

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 No. A716176
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**RESPONDENTS' REPLY IN SUPPORT OF MOTION TO DISMISS OR
ALTERNATIVELY STAY THE APPEAL AND
REQUEST TO CLARIFY ISSUE ON APPEAL**

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I. INTRODUCTION

The Opposition filed by TitleMax of Nevada, Inc. (“TitleMax”) to the Motion to Dismiss or Alternatively Stay the Appeal and Request to Clarify Issue on Appeal (the “*Motion*”) filed by the Financial Institutions Division (“FID”) is based on three faulty premises. First, TitleMax posits that the issues it presented to the lower court involve no questions of fact - while simultaneously attaching new evidence not contained in the record on appeal. Second, TitleMax denies that its new Petition for Judicial Review (“PJR”) renders this appeal judicially inefficient and moot— notwithstanding that it was the party that declined to stipulate to facts or seek any stay of its PJR. Finally, TitleMax’s concession that in this appeal it “limited the issues” to the district court’s jurisdictional determination, also amounts to a concession that any questions involving the interpretation of NRS Chapter 604A are also not properly before this Court.

First, though, the procedural facts - which TitleMax erroneously infers have “cut short” its litigation rights - must be clarified. *Opposition at 8*. It should be noted that TitleMax commenced the underlying action before FID had even completed the 2015 examination. (JA 00346; 00002; 00063; 00299-312). The FID does not commence administrative action until after an exam is completed. NRS 604A.820; (JA 00093-94). Here, TitleMax attempted to obtain a judicial determination in advance of any administrative action. (JA 00002; 00299-312). As it now stands, TitleMax has been afforded exactly what the law provides – an administrative hearing

followed by a petition for judicial review, and thereafter review by this Court. NRS 604A.820; NRS 233B.130; NRS 233B.150.

II. ARGUMENT

A. The District Court Properly Found that Factual Questions Exist.

Based on its determination that factual issues existed, the District Court determined it lacked jurisdiction and ordered TitleMax to “exhaust its administrative remedies and, thereafter, seek judicial review by a district court pursuant to Chapter 233B of the NRS.” (JA 00536). In doing so, the court determined that the issues were not questions of pure statutory construction and that exhaustion was not futile.

TitleMax asserts that these determinations of the District Court are in error. Instead, TitleMax contends that there is “no factual dispute that TitleMax offered a grace period.” TitleMax can call it a grace period over and over again, but simply doing so doesn’t make it true. Instead, based on the factual evidence presented during a 2 ½ day evidentiary hearing, the ALJ found that there is **no** grace period, *i.e.* no “period of deferment offered gratuitously” for purposes of NRS 604A.070. *See Motion, Exhibit A (ALJ’s Decision, pp. 8, 11)*. TitleMax is simply asserting that there were no disputed facts when, in fact, there were.¹

¹ In addition, TitleMax focuses on NRS 604A.210 and NRS 604A.445 and ignores the issue related to NAC 604A.230. The District Court ruled that the facts could show that co-borrowers were really “de facto guarantors.” (JA 00517, ln. 12-18). Therefore, the court ruled that a factual issue existed as to whether TitleMax treated co-borrowers as guarantors. (JA 00517). Based on the subsequent administrative hearing, the ALJ found that TitleMax was not treating co-borrowers as

Similarly, TitleMax's assertion that the issues presented below involved no disputed facts is belied by its reliance on new evidence outside the record of this appeal. TitleMax directs this Court to visit a website to view previously proposed regulations - facts outside the record on appeal.² Based on this extra-record evidence, TitleMax argues that FID's failure to act should be construed as an admission that a regulation was needed. *Id.* at 4. Clearly, such an argument is a "weak reed upon which to lean" in construing a statute. 2A C. Sands, Sutherland Statutory Construction, § 49.10 (4th ed. 1984) (citations omitted). Moreover, under the circumstances at issue the "no additional interest" language is not ambiguous. NRS Chapter 604A was created to control the amount loaned as well as the amount to be repaid. Allowing interest to accrue during a grace period is clearly contrary to the

guarantors because they never tried to collect from a co-borrower personally. *Exhibit A*, p. 8. Thus, the ALJ made the factual findings that the District Court said were needed.

² TitleMax continues to pursue the piecemeal litigation by presenting only the facts that it wants this Court to see. Similarly, before the District Court, TitleMax pursued declaratory relief based on its unilaterally chosen and self-proclaimed undisputed facts. If TitleMax had pursued issues of pure statutory interpretation before the District Court, it would not have attached copies of blank contracts to its moving papers and asked the court to consider inferred facts from unexecuted documents. (JA 250-253). Clearly, it would be unfair for this Court to consider the new facts cited by TitleMax without affording the FID that same opportunity. This Court, however, can and should avoid such *ad hoc* and piecemeal litigation by reviewing a complete record if and when the pending PJR is appealed pursuant to NRS 233B.150.

goals.³ However, as the District Court’s dismissal order indicated, under the circumstances of this case such determination requires factual findings. (JA 00536).

B. TitleMax’s PJR Renders this Appeal Judicially Inefficient and Moot.

That the underlying controversy is real is clear - TitleMax has always been obstinately uncooperative with regard to the clear statutory authority and Legislative intent. The parties, however, did *not* agree to convert the underlying case to an NRS Chapter 29 proceeding, which would have involved a stipulation of facts.⁴ Had they done so, TitleMax might now be able to argue the case involved purely statutory interpretation issues. *See Sparks Nugget, Inc. v. State, Dep't of Taxation*, 124 Nev. 159, 163, 179 P.3d 570, 573 (2008) (“Because the parties have stipulated to the operative facts ... the only issue before us involves the interpretation and application of Nevada [law].”). Even now, however, TitleMax continues to assert additional facts - including asking this Court to find there was a concession when there was no such agreement.

Notwithstanding TitleMax’s assertions to the contrary, its new PJR has effectively subsumed this case. When TitleMax commenced the new action, it could have moved the district court to stay the PJR. NRS 233B.140. Among other things,

³ Because a contract rate of interest is not subject to a usury cap, allowing the interest to accrue during a grace period leads to the absurd result of allowing continuous grace periods and accrual of high rates of interest. *Smith v. Kisorin USA, Inc.*, 127 Nev. 444, 448, 254 P.3d 636, 639 (2011) (“[W]e consider ‘the policy and spirit of the law and will seek to avoid an interpretation that leads to an absurd result.’” (citation omitted)).

⁴ NRS 29.010 (requiring the parties to agree to facts, and stating that “it must appear, by affidavit, that the controversy is real, and the proceedings in good faith . . .”).

that would have required TitleMax to post security. *Id.* Having failed to seek a stay, the district court will review the ALJ's Decision, to determine whether the agency's factual determinations are supported by substantial evidence, and whether the relevant law was properly applied to the facts. Presumably, TitleMax exercised its rights before the ALJ and presented its facts and its statutory interpretation arguments. Accordingly, if and when that PJR is appealed to this Court there will be a complete factual and legal record for purposes of judicial review.

C. Statutory Interpretation Issues are beyond the Scope of this Appeal.

Though its second and third issues seek statutory interpretation,⁵ TitleMax now concedes the only issue on appeal is whether the lower court erred in dismissing the case for lack of subject matter jurisdiction. Consequently, this Court should clarify that those two statutory interpretation issues are not properly before this Court.

III. CONCLUSION

Based on the foregoing, the FID respectfully requests the Court grant the

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⁵ See *Docketing Statement* (Docket Entry 16-08064).

Motion to Dismiss or Alternatively Stay the Appeal and Request to Clarify Issue on Appeal.

Dated: September 29, 2016.

ADAM PAUL LAXALT
Attorney General

/s/ DAVID J. POPE

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Motion complies with the formatting requirements of NRAP 27(d), the typeface requirements of NRAP 27(d)(1)(E) and the type style requirements of NRAP 32(a)(6) because this Motion has been prepared in a proportionally spaced typeface using Office Word 2007 in size 14 font in double-spaced Garamond font. This filing also complies with NRAP 32.

I further certify that I have read this Motion and that it complies with the page or type-volume limitations of NRAP 27(d)(2) and NRAP 32 because, it is proportionately spaced, and does not exceed 10 pages.

Finally, I hereby certify that to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires that every assertion in this brief regarding matters in the record to be supported by appropriate references to the record on appeal. I understand that I may be subject to sanctions in the event that the

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accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated: September 29, 2016.

ADAM PAUL LAXALT
Attorney General

/s/ DAVID J. POPE
David J. Pope
Senior Deputy Attorney General

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **RESPONDENT’S MOTION TO DISMISS OR, ALTERNATIVELY, STAY BRIEFING AND REQUEST FOR CLARIFICATION OF ISSUE ON APPEAL** with the Clerk of the Nevada Supreme Court by using the electronic filing system on the 29th day of September, 2016.

The following participants in this case are registered electronic filing systems users and will be served electronically:

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