IN THE SUPREME COURT OF THE

STATE OF NEVADA

TITLEMAX OF NEVADA, INC., A NEVADA CORPORATION, Appellant, vs. THE STATE OF NEVADA DEPARTMENT OF BUSINESS AND INDUSTRY, FINANCIAL INSTITUTIONS DIVISION, Respondent.	**Supreme Court No.** 69807 District Court Case No.: A719176

Appeal from Eighth Judicial District Court, State of Nevada, County of Clark
The Honorable Valerie Adair, District Judge

OPPOSITION TO MOTION TO DISMISS OR ALTERNATIVELY STAY THE APPEAL AND REQUEST TO CLARIFY THE ISSUE ON APPEAL

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INTRODUCTION

This case involves the Financial Institutions Division's ("FID") attempt to deprive TitleMax of its right to seek declaratory relief on questions of statutory interpretation by commencing a separate administrative action against TitleMax. By asserting issues of fact when none existed, the FID (1) convinced the lower court to dismiss; and (2) engaged in forum shopping before a friendlier administrative tribunal. Now, the FID seeks to deny TitleMax of its right to appeal the lower court's erroneous determination.

STATEMENT OF PROCEEDINGS

The procedural facts are undisputed and telling:

TitleMax filed a declaratory judgment action seeking a statutory interpretation of "any interest" versus "any additional interest" in NRS 604A.210. The FID proposed a Chapter 29 proceeding; TitleMax declined. The FID filed a motion to dismiss, alleging questions of fact; simultaneously, the FID filed an Administrative Complaint seeking revocation of TitleMax's license. The lower court granted the motion to dismiss; TitleMax appealed. The FID's hearing officer refused to stay the administrative proceeding pending this appeal. The hearing officer then decided the legal interpretation issue as proposed by the FID and found a "willful" violation; TitleMax has petitioned for judicial review. The FID now argues that TitleMax's first appeal, this appeal, should be dismissed or stayed.

Seeing the FID's gamesmanship for what it is, this Court should deny the FID's motion.

STATEMENT OF FACTS

A. Enactment of A.B. 384 and its Legislative History.

In 2005, the Legislature adopted Assembly Bill ("A.B.") 384, a comprehensive overhaul to payday and title lending, resulting in the creation of the two statutes at issue, NRS 604A.210 and NRS 604A.445. NRS 604A.210 specifically authorizes a lender to offer a grace period on the repayment of a loan if the lender does not charge any (a) fees for the granting of such a grace period; or (b) additional interest on the outstanding loan during the grace period. NRS 604A.210 places no other limitations on the offering of a grace period and, notably, does not define "additional interest." Meanwhile, NRS 604A.445 separately governs the length of title loans and their extensions, and (by its very terms) has no application to grace periods under NRS 604A.210.

Section 23 of A.B. 384, as originally proposed, would have prohibited a lender from continuing to charge any interest whatsoever, barring even the originally contracted rate of interest on unpaid principal during the grace period. *See* Assemb. Daily Journal, 73d Leg., at 84 (Nev., April 25, 2005) (excluding "[a]ny fees or interest on the outstanding loan during such a grace period"). In May 2005, the Legislature specifically added "additional" before "interest" to A.B.

384, and this version ultimately became NRS 604A.210. *See* Assemb. Daily Journal, 73d Leg., at 63 (Nev., May 26, 2005); 2005 Nev. Stat., ch. 414, § 23, at 1686. This change was made *after* lengthy consultation, negotiation, and agreement with the lending industry. *See* Hearing on A.B. 384 Before the Senate Comm. on Commerce & Labor, 73d Leg. (Nev., May 6, 2005).

B. The FID Acknowledges Ambiguity in NRS 604A.210 and Drafts a Proposed Interpretive Regulation.

In 2012, the FID conducted a public workshop to consider proposed regulations for NRS Chapter 604A, including the topic of grace periods. At that workshop, the FID introduced a proposed regulation, entitled, "Grace Period Limitation," which stated in part: "During a grace period, no interest shall accrue and no fees shall be charged after expiration of the loan period."[1]

Deputy Commissioner Carla Kolebuck acknowledged that "some ambiguity exists in the statutes, and that a possible interpretation would permit the contract rate of interest to be charged during a grace period so long as it is not considered 'additional interest or fees' on the loan."[2]

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[1]*See* Nev. Dep't of Bus. & Indus., Fin. Insts. Div., *Notice of Workshop to Solicit Comments on Proposed Regulations* (Sept. 21, 2012), *available at* http://fid.nv.gov/uploadedFiles/fidnvgov/content/Opinion/Propoosed_Regulations/2012-09-21_NoticeOfWorkshop604A.pdf.

[2]Nev. Dep't of Bus. & Indus., Fin. Insts. Div., *NAC 604A Workshop Minutes*, at para. 4-B-3 (Oct. 10, 2012), *available at* http://fid.nv.gov/uploadedFiles/fidnvgov/content/Opinion/*Proposed_Regulations/NAC604A_2012-10-10.pdf.*

Given the admitted ambiguity, the FID proposed a regulation that would have prohibited the collection of *any interest* in excess of the amount disclosed in the original loan agreement. The proposed regulation paralleled the language of the proposed statute (Section 23 of A.B. 384). Neither were ever adopted.

C. TitleMax and the FID Disagree Over the Meaning of NRS 604A.210.

The FID examined TitleMax in 2014 and 2015 and issued written Reports of Examination in which it cited TitleMax for violating NRS 604A.210 and NRS 604A.445 as a result of TitleMax's Grace Period Deferment Agreement. 2 JA 349. The FID concluded that a violation occurred because the grace period TitleMax offered resulted in a loan obligation "higher than the total amount owed under the original loan agreement." *Id.* at 350. In effect and without any legal support, the FID cited TitleMax for violating NRS 604A.210 based on (1) the interpretation Ms. Kolebuck tried to address in her proposed regulation; and (2) an interpretation of NRS 604A.210 based on the original Section 23 of A.B. 384 that was never adopted.

D. TitleMax Commences the Lower Court Action; the FID Concedes a "Good Faith" Dispute.

The dispute between the FID and TitleMax (i) was solely legal and turned on the interpretation of the applicable law, and (ii) did not involve rate making and licensing. In addition, no administrative procedure for challenging an FID Report of Examination under NRS Chapter 604A and NRS Chapter 233B existed. Thus,

TitleMax sought declaratory relief in the form of an interpretation of NRS 604A.210 and NRS 604A.445. 1 JA 2-5, 13-16. TitleMax sought no damages, attorney fees, or costs. *Id.* at 5, 16.

The FID proposed converting the matter into an NRS Chapter 29 proceeding, where the parties would jointly seek an interpretation of the law. In exchange, the FID would refrain from commencing an administrative proceeding.[3] NRS Chapter 29 requires the parties to file an affidavit with the court swearing under penalty of perjury that the dispute is "in good faith." Although TitleMax ultimately rejected converting the matter, the FID's proposal for a special proceeding under NRS Chapter 29 effectively conceded that the legal dispute over the interpretation of the law was in "good faith."

On October 6, 2015, the FID moved to dismiss the lower court action for failure to exhaust administrative remedies. 1 JA 50-70. Notably, that same day, the FID filed an Administrative Complaint for Disciplinary Action and Notice of Hearing. The FID sought revocation or suspension of TitleMax's license. *Id.* at 108. The FID also sought maximum fines and a finding of "willful violations"—remedies sought in retaliation for the declaratory relief action. The lower court dismissed TitleMax's declaratory relief action without addressing *Malecon Tobacco, LLC v. State*, 118 Nev. 837, 59 P.3d 474 (2002), particularly (1) the

[3] *See* **Exhibit "A"** attached hereto.

futility doctrine; and (2) the exception to exhausting administrative remedies when only questions of statutory interpretation are presented. 3 JA 522-23.

Though the FID had repeatedly attempted to cast its administrative complaint as fact-based, there was, and is, no factual dispute that TitleMax offered a grace period, and no factual dispute over the terms of the grace period offered. Yet, the hearing officer refused to stay the proceedings pending the outcome of this appeal, scheduled an administrative hearing (creating the very "two proceeding" problem of which the FID now complains), and ruled against TitleMax on the "any interest" versus "any additional interest" legal interpretation. The FID hearing officer's order amounted to little more than a rubberstamp of the FID's "any interest" interpretation of NRS 604A.210 and NRS 604A.445. Indeed, the administrative hearing was revealed for what it was—an attempt by the FID to obtain an opinion affirming the FID's "any interest" interpretation in a friendly administrative forum. Worse yet, the hearing officer found that TitleMax had acted willfully, even though (i) the FID previously conceded a "good faith" disagreement by requesting to convert the matter into an NRS Chapter 29 proceeding; (ii) the FID previously admitted that the underlying statutes were ambiguous and that the interpretation that TitleMax espoused was a "possible interpretation"; and (iii) TitleMax attempted to obtain a judicial interpretation in the lower court proceeding.

ARGUMENT

I. The FID Improperly Constructed Issues of Mootness to Deprive TitleMax of its Legal Right to Seek Declaratory Relief on Questions of Statutory Interpretation.

This Court generally refrains from resolving moot issues because doing so would result in advisory opinions, which are non-justiciable. *See Personhood Nev. v. Bristol*, 126 Nev. 599, 602, 245 P.3d 572, 574 (2010). However, TitleMax's appeal—which specifically concerns its efforts to obtain a judicial interpretation of the law and the FID's deliberate attempt to circumvent that right by commencing a separate administrative proceeding—is very much justiciable. Indeed, the FID seeks to be rewarded for deliberately ignoring three published Supreme Court cases—*Malecon Tobacco*, *NAS*, and *Check City* (see *supra*)—and engaging in brazen forum shopping. Such conduct should not be rewarded.

This appeal presents an issue of widespread importance. Specifically, whether an administrative agency can deprive litigants of their right to seek declaratory relief on the interpretation of a statute under NRS 30.040 by subsequently filing administrative complaints in a deliberate attempt to render moot the declaratory relief action. In this case, the FID falsely asserted to the lower court that this case involved questions of fact in the hope of moving the proceedings to an administrative forum, where it would no doubt receive "home cooking" and, it apparently hopes, a more deferential standard of review on appeal.

These hopes are without foundation, as the hearing officer's decision involved pure questions of law that will be subject to a *de novo* review. *See Educ. Initiative v. Comm. to Protect Nev. Jobs*, 129 Nev. 35, 41, 293 P.3d 874, 878 (2013).

This Court should consider this appeal because of the likelihood that the State—if successful—will use this same dubious tactic in the future. As demonstrated by the fact that the FID filed the Administrative Complaint the same day it moved to dismiss the lower court action for failure to exhaust administrative remedies, the FID posits it has the power to cut short a litigant's right to seek declaratory relief by instantly filing an administrative complaint, then later invoking mootness and/or lack of jurisdiction to avoid appellate review. *See* 1 JA 50-70, 96-187. Moreover, this same issue has a likelihood of arising in the future, as it is "pattern and practice" for the FID to invoke (in error) the exhaustion doctrine. *See State v. Check City P'ship, LLC*, 130 Nev., Adv. Op. 90, 337 P.3d 755, 758 n.5 (2014); *State v. Nev. Ass'n Servs., Inc.*, 128 Nev. 362, 370, 294 P.3d 1223, 1228 (2012). Thus, this Court should consider TitleMax's appeal and determine whether the lower court properly had jurisdiction to interpret NRS 604A.210 and NRS 604A.445.

A. Administrative *Res Judicata* Does Not Render this Case Moot.

The FID argues "this Court is unable to grant effective relief should there be a reversal" because "a second hearing on the same facts will be barred by

administrative res judicata."[4] Motion, at 7. This argument is meritless because (1) the administrative is being reviewed and is not *res judicata*; (2) questions of fact were not properly before the hearing officer and (2) this doctrine only affects factual determinations and does not render moot TitleMax's claim for declaratory relief, where only questions of law were presented. *See Tom v. Innovative Home Sys., LLC*, 132 Nev., Adv. Op. 15, 368 P.3d 1219, 1224 (2016) ("Claim and issue preclusion can apply in the administrative context when an administrative agency is acting in a judicial capacity and resolves *disputed issues of fact* properly before it which the parties have had an opportunity to litigate.").

II. Judicial Economy Supports Considering this Appeal and Denying the FID's Request for Stay.

The FID argues that judicial economy would be best served by staying this appeal until the petition for judicial review "work[s] its way toward this Court" because, by that time, "this Court will then have the entire record before it for review and would only have to consider these issues once." Motion, at 8-9. The FID, however, has already ignored principles of judicial economy by filing the Administrative Complaint and creating a separate proceeding. *See* 1 JA 96-187.

[4]The FID's citation to Rule 19 of the Rules of the District Courts makes little sense. *See* Motion, at 8 & n.2. Rule 19 has no effect on *this* Supreme Court and *its* ability to consider this appeal. Moreover, remanding a matter to the district court for a legal interpretation in the first instance is distinguishable from refiling the same application or motion with a different judge when it is pending or has been denied.

TitleMax has consistently pursued its claim for declaratory relief based solely on issues of statutory interpretation. *See id.* at 15-16, 20, 31. Thus, this Court should consider this appeal because the question of whether the lower court had jurisdiction is properly before this Court. Any potential inefficiencies are the result of the FID's maneuvering to deprive TitleMax of its right to seek declaratory relief. *See* NRS 30.040.

III. Clarification Is Only Necessary to the Extent this Court Decides to Address the Merits of the Declaratory Relief Action.

The FID seeks clarification of whether the issues on appeal should be limited to the motion to dismiss or should also include briefing on the merits of the declaratory relief action. Because the district court denied as moot TitleMax's motion for summary judgment after it granted the FID's motion to dismiss, the district court did not rule in the first instance on the merits of the declaratory relief action. Thus, on appeal, TitleMax limited the issues to whether the district court erred in concluding it lacked jurisdiction and erred in its failure to apply the futility exception to the administrative exhaustion doctrine. *See* AOB 2-3. If this Court decides to address the merits of the declaratory relief action and interpret NRS 604A.210 and NRS 604A.445, TitleMax respectfully requests leave to amend its opening brief to include said analysis.

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CONCLUSION

In light of the foregoing, TitleMax respectfully requests that this Court deny the FID's motion to dismiss or alternatively stay the appeal.

Dated: September 22, 2016.

HOLLAND & HART LLP

By_____

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I electronically filed the forgoing **OPPOSITION TO MOTION TO DISMISS OR ALTERNATIVELY STAY THE APPEAL AND REQUEST TO CLARIFY THE ISSUE ON APPEAL** with the Clerk of Court for the Supreme Court of Nevada by using the Supreme Court of Nevada's E-filing system on September 22, 2016.

I further certify that all participants in this case are registered with the Supreme Court of Nevada's E-filing system, and that service has been accomplished to the following individuals through the Court's E-filing System:

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EXHIBIT "A"

Patrick Reilly

From: Christopher A. Eccles <CEccles@ag.nv.gov>
Sent: Thursday, July 23, 2015 12:15 PM
To: Patrick Reilly
Cc: David J. Pope
Subject: RE: Joint Declaratory Relief

Harveen said the report is going out today or tomorrow. FID will not bring an administrative complaint if we agree to a Chapter 29. Please let me know and thanks.

Chris Eccles
Deputy Attorney General

From: Patrick Reilly [mailto:PReilly@hollandhart.com]
Sent: Thursday, July 23, 2015 10:39 AM
To: Christopher A. Eccles
Cc: David J. Pope
Subject: RE: Joint Declaratory Relief

Chris,

I never heard back as to whether the Division would actually commit to refrain from commencing an administrative proceeding in the event that the parties agree to convert the matter to a Chapter 29 proceeding. Can you please let me know?

Also, has an Unsatisfactory actually been issued yet?

Thanks.

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From: Christopher A. Eccles [mailto:CEccles@ag.nv.gov]
Sent: Wednesday, July 15, 2015 11:12 AM
To: Patrick Reilly
Cc: David J. Pope
Subject: RE: Joint Declaratory Relief

Yes, you heard wrong. TitleMax did receive a "Needs Improvement" rating last year. My understanding is that if the examiners found substantially the same issues this year, then TitleMax may be rated "Unsatisfactory." The latter rating is typically when the Divisions refers the matter to the AG for possible action such as an administrative complaint.

I think that if we agree to a Chapter 29, it is unlikely that the Division would proceed with an administrative compliant even if TitleMax receives an Unsatisfactory rating, until we receive a ruling from the judge. I will talk to the client today to confirm this.

Thanks,

Chris Eccles
Deputy Attorney General

From: Patrick Reilly [mailto:PReilly@hollandhart.com]
Sent: Wednesday, July 15, 2015 8:52 AM
To: Christopher A. Eccles
Cc: David J. Pope
Subject: RE: Joint Declaratory Relief

Thanks Chris. Just as a follow up, I understood from our conversation that TitleMax had received an Unsatisfactory last year and was about to get another one this year. I went back to the Complaint, however, and saw that last year was merely a "Needs Improvement." Did I just hear you wrong? And what does that mean in terms of possible administrative proceedings if TitleMax does not agree to convert the action to a Chapter 29 proceeding?

Pat

From: Christopher A. Eccles [mailto:CEccles@ag.nv.gov]
Sent: Tuesday, July 14, 2015 6:50 PM
To: Patrick Reilly
Cc: David J. Pope
Subject: RE: Joint Declaratory Relief

Thanks, Pat. Yes, I agree that if we convert to a Chapter 29 we should set our briefing schedule by stipulation. Please let me know when you have an answer from your client.
Thanks,

Chris Eccles
Deputy Attorney General

From: Patrick Reilly [mailto:PReilly@hollandhart.com]
Sent: Monday, July 13, 2015 11:29 AM
To: Christopher A. Eccles
Cc: David J. Pope
Subject: RE: Joint Declaratory Relief

I'm checking with the client. The initial response to your suggestion to covert the action to a Chapter 29 proceeding was favorable and I should have a formal response shortly. Assuming TitleMax is agreeable to converting the action to a Chapter 29 dispute, we could simply set a briefing schedule by stipulation.

Thanks.

From: Christopher A. Eccles [mailto:CEccles@ag.nv.gov]
Sent: Monday, July 13, 2015 10:10 AM
To: Patrick Reilly
Cc: David J. Pope
Subject: RE: Joint Declaratory Relief

Are you agreeable to an extension the 31st?
Thanks,

Chris Eccles
Deputy Attorney General

From: Patrick Reilly [mailto:PReilly@hollandhart.com]
Sent: Monday, July 13, 2015 10:03 AM
To: Christopher A. Eccles
Cc: David J. Pope
Subject: RE: Joint Declaratory Relief

I have not had a chance to talk with the client but hope to today. If you need an extension on anything, please let me know.

Thanks.

From: Christopher A. Eccles [mailto:CEccles@ag.nv.gov]
Sent: Monday, July 13, 2015 9:41 AM
To: Patrick Reilly
Cc: David J. Pope
Subject: Joint Declaratory Relief

Hi Pat,

Is there any headway on the possibility of TitleMax converting to a Chapter 29? It's an awesome (and short) chapter! The whole chapter is copied below. We think that this is the quickest way to a judge's interpretation.

Please let us know and thanks.

CHAPTER 29 - SUBMITTING A CONTROVERSY WITHOUT ACTION

NRS 29.010 Submission of a controversy without action. Parties to a question in difference, which might be the subject of a civil action, may, without action, agree upon a case containing the facts upon which the controversy depends, and present a submission of the same to any court which should have jurisdiction if an action had been brought. But it must appear, by affidavit, that the controversy is real, and the proceedings in good faith, to determine the rights of the parties. The court shall thereupon hear and determine the case and render judgment thereon, as if an action were pending.

[1911 CPA § 310; RL § 5252; NCL § 8808]

NRS 29.020 Entry of judgment; judgment roll. Judgment shall be entered in the judgment book as in other cases, but without costs for any proceeding prior to the trial. The case, the submission and a copy of the judgment shall constitute the judgment roll.

[1911 CPA § 311; RL § 5253; NCL § 8809]

NRS 29.030 Enforcement and appeal of judgment. The judgment may be enforced in the same manner as if it had been rendered in an action, and shall be in the same manner subject to appeal.

[1911 CPA § 312; RL § 5254; NCL § 8810]

Chris Eccles
Deputy Attorney General