 1, 2019, to have the required inspection conducted prior to the first close of escrow of a separate interest in the project, and would require the inspection report and written confirmation by the inspector that any recommended repairs or replacements have been completed to be submitted to, among others, the Department of Real Estate and included in certain required statements and reports, as specified. The bill would authorize a local governing entity to enact stricter requirements than those imposed by these provisions.

This bill contains other related provisions and other existing laws.

Organization	Assigned	Position	Priority	Subject	Group
UTA	MDB				

Notes 1:

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**SB 818** **(Beall D) Mortgages and deeds of trust: foreclosure.** ( Chaptered: 9/15/2018 [html](#) [pdf](#) )  
**Status:** 9/14/2018-Approved by the Governor. Chaptered by Secretary of State. Chapter 404, Statutes of 2018.  
**Location:** 9/14/2018-S. CHAPTERED

**Summary:** (1)Existing law prescribes various requirements to be satisfied before the exercise of a power of sale under a mortgage or deed of trust. In this regard, existing law requires that a notice of default and a notice of sale be recorded and that specified periods of time elapse between the recordings and the sale. Certain laws enacted in 2012 and repealed on January 1, 2018, commonly referred to as the California Homeowner Bill of Rights, established a variety of requirements in connection with foreclosures on mortgages and deeds of trust, including restrictions on mortgage servicers actions while a borrower is attempting to secure a loan modification or has submitted a loan modification application. The foreclosure provisions of the act were generally limited to first lien mortgages and deeds of trust on owner-occupied residences, as specified. This bill would reenact various provisions of the California Homeowner Bill of Rights, as described above, and make other changes. With regard to first lien mortgages or deeds of trust on residential real property, as specified, the bill would prohibit an entity that forecloses on more than 175 real properties from recording a notice of default or notice of sale, or conducting a trustee's sale after a borrower submits a complete application for a first lien loan modification and that application is pending. The bill would require that the complete application be submitted at least 5 business days before a scheduled foreclosure sale. The prohibition on recording a notice of default or a notice of sale would continue until one of 3 specified events occur. The bill would grant a borrower 30 days to appeal if the loan modification is denied and authorize the borrower to provide evidence that the mortgage servicer's determination was in error. During this appeal period, the bill would prohibit filing a notice of default, or if that notice has already been filed, from recording a notice of sale or conducting a trustee's sale until the later of specified events. The bill would require a mortgage servicer to send a written notice to the borrower that identifies the reasons for denial and that includes certain information in connection with the denial. The bill would provide that a mortgage servicer satisfies specified telephone contact requirements if the borrower makes a written request to cease communications.

This bill contains other related provisions and other existing laws.

Organization	Assigned	Position	Priority	Subject	Group
UTA	MDB		AA - Folder		

Notes 1:

**SB 831** (Wieckowski D) **Land use: accessory dwelling units.** ( Amended: 6/21/2018 [html](#) [pdf](#) )  
**Status:** 6/29/2018-Failed Deadline pursuant to Rule 61(b)(13). (Last location was A. L. GOV. on 6/20/2018)  
**Location:** 6/29/2018-S. DEAD

**Summary:** The Planning and Zoning Law authorizes a local agency to provide by ordinance for the creation of accessory dwelling units in single-family and multifamily residential zones, requires that ordinance to designate areas where accessory dwelling units may be permitted, and sets forth standards the ordinance is required to impose, including, among others, maximum unit size, parking, and height standards. Existing law requires a local agency to submit an ordinance adopted for the creation of accessory dwelling units to the Department of Housing and Community Development and authorizes the department to review and comment on the ordinance. Existing law requires an application for an accessory dwelling unit permit to be considered, as specified, within 120 days of receiving it. This bill would require the ordinance for the creation of accessory dwelling units to designate areas where accessory dwelling units may be excluded for health and safety purposes, as specified. The bill would revise the standards for the local ordinance to, among other things, delete the authority to include lot coverage standards, and include a prohibition on considering the square footage of a proposed accessory dwelling unit when calculating an allowable floor-to-area ratio or lot coverage ratio for the lot. The bill would require that a permit application for an accessory dwelling unit be approved or disapproved within 60 days and would specify that if a local agency does not act on an application for a accessory dwelling unit within 60 days, then the application shall be deemed approved. The bill would prohibit a local agency from requiring that offstreet parking spaces be replaced when a garage, carport, or covered parking structure is demolished or converted in conjunction with the construction of an accessory dwelling unit. The bill would prohibit another local ordinance, policy, or regulation from being the basis for the delay of the issuance of a building permit or use permit for an accessory dwelling unit. The bill would delete provisions authorizing a local agency to require owner occupancy by the permit applicant and would declare an agreement with a local agency to maintain owner occupancy as void and unenforceable.

This bill contains other related provisions and other existing laws.

Organization	Assigned	Position	Priority	Subject	Group
UTA	MDB				

Notes 1:

**SB 838** (Hertzberg D) **Corporate records: articles of incorporation: blockchain technology.** ( Chaptered: 9/28/2018 [html](#) [pdf](#) )  
**Status:** 9/28/2018-Approved by the Governor. Chaptered by Secretary of State. Chapter 889, Statutes of 2018.  
**Location:** 9/28/2018-S. CHAPTERED

**Summary:** Existing law authorizes and regulates the formation and operation of a corporation, social purpose corporation, nonprofit public benefit corporation, nonprofit mutual benefit corporation, or nonprofit religious corporation, including, but not limited to, the adoption and contents of corporate articles of incorporation. This bill would also authorize, until January 1, 2022, a corporation or a social purpose corporation that does not have outstanding securities listed on specified securities exchanges to adopt provisions within its articles of incorporation authorizing records administered by or on behalf of the corporation in which the names of all of the corporation's stockholders of record, the address and number of shares registered in the name of each of those stockholders, and all issuances and transfers of stock of the corporation to be recorded and kept on or by means of blockchain technology, as specified.

Position	Priority	Subject	Group
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**Organization Assigned**  
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**Notes 1:**

**SB 861** **(Committee on Budget and Fiscal Review) National Mortgage Settlement Fund: allocations.** ( Chaptered: 9/10/2018 [html](#) [pdf](#) )  
**Status:** 9/10/2018-Approved by the Governor. Chaptered by Secretary of State. Chapter 331, Statutes of 2018.  
**Location:** 9/10/2018-S. CHAPTERED

**Summary:** Existing law creates the National Mortgage Special Deposit Fund, the moneys in which are continuously appropriated and to be allocated by the Department of Finance. Existing law authorizes the Director of Finance to allocate or otherwise use the funds in the National Mortgage Special Deposit Fund to offset General Fund expenditures in the 2011–12, 2012–13, and 2013–14 fiscal years. This bill would provide legislative confirmation and ratification that allocations of funds from the National Mortgage Special Deposit Fund in the 2011–12, 2012–13, and 2013–14 fiscal years were consistent with the direction given to the Director of Finance, as specified. The bill would also confirm and ratify that, because those allocations were displayed in the Governor’s proposed budget for the 2012–13 and 2013–14 fiscal years, and left unchanged in the budget acts adopted for the 2012–13 and 2013–14 fiscal years, the Legislature was aware of, and approved, the allocation and expenditure of funds from the National Mortgage Special Deposit Fund to offset General Fund expenditures in those fiscal years. The bill would make related declarations and a statement of legislative intent.

This bill contains other related provisions.

Organization	Assigned	Position	Priority	Subject	Group
UTA	MDB				

**Notes 1:**

**SB 943** **(Cannella R) Local government: housing.** ( Introduced: 1/29/2018 [html](#) [pdf](#) )  
**Status:** 8/31/2018-Failed Deadline pursuant to Rule 61(b)(18). (Last location was S. RLS. on 1/29/2018)  
**Location:** 8/31/2018-S. DEAD

**Summary:** Existing law requires local governments to adopt a general plan that consists of a number of elements, including the housing element. The housing element is required to be updated at specified intervals, and when updating the housing element, the local government is required to take into account regional housing needs for various income levels. Existing law authorizes local governments to conduct a review or appeal regarding allocation data provided by the Department of Housing and Community Development or the council of governments regarding the locality’s share of the regional housing need or the submittal of data or information for a proposed allocation, as specified. This bill would make nonsubstantive changes to this provision.

Organization	Assigned	Position	Priority	Subject	Group
UTA	MDB				

**Notes 1:**

**SB 993** **(Hertzberg D) Sales and use taxes: service tax: qualified business.** ( Amended: 5/9/2018 [html](#) [pdf](#) )  
**Status:** 8/31/2018-Failed Deadline pursuant to Rule 61(b)(18). (Last location was S. GOV. & F. on 5/9/2018)  
**Location:** 8/31/2018-S. DEAD

**Summary:** Existing sales and use tax laws impose a tax on retailers measured by the gross receipts from the sale of tangible personal property sold at retail in this state, or on the storage, use, or other consumption in this state of tangible personal property purchased from a retailer for storage, use, or other consumption in this state. This bill would reduce the rate of tax imposed by the Sales and Use Tax Law incrementally every calendar year beginning on January 1, 2020, until January 1, 2022, at which time the rate would be reduced by a total of 2%. This bill would require the Director of Finance to estimate the amount of net revenue that will be derived for specified calendar years as a result of the changes made by this bill and would require the rate of tax imposed by the Sales and Use Tax Law to be reduced or increased by a specified percentage amount for specified calendar years depending on the amount of the estimated revenue gains or losses. Existing law imposes various taxes, including taxes on the privilege of engaging in certain activities. The Fee Collection Procedures Law, the violation of which is a crime, provides procedures for the collection of certain fees and surcharges. This bill, beginning on and after January 1, 2020, would impose a tax on the receipt of a benefit in this state of a service that is purchased by a qualified business from any retailer, as measured by a percentage of the sales price for the service. This bill would incrementally increase the rate of the tax every calendar year until January 1, 2022, at which time the rate would be 3%. This bill would require every seller and retailer engaged in business in this state, as specified, and making sales of services whose benefit is received in this state, to, at the time of making the sales or if the receipt of the benefit is not then taxable hereunder at the time the receipt of the services becomes taxable, determine whether the purchaser is a qualified business, collect the tax from the qualified business purchasing the service, and give the qualified business a receipt, as specified. This bill would require those sellers and retailers to register with the California Department of Tax and Fee Administration. This bill would make any person that violates specified provisions relating to the collection of the tax, the advertisement of the tax, and the separate statement of price and tax guilty of a misdemeanor. By creating a new crime, this bill would impose a state-mandated local program. This bill would require all amounts to be paid to the California Department of Tax and Fee Administration, and would require the department to transmit those amounts, less refunds, to the Treasurer to be deposited into the General Fund. This bill would provide for the administration and collection of this tax pursuant to procedures set forth in the Fee Collection Procedures Law. By expanding the application of the Fee Collection Procedures Law, the violation of which is a crime, this bill imposes a state-mandated local program. The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement. This bill would provide that no reimbursement is required by this act for a specified reason. This bill would include a change in state statute that would result in a taxpayer paying a higher tax within the meaning of Section 3 of Article XIII A of the California Constitution, and thus would require for passage the approval of 2/3 of the membership of each house of the Legislature.

This bill contains other related provisions.

Organization	Assigned	Position	Priority	Subject	Group
UTA	MDB				

Notes 1:

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**SB 996** (**Gaines R**) **Corporation taxes: tax rates.** ( Amended: 4/5/2018 [html](#) [pdf](#) )

**Status:** 8/31/2018-Failed Deadline pursuant to Rule 61(b)(18). (Last location was S. GOV. & F. on 4/5/2018)

**Location:** 8/31/2018-S. DEAD

**Summary:** The Corporation Tax Law imposes taxes measured by income at a rate of 8.84%, as specified. The Corporation Tax Law imposes a minimum franchise tax of \$800, except as provided, on every corporation incorporated in this state, qualified to transact intrastate business in this state, or doing business in this state. This bill, for taxable years beginning on or after January 1, 2018, would reduce the corporate tax rate to 6.84%.

This bill contains other related provisions.

Organization	Assigned	Position	Priority	Subject	Group
UTA	MDB				

Notes 1:

**SB 1016 (Allen D) Common interest developments: EV-dedicated TOU meters.** ( Chaptered: 9/14/2018 [html](#) [pdf](#) )

**Status:** 9/13/2018-Approved by the Governor. Chaptered by Secretary of State. Chapter 376, Statutes of 2018.

**Location:** 9/14/2018-S. CHAPTERED

**Summary:** The Davis-Stirling Common Interest Development Act defines and regulates common interest developments, which include community apartment projects, condominium projects, planned developments, and stock cooperatives. The act provides that any covenant, restriction, or condition contained in any deed, contract, security instrument, or other instrument affecting the transfer or sale of any interest in a common interest development, or any provision of the governing documents of a common interest development, that effectively prohibits or restricts the installation or use of an electric vehicle (EV) charging station in an owner's designated parking space is void and unenforceable. The act authorizes an association, as defined, to impose reasonable restrictions on those stations, as specified, and imposes requirements with respect to an association's approval process for those stations. If the station is to be placed in a common area or an exclusive use common area, the act requires the homeowner to pay for the electricity usage associated with the charging station and to be responsible for various costs associated with maintaining and repairing the station, as well as costs for damage to common areas and adjacent units resulting from installation and maintenance of the station. Existing law requires the owner and each successive owner of the charging station to, at all times, maintain a homeowner liability coverage policy in the amount of \$1,000,000 and name the association as a named additional insured. Existing law requires the award of reasonable attorney's fees to a prevailing plaintiff in an action to enforce these provisions. This bill would, with respect to an EV charging station placed in a common area or an exclusive use common area, require the homeowner to agree to pay the costs associated with the installation of the charging station. The bill would instead require the owner of the charging station, wherever located within the common interest development, to maintain a liability coverage policy, and provide the association with a corresponding certificate of insurance, as specified. The bill would instead require the award of those fees to a prevailing plaintiff in an action by a homeowner requesting to have an EV charging station installed.

This bill contains other related provisions.

Organization	Assigned	Position	Priority	Subject	Group
UTA	MDB				

Notes 1:

**SB 1078 (Committee on Transportation and Housing) Housing.** ( Chaptered: 10/1/2018 [html](#) [pdf](#) )

**Status:** 9/30/2018-Approved by the Governor. Chaptered by Secretary of State. Chapter 957, Statutes of 2018.

**Location:** 9/30/2018-S. CHAPTERED

**Summary:** (1)Existing law authorizes the legislative body of a city or a county to establish an enhanced infrastructure financing district to finance public capital facilities or other specified projects of communitywide significance. Existing law requires the district to require, by recorded covenants or restrictions, that housing units built pursuant to this authority remain available at affordable housing

costs to, and occupied by, persons and families of very low, low-, or moderate-income households, as provided. This bill would delete an unnecessary reference to "households" in these provisions.

This bill contains other related provisions and other existing laws.

<b>Organization</b>	<b>Assigned</b>	<b>Position</b>	<b>Priority</b>	<b>Subject</b>	<b>Group</b>
UTA	MDB				

Notes 1:

**SB 1087 (Roth D) PACE program: program administrators.** ( Chaptered: 9/27/2018 [html](#) [pdf](#) )  
**Status:** 9/27/2018-Approved by the Governor. Chaptered by Secretary of State. Chapter 798, Statutes of 2018.

**Location:** 9/27/2018-S. CHAPTERED

**Summary:** (1)Existing law, known commonly as the Property Assessed Clean Energy (PACE) program, authorizes a public agency, by making specified findings, to authorize public agency officials and property owners to enter into voluntary contractual assessments to finance the installation of distributed generation renewable energy sources or energy or water efficiency improvements that are permanently fixed to real property. Existing law, the California Financing Law (CFL), requires a program administrator who administers a PACE program on behalf of, and with the written consent of, a public agency to comply with specified requirements relating to the PACE program, including requiring, commencing on January 1, 2019, a program administrator to be licensed by the Commissioner of Business Oversight. Existing law requires a program administrator, as of that date, to establish and maintain a process for the enrollment of, and the cancellation of that enrollment, a PACE solicitor and a PACE solicitor agent. This bill would require the program administrator to maintain the processes described above in writing.

<b>Organization</b>	<b>Assigned</b>	<b>Position</b>	<b>Priority</b>	<b>Subject</b>	<b>Group</b>
UTA	MDB				

Notes 1:

**SB 1091 (Stone R) Property taxation: transfer of base year value: disaster relief.** ( Introduced: 2/12/2018 [html](#) [pdf](#) )

**Status:** 8/31/2018-Failed Deadline pursuant to Rule 61(b)(18). (Last location was S. APPR. SUSPENSE FILE on 5/22/2018)

**Location:** 8/31/2018-S. DEAD

**Summary:** Existing property tax law, pursuant to a requirement of the California Constitution, authorizes the base year value of property that is substantially damaged or destroyed by a disaster, as declared by the Governor, to be transferred to a comparable property located within the same county that is acquired or newly constructed as a replacement for the substantially damaged or destroyed property. This bill would prohibit the limitation requiring the transfer of base year value within the same county from applying to the transfer of base year value of property that is substantially damaged or destroyed by a disaster, as declared by the Governor, occurring on or after January 1, 2017, to July 1, 2018, inclusive, to comparable property located within a different county that is acquired or newly constructed as a replacement for the substantially damaged or destroyed property. The bill would limit these provisions to intercounty transfers of base year value that occur on or after the effective date of this bill.

This bill contains other related provisions and other existing laws.

<b>Position</b>	<b>Priority</b>	<b>Subject</b>	<b>Group</b>
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**Organization Assigned**  
 UTA MDB

**Notes 1:**

**SB 1121 (Dodd D) California Consumer Privacy Act of 2018.** ( Chaptered: 9/23/2018 [html](#) [pdf](#) )  
**Status:** 9/23/2018-Approved by the Governor. Chaptered by Secretary of State. Chapter 735, Statutes of 2018.  
**Location:** 9/23/2018-S. CHAPTERED

**Summary:** (1)Existing law, the California Consumer Privacy Act of 2018, grants, commencing on January 1, 2020, a consumer various rights with regard to personal information relating to that consumer that is held by a business, including the right to request a business to delete any personal information about the consumer collected by the business, and requires the business to comply with a verifiable consumer request to that effect, unless it is necessary for the business or service provider to maintain the customer's personal information in order to carry out specified acts. The act requires a business that collects personal information about a consumer to disclose the consumer's right to delete personal information described above on its Internet Web site or in its online privacy policy or policies. This bill would modify that requirement by requiring a business that collects personal information about a consumer to disclose the consumer's right to delete personal information in a form that is reasonably accessible to consumers and in accordance with a specified process.

This bill contains other related provisions and other existing laws.

**Organization Assigned Position Priority Subject Group**  
 UTA MDB

**Notes 1:**

**SB 1128 (Roth D) Common interest developments: governance.** ( Vetoed: 10/1/2018 [html](#) [pdf](#) )  
**Status:** 9/30/2018-Vetoed by the Governor. In Senate. Consideration of Governor's veto pending.  
**Location:** 9/30/2018-S. VETOED

**Summary:** Existing law, the Davis-Stirling Common Interest Development Act, governs the management and operation of common interest developments by an association. Under existing law, an association that is required to deliver a document by "individual delivery" or "individual notice" is authorized to deliver the document by email facsimile, or other electronic means, if the recipient has consented in writing, unless the consent is revoked in writing. This bill would authorize the recipient to consent to that delivery and revoke that consent by email.

This bill contains other related provisions and other existing laws.

**Organization Assigned Position Priority Subject Group**  
 UTA MDB

**Notes 1:**

**SB 1130 (Leyva D) Property tax postponement: residential dwelling: manufactured homes.** ( Chaptered: 9/28/2018 [html](#) [pdf](#) )  
**Status:** 9/28/2018-Approved by the Governor. Chaptered by Secretary of State. Chapter 896, Statutes of 2018.  
**Location:** 9/28/2018-S. CHAPTERED

**Summary:** Existing law authorizes a claimant to file a claim with the Controller to postpone the

payment of property taxes that are due on the residential dwelling of the claimant pursuant to the Senior Citizens and Disabled Citizens Property Tax Postponement Law, the Senior Citizens Tenant-Stockholder Property Tax Postponement Law, and the Senior Citizens Possessory Interest Holder Property Tax Postponement Law. Existing law, for purposes of these laws, defines a "residential dwelling" to mean a dwelling occupied as the principal place of residence of the claimant and owned by the claimant, the claimant and spouse, or by the claimant and another individual, as specified, including condominiums that are assessed as realty for local property tax purposes. Existing law continuously appropriates revenues in the Senior Citizens and Disabled Citizens Property Tax Postponement Fund for, among other things, disbursements relating to the postponement of property taxes pursuant to these laws. Existing law authorizes the postponement of the payment of property taxes of a claimant who is the owner of a mobilehome for loans established prior to February 20, 2009, pursuant to the Senior Citizens Mobilehome Property Tax Postponement Law. This bill would expand the definition of a "residential dwelling" to include a manufactured home, thereby authorizing a claimant who is the owner of a manufactured home to postpone the payment of property taxes. The bill, on July 1, 2019, and on July 1 each year thereafter, would require up to 1% of the amount available in the Senior Citizens and Disabled Citizens Property Tax Postponement Fund for disbursements relating to postponement of property taxes to be available for residential dwellings that are manufactured homes. Because this bill would provide for an additional category of expenditures from the Senior Citizens and Disabled Citizens Property Tax Postponement Fund, a continuously appropriated fund, it would make an appropriation.

This bill contains other related provisions and other existing laws.

<b>Organization</b>	<b>Assigned</b>	<b>Position</b>	<b>Priority</b>	<b>Subject</b>	<b>Group</b>
UTA	MDB				

Notes 1:

**SB 1139** **(Morrell R) Real property liens: equity lines of credit: suspend and close.** ( Chaptered: 7/9/2018 [html](#) [pdf](#) )

**Status:** 7/9/2018-Approved by the Governor. Chaptered by Secretary of State. Chapter 90, Statutes of 2018.

**Location:** 7/9/2018-S. CHAPTERED

**Summary:** Existing law requires a creditor to make certain disclosures to a consumer applying for a home equity loan, as defined. Under existing law, upon receipt of a specified written request from a borrower, the lender must suspend the borrower's equity line of credit for a minimum of 30 days. Upon receipt of both that request and a specified payment, existing law requires a lender to close the borrower's equity line of credit and release or reconvey the property secured by the line of credit, as specified. Existing law provides for the repeal of these equity line of credit suspension and closure provisions on July 1, 2019. This bill would extend the operation of those provisions indefinitely.

<b>Organization</b>	<b>Assigned</b>	<b>Position</b>	<b>Priority</b>	<b>Subject</b>	<b>Group</b>
UTA	MDB				

Notes 1: CLTA-sponsored.

**SB 1167** **(Anderson R) Eminent domain: final offer of compensation.** ( Introduced: 2/14/2018 [html](#) [pdf](#) )

**Status:** 5/11/2018-Failed Deadline pursuant to Rule 61(b)(6). (Last location was S. JUD. on 2/22/2018)

**Location:** 5/11/2018-S. DEAD

**Summary:** Existing law governing settlement offers in eminent domain proceedings authorizes the recovery of litigation expenses under certain circumstances. Existing law provides that if a court finds, on motion of the defendant, that the offer of the plaintiff was unreasonable and the offer of the defendant was reasonable in light of the evidence admitted and the compensation awarded in the proceeding, then the costs allowed shall include the defendant's litigation expenses. This bill would

instead provide that if a court finds, on motion of the defendant, that the offer of the plaintiff was lower than 85% of the compensation awarded in the proceeding, then the court would be required to include the defendant's litigation costs in the costs allowed. If the court finds that the offer of the plaintiff was at least 85% and less than 100% of the compensation awarded in the proceeding, the court would be authorized to include the defendant's litigation costs in the costs allowed.

Organization	Assigned	Position	Priority	Subject	Group
UTA	MDB				

Notes 1:

**SB 1173 (Vidak R) Common interest developments: annual notices: time-share plan interests.** ( Chaptered: 7/9/2018 [html](#) [pdf](#) )

**Status:** 7/9/2018-Approved by the Governor. Chaptered by Secretary of State. Chapter 91, Statutes of 2018.

**Location:** 7/9/2018-S. CHAPTERED

**Summary:** The Davis-Stirling Common Interest Development Act defines and regulates common interest developments. Existing law requires a common interest development to be managed by an association, which may be a nonprofit corporation or an unincorporated association created for the purpose of managing the development. Existing law requires the owner of a separate interest in a common interest development to annually provide the association with specified written information, including an address for the purpose of receiving notices from the association. Existing law requires the association to solicit these annual notices of each owner, and authorizes the association, when an owner fails to provide the required notice, to use the last address provided in writing by the owner, except as specified. This bill would deem a common interest development association, which includes time-share plan interests that are part of a mixed-use project, to have complied with the notice requirements under the Davis-Stirling Common Interest Development Act if, at least once annually, it obtains from the time-share plan association a copy of the list of owners in the time-share plan and enters that data into its books and records. The bill would require the time-share plan association to provide this list to the common interest association at least annually for this purpose.

This bill contains other existing laws.

Organization	Assigned	Position	Priority	Subject	Group
UTA	MDB				

Notes 1:

**SB 1174 (Stone R) Commercial real estate: disclosures.** ( Amended: 4/2/2018 [html](#) [pdf](#) )

**Status:** 4/27/2018-Failed Deadline pursuant to Rule 61(b)(5). (Last location was B. & F. I. on 4/2/2018)

**Location:** 4/27/2018-S. DEAD

**Summary:** The Real Estate Law provides for the licensure and regulation of real estate brokers by the Real Estate Commissioner and makes a willful violation of that law a crime. Existing law requires the commissioner to enforce all provisions of that law and authorizes the commissioner to adopt, amend, or repeal rules and regulations that are reasonably necessary for the enforcement of that law. This bill would specify that a substantial misrepresentation for purposes of that provision includes, but is not limited to, the inaccurate reporting of, or failure to report, among other things, any and all dues related to ownership of the property, taxes associated with the property, liens on the property, or all ongoing or pending litigation affecting the property. Existing law governing disclosures upon the transfer of residential property requires the transferor of any real property to deliver to the prospective transferee a specified written statement disclosure subject to specified requirements. If any disclosure, or any material amendment of any disclosure, is delivered after the execution of an offer to purchase, existing law requires the transferee to have a specified period of time to terminate

his or her offer by delivery of a written notice of termination to the transferor or the transferor's agent. Existing law requires these disclosures to be made on a specified form.

This bill contains other related provisions and other existing laws.

<b>Organization</b>	<b>Assigned</b>	<b>Position</b>	<b>Priority</b>	<b>Subject</b>	<b>Group</b>
UTA	MDB				

Notes 1:

**SB 1183** **(Morrell R) Mortgages: deeds of trust: successors in interest.** ( Chaptered: 7/18/2018 [html](#) [pdf](#) )

**Status:** 7/18/2018-Approved by the Governor. Chaptered by Secretary of State. Chapter 136, Statutes of 2018.

**Location:** 7/18/2018-S. CHAPTERED

**Summary:** Existing state law regulates reverse mortgages and defines a reverse mortgage to mean a nonrecourse loan secured by real property if the loan provides cash advances to a borrower based on the equity or the value in a borrower's owner-occupied principal residence, the loan requires no payment of principal or interest until the entire loan becomes due and payable, and the loan is made by a specified licensed or chartered lender. Existing law prohibits a mortgage servicer, upon notification that a borrower has died by a person claiming to be a successor in interest, from recording a notice of default until the mortgage servicer gives an opportunity for the claimant to show that he or she is a successor in interest, as specified. Existing law requires a mortgage servicer, within 10 days of a claimant being deemed a successor in interest, to provide the successor in interest with information about the loan, as specified. Existing law also requires a mortgage servicer to allow a successor in interest to assume the deceased borrower's loan or to apply for foreclosure prevention alternatives on an assumable loan, as specified. Existing law provides other protections for these successors in interest and deems a mortgage servicer, mortgagee, or beneficiary of the deed of trust, or an agent thereof, to be in compliance with the above-described provisions if they comply with specified federal laws. Existing law makes these provisions inoperative on January 1, 2020. This bill would make those provisions inapplicable to reverse mortgages, as defined, and would delete certain obsolete references.

<b>Organization</b>	<b>Assigned</b>	<b>Position</b>	<b>Priority</b>	<b>Subject</b>	<b>Group</b>
UTA	MDB	Sponsor	AA - Folder		

Notes 1:

**SB 1201** **(Jackson D) Contracts: consumer protection: residential mortgage lending.** ( Chaptered: 9/11/2018 [html](#) [pdf](#) )

**Status:** 9/11/2018-Approved by the Governor. Chaptered by Secretary of State. Chapter 356, Statutes of 2018.

**Location:** 9/11/2018-S. CHAPTERED

**Summary:** Existing law requires a supervised financial organization that negotiates primarily in Spanish, Chinese, Tagalog, Vietnamese, or Korean, whether orally or in writing, in the course of entering into a contract or agreement for a loan or extension of credit secured by residential real property, to deliver to the other party to that contract or agreement before execution of the contract or agreement, a specific form, created by the Department of Business Oversight, in each of these languages for use by a supervised financial organization to summarize the terms of a mortgage loan. Existing law authorizes the department, in creating the form, to use a specific federal disclosure form from the United States Department of Housing and Urban Development as guidance. This bill would also require a supervised financial organization that negotiates the modification of any of the terms of a loan or extension of credit secured by residential real property primarily in one of the above languages and that offers a borrower a final loan modification in writing, to deliver to that borrower, at

the time the final loan modification offer is made, a specified form summarizing the modified loan terms in the same language as the negotiation.

This bill contains other related provisions and other existing laws.

Organization	Assigned	Position	Priority	Subject	Group
UTA	MDB				

Notes 1:

**SB 1235 (Glazer D) Commercial financing: disclosures.** ( Chaptered: 10/1/2018 [html](#) [pdf](#) )

**Status:** 9/30/2018-Approved by the Governor. Chaptered by Secretary of State. Chapter 1011, Statutes of 2018.

**Location:** 9/30/2018-S. CHAPTERED

**Summary:** (1)Existing law, the California Financing Law (CFL), provides for the licensure and regulation of finance lenders and brokers and, beginning on January 1, 2019, program administrators, by the Commissioner of Business Oversight. The CFL prohibits anyone from engaging in the business of a finance lender or broker without obtaining a license. Existing law defines a finance lender as any person who is engaged in making consumer loans or commercial loans, as defined. The CFL prohibits a licensee from making a materially false or misleading statement to a borrower about the terms or conditions of a loan. The CFL authorizes the commissioner to bring an action to enjoin, as specified, against a person who, in the commissioner's estimation, has violated or is about to violate the CFL, and authorizes the imposition of civil penalties to that effect. A willful violation of the CFL is a crime, except as specified. This bill would require a provider who facilitates commercial financing to a recipient, as defined, to disclose specified information relating to that transaction to the recipient at the time of extending a specific offer of commercial financing, and to obtain the recipient's signature on that disclosure before consummating the commercial financing transaction. The bill would require that disclosure to include specified information, including the total amount of funds provided, information related to the payments to be made, and the total dollar cost of the financing. The bill would, until January 1, 2024, additionally require a provider to disclose the total cost of financing expressed as an annualized rate. The bill would authorize a provider who offers financing that is factoring or asset-based lending to, in lieu of those disclosure requirements, provide an alternative disclosure that meets specified requirements, including that the disclosure may be based on an example of a transaction that could occur under the general agreement for a given amount of accounts receivables. The bill would require the commissioner to adopt regulations governing these disclosure requirements, and would require those regulations to include specified information and determinations. The bill would provide that a provider is not subject to these provisions until those regulations become effective. The bill would provide that the provisions of this bill do not apply to specified entities or financing arrangements, including a provider who is a depository institution, which this bill would define to include specified state and federal financial institutions, a commercial financing transaction secured by real property, and a commercial financing transaction in which the recipient is a dealer or vehicle rental company and meets specified requirements, or a provider who makes a specified number of commercial financing transactions in California during a 12-month period and meets other requirements.

This bill contains other related provisions and other existing laws.

Organization	Assigned	Position	Priority	Subject	Group
UTA	MDB				

Notes 1:

**SB 1246 (Gaines R) Property tax: claims for refund.** ( Chaptered: 9/11/2018 [html](#) [pdf](#) )

**Status:** 9/11/2018-Approved by the Governor. Chaptered by Secretary of State. Chapter 358, Statutes of 2018.

**Location:** 9/11/2018-S. CHAPTERED

**Summary:** Existing property tax law requires property taxes to be refunded to the taxpayer or last recorded owner, as provided, under specified circumstances and requires that a refund only be made pursuant to a claim for refund. Existing law requires the claim to be verified by the person who paid the tax, including his or her guardian, executor, or administrator. This bill would additionally provide for verification of a claim by the trustee of the person who paid the tax. The bill would also authorize, pursuant to the board of supervisors of a county adopting a resolution or ordinance that so provides, a refund of property taxes or assessments without a verified claim if there has been no transfer of the property in the fiscal year that the taxes were levied and if the refund amount is less than \$5,000.

Organization	Assigned	Position	Priority	Subject	Group
UTA	MDB				

Notes 1:

**SB 1269** (**Hueso D**) **Schoolbus safety: child safety alert system.** ( Amended: 5/8/2018 [html](#) [pdf](#) )

**Status:** 8/31/2018-Failed Deadline pursuant to Rule 61(b)(18). (Last location was S. INACTIVE FILE on 5/31/2018)

**Location:** 8/31/2018-S. DEAD

**Summary:** Existing law requires all schoolbuses to be equipped with certain safety features, as specified. Existing law requires, on or before the beginning of the 2018–19 school year, schoolbuses, school pupil activity buses, except as provided, youth buses, and child care motor vehicles to be equipped with an operational “child safety alert system,” which is a device located at the interior rear of a vehicle that requires the driver to either manually contact or scan the device before exiting the vehicle, thereby prompting the driver to inspect the entirety of the interior of the vehicle before exiting. This bill would limit that requirement to those buses or vehicles that transport special needs pupils and would postpone that requirement until 6 months after the beginning of the 2018–19 school year for those buses or vehicles that do not transport special needs pupils.

This bill contains other related provisions.

Organization	Assigned	Position	Priority	Subject	Group
UTA	MDB				

Notes 1:

**SB 1289** (**Committee on Judiciary**) **Maintenance of the codes.** ( Chaptered: 7/9/2018 [html](#) [pdf](#) )

**Status:** 7/9/2018-Approved by the Governor. Chaptered by Secretary of State. Chapter 92, Statutes of 2018. (Set for hearing 8/14/2018)

**Location:** 7/9/2018-S. CHAPTERED

**Summary:** Existing law directs the Legislative Counsel to advise the Legislature from time to time as to legislation necessary to maintain the codes. This bill would make nonsubstantive changes in various provisions of law to effectuate the recommendations made by the Legislative Counsel to the Legislature.

Organization	Assigned	Position	Priority	Subject	Group
UTA	MDB				

Notes 1:

**SB 1300**

**(Jackson D) Unlawful employment practices: discrimination and harassment.** ( Chaptered: 9/30/2018 [html](#) [pdf](#) )

**Status:** 9/30/2018-Approved by the Governor. Chaptered by Secretary of State. Chapter 955, Statutes of 2018.

**Location:** 9/30/2018-S. CHAPTERED

**Summary:** The California Fair Employment and Housing Act (FEHA) prohibits various actions as unlawful employment practices unless the employer acts based upon a bona fide occupational qualification or applicable security regulations established by the United States or the State of California. In this regard, FEHA makes it an unlawful employment practice for an employer, labor organization, employment agency, apprenticeship training program, or any training program leading to employment, to engage in harassment of an employee or other specified person. FEHA also makes harassment of those persons by an employee, other than an agent or supervisor, unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action. This bill would specify that an employer may be responsible for the acts of nonemployees with respect to other harassment activity.

This bill contains other related provisions and other existing laws.

Organization	Assigned	Position	Priority	Subject	Group
UTA	MDB				

Notes 1:

**SB 1327 (Atkins D) Building Homes and Jobs Act.** ( Introduced: 2/16/2018 [html](#) [pdf](#) )

**Status:** 8/31/2018-Failed Deadline pursuant to Rule 61(b)(18). (Last location was S. RLS. on 2/16/2018)

**Location:** 8/31/2018-S. DEAD

**Summary:** Existing law, the Building Homes and Jobs Act, imposes a charge, except as provided, of \$75 to be paid at the time of the recording of every real estate instrument, paper, or notice required or permitted by law to be recorded, per each single transaction per parcel of real property, not to exceed \$225. This bill would state the intent of the Legislature to enact legislation that would provide clarifying amendments to the provisions described above.

Organization	Assigned	Position	Priority	Subject	Group
UTA	MDB				

Notes 1:

**SB 1343 (Mitchell D) Employers: sexual harassment training: requirements.** ( Chaptered: 9/30/2018 [html](#) [pdf](#) )

**Status:** 9/30/2018-Approved by the Governor. Chaptered by Secretary of State. Chapter 956, Statutes of 2018.

**Location:** 9/30/2018-S. CHAPTERED

**Summary:** The California Fair Employment and Housing Act makes specified employment practices unlawful, including the harassment of an employee directly by the employer or indirectly by agents of the employer with the employer's knowledge. The act requires employers with 50 or more employees to provide at least 2 hours of prescribed training and education regarding sexual harassment, abusive conduct, and harassment based upon gender, as specified, to all supervisory employees within 6 months of their assumption of a supervisory position and once every 2 years, as specified. This bill would instead require an employer who employs 5 or more employees, including temporary or seasonal employees, to provide at least 2 hours of sexual harassment training to all supervisory employees and at least one hour of sexual harassment training to all nonsupervisory employees by January 1, 2020, and once every 2 years thereafter, as specified. The bill would require the

Department of Fair Employment and Housing to develop or obtain 1-hour and 2-hour online training courses on the prevention of sexual harassment in the workplace, as specified, and to post the courses on the department's Internet Web site. The bill would also require the department to make existing informational posters and fact sheets, as well as the online training courses regarding sexual harassment prevention, available to employers and to members of the public in specified alternate languages on the department's Internet Web site.

Organization	Assigned	Position	Priority	Subject	Group
UTA	MDB				

Notes 1:

**SB 1361 (Bradford D) Department of Business Oversight: administration.** ( Chaptered: 9/22/2018 [html](#) [pdf](#) )

**Status:** 9/22/2018-Approved by the Governor. Chaptered by Secretary of State. Chapter 699, Statutes of 2018.

**Location:** 9/22/2018-S. CHAPTERED

**Summary:** Existing law, the Financial Institutions Law, regulates the activities of various financial entities, including commercial banks, industrial banks, and trust companies. The Financial Institutions Law authorizes the Commissioner of Business Oversight to levy civil penalties against any specified financial institutions licensee, or any subsidiary of a licensee, for violations of law that apply to that particular category of financial institution, as defined. Existing law prohibits the commissioner and his or her designees from disclosing or permitting the disclosure of any record, record of any action, or information contained in a record of any action, taken by the commissioner, except as specified, to persons other than federal or state government employees who are authorized by statute to obtain the records in the performance of their official duties, unless the disclosure is authorized or requested by the affected licensee or the affected subsidiary of the licensee. This bill would delete that prohibition and would require the commissioner to make all final orders issued pursuant to those provisions public on the department's Internet Web site.

This bill contains other related provisions and other existing laws.

Organization	Assigned	Position	Priority	Subject	Group
UTA	MDB				

Notes 1:

**SB 1380 (Stern D) Climate adaptation information clearinghouse.** ( Amended: 4/23/2018 [html](#) [pdf](#) )

**Status:** 5/25/2018-Failed Deadline pursuant to Rule 61(b)(8). (Last location was S. APPR. SUSPENSE FILE on 5/7/2018)

**Location:** 5/25/2018-S. DEAD

**Summary:** Existing law requires the Office of Planning and Research to coordinate with appropriate entities to establish a clearinghouse for climate adaptation information for use by state, regional, and local entities. This bill would authorize the office to include in the clearinghouse information concerning funding and financing opportunities relating to clean energy projects, as specified.

Organization	Assigned	Position	Priority	Subject	Group
UTA	MDB				

Notes 1:

**SB 1411 (Moorlach R) Taxation: documentary transfer tax.** ( Introduced: 2/16/2018 [html](#) [pdf](#) )

**Status:** 5/11/2018-Failed Deadline pursuant to Rule 61(b)(6). (Last location was S. GOV. & F. on 3/8/2018)

**Location:** 5/11/2018-S. DEAD

**Summary:** Existing law authorizes counties and cities and counties to impose a documentary transfer tax at a specified rate upon deeds, instruments, or writings by which any lands, tenements, or other realty sold are transferred. Existing law additionally authorizes a city located within a county that has imposed a tax described above to impose a documentary transfer tax at a specified rate. This bill would remove the authorization for a city to impose a documentary transfer tax.

Organization	Assigned	Position	Priority	Subject	Group
UTA	MDB				

**Notes 1:**

**SB 1415 (McGuire D) Housing.** ( Vetoed: 10/1/2018 [html](#) [pdf](#) )

**Status:** 9/30/2018-Vetoed by the Governor. In Senate. Consideration of Governor's veto pending.

**Location:** 9/30/2018-S. VETOED

**Summary:** (1)Existing law requires the State Fire Marshal, the chief of any city, county, or city and county fire department or district providing fire protection services, or a Designated Campus Fire Marshal, and their authorized representatives, to enforce in their respective areas building standards relating to fire and panic safety adopted by the State Fire Marshal and published in the California Building Standards Code, and other regulations that have been formally adopted by the State Fire Marshal for the prevention of fire or for the protection of life and property against fire or panic. Existing law also authorizes a city, county, or city and county fire department or fire protection district to adopt more stringent or restrictive regulations. This bill would, until January 1, 2029, require each entity responsible for enforcing building standards and other regulations of the State Fire Marshal, as specified, to inspect, every 5 years, all privately owned structures within the entity's responsibility that are in the Storage Group S occupancy classifications, as described, for compliance with those standards and regulations, or, if applicable, more stringent or restrictive local regulations, unless the structure meets any of 4 specified criteria. The bill would authorize an entity that inspects a structure pursuant to these provisions to charge and collect a fee from the owner of the structure to recover the costs of the inspection or related fire and life safety activities, including reporting to the State Fire Marshal as described below.

This bill contains other related provisions and other existing laws.

Organization	Assigned	Position	Priority	Subject	Group
UTA	MDB				

**Notes 1:**

**SB 1416 (McGuire D) Local government: nuisance abatement.** ( Vetoed: 9/27/2018 [html](#) [pdf](#) )

**Status:** 9/26/2018-Vetoed by the Governor. In Senate. Consideration of Governor's veto pending.

**Location:** 9/26/2018-S. VETOED

**Summary:** Existing law authorizes the legislative body of a city or county to establish a procedure to use a nuisance abatement lien or a special assessment to collect abatement costs and related administrative costs. This bill would authorize, until January 1, 2024, the legislative body of a city or county to also collect fines for specified violations related to the nuisance abatement using a nuisance abatement lien or a special assessment. The bill would require any fines or penalties related to nuisance abatement that are recovered pursuant to these provisions to be used for specified purposes relating to supporting local enforcement of state and local building and fire code standards. The bill would require the city or county to create a process for granting a hardship waiver, to reduce the amount of the fine, upon a specified showing by the responsible person. The bill would also require the enforcing entity to provide a reasonable amount of time, as specified, to a person responsible for a continuing violation to correct or remedy the violation prior to the imposition of

penalties, except where the violation creates an immediate danger to health or safety.

<b>Organization</b>	<b>Assigned</b>	<b>Position</b>	<b>Priority</b>	<b>Subject</b>	<b>Group</b>
UTA	MDB				

Notes 1:

**SB 1431 (Morrell R) Obligations: release.** ( Chaptered: 7/20/2018 [html](#) [pdf](#) )

**Status:** 7/20/2018-Approved by the Governor. Chaptered by Secretary of State. Chapter 157, Statutes of 2018.

**Location:** 7/20/2018-S. CHAPTERED

**Summary:** Under existing law, an obligation is a legal duty to do or not to do a certain thing and an obligation may be extinguished in various ways. An obligation is extinguished if a creditor releases a debtor from the obligation either upon new consideration or in writing, with or without new consideration. Under existing law, a general release from an obligation does not apply to claims that the creditor does not know or suspect to exist in his or her favor, as specified, and that would have materially affected his or her settlement with the debtor. This bill would clarify that the terms "creditor" and "debtor" as used in the above provisions include "releasing party" and "released party," respectively. This bill would state that its changes are declaratory of existing law.

<b>Organization</b>	<b>Assigned</b>	<b>Position</b>	<b>Priority</b>	<b>Subject</b>	<b>Group</b>
UTA	MDB				

Notes 1:

**SB 1506 (Committee on Governance and Finance) Property taxation: tax collector: notices.** ( Chaptered: 7/16/2018 [html](#) [pdf](#) )

**Status:** 7/16/2018-Approved by the Governor. Chaptered by Secretary of State. Chapter 119, Statutes of 2018.

**Location:** 7/16/2018-S. CHAPTERED

**Summary:** Under existing property tax law, unpaid property taxes are declared delinquent and subject to penalties and costs, and, if the taxes remain unpaid, the property is declared tax-defaulted and subject to sale, as provided, if not redeemed by the owner within a certain amount of time. Existing property tax law requires the tax collector to provide assessesees or parties of interest, as applicable, of tax-defaulted property subject to sale with specified notices, including, among others, a notice of default and power to sell the property for nonpayment of taxes, a notice of intended sale, and a notice of proposed sale. Under existing federal law, the filing of certain bankruptcy petitions or an application under the Securities Investor Protection Act of 1970, as provided, operate as a stay of specified enforcement and collection actions, except for the issuance by a governmental unit of a notice of tax deficiency. This bill would require the notices described above to constitute a "notice of tax deficiency" for the purposes of the exception under federal law described above if the property subject to the notices is the subject of a bankruptcy proceeding.

<b>Organization</b>	<b>Assigned</b>	<b>Position</b>	<b>Priority</b>	<b>Subject</b>	<b>Group</b>
UTA	MDB				

Notes 1:

Total Measures: 104

Total Tracking Forms: 104



**Utah**

## **2018 Utah Legislative Changes Affecting Default Mortgage Servicing**

**by Brigham J. Lundberg  
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The 2018 Utah legislature passed a few bills affecting Utah mortgage servicing, liens, and evictions. The effective date for these bills was May 8, 2018. House Bill 108, SAFE Act Exemptions, amended the Utah Residential Mortgage Practices and Licensing Act (RMPLA). House Bill 168, Political Subdivision Lien Authority, made minor changes and clarifications regarding the lien rights and priority of municipalities for recurring and non-recurring charges. Senate Bill 159, Forcible Entry and Detainer, both made important changes to Utah eviction actions, personal property evictions, and the rights of the respective parties therein. Senate Bill 188, Uniform Unsworn Declarations Act, codified the Act detailing the limits and addressing the validity of the use of unsworn declarations in certain situations. Finally, while not passed in this legislative session, two (2) potentially impactful bills regarding statutory notice via publication and the statute of limitations for foreclosures were introduced (and defeated) which may be indicative of probably future legislation in Utah.

### **SAFE Act Exemptions**

*House Bill 108* amends the Utah Residential Mortgage Practices and Licensing Act (RMPLA) primarily to define terms and to exempt certain nonprofit corporations from the RMPLA's provisions. The amended version of the RMPLA now includes a definition for "balloon payment," which is defined as a required payment in a mortgage transaction that (i) results in a greater reduction in the principal of the mortgage than a regular installment payment, and (ii) is made during or at the end of the loan's term.

Additionally, the amended RMPLA now exempts from its provisions a nonprofit corporation that, in addition to the other criteria already set forth in the RMPLA, (i) is exempt from paying federal income taxes; (ii) has as the nonprofit corporation's primary purpose serving the public by helping low-income individuals and families build, repair, or purchase housing; (iii) does not require, under the terms of the mortgage, a balloon payment; and (iv) to perform loan originator activities, uses only unpaid volunteers or employees whose compensation is not based on the number or size of the mortgage transactions that the employees originate. Similarly, an employee or volunteer for a nonprofit corporation is exempt from the RMPLA's provisions while working within the scope of the nonprofit corporation's business, provided that such nonprofit corporation either meets the criteria above, or is a community development financial institution.

### **Political Subdivision Lien Authority**

*House Bill 168* clarifies that no lien rights exist for direct recurring (i.e., monthly) charges for goods and services (e.g., garbage collection) provided by local political subdivisions (municipalities). That is, these types of liens are provided no lien status or priority at all. Additionally, this bill grants lien rights to municipalities for some non-recurring charges, but the municipality must file actual liens for those amounts, and such liens will have priority based on filing date. Generally speaking, these liens should not

cause any priority issues with foreclosures as they follow the rule of “first in time, first in right” and will be recorded and appear as actual liens on a foreclosure title report.

Finally, House Bill 168 clarifies that if charges levied by a municipality are statutorily authorized to be on the tax notice, then they are allowed to be certified and become part of the property taxes. Such charges would take priority over consensual liens, just as property taxes do now. There is no requirement for a separate notice of lien for these items, as they simply show up on the property tax notice after being certified to the treasurer. Please note that, in the 2018 legislative session, no categories of charges were added to the “statutorily authorized” category that did not already have statutory authorization. (The legislature could make future changes, but did not do so with this bill.)

Ultimately, House Bill 168 should not cause any changes to a trustee’s previous approach to non-judicial foreclosures and lien priority in the state of Utah.

### **Forcible Entry and Detainer**

*Senate Bill 159* modifies the Utah statute governing forcible entry and detainer, which is relied upon in prosecuting post-foreclosure eviction actions. The bill expands the options for providing service of a Notice to Quit, specifically for situations in which a tenant “controls” a property but may not actually reside or work there. The bill also permits the court to schedule an initial occupancy hearing before a substitute judge, instead of the assigned judge, to expedite the eviction process.

While previously the judge had discretion to award costs and reasonable attorney fees to the prevailing party, this bill makes the award of such fees and costs mandatory. Finally, with respect to personal property evictions, this bill defines the term “abandonment,” and amends the statutory notification process for abandoned personal property. Of note, where it previously expressly authorized the removal of only the eviction *defendant’s* abandoned personal property, this bill amends the statute to state that *any* abandoned personal property remaining in or on the premises may be removed pursuant to the statutory removal process.

### **Uniform Unsworn Declarations Act**

*Senate Bill 188* enacts the Uniform Unsworn Declarations Act, including defining its relevant terms, providing the applicability of the act, addressing the validity of unsworn declarations; addressing a declaration’s required medium, and outlining the form of an unsworn declaration. The bill also repeals provisions related to unsworn declaration in lieu of affidavit and the Utah Uniform Unsworn Foreign Declarations Act. The provisions of this act do not apply to documents that are recorded pursuant to Utah’s non-judicial foreclosure statute, but will most likely affect the ability of process servers, sheriffs, constables and private investigators to utilize unsworn declarations in lieu of sworn affidavits, in some situations.

## **Defeated Legislation**

Two (2) pieces of proposed legislation pertaining to the mortgage default industry that were not enacted, but may return in future legislative sessions include: *House Bill 301, Legal Notice Amendments* and *House Bill 384, Trust Deeds and Statute of Limitations*. Both bills garnered some support among legislators, but ultimately could not muster enough votes to be enacted. However, these bills should be viewed as informative as to potential future legislative efforts.

*House Bill 301* sought to exempt certain entities (principally, municipal governments) from requirements to provide legal notice via publication, when such notice could be given in another suitable manner (e.g., personal service). The bill, meant to save municipalities on high publication costs, was ultimately too controversial, as the vague language in the bill left the determination of adequate notice to the sender, and some legislators feared it would lead to increased litigation and a lack of transparency on the part of municipal governments. Others feared it might erode notice by publication provisions in the non-judicial foreclosure statute. We anticipate that, at some time in the future, a challenge will be made to the necessity of continuing to use newspaper publications as a required form of notice in Utah non-judicial foreclosure actions.

*House Bill 384* was an effort by plaintiffs' attorneys to gut the current precedent of statute of limitations case law in Utah. Currently, the case law in Utah is favorable to lenders and servicers in allowing quite a bit of leeway with respect to avoiding statute of limitations issues and completing foreclosure actions. Attorneys at Lundberg & Associates, PC testified against this bill and were instrumental in rallying the support of the Utah Bankers Association and the Utah Credit Unions Association to oppose and ultimately defeat it. The bill, as presented, would have been disastrous for lenders and led to a monumental spike in statute of limitations litigation. It is unclear whether such legislation should be expected in future years as the legislation's sponsor (and really its only ardent supporter) retired from the House at the conclusion of the 2018 legislative session.



# Trustees Roundtable

## Facilitators:

**Tammy Laird  
Aldridge Pite**

**Linda Kidder Adleson  
PLM Lender Services**

**Olivia Todd  
Tiffany & Bosco**

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## **Tammy Laird**

Tammy Laird is a Foreclosure Manager for Clear Recon Corp the Foreclosure Trustee for Aldridge Pite, LLP. Tammy has been with the firm since January of 2013 and manages client, state and process-specific teams for Clear Recon Corp. She handles escalated matters and ensure compliance to federal, state, investor, regulatory and internal policies and procedures for the west coast non-judicial jurisdictions of Alaska, Arizona, California, Idaho, Nevada, Oregon, Texas, Utah and Washington. Tammy communicates with new and existing clients on a daily basis and ensures that the services provided by the firm exceed the clients' expectations. Tammy is well versed in third party applications such as BKFS Loansphere, Vendorscape, Tempo and other proprietary systems. Tammy began her career in the mortgage default industry with Cal-Western Reconveyance Corporation where she worked from 1995 to 2013 with an interim period in the default servicing side with Homecomings Financial Network from 1999 to 2001. Tammy has over 23 years of experience in the mortgage default industry. She can be reached at [tlaird@clearreconcorp.com](mailto:tlaird@clearreconcorp.com).



## **Linda Kidder Adleson**

Linda Kidder Adleson, is Vice President of PLM Loan Management Services. She began her career at TD Service Company in 1974 assisting both in accounting and TD President Dale Dykema's secretary. Shortly thereafter, she moved into the foreclosure unit and became Senior Vice President, continuing with TD Service Company through 2016.



Ms. Kidder Adleson was a member of the Orange County Chapter of CTA as part of the educational committee, has taught UTA Foreclosure 101 and California certification classes and was the 2007 UTA Dorothy Schick Veteran Member of the Year. She can be reached at [linda@plmweb.com](mailto:linda@plmweb.com).

## **Olivia Todd**

Olivia A. Todd is the Executive Director of Tiffany & Bosco, P.A. (“T&B”) located in Phoenix, Arizona. T&B and its subsidiary National Default Servicing Corporation (“NDSC”) handle all Default Related Processes for the states of Arizona, California Nevada and New Mexico.



She joined the firm 20 years ago when she moved from Austin, Texas where she was a Senior Vice President for Calmco, Inc.; a loan servicing operation specializing in the servicing of sub-prime loans. Prior to Calmco, Inc., Olivia was with the default servicing operation of Temple-Inland Mortgage (now known as Guaranty Residential Lending) for 12 years.

Olivia has served on the Board of Directors for the USFN. She graduated from the University of Texas – Austin in 1981 with a degree in Finance. She can be reached at [otodd@ndscorp.com](mailto:otodd@ndscorp.com).

## Trustees Roundtable

- 1) Nevada Mediation – What are trustees sending out to borrowers?
- 2) What are trustees doing when HMN chooses not to issue a certificate? Or when they sit on the certificate?
- 3) How are trustees handling foreclosures when the borrower is deceased in Washington?
- 4) Firm Transfers
  - a. Auditing the files
  - b. How are you handling the firms/trustees as they shut down?
  - c. Title companies – how are you handling this?
- 5) Invoice with 30 days – cost incurred, or payment refused?
- 6) What are trustees doing on Fannie/Freddie guidelines?
  - a. How are you treating clients that aren't going through the guidelines?
- 7) New Fannie 2-owner issue for non-CA states ... and changes in CA.
- 8) FHA/VA Loans – Post Sale Conveyance
  - a. How are you handling FHA/VA Post Sale conveyances where the legal description is not exactly as the recorded Deed of Trust?
  - b. How specific are you getting that you feel they need to be corrected?
  - c. Are you fighting any claims that are coming back denied based on legal descriptions with minor issues?
  - d. Who is your expert for FHA/VA, is it someone internally? At either GSE and if so – can you share who that is? or at the Servicer?
- 9) Do you send mailings to ALL parties listed on the TSG, even when some could be considered duplicates? Examples: including the extra four digit zip code, middle name initial, verses no middle initial, Jr. Deed of Trust with multiple AOM's, notices are showing to all parties?
- 10) Are you finding that Title is no longer provided definitive answers to your questions and now pretty much giving you multiple choice and having you decide? (Tammy)



# **Legal and Practical Concerns When the Borrower is Deceased**

**Presenters:**

**Laura N. Coughlin, Esq.  
Wright Finlay & Zak**

**Erica Jones, Esq.  
Barrett Daffin Frappier & Engel, LLP**

**Minda Turnbull  
Reverse Mortgage Solutions**

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### **Laura N. Coughlin, Esq.**

Laura N. Coughlin, was admitted to practice law in the State of Washington in 2013 after graduating from Washburn University School of Law as a member of the Order of Barristers. While in law school, Ms. Coughlin served as the Director of the Center for Excellence in Advocacy and competed with the Trial Advocacy team. After law school, Ms. Coughlin represented mortgage servicers and lenders in judicial foreclosure, unlawful detainer and title clearing matters. Ms. Coughlin joined Wright, Finlay & Zak as an associate attorney at the firm in March 2017. Since joining Wright, Finlay & Zak, Ms. Coughlin has focused primarily on real estate litigation, including lender and servicer liability defense, wrongful foreclosure defense, fair debt collection practices defense, and title disputes. Ms. Coughlin regularly practices in state and federal courts throughout Washington. Ms. Coughlin is an active member of the Washington Women Lawyers. She can be reached at [lcoughlin@wrightlegal.net](mailto:lcoughlin@wrightlegal.net).



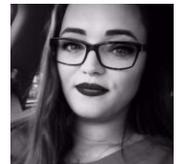
### **Erica Jones, Esq.**

Erica Jones is a Managing Attorney in the Foreclosure Department of BDF Law Group. She attended San Diego State University earning her Bachelor of Science degree in Finance in 1993. She received her Juris Doctor degree from Loyola Law School in 2002.

Erica is licensed with the State Bars of Texas and California and is licensed to practice before the United States District Court for the Central District of California. Erica has over 10 years experience representing clients in foreclosure and title related matters. She can be reached at [ericaj@bdfgroup.com](mailto:ericaj@bdfgroup.com).

### **Minda Turnbull**

Minda Turnbull is a Senior Director of Client Special Servicing for Reverse Mortgage Solutions, Inc. where she manages all aspects of loan servicing, from active servicing through claim filing for a dedicated client, along with several other critical areas. She has nearly 10 years in the industry, but the last 8 have been spent working with reverse mortgages, with a focus in Default, Foreclosure, and Bankruptcy. Leading and developing people is her favorite part of the job! She is constantly looking to learn new ways to keep her



folks motivated, encourages staff at all levels to be engaged and involved in every aspect of the business, and she enjoys furthering her education by reading books on leadership and management. She can be reached at *Minda.Turnbull@rmsnav.com*.

## **Legal and Practical Concerns When the Borrower is Deceased**

1. Consumer Financial Protections Bureau Regulations (“CFPB”)
  - a. Summary of the current requirements and how they have changed.
  - b. How it is looking 7 months later and what is still not clear
  - c. State adoption in their own regulations/statutes to conform
  
2. Non-Borrowing Spouses and/or HUD Guidelines for Reverse Mortgages
  - a. Spouse under 62 at origination – Not a party to the contract
  - b. HUD protections for those under 62 spouses
  
3. Reverse Mortgages
  - a. Origination Issues that can affect foreclosures
  - b. Background on how they work generally before death
  - c. Non-Death Defaults that occur also
  - d. What occurs upon death –acceleration v. non acceleration
  
4. Statute of Limitations
  - a. Acceleration upon death
    - i. Statutes – Is acceleration immediate upon death/notice of death?
    - ii. Terms of the contract
    - iii. Caselaw
    - iv. If state/contract doesn’t require acceleration before foreclosure, watch your language in your notices implying that acceleration has occurred or WILL occur v. MAY occur.
  - b. Tolling for death
    - i. State statutes
    - ii. Caselaw
  
5. Probate and Title Vesting at Death
  - a. Status of Title and Death
    - i. State statutes regarding vesting in heirs immediately upon death
    - ii. Community Property Agreements
    - iii. Title Company Insurance – Lack of Probate
  - b. Requirements to Act in Probate
  - c. Role of the Personal Representative
    - i. Takes the place of the borrower
    - ii. Notice to only PR
    - iii. Conflicting statutes requiring notice to others
  - d. Probate initiated after foreclosure initiated
  - e. Probate Closed at Initiation of FC
  
6. Vacant Properties – Pre REO Status

- a. Revisit the state statutes on vesting at death briefly
- b. Local authority's actions on vacant properties
  - i. Different jurisdictions can have separate processes and they can run simultaneously. Example: City code violations for the overgrown grass. County has building code violations.
  - ii. They have the authority to appoint receivers.
    - 1. Receivers can tell the property free and clear of all liens. The lender then takes the remainder.
    - 2. Receivers cost a lot of money and take a lot off the top of the sale.
  - iii. Different jurisdictions have different statutes and caselaw as to how a beneficiary *may* be liable for failing to maintain the property
  - iv. In summary – tell the lender/servicer anytime there is a notice, lien, violation, or case initiated by a local agency.
- c. Access to the property – Terms of the Deed of Trust
  - i. Waiver from heirs – if heirs contact you about the condition of the property or threats from local agencies, they can provide waivers to allow the lender to enter.
  - ii. Some state statutes allow the trustee to request permission to enter the property
  - iii. Watch for conflicting caselaw, not just statute or the terms of the deed of trust

# Non-Borrowing Spouse: MOE and eNBS

## General Requirements:

- ✓ Must have been married to the borrower at the time of origination, and remained married throughout the life of the HECM
- ✓ Must provide proof of legal right to remain within 90 days of the borrowers passing – accepted evidence is state specific
- ✓ MOE: Must provide all other required documents (Death Certificate, ID/SSN, NBS certification, Tolling Agreement, Insurance Dec Page, HOA statement, etc.)
- ✓ Maintain all obligations of the borrower. i.e. occupy home as primary residence, maintain taxes, insurance and HOA

Non-Borrowing Spouse	
MOE	<ul style="list-style-type: none"> <li>• Case numbers assigned prior to 8/4/2014</li> <li>• Identified upon the borrowers passing</li> <li>• Ultimately, these files will be assigned to HUD for servicing if the NBS is eligible and the loan is assignable</li> <li>• RMS reviews files throughout the process to ensure deadlines are met</li> <li>• RMS initiated a Claim Type 22 assignment, with the additional MOE package</li> </ul>
eNBS	<ul style="list-style-type: none"> <li>• Case numbers assigned on or after 8/4/2014</li> <li>• Identified at origination</li> <li>• Ultimately, the loan remains with the servicer should the eNBS meet the requirements before the 90 day deadline.</li> <li>• There is no assignment to HUD. The due and payable is "deferred"</li> <li>• Loans are monitored for eNBS defaults after deferral</li> </ul>

## MOE Process Flow





## **Third Party Bidders**

**Justin Bruni  
Wedgewood**

**Scott Sibley  
Nevada Legal News**

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## **Scott Sibley**

Scott A. Sibley is well known in the Las Vegas Community as a visionary leader in the foreclosure industry with consistent success in maximizing corporate performance. His career includes over 25 years of service at Nevada Legal News as the Publisher, as well as the Managing Partner of Equis Group since 2000.

Scott's ability to manage complex business challenges, make high-stake decisions and successfully drive growth has played a key factor in his success. Scott has been a licensed real estate broker and real estate agent for 15 years. He has been involved in many challenging real estate transactions. In the last several years, Scott has acquired various forms of distressed debt and has been very successful at reorganizing, stabilizing and disposing of these assets.

In 2004, Scott decided to run for public office. He was elected to the Nevada State Assembly as a Republican and served for one term and one special session. During his assembly office, and known for being a team player, he built powerful relationships with the Democrats early on in the session. These relationships paid off throughout the session. Scott, as a freshman, passed landmark legislation including a new regulation regulating government land swaps.

After the session, he was appointed by the Democratic Speaker to several committees. One of those committees oversaw regulations at the Department of Motor Vehicles.

In 2009, Governor Jim Gibbons appointed Scott as a Commissioner to the Nevada Commission of Common-Interest Communities and Condo Hotels. Scott was placed on this commission for his insight and knowledge with Nevada Real Estate and his conflict resolution skills. To date, Scott still remains on this commission and is a very active member of this body.

Scott received The Dorothy Schick Veteran Member of the Year Award from the United Trustee's Association for his dedication to the organization and their vision. The United Trustee's Association is an organization that the members include all major banks, servicers and trustees.

In 2010, during the 76th session of the Nevada State Legislature, Scott assisted in brokering an agreement between the Governor, Attorney General, and the

Assembly Leadership to revise provisions of several pieces of legislation that would have negatively impacted jobs in Nevada.

Scott was elected as President of the Nevada State Press Association in June 2012 after serving as Director for several years prior. The Nevada State Press Association is the trade organization that all major Nevada newspapers are members.

In March 2017, Scott was appointed by the Clark County Commission to the Green Ribbon Advisory Panel. The panel was formed to bring community leaders and stakeholders together to set policies regarding land use and licensing retail marijuana establishments. The GRAP will also recommend proposed changes to zoning and business license codes.

Scott is an active philanthropist in the Las Vegas community. In 2008, Scott founded the Sibley Family Foundation. The foundation has supported many charities both locally and nationally. In October 2011, he was inducted into Cleveland Clinic's 1921 Society for cumulative gifts of over one million dollars. In addition, Scott received an award from the Clark County Pro Bono Project for his support in seeing that all people, especially the needy, have access to attorneys who graciously volunteer their time to help those in need and assist them on how to navigate through the legal system. He can be reached at [ssibley@nevadalegalnews.com](mailto:ssibley@nevadalegalnews.com).



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