

1 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

2 BANK OF NEVADA, A Nevada
3 Banking Corporation,
4 Appellant,
5 vs.
6 MURRAY PETERSEN, an
7 individual,
8 Respondent.

Supreme Court Case No.: 66568
Electronically Filed
D.C. Case No. CA062016
October 6, 2016 01:25 p.m.
Tracie K. Lindeman
Clerk of Supreme Court

9 **APPEAL**

10 **From the Eighth Judicial District Court,**
11 **The Honorable Kenneth Cory, District Judge**

12 **PETITION FOR EN BANC RECONSIDERATION**

13
14
15 David Mincin, Esq.
16 Nevada Bar No. 5427
17 MINCIN LAW, PLLC
18 528 S. Casino Center, #325
19 Las Vegas, Nevada 89101
20 Telephone: (702) 589-9881
21 Facsimile: (702) 589-9882
22 dmincin@mincinlaw.com

23
24
25 *Attorney For Respondent Murray Petersen*
26
27
28

1 **PETITION FOR EN BANC RECONSIDERATION**

2 Respondent Murray Petersen (“Petersen”) hereby petitions this court
3 under NRAP 40A (a) to rehear and reconsider the Opinion entered on August
4 12, 2016 en banc. Reconsideration is requested on the grounds that
5 reconsideration by the full court is necessary to insure uniformity of decisions
6 of this court and because this proceeding involves substantial precedential and
7 public policy issues.

8 As the Court is familiar the decision issued in this case primarily
9 revolved around interpretation and application of the unpublished *Lavi v.*
10 *Eighth Judicial Dist. Court of State ex rel. County of Clark*, 325 P.3d 1265, 130
11 Nev. Adv. Op. 38 (2014) which in turn cited and relied upon prior published
12 precedent *Walters v. Eighth Judicial Dist. Court of State ex rel. Cnty. of Clark*,
13 127 Nev. 723, 263 P.3d 231 (Nev. 2011).¹ Petersen respectfully submits that
14 the Opinion issued in this case implicitly, if not explicitly, marks a policy
15 departure from both previously published and even recently published
16 precedent which apply and interpret the anti-deficiency statutes strictly. *Badger*
17 *v. Eighth Jud. Dist. Ct.*, 132 Nev. Adv. Op. 39, 373 P.3d 89 (2016).² Petersen
18 further submits that rehearing is appropriate because these policy considerations
19 have been overlooked in the Opinion.

20 Specifically, the Court’s Opinion in this case found that requiring the
21 lender to file an amended complaint or otherwise timely file an application for a

22
23 ¹ Pursuant to NRAP 40(2)(A) *Lavi* was discussed in detail on pages 7, 8
24 and 12 of Respondents Answering Brief filed April 8, 2015 and *Walters* was
25 discussed in detail on pages 9, 10 and 12 of Respondents Answering Brief filed
April 8, 2015

26 ² *Badgers* was not cited or discussed in Respondents Answering Brief
27 filed April 8, 2015 as the decision was not published until after briefing and oral
28 argument was completed.

1 deficiency would be akin to forcing it to engage an “idle act.” See Opinion,
2 page 15. However, Petersen believes that what this Court has perceived to be
3 an “idle act” is in fact an important procedural safeguard, the removal of which
4 has undermined the primary policies of the anti-deficiency statutes. Rehearing
5 should be granted because this Court has overlooked and misapprehended the
6 importance of applying the procedural barriers imposed by NRS Chapter 40
7 strictly rather than viewing them as superfluous acts which can be disregarded
8 without consequence to the party seeking a deficiency.

9 Standard For Petition For Reconsideration En Banc.

10 NRAP 40A(a) provides as follows:

11 En banc reconsideration of a decision of a panel of the Supreme Court is
12 not favored and ordinarily will not be ordered except when (1)
13 reconsideration by the full court is necessary to secure or maintain
14 uniformity of decisions of the Supreme Court or Court of Appeals, or (2)
the proceeding involves a substantial precedential, constitutional or
public policy issue.

15 Legal Argument

16 Reconsideration en banc should be granted in this case for two reasons.
17 First, as demonstrated below, the decision entered in this case qualifies as one
18 that is contrary to the tenor of a prior, published opinion, *Badger v. Eighth Jud.*
19 *Dist. Ct.*, 132 Nev. Adv. Op. 39, 373 P.3d 89 (2016).

20 Second, the deficiency judgment issues raised in this proceeding have
21 great impact beyond just the parties involved. AB 273 and subsequent
22 amendments to the anti-deficiency statutes were enacted by the legislature to
23 address the mortgage crisis that pervaded the Nevada economy and there are
24 presumably hundreds if not thousands of anti-deficiency lawsuits that could be
25 impacted by the decree of this court in this case.

1 Though it was not a published decision, *Lavi*, supra., relied heavily on the
2 published decision of *Walters*, supra., and it has been looked upon extensively
3 by the Nevada trial courts as persuasive authority when presiding over
4 deficiency lawsuits. In light of the importance of this precedence, Petersen
5 requests rehearing because he believes the decision rendered in this appeal
6 marks a strong departure from this Court's prior strict interpretation of the anti-
7 deficiency statutes. This court's prior jurisprudence interpreted the anti-
8 deficiency statutes strictly which in turn fulfilled the underlying purpose of the
9 statutes of providing strong substantive and procedural safeguards for
10 borrowers who are often facing financial annihilation against highly
11 sophisticated adversaries with nearly unlimited legal resources.

12 The apparent differing viewpoints between justices inherent in this
13 court's prior jurisprudence is identified in the *Lavi* dissent wherein the dissent
14 submitted as follows:

15 Third, new NRS 40.495(4), which applies specifically to suits against
16 guarantors who have given NRS 40.495(2) waivers, confirms that, in this
17 context, NRS 40.455 and NRS 40.459 do not apply because they are
inconsistent with NRS 40.495(4) and do not require an "application"
beyond the pre-foreclosure complaint against the guarantor.

18 *Lavi*, supra., Dissent, p. 7.

19 By contrast, the *Lavi* majority rejected this argument and ultimately held
20 as follows:

21 BB & T's interpretation that waiving the one-action rule also frees an
22 obligee from complying with the provisions of NRS 40.455 is
23 unreasonable. NRS 40.495(2) focuses on maintaining a separate action;
nothing in the subsection implies that it also terminates the procedural
requirements for that action.

24 *Lavi*, supra., p. 5.

25 ///

26 ///

27

28

1 Stated another way, what has been deemed to be idle and superfluous acts
2 by the *Lavi* dissent, has been viewed as important procedural safeguards by the
3 majority. Petersen submits that the majority position stated in *Lavi* follows
4 strong precedent from this Court and courts from many jurisdictions which have
5 interpreted state anti-deficiency statutes strictly due to the policy consideration
6 of insuring that strong procedural and substantive safeguards are in place to
7 protect borrowers. As an example, the Arizona courts have held as follows:

8 Statutory anti-deficiency protection reflects a legislative policy decision
9 to place the risk of inadequate security on lenders rather than borrowers,
10 and is intended to discourage purchase money lenders from over-valuing
real property by requiring them to look solely to the collateral for
recovery in the event of foreclosure.

11 *Helvetica Servicing, Inc. v. Pasquan*, 277 P.3d 198, 229 Ariz. 493 (Court
12 of Appeals of Arizona, Division 1, 2012).

13 As was also recently held in *Badger v. Eighth Jud. Dist. Ct.*, 132 Nev.
14 Adv. Op. 39, 373 P.3d 89 (2016):

15 Indeed, “the Legislature has shown a strong inclination towards
16 protecting an obligor's rights under the antideficiency statutes.” *Lavi v.*
17 *Eighth Judicial Dist. Court*, 130 Nev. —, —, 325 P.3d 1265, 1268
18 (2014). Accordingly, Nevada's deficiency judgment statutes are intended
19 not only to protect borrowers, but to protect guarantors as well. *Shields*,
102 Nev. at 621, 730 P.2d at 432. Such protection furthers Nevada public
policy goals because “[a] guarantor is the favorite of the law.” *Tri-Pac*.
Commercial Brokerage, Inc. v. Boreta, 113 Nev. 203, 206, 931 P.2d 726,
729 (1997) (citation omitted).

20 *Id.*, 373 P.3d at 93-94.

21 *Badger* concluded as follows:

22 Having considered the parties' filings and the attached documents, we
23 choose to entertain the Guarantor's petition for a writ of mandamus. In
24 doing so, we conclude that the district court erred in permitting Omni's
25 Amended Borrower Complaint to relate back to the timely Borrower
Complaint pursuant to NRCP 15(c), so as to satisfy the six-month
deadline for an application for a deficiency judgment required by NRS
40.455(1).

26 *Id.*, 373 P.3d at 96.

1 While *Badger* addressed different issues than this appeal, the tenor of
2 *Badger* is in conflict with the tenor of the Court's Opinion in this appeal.
3 Specifically, *Badger* stands for the underlying proposition that in spite of the
4 general rule of interpreting and applying pleadings liberally in most garden
5 variety civil actions³, this liberality does not extend to NRS Chapter 40
6 deficiency actions.

7 In this case the District Court ruling ultimately hinged on a simple
8 interpretation of the statute and on simple facts.⁴ The District Court applied a
9 very simple interpretation that an "application" for a deficiency under NRS
10 40.455 must be filed within 6 months of the foreclosure date, whether its
11 deemed an application for a deficiency hearing or a motion for summary
12 judgment as contemplated by *Walters*. Specifically, the District Court ruled at
13 the hearing "I tend to agree that it does not necessarily require an amendment to
14 the Complaint but, you know, a literal reading of 455 just says an application
15 for a deficiency judgment. That sounds like a motion to me."(III JA at 557-558).

16 Although Petersen may have waived the one-action rule (II JA AA352-
17 361) there is no Nevada case which suggests that the 6 month limitation
18 prescribed by NRS 40.455 can be waived. Under NRS 40.455(1) a judgment
19 creditor must apply for a deficiency judgment "within 6 months after the date of
20 the foreclosure sale or the trustee's sale" An application for a deficiency
21 judgment must be in writing, "set forth in particularity the grounds for the
22

23 ³ See for instance NRCP 15 (a) leave shall be freely given to amend the
24 pleadings, and also NRCP 15 (b) permitting the amendment of pleadings even
25 after trial to conform to the evidence.

26 ⁴ Pursuant to NRAP 40(2)(A), the arguments raised on this page and on
27 the following pages were raised on pages 4, 5, 7, 8 and 10 thru 12 of
28 Respondents Answering Brief filed April 8, 2015

1 [deficiency] application, set forth the relief sought" and be filed within six
2 months after the foreclosure sale. *Walters v. Eighth Judicial Dist. Court of State*
3 *ex rel. Cnty. of Clark*, 263 P.3d 231, 232-35 (Nev. 2011).

4 No "application" of any kind was filed by Bank until the untimely motion
5 for summary judgment was filed on January 6, 2014 (II JA AA 161-410). Here
6 the bank has failed to apply for a deficiency within 6 months of foreclosure.

7 While the trial court's ruling could possibly be viewed as harshly leading
8 to a forfeiture (see *Lavi*, supra., Dissent, p. 12), it is not harsh when placed in the
9 context of the anti-deficiency statutes. The banks that make, hold and enforce
10 the commercial loans that come under NRS Chapter 40 are highly sophisticated
11 entities that have almost unlimited legal resources. The "harshness" that is
12 perceived to have been generated by the District Court's decision that its claims
13 are time barred due to procedural failings is not harsh at all when placed within
14 the policy consideration of placing strong procedural barriers in the way of what
15 usually emerges as the financial annihilation that results when distressed
16 commercial borrowers are sued.

17 The imposition of making a creditor formally seek a deficiency within 6
18 months of a foreclosure does not mandate an idle act nor does it cause an unjust
19 and harsh result in deficiency actions. The District Court's ruling correctly
20 applied strict procedural barriers that were imposed by the legislature for strong
21 public policy reasons. The District Court ruling that the Bank's claims were
22 time barred was correct and should not have been overturned.

23 ///

24

25

26

27

28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CONCLUSION

Petersen requests rehearing so that this appeal may be reconsidered en banc in light of longstanding policy considerations that were affirmed recently in *Badger v. Eighth Jud. Dist. Ct.*, 132 Nev. Adv. Op. 39, 373 P.3d 89 (2016) and which require that Bank of Nevada’s claims are time barred due to failure to timely apply for a deficiency judgment.

DATED this 6th day of October, 2016.

MINCIN LAW, PLLC

By:  /s/ David Mincin
David Mincin, Esq.
Nevada State Bar No. 5427
528 S. Casino Center, #325
Las Vegas, Nevada 89101
*Attorney for Respondent,
Murray Petersen*

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28

- 2
- 3
- 4
- 5

6
7

8
9
10

11
1213
14

15

16

17

18

19

21

22
23
24

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury, that I am over the age of eighteen (18) years, and I am not a party to, nor interested in, this action.

On the 6th day of October, 2016, I caused to be served a true and correct copy of the foregoing PETITION FOR EN BANC RECONSIDERATION upon the following by the method indicated:

- ☐ **BY E-MAIL:** by transmitting via e-mail the document(s) listed above to the e-mail addresses set forth below and/or included on the Court's Service List for the above referenced case.
- ☐ **BY U.S. MAIL:** by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Las Vegas, Nevada addressed as set forth below.
- ☒ **BY ELECTRONIC SUBMISSION:** submitted to the above-entitled Court for electronic filing and service to the persons listed as follows:

Michael Stein, Esq.
Bradley Austin, Esq.
Attorneys For Appellant



An employee of Mincin Law, PLLC