

UTA Helps to Foreclose on the Argument

**By: Christopher Benner, Esq. and Robin P. Wright, Esq., Wright, Finlay & Zak, LLP
Spring 2013**

In a recent decision, the Nevada State District Court ruled against the Nevada Financial Institutions Division (“FID”), holding that foreclosure trustee’s are not debt collectors within the meaning of Nevada law. This brought a close to two years of uncertainty, during which trustees were left to wonder whether they were subject to regulatory oversight by the FID and possibly other administrative entities. The recent ruling held that the FID erred as a matter of law in characterizing a trustee’s exercising of a power of sale as an effort to collect a debt. Thus, Trustees need neither a debt collector’s license nor to respond to complaints sent to the FID.

The matter began in 2010, when the FID responded to a borrower’s complaint against Quality Loan Service Corp. (“Quality”), which was the foreclosure trustee on the borrower’s deed of trust, for acting as a collection agency without a license. The borrower, who had defaulted on a real estate secured home loan, alleged that Quality’s notices and sales under the Deed of Trust were efforts to collect a debt but Quality did not have a state debt collector’s license at the time. For its part, Quality contended that exercising the power of sale was not an act of debt collection within the meaning of the operative statutes. The FID, without conducting any investigation into the matter, issued a Cease and Desist Order directing Quality to cease acting as a trustee under NRS Chapter 107 until it be- came licensed by the FID as a collection agency.

The Order by the FID was timely appealed to the Commissioner of the FID, resulting in an administrative hearing on the matter in 2012. The FID Commission concluded that that a Trustee exercising the power of sale in compliance with NRS Chapter 107 was soliciting the payment of a claim, and thus required a debt collection license. Quality then appealed the FID Commissioner’s decision to the State District Court. In the meantime, the FID commenced issuing similar Cease and Desist letters or demands for information to other foreclosure trustees.

The matter was fully briefed by Quality and the State Attorney General. Wright Finlay & Zak prepared an Amicus brief on behalf of the United Trustees Association (“UTA”) to help educate the court as to the potential impact of the FID decision on the industry and the Nevada economy. The amicus brief asserted that the Nevada Legislature intended that trustees be governed exclusively by NRS Chapter 107, such that the collection agency requirements of NRS Chapter 649 would be improper and counter to the Legislature’s intent. The brief also informed the Court of the numerous federal court decisions holding that the borrower consented to the power of sale in the Deed of Trust, so that a Notice of Default was not an attempt to collect a debt, but rather simply a notice of an agreed upon remedy. The amicus brief also pointed out the unique function of the trustee, and the fact that the trustee is not paid based on what the trustee collects, functioning instead as a mere conduit for other’s proceeds. The UTA further emphasized that, as a matter of law, trustees have legal title to the property putting them

into a unique position completely different than that of the strangers who serve as true debt collectors.

The Judge had previously worked in the title industry in Illinois and correctly noted that the entire foreclosure process stemmed from the remedies clearly outlined in the Deed of Trust, and triggered by the borrowers default. Swayed by the arguments of the UTA and Quality, the Court acknowledged that real property rights are different than interests in money, further distinguishing Trustees from debt collectors. After an extensive hearing on the matter, the Court ruled that exercising the power of sale was not equivalent to collecting on a claim, thus trustees were not doing business as collection agents and no license was required. The Court lifted the Cease and Desist Order, finding the FID did not have authority to regulate or oversee trustees, and that it was the state court's job to oversee the foreclosure process.

The Judge also commented upon the reality that even non-judicial foreclosures were becoming quasi-judicial. With the ability of borrowers to demand mediations, and those mediations being reviewed by the judiciary, there was now only a judicial and quasi-judicial process. This comment was reinforced by the language of the written decision, which notes that the "FID has no authority to regulate or oversee a Trustees exercise of the power of sale," that only "the Judiciary, pursuant to a duly filed claim in District Court, has authority to review or oversee a Trustee's exercise of the power of sale," and that the statutes regarding debt collection "gives the FID no authority to regulate, license or oversee a Trustee's exercise of the power of sale under NRS Chapter 107." The Court thus held that trustees should not be deemed to be overseen by state administrative agencies, but need only respond to the courts in the event of disputes being filed.

Thus, while trustees are still named in many wrongful foreclosure lawsuits by borrowers, and still face hurdles with the seemingly unending changes to NRS Chapter 107, especially the changes imposed by AB 284, Trustees are not subject to the whims of the FID. The burden of judicial proceedings will remain, but the burdens of licensing as collection agencies and responding to administrative complaints, with ensuing investigations by state administrative agencies of Nevada, has (for the moment, at least) been avoided.

The content of this website and the articles herein are for general informational purposes only and any unauthorized use is strictly prohibited.