

From: Mark Witt mwwnv@aol.com
Subject:
Date: February 6, 2022 at 4:47 PM
To:



Request for NRED Advisory Opinion

NRS 116 HOA nonjudicial foreclosure of FHFA property

Questions:

QUESTIONS: NRED Advisory Opinion:

1. To what extent does the Nevada Supreme Court's order to pre-empt NRS 116 in the case *Saticoy Bay v. Fed. Nat'l Mortg. Ass'n* (2018), limit the statutory authority of a Nevada Homeowners Association to attach and perfect liens and super-priority liens to Federal Housing Finance Agency ("FHFA") property or to enforce payment by non-judicially foreclosing property financed by the Federal Housing Finance Agency (FHFA) when FHFA does not consent to such action?
2. What is the legal process for HOA's attempting to settle disputed claims against homeowners for alleged unpaid HOA assessments, breach of contract involving CCR's or money damages?
3. What "Remedies" (NRS 116.1114) exist under Nevada law to compensate homeowners for damages related to the non-judicial foreclosure of FHFA property, based on the HOA's false representations of the "character, amount or legal status" of claims, or the HOA's actions to enforce payment by non-judicially foreclosing and selling FHFA property that constitute an "action which cannot legally be taken"?

Signature	Name	Date
1. <i>Jon C Solar</i>	Jon Solar	2/6/22
2. <i>Alexcia S Daskalos</i>	ALEXCIA S DASKALOS	2/6/22
3. <i>James Tiscareno</i>	James Tiscareno	2-6-2022
4. <i>Tina Bradford</i>	<i>TIP FABIAN WITT</i> TINA BRADFORD	2-6-22 2-6-2022
5. <i>Tina Bradford</i>	TINA BRADFORD	2-6-2022
6. <i>Jon Bradford</i>	Jon Bradford	
7. <i>NICK DASKALOS</i>	NICK DASKALOS	2/6/22
8. <i>Sarah Witt</i>	Sarah Witt	2/6/22
9. <i>Mark Witt</i>	Mark Witt	2/6/22
10.		

02-03-2022

REQUEST FOR ADVISORY OPINION

Petitioner: Sarah Witt
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Las Vegas Nevada 89149
(702) 232-3333

Dear NRED Commissioners,

Please allow this letter to serve as a formal request to the Nevada Real Estate Division ("NRED") for an Advisory Opinion pursuant to NRS 116.623 (5)(a)-(b). I am asking the Nevada Real Estate Division to address the questions presented below regarding a Homeowner Association's ("HOA") legal authority to non-judicially foreclose FHFA property pursuant to recent rulings by the Nevada Supreme Court and applicable Nevada statutes.

The purpose of this request is to obtain clarification for HOA's and homeowners in navigating the process for handling potential disputes over HOA assessments, fees, fines, costs of collection, attorney fees, and other charges which are breach of contract and/or money damages claims.

QUESTIONS: NRED Advisory Opinion:

1. To what extent does the Nevada Supreme Court's order to pre-empt NRS 116 in the case *Saticoy Bay v. Fed. Nat'l Mortg. Ass'n* (2018), limit the statutory authority of a Nevada Homeowners Association to attach and perfect liens and super-priority liens to Federal Housing Finance Agency ("FHFA") property or to enforce payment by non-judicially foreclosing property financed by the Federal Housing Finance Agency (FHFA) when FHFA does not consent to such action?
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Legal Issues:

Is the HOA's non-judicial foreclosure of FHFA property based on valid statutes?

In *Saticoy Bay v. Fed. Nat'l Mortg. Ass'n*, 417 P.3d 363 (2018), the Nevada Supreme Court ordered the pre-emption of NRS 116. The court specifically held 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." Furthermore, the Court held that the Federal Foreclosure Bar implicitly pre-empts NRS 116. Prior to the Nevada Supreme Courts pre-emption of NRS 116, federal law and state law were in conflict. Federal law overrides state law when the laws conflict. The issues raised by the Nevada Supreme Court's holding are the following:

1. What is the effect of the Nevada Supreme Courts pre-emption of NRS 116.3116?
2. Is the non-judicial foreclosure of FHFA property based on a valid statute?
3. What procedure is required of an HOA making the decision to take action proceeding to foreclose on a property under FHFA conservatorship?

NRS 116.4117; NRS 38.310 HOA's are required to submit disputed claims for mediation

Assuming, for the sake of argument, the Nevada Supreme Court's pre-emption of NRS 116.3116 does not void the statute with regard to the HOA's legal authority to attach and perfect liens and super priority liens and non-judicially foreclose of FHFA property. This petition will continue by discussing NRS 116.4117 and NRS 38.310 and the homeowners disputed claims for breach of contract and money damages. HOA's are required to submit disputed claims to NRED for NRS 38 mediation before the HOA can proceed with any 'civil action for damages' or 'other appropriate relief'. Public policy favors mediation of claims before the adjudication of claims. NRS 38.310 requires mediation or arbitration for disputed claims based on the homeowners alleged breach of the Covenants, Conditions and Restrictions ("CCR'S"), or money damages. (See Nevada Supreme Court decision *Hamm v. Arrowcreek HOA*, (2008)).

1. What is the proper procedure for a HOA to follow when the homeowner disputes charges for assessments, breach of CCR's or money damages and refuses to pay?
2. What obligation does a HOA have to mediate/arbitrate disputes raised by a homeowner? (including the homeowners requests for compliance with statutory requirements under NRS 38 and 649.375, accounting and payment records, proof of consent by FHFA to foreclose.)

NRS 649.375 HOA's taking action to enforce payment without a court order.

Nevada law prohibits HOA community managers and collection agencies from taking action to enforce payment on a claim without a court order (NRS 649.375). This statute applies to collection agencies, community managers and HOA's employing collection agencies and the HOA's board of directors.

1. Do Nevada HOA's have legal authority to non-judicially foreclose FHFA property Based on disputed claims without NRS 38 mediation and a court order ?
2. Are Nevada HOA's subject to NRS 649.370 and §1692f(6) which specifically prohibits non-judicial foreclosure of property protected by other laws?

NRS 649.370, Homeowner rights and Nevada's Fair Debt Collection Practice Act.

Nevada's Fair Debt Collection Act (649.370) specifically prohibits non-judicial foreclosure when the property is protected from foreclosure by other law. (§1692f(6))

HOA's and collection agencies are prohibited(649.379) from making false representations of the "character, amount and legal status" of the debts they are attempting to collect from a homeowner. Nevada laws are intended to protect consumers against abusive debt collection practices. Nevada HOA's, HOA community managers and collection agencies are prohibited from threatening to take any action that cannot legally be taken. Threats to advertise, foreclose or sell a homeowners property to enforce payment on a disputed claim without NRS 38 mediation and a court order providing legal authority to take specific action against a homeowner or their property is oppressive, unfair and the essence of what most people would agree to be abusive debt collection practices.

1. What recourse is available to a homeowner disputing claims related to the CCR's whose property is under FHFA conservatorship and has been non-judicially foreclosed on by a HOA?

I believe that an Advisory Opinion on the above mentioned issues will serve to assist HOAs and homeowners alike in navigating this complex area of law. Further, an Advisory Opinion will assist HOAs and homeowners by providing the proper procedure for an HOA foreclosure and methods for handling disputes prior to unnecessary litigation, specifically in regards to FHFA properties.

I appreciate the time and effort taken to review these issues. For convenience, I have included additional information to assist in review of the legal issues. If you have any questions, please feel free to contact me at (702) 232-3333.

I am not a party to any ongoing administrative proceedings, civil or criminal case(s) involving NRS 116, NRS 38, NRS 649.

Kind regards,



Sarah Witt

Nevada Statutes, Nevada Supreme Court Opinions and Statutory History

Statutes:

NRS 116, NRS 116.3116 (Pre-empted statute), NRS 116 .3116, NRS 116 4117, NRS 116.3103, NRS 116.1114, NRS 116.623.
NAC 116.470, NAC 116.405
NRS 649, NRS 649.370, NRS 649.375
NRS 38, NRS 38.310, NAC 38.350

Nevada Supreme Court Cases:

NRS 38 Mediation:

Hamm v Arrowcreek Homeowners Association, No. 47763, May 15, 2008
McNight Family LLP v Adept Management (Oct 3,2013)

Fair Debt Collection Cases:

Calvert v Alessi Koenig LLC 2013 WL 3833053,
Karimova v. Alessi & Koenig, Llc.

Nevada Constitution Article 1, section 3 : The right to a trial:

Cheung v District Ct. 2005 No. 42212,
Aftercare of Clark County v Justice Ct. 1-23-2004 NO. 38625, 38626

NRED Advisory opinion, "Super-priority Liens" 13-01, (Dec.12, 2012)

State of Nevada Department of Business and Industry v. Nevada Association Services, Inc
Horizons at Seven Hills HOA v IKON Holdings, Nevada Supreme Court No. 63178, April 28,2016.

Federal Foreclosure Bar Pre-empts NRS 116:

Saticoy Bay LLC 9641 Christine View v Federal National Mortgage Assoc. 134 Nev.270 (2018)

Statutory History

NRED received requests for information regarding validity of NRS 116 with regard to FHFA property based on the cases *Saticoy Bay LLC 9641 Christine View v Federal National Mortgage Assoc. 134 Nev. 270 (2018)* and *Berezovsky v. Moniz No. 16-15066 , 08-25-2017*. Separately an initial petition for an Advisory Opinion requesting NRED to address NRS 116 HOA non-judicial foreclosure of FHFA property. This petition for an Advisory Opinion was based on the concerns that Nevada HOA's did not have an established security interest in FHFA property. As a result they could not foreclose FHFA properties and the debts were unsecured. Federal statutes including HERA, Federal Foreclosure Bar, the Federal Fair Debt Collection Practice Act and the FHFA Conservatorship of Fannie Mae and Freddie Mac were provided as evidence of the intent of the U.S. Congress to protect FHFA property from non consensual liens, levy and foreclosure. Non-judicial foreclosure disregards the legal protections provided by the FHFA Conservatorship of Fannie Mae and Freddie Mac properties. NRED declined to provide an Advisory Opinion stating they "do not have authority to interpret federal law".

This petition for an Advisory Opinion is based exclusively on Nevada law, the Nevada Constitution, an NRED Advisory Opinion and Nevada Supreme Court decisions and orders:

- 1) NRS 38; mediation, breach of contract and money claims requiring interpretation of CCR's.
- 2) NRS 649: requirements to obtain a court order prior to taking action to enforce payment.
- 3) NRS 649:Nevada's Fair Debt Collection Practice Act.
- 4) NRED Advisory Opinion 13-01: Super-priority lien, December 12, 2012.
- 5) The Nevada Constitution: Article 1 sections 3; The right to a trial.
- 6) NRS 116: Nevada's HOA super-priority lien and non-judicial foreclosure statute.
- 7) The Nevada Supreme Court: Pre-emption of NRS 116.

Introduction:

This petition is not intended to address all the potential issues related to HOA foreclosure of FHFA property. It avoids discussion of the federal statutes and federal court decisions to avoid any issues with NRED limited authority with regard to federal law. The petition is not intended to address the unfortunate but real situation where a homeowner is financially unable to pay and simply makes the decision to stop paying the HOA assessments. This petition is meant to address another common problem, the homeowner disputes the validity of the HOA's charges for assessments under the CCR's.

FHFA finances approximately 50% of the residential property purchased in Nevada. Homeowners purchasing property with FHFA financing (Fannie Mae or Freddie Mac) receive title to property protected by federal statutes and the laws of Nevada. Homeowners living in a HOA have received a copy of their CCR's. They may not have a copy of the Nevada Revised Statutes NRS 116 or the other pertinent statutes (NRS 38 and NRS 649. Homeowners have a right to information about their HOA and how it is supposed to operate. This is part of the duties of the NRED Ombudsman office.

This petition is intended to formal request so that NRED can provide consumers, homeowners and HOA's important information about disputed claims and the appropriate steps required in the processing of disputed claims under NRS 116.4117. Homeowners have a right to dispute inaccurate and erroneous HOA charges. They have a right to request and be obtain accurate information about the process for resolving disputes related to HOA assessments and disputed claims, including HOA claims for breach of contract or money damages. Homeowners should not be forced to pay illegitimate claims to avoid foreclosure by their HOA. There should be no ambiguity regarding the amount or the legal status of the debt. HOA's should be required to provide a complete and full accounting of charges and payments. Homeowners should be advised of their rights, the process for resolving disputes over the CCR's should be clear and the HOA and homeowner should be required to follow them.

The homeowner should know when the HOA has complied with the law and when it has legal authority to enforce payment on disputed claims. The amount required to settle the debt should not be in question.

NRS 38.310; Limitations on commencement of certain civil actions. NRS 38.310 Mediation

Parties are required to submit disputed claims for breach of contract and money damages to mediation or arbitration pursuant to NRS 116.4117 and NRS 38.310. The party making the claim must serve a copy of the written claim and the statement explaining the procedures for mediation and arbitration on the opposing party within 45 days after filing the claim with the real estate division of the department of business and industry. Nevada law requires NRS 38 arbitration / mediation of disputed claims based on HOA covenants, conditions and restrictions (CCR's). Disputed claims imposed by the association for assessments against homeowners require the interpretation of the CCR's. The disputed claims for "breach of contract" and "money damages" require NRS 38 mediation before the claim can proceed to court. NRS 649.375 prohibits community managers, and collection agencies from advertising or threatening to advertise for sale any claim as a means to enforce payment of the claim unless acting under a court order.

NRS 38.310 Limitations on commencement of certain civil actions.

1. No civil action based upon a claim relating to:

(a) The interpretation, application or enforcement of any covenants, conditions or restrictions applicable to residential property or any bylaws, rules or regulations adopted by an association; or

(b) The procedures used for increasing, decreasing or imposing additional assessments upon residential property É may be commenced in any court in this State unless the action has been submitted to mediation or, if the parties agree, has been referred to a program pursuant to the provisions of [NRS 38.300](#) to [38.360](#), inclusive, and, if the civil action concerns real estate within a planned community subject to the provisions of [chapter 116](#) of NRS or real estate within a condominium hotel subject to the provisions of [chapter 116B](#) of NRS, all administrative procedures specified in any covenants, conditions or restrictions applicable to the property or in any bylaws, rules and regulations of an association have been exhausted.

2. A court shall dismiss any civil action which is commenced in violation of the provisions of subsection 1.

(Added to NRS by [1995, 1417](#); [A 1997, 526](#); [2007, 2278](#); [2013, 2296](#))

The Nevada Supreme Court decision in *Hamm v Arrowcreek Homeowners Association (2008)* stated "NRS 38.310 requires mediation or arbitration before civil actions are initiated by homeowners or homeowner associations alike, without classification". The Nevada Supreme Court concluded "if the collection agency acts as the agent of a homeowners' association and NRS 38.310 applies to the action against the homeowners' association, then that statute applies equally to the collection agency. The Nevada Supreme Court decision in *McNight Family LLP v Adept Management (Oct 3,2013)* states HOA claims based on "Breach of Contract" or " Money Damages" requires NRS 38 mediation prior to the filing of a case in district court.

The CCR's are a contract between the HOA and the homeowner. HOA's claims for additional fees, fines, collection costs, filing and mailing fees, attorney costs and other charges are claims for "Money Damages". These claims are directly related to the obligations and duties set forth in the CCR's. The Nevada Supreme Court decisions clearly indicate that the party intending to take "civil action" to enforce payment is required to file and complete NRS 38 mediation first.

NRS 649.375; Prohibited Practices:

NRS 649.375 governs the activities of community managers and collection agencies and indirectly governs the activities of HOA's and members of the executive board of HOA's. The HOA executive board members are expected to understand the "prohibited practices" for community managers and collection agencies.

NRS 649.375 Prohibited practices. A collection agency, or its manager, agents or employees, shall not:

1. Use any device, subterfuge, pretense or deceptive means or representations to collect any debt, nor use any collection letter, demand or notice which simulates a legal process or purports to be from any local, city, county, state or government authority or attorney.

2. Collect or attempt to collect any interest, charge, fee or expense incidental to the principal obligation unless:

(a) Any such interest, charge, fee or expense as authorized by law or as agreed to by the parties has been added to the principal of the debt by the creditor before receipt of the item of collection;

(b) Any such interest, charge, fee or expense as authorized by law or as agreed to by the parties has been added to the principal of the debt by the collection agency and described as such in the first written communication with the debtor; or

(c) The interest, charge, fee or expense has been judicially determined as proper and legally due from and chargeable against the debtor.

6. Advertise for sale or threaten to advertise for sale any claim as a means to enforce payment of the claim, unless acting under court order.

NRS 649.370 ; Nevada's Fair Debt Collection Practice Act

NRS 649.370 Violation of federal Fair Debt Collection Practices Act. A violation of any provision of the federal Fair Debt Collection Practices Act, 15 U.S.C. §§ 1682 et seq., or any regulation adopted pursuant thereto, shall be deemed to be a violation of this chapter. (Added to NRS by [2007, 2500](#))

§1692f(6) and specifically prohibits a "debt collector" from: "Taking or threatening to take any nonjudicial action to effect dispossession or disablement of property if—(A) there is no present right to possession of the property (B) there is no present intention to take possession of the property; or (C) the property is exempt by law from such dis- possession or disablement."

Courts have determined that HOA claims are debts subject to the Fair Debt Collection Practice Act (FDCPA). *Calvert v Alessi Koenig LLC* 2013 WL 3833053. *Karimova v. Alessi & Koenig*,

The Nevada FDCPA specifically precludes the use of non-judicial foreclosure to collect a debt when property is protected from foreclosure by other laws.

The Fair Debt Collection Practice Act is a consumer protection statute, it places specific requirements on HOA's, community managers and collection agencies:

- A debt collector may not falsely represent "the character, amount, or legal status of any debt"
- A debt collector may not use "any false representation or deceptive means to collect or attempt to collect any debt"
- A debt collector may not use "unfair or unconscionable means to collect or attempt to collect any debt."
- A debt collector may not threaten "to take any action that cannot legally be taken or that is not intended to be taken."

HOA's make informed decisions about when and how they take pursue claims or take action to enforce payment. When there is a dispute for breach of contract related to the CCR's or a dispute over money damages the HOA community manager and HOA board members have options to consider ranging from no action on a claim, to decisions to take action to enforce payment. The HOA executive boards decision to take action to enforce payment should comply with the requirements under NAC 116.405. The HOA must have legal authority to enforce payment on the claims.

A decision to enforce payment on a disputed claims related to breach of CCR's or money damages, without NRS 38 mediation violates NRS 116.4117 and NRS 38.310. Homeowner disputes with their HOA commonly involve assessments for fees and fines, interest, accounting errors, assessment of claims more than 3 years old, errors in the posting of payments, collection fees and attorney costs. Any number of errors regarding

the claims for assessments can become the factual basis for a homeowner dispute with their HOA over the charges and assessments. It is up to the HOA to submit the claim for NRS 38 mediation. When the dispute arises it may initially involve a management company or community manager working under a management agreement. The HOA has a fiduciary duty to the homeowners of the association. There is a duty ensure the accounting records and posting the homeowner payments is correct. If the dispute is not resolved the homeowner may be unwilling to pay the demands or money damages claimed by the HOA. Homeowners have a right to dispute charges for breach of contract or money damages. A collection agency may get involved. Collection agencies are subject to NRS 649.375. Debt collectors are known to take liberties, adding additional fees and charges to the HOA lien demands. This can escalate the dispute by introducing additional erroneous charges that are inconsistent with the terms of the CCR's and Nevada's statutes NRS 649.375 and NRS 649.370.

Charges for interest, fees, fines, filing and mailing costs, attorney fees and collection costs are subject to the CCRS and NRS 116. The disputed claims and additional charges can include hundreds or thousands of dollars of disputed charges. The charges may not be supported by the CCR's or the statutes in Nevada. (Nevada statutes NAC 116.470 provide maximum limits to allowable charges, the statutes do not set the fees) As a result, the amount of money demanded by the HOA/ collection agency in notices sent to homeowners can be completely inaccurate.

Notices sent to homeowners may actually appear as foreclosure notices, meeting the states requirements and timelines under state law. The notices are provided in a form conforming to the legal process of a NRS 116 non-judicial foreclosure. (A potential violation of NRS 649.375(1)) The notices demand payment and include threats and timelines informing the homeowner they can lose their property if payment is not received by specific dates. These notices are sent when the HOA has a legal obligation under NRS 116.4117 and NRS 38 to mediate the disputed claims. The notices provide this information when the HOA does not have legal authority to foreclose, a violation of the FDCPA.

These claims have not been mediated or adjudicated, there is no court order and no legal authority to foreclose. Nonjudicial foreclosure is used to enforce and collect payment. Homeowners are forced to pay invalid debts to avoid the non-judicial foreclosure of their property. This is unfair oppressive, and it appears to be illegal. HOA's should be required to comply with the statutes and mediate disputed claims.

The character, amount, and legal status of the debt is being misrepresented in an effort force the homeowners payment on the disputed claim. The HOA's have no legal authority to foreclose FHFA property until the disputed claims have been mediated under NRS 38.

NRED Advisory Opinion 13-01

The NRED Advisory Opinion " Super-priority Liens" 13-01, (Dec.12, 2012) discusses various types of HOA liens in reference to NRS 116. The NRED Advisory Opinion clearly describes different types of liens. It is important for HOA's to understand the information provided in this advisory opinion. The HOA must get this right or charges and demands for payment sent to the homeowner and the lender will be incorrect.

A clear understanding liens and how they relate to the calculation of the super priority lien or the calculation of the HOA's lien for assessments is critical to providing an accurate demand for payment. There has been a lot of confusion over the years regarding a number of these liens. The NRED Advisory Opinion states the super-priority lien does not contain "costs of collecting" and the associations lien does not include "costs of collecting. Competing interests regarding fees and interest what is and what is not part of the super -priority lien has confused the facts. This is supported by Nevada Supreme Court decisions, *Horizons at Seven Hills HOA v IKON Holdings, Nevada Supreme Court No. 63178, April 28,2016*. The NRED Opinion 13-01 includes a discussion of contradictory Advisory Opinions issued by a different state agency. The NRED opinion demonstrates there have been differing opinions between state agencies and a long period of controversy over HOA liens.

According to the NRED Advisory Opinion 13-01 there are a number of lien categories, not all represent secured debts or valid claims against the homeowner or property. A dispute over assessments or money damages requires an interpretation of CCR's. The CCR's in most cases will determine how the HOA claims are assessed and enforced against the homeowner. The statutes under NRS 116 provide limits to what can be charges and they may supersede the HOA CCR's. This is a complicated task and certainly an area where the HOA or the debt collector can misrepresent the " character, amount, or legal status" of the debt.

Each HOA has its own unique set of Covenants, Conditions and Restrictions (CCR's). The CCR's specify the terms of the contract between HOA and the homeowner. NRS 116 provides limits to what HOA's can charge homeowners. NAC 116.470 provides limits but it does not specify what the charges must be. HOA claims for breach of CCR's or money damages require proper adjudication by a court to determine if the debts are valid against the homeowner, secured debts, or unsecured debts.

Nevada Constitution; Article 1, Section 3. Nonjudicial foreclosure of property without a court order violates a person's right to a trial.

Nevada Constitution Article 1, Sec: 3. Trial by jury; waiver in civil cases. The right of trial by Jury shall be secured to all and remain inviolate forever; but a Jury trial may be waived by the parties in all civil cases in the manner to be prescribed by law; and in civil cases, if three fourths of the Jurors agree upon a verdict it shall stand and have the same force and effect as a verdict by the whole Jury, Nevada Supreme Court decisions (1) *Cheung v District Ct. 2005 No. 42212*,(2) *Aftercare of Clark County v Justice Ct. 1-23-2004 NO. 38625, 38626*. Nonjudicial foreclosure without a court order violates due process and a persons right to trial.

NRS 116, Nevada's Super-Priority Lien and Non-judicial Foreclosure Statute

NRS 116.3116 (1) "Unless the Declaration Otherwise Provides" The statute clearly indicates that HOA charges and the enforcement of claims is dependent on the proper interpretation of the CCR's. The CCRs define the terms, obligations and duties of the contract. The enforcement of liens as assessments depends on terms of the contract and the effect of NRS 116 on the validity of the charges.

NRS 116.3116 Liens against units for assessments. [Effective through December 31, 2019.]

1. *The association has a lien on a unit for any construction penalty that is imposed against the unit's owner pursuant to [NRS 116.310305](#), any assessment levied against that unit or any fines imposed against the unit's owner from the time the construction penalty, assessment or fine becomes due. Unless the declaration otherwise provides, any penalties, fees, charges, late charges, fines and interest charged pursuant to paragraphs (j) to (n), inclusive, of subsection 1 of [NRS 116.3102](#) and any costs of collecting a past due obligation charged pursuant to [NRS 116.310313](#) are enforceable as assessments under this section.*

NRS 116.4117(2) provides a requirement for NRS 38 mediation of claims resulting from the failure of a party to comply with the chapter, declaration or the bylaws. The Nevada Supreme Court opinion *Hamm v Arrowcreek Homeowners Association, No. 47763, May 15, 2008*, indicates NRS 116.4117 applies equally to the HOA as it applies to homeowners. Equal protection under the law is provided under NRS 38.310. The statute requires the parties subject to the CCR's to submit their claims to mediation before taking any "civil action" for money damages or equitable relief. Nevada HOA's are required to comply with NRS 38.310 by submitting claims for equitable relief or money damages, to NRED for mediation. NRS 38 mediation provides the initial step to resolving disputes. The HOA has no legal authority to take action to enforce payment on such a debt without NRS 38 mediation.

NRS 116.4117 Effect of violations on rights of action; civil action for damages for failure or refusal to comply with provisions of chapter or governing documents; members of executive board not personally liable to victims of crimes; circumstances under which punitive damages may be awarded; attorney's fees.

1. *Subject to the requirements set forth in subsection 2, if a declarant, community manager or any other person subject to this chapter fails to comply with any of its provisions or any provision of the declaration or bylaws, any person or class of persons suffering actual damages from the failure to comply may bring a civil action for damages or other appropriate relief.*

2. *Subject to the requirements set forth in [NRS 38.310](#) and except as otherwise provided in [NRS 116.3111](#), a civil action for damages or other appropriate relief for a failure or refusal to comply with any provision of this chapter or the governing documents of an association may be brought:*

NAC 116.470(2) provides a list of charges related to costs of collection. The fees listed are the maximum amount that a HOA may charge against the units owner. The amount charged cannot exceed the actual amount paid by the HOA. The statute does not specify the amount the HOA charges the homeowner, as this needs to be specified in the CCR's. In addition these charges are charges against the unit owner (not a lien to be enforced against property).

NAC 116.470(2). An association or a person acting on behalf of an association to collect a past due obligation of a unit's owner may not charge the unit's owner fees in connection with a notice of delinquent assessment pursuant to paragraph (a) of subsection 1 of [NRS 116.31162](#) which exceed the following amounts... (list of fees)

NRS 116.3103 "Except as provided in the declaration, the bylaws"...the executive board, members and officers are fiduciaries acting on behalf of the association: having a duty of care, in the performance of their duties. Shall act on an informed basis and required to exercise the ordinary and reasonable care of officers and directors of a nonprofit corporation, subject to business-judgement rule.

NRS 116.3103 Power of executive board to act on behalf of association; members and officers are fiduciaries; duty of care; application of business-judgment rule and conflict of interest rules; limitations on power.

1. *Except as otherwise provided in the declaration, the bylaws, this section or other provisions of this chapter, the executive board acts on behalf of the association. In the performance of their duties, the officers and members of the executive board are fiduciaries and shall act on an informed basis, in good faith and in the honest belief that their actions are in the best interest of the association. Officers and members of the executive board:*

(a) *Are required to exercise the ordinary and reasonable care of officers and directors of a nonprofit corporation, subject to the business-judgment rule:*

NRS 116.1114 "Remedies" to be liberally administered, to ensure that the aggrieved party is put in as good a position as if the other party had fully performed. The performance required under the contract is based on the statutes and the governing documents and bylaws of the HOA.

NRS 116.1114 Remedies to be liberally administered. The remedies provided by this chapter must be liberally administered to the end that the aggrieved party is put in as good a position as if the other party had fully performed. Consequential, special or punitive damages may not be awarded except as specifically provided in this chapter or by other rule of law. (Added to NRS by [1991, 541](#); A [2011, 2417](#))

NAC 116.045 Requires executive Board to comply with federal, state and local law and "the governing documents of the association". This regulation again indicates the executive board has a limited scope of authority, the executive board may not act outside the scope of their authority which is granted in the governing documents. The regulation clearly requires an interpretation of the CCR's to determine the executive boards "scope of authority". The law in Nevada specifically requires the executive board to comply with federal and state law. The statute indicates commissioners have the authority to determine if the members of the executive board have performed their duties, complied with federal state and local law or acted outside the authority granted in the governing documents..

NAC 116.405 Executive board: Determination by Commission of whether members have performed their duties. (NRS 116.3103, 116.615) In determining whether a member of the executive board has performed his or her duties pursuant to NRS 116.3103, the Commission may consider whether the member of the executive board has:

1. Acted outside the scope of the authority granted in the governing documents;
8. Caused the association to:
 - (a) Comply with all applicable federal, state and local laws and regulations and the governing documents of the association;
 - (b) Uniformly enforce the governing documents of the association;

NRS 116.623 Petitions for declaratory orders or advisory opinions: Regulations; scope; contents of petition; filing; period for response.

Pre-emption of NRS 116

The final and possibly the most compelling argument against the authority of the HOA to foreclose FHFA property involves the pre-emption of NRS 116. In the case *Saticoy Bay v. Fed. Nat'l Mortg. Ass'n* (2018) the Nevada Supreme Court conducted the required pre-emption analysis to evaluate potential conflicts between federal and state law. The decision provides the analysis and necessary evidence showing NRS 116.3116 implicitly conflicts with the Federal Foreclosure Bar. The implicit conflict impairs the U.S. Congress objectives to conserve and preserve FHFA assets. The Nevada Supreme Courts order to pre-empt NRS 116 appears to remove any legal authority allowing Nevada HOA's to non-judicially foreclose FHFA property.

The Nevada Supreme Court has preserved the FHFA Deeds of Trust as requested in the case pleadings by FHFA attorneys. NRS 116 provides HOA's with statutory liens, super priority liens, and the right to non-judicially foreclose property. Pre-emption voids NRS 116 with regard to FHFA property and removes the statutory right to establish a super-priority lien or non-judicially foreclose FHFA property.

Pre-emption of NRS 116 is based on the Supremacy Clause of the U.S. Constitution which provides that when laws conflict federal law overrides state law. The effect of pre-emption is to void the state statute (NRS 116) with regard to FHFA property. The Nevada Supreme Court's pre-emption order exempts FHFA property from the effects of NRS 116 Pre-emption removes the statutory authority authorizing super priority liens and non-judicial foreclosure of FHFA property.

Conclusion:

The Nevada Supreme Court's decision to pre-empt NRS 116.3116 in the case *Saticoy Bay v. Fed. Nat'l Mortg. Ass'n* (2018) provides a pre-emption analysis and the courts order to pre-empt NRS 116.3116. This exempts FHFA property from the effects of NRS 116 statutory liens, super priority liens and nonjudicial foreclosure.

Nevada HOA's fail to consider Nevada law requiring the HOA to mediate (NRS 116.4116, NRS 38.310) and adjudicate disputed claims before taking action to enforce payment (NRS 649.375). Instead, HOA's take action to enforce payment by non-judicial foreclosure and circumvent the statutes and abridging the homeowners rights and ability to dispute claims for breach of contract (CCR's) and money damages. The disputed claims are not subjected to an interpretation of the CCR's, they are simply foreclosed to collect a debt.

Notices from the HOA, community managers and collection agencies are sent to homeowners falsely representing the "character, amount, and legal status" of the debt. The collection process is does not comply with NRS 116.4117 or NRS 38.310. The HOA's foreclosure of a super priority lien and FHFA property is based on NRS 116.3116, a state statute in conflict with federal statutes and pre-empted by the Nevada Supreme Court. The Nevada Supreme Court has held that NRS 116.3116 conflicts with the Federal Foreclosure Bar. Pre-empted statutes do not convey legal authority to allow enforcement of payment or the foreclosure of FHFA property.

HOAs and the collection agencies disregard Nevada's Fair Debt Collection Act (NRS 649.370, §1692f(6)) which specifically prohibits "taking or threatening to take any nonjudicial action" against property protected by other law. FHFA property is protected by a number of statutes!

The process used by HOA's to sell FHFA property is not based on the statutes, it depends on on deceptive and false representation of the "character and legal status" of the debt. The deception carries through to the "Trustees Deed" issued at the sale of FHFA property stating "compliance with the statutes". If the disputed claims for assessments and money damages requires mediation and adjudication before enforcement of payment or foreclosure under the law, the non-judicial foreclosure FHFA property is based on a false premise that the HOA has legal authority to enforce payment and foreclose.

The implicit conflict and pre-emption of NRS 116.3116 is an obstacle preventing the HOA from having the statutory authority necessary to apply liens, including super priority liens to FHFA property or the legal authority to non-judicially foreclose FHFA property. The HOA's failure to mediate disputed claims is a problem. The Nevada Fair Debt Collection Practice Act (649.370) includes a specific prohibition §1692f(6) against non-judicial foreclosure that applies to FHFA property. In addition the statute provides consumer protections against HOA's using misleading information, unfair or unconscionable means to collect or attempt to collect any debt.

FHFA has not consented to the foreclosure or sale of any FHFA property in Nevada.

QUESTIONS: NRED Advisory Opinion:

1. To what extent does the Nevada Supreme Court's order to pre-empt NRS 116 in the case *Saticoy Bay v. Fed. Nat'l Mortg. Ass'n* (2018), limit the statutory authority of a Nevada Homeowners Association to attach and perfect liens and super-priority liens to Federal Housing Finance Agency ("FHFA") property or to enforce payment by non-judicially foreclosing property financed by the Federal Housing Finance Agency (FHFA) when FHFA does not consent to such action?
2. What is the legal process for HOA's attempting to settle disputed claims against homeowners for alleged unpaid HOA assessments, breach of contract involving CCR's or money damages?
3. What "Remedies" (NRS 116.1114) exist under Nevada law to compensate homeowners for damages related to the non-judicial foreclosure of FHFA property, based on the HOA's false representations of the "character, amount or legal status" of claims, or the HOA's actions to enforce payment by non-judicially foreclosing and selling FHFA property that constitute an "action which cannot legally be taken" ?

Thank you for your time and interest.

Sincerely,



Sarah Witt

Additional petitioners: