

FORECLOSURE TRUSTEE DEBT COLLECTION LICENSING

TO BE OR **NOT TO BE?**

LAST YEAR, IN *OBUSKEY V. MCCARTHY & HOLTHUS, LLP*¹, THE U.S. SUPREME COURT HELD THAT “BUT FOR [THE LIMITED PURPOSE DEFINITION UNDER] 1692F(6), THOSE WHO ENGAGE IN ONLY NONJUDICIAL FORECLOSURE PROCEEDINGS ARE NOT DEBT COLLECTORS WITHIN THE MEANING OF THE ACT.” OUR NATION’S HIGHEST COURT ANSWERED THE QUESTION AS TO WHETHER FORECLOSURE TRUSTEES WERE DEBT COLLECTORS UNDER THE FDCPA, BUT LEFT OPEN CERTAIN QUESTIONS UNDER STATE LAW, INCLUDING WHETHER ACTING AS A FORECLOSURE TRUSTEE REQUIRES LICENSING AS A COLLECTION AGENCY. IN NEVADA, THIS QUESTION HAS BEEN ANSWERED.

BY KRISTIN A. SCHULER-HINTZ, ESQ.,
PARTNER, MANAGING ATTORNEY NV, MCCARTHY HOLTHUS, LLP
KHINTZ@MCCARTHYHOLTHUS.COM

IN *BENKO V. QUALITY LOAN SERVICE*,² THE NEVADA SUPREME COURT EXAMINED THE QUESTION OF WHETHER THE BROAD DEFINITION OF A COLLECTION AGENCY IN NRS 649.020 INCLUDED FORECLOSURE TRUSTEES. THE NEVADA SUPREME COURT HARMONIZED THE BROAD STROKES IN NRS 649 WITH THE SPECIFIC REQUIREMENTS AND DUTIES OF NRS 107 AND HELD THAT THE COMPREHENSIVE STATUTORY SCHEME IN NRS 107 TRUMPED THE MORE GENERALIZED APPLICATION OF NRS 649 TO PREVENT TWO DISTINCT AND CONFLICTING SCHEMES FROM ATTEMPTING TO REGULATE THE NON-JUDICIAL FORECLOSURE PROCESS.

In litigation dating back to 2010, Quality Loan Service Corp. (“the Trustee”) obtained a ruling from the State District Court against the Nevada Financial Institutions Divisions³ holding that NRS 649 did not govern the activities of a foreclosure trustee acting under NRS 107.

The Benko case initially commenced in October 2011, as a purported state court class action (despite the results of the prior litigation with the FID) alleging that foreclosure trustees were required to hold collection agency licenses under what was perceived to be a broad definition of “collection agency” under NRS 649. The case was removed to federal court in February 2012, and was initially dismissed on the Trustee’s motion. The dismissal order was appealed to the Ninth Circuit Court of Appeals, and in October 2015, was remanded by the Ninth Circuit on the District Court’s denial of the Plaintiff’s Motion to Remand to State Court under the Class Action Fairness Act. After substantial motion work in state court, the Trustee’s Motion to Dismiss the Third Amended Complaint was granted in June

2017. The appeal followed.

Prior to the ruling in *Obduskey*, the state court dismissed the action ruling that foreclosure trustees were not debt collectors; are subject to NRS 107 and do not need to be licensed as collection agencies. The court found NRS 107 empowers deed of trust trustees to contract and perform duties to accomplish non-judicial foreclosures. Further, the court found that NRS 649 intended to exclude deed of trust trustees from its licensing requirements.⁴

After oral argument on September 5, 2019, the en banc Nevada Supreme Court held that the comprehensive framework and specific scheme of NRS 107 indicated the intent of the legislature to exempt deed of trust trustees from the NRS 649 licensing requirement. The undivided Supreme Court found that NRS 107 was specific and trumped the generalized application of NRS 649.

The Nevada Supreme Court further held that the conflicting provisions of NRS 649 and NRS 107 supported their conclusion that NRS 649 was not intended to apply to foreclosure trustees. For example,

¹*Obduskey v. McCarthy & Holthus, LLP* (2019) ___ U.S. ___ [139 S.Ct. 1029, 203 L.Ed.2d 390]

²*Benko v. Quality Loan Service Corp.* (135 Nev.Adv.Op. 64; Dec. 26, 2019)

³*Quality Loan Service Corp. vs. Dept. of Bus. & Ind., Fin. Inst. Div.* (A-12-657580-J, Jan. 1, 2013)

⁴The District court further found that enforcing a security interest was not doing business in Nevada so licensing was not required; however, the Supreme Court did not reach a decision on this issue.

"...THE TRUSTEE "AS BOTH THE COMMON AGENT OF THE LENDER AND BORROWER" WOULD COLLECT MONEY AND DISCUSS FORECLOSURE STATUS..."



non-judicial foreclosure requires the trustee to notify the borrower of foreclosure prevention alternative resources and to post, publish, and mail debt information, thereby revealing information about the debtor, which conflicts with NRS 649.⁵

Further, and of long standing, NRS 649 specifically speaks to the requirement of a community manager who performs "any act associated with the foreclosure of a lien" to be licensed as a collection agency. From that, the Nevada Supreme Court inferred the legislative knowledge of how to include foreclosure activity as a collection agency if they so intended. Additionally, in further support of its holding, the Nevada Supreme Court noted the legislative amendments in 2011, and its comprehensive list of licenses that could serve as foreclosure trustees. A collection agency is one of the options, but by no means the only one.

Once the Nevada Supreme Court determined that a foreclosure trustee performing the actions under NRS 107 was not required to be licensed as a collection agency, the Court looked to the allegations

of the Third Amended Complaint to determine if they showed activity outside of the ambient of NRS 107. The undivided Nevada Supreme Court held that NRS 107 contemplates that the trustee "as both the common agent of the lender and borrower" would collect money and discuss foreclosure status and related arrangements and, as such, the activity does not amount to claim collection. The Court further held that the collection of funds from the sale and its application was contemplated by NRS 107. Finally, while there were allegations that the foreclosure notices themselves were debt collection, the Nevada Supreme Court held that NRS 107.080 explicitly empowers a trustee to create the necessary notices to initiate and complete the foreclosure process.

NRS 649 regarding collection agency licensure paints with a broad brush. By contrast, NRS 107 has a much finer point. In light of this decision, it is important to review the tasks and activities of foreclosure trustees to ensure they remain within the finer points of NRS 107. ■

⁵In light of *Obduskey*, the Nevada Supreme Court held that the broad definition of collection agency found in NRS Chpt 649 (which is broader than the FDCPA) would encompass foreclosure trustee activities.