Greetings Section Members!

My original greeting promised a newsletter three or four times a year. We’re off to a slower start than I imagined, but I hope you find this edition was worth the wait. We welcome comments on the newsletter, including any suggestions for improving the content or topics to address. Please let me know if there is something you would be interested in hearing about. Better yet, write about it! I’m sure many of you have articles or other materials the rest of us would welcome reading. Please share!

If you read the LISTSERV, you know the section legislative proposals were approved by the Board of Governors to be pursued as a section rather than a State Bar initiative. This is consistent with past practice. We’re now seeking to find sponsors for our proposals. I will keep you posted on our progress. Please feel free to e-mail or call me anytime with questions or suggestions.

Our biggest endeavor at present is undertaking creation and publication, through the State Bar Publications Committee, of a Real Property Practice Manual. Our editorial team will be meeting with the Bar’s Communications Director, Jenni Smith-Pulsipher, and her team in early October to review our preliminary outline and divide up the editorial assignments. This is a tremendous undertaking, and we will need a great deal of help. If you are interested in writing on a topic or wish to be involved, please let me know. See the sidebar for a preliminary high-level outline of chapter topics. A more detailed outline can be found on pages 3-4.

As a reminder, the section’s Executive Committee meets the third Tuesday of each month at 4 p.m. via teleconference. Everyone is invited to phone in. The Executive Committee frequently receives requests, at this point mostly from the State Bar, for monetary support for section activities/interests. Among other things, our section has provided financial support for the Bar’s annual meeting, the national moot court competition in Reno and the opening of the Las Vegas Supreme Court Building. As we prepare our 2019 budget to submit to the Board of Governors, I encourage you to let me know if you have any suggestions for programs or events. With approximately 230 members, our annual income is approximately $5,750.

As a final note...if you (or anyone you know) are not subscribed to the LISTSERV, please let me know, and I will add you to the list.

Until next time!

Michael Buckley
Hot Tips Corner

By Michael Buckley, Fennemore Craig

RETAINAGES

Did you know? NRS 624.609 and 624.624 were amended in 2015 to reduce the amount of retainages that may be withheld by the owner from the prime contractor or by the prime contractor from a subcontractor from ten percent to five percent. Unless a lender is familiar with Nevada law, it's customary to find construction loan disbursements limited to 90 percent of a requested construction draw, thus leaving the owner to fund the difference. Most lenders don't seem to have an objection to increasing construction draws to 95 percent, if they are made aware of Nevada law.

UCC FINANCING STATEMENTS COLLATERAL DESCRIPTIONS: TAKE CARE!

The lesson of First Midwest Bank v. Jeana K. Reinbold, Chapter 7 Trustee (In re I80 Equipment, LLC) (Bankr. C.D. Ill., Aug. 20, 2018) was a difficult one for the lender! I80's Chapter 7 bankruptcy trustee sought to avoid the bank's security interest covering substantially all of the debtor's assets. The financing statement described the collateral as “All Collateral described in First Amended and Restated Security Agreement dated March 9, 2015 between Debtor and Secured Party.” First Midwest argued its description satisfied the "any other method, if the identity of the collateral is objectively determinable" standard. See NRS 104.9108(2)(f). The court held otherwise: “First Midwest's financing statement does not describe the collateral. Rather, it attempts to incorporate by reference the description of collateral set forth in a separate document, not attached to the financing statement. The financing statement, on its face, provides no information whatsoever, and therefore no notice to any third party, as to which of the Debtor's assets First Midwest is claiming a lien on, which is the primary function of a financing statement.” As a result, the trustee was entitled to avoid the bank's security interest in the exercise of her strong-arm powers.

By Therese Shanks, Robison Sharp Sullivan Brust

In Frederic and Barbara Rosenberg Living Trust v. MacDonald Highlands Realty, 134 Nev., Adv. Op. 69 (Sept. 13, 2018), the Nevada Supreme Court declined to expand Nevada law to create implied restrictive easements based on a common development scheme that prohibit construction on a parcel. Held, land formerly owned by a golf course was not required to remain part of a golf course where there was no express agreement, no public dedication, and the appellant did not demonstrate the existence of an implied easement across the contested parcel.
Proposed Outline for Real Property Practice Manual
(Cont’d from page 1)

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   2. ADVERSE POSSESSION

B. CONCURRENT OWNERSHIP
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   2. COMMUNITY PROPERTY, PROPERTY HELD BY UNMARRIED COUPLE
   3. COMMON INTEREST COMMUNITIES
   4. TIMEShaRES
   5. TRUSTS

C. EASEMENTS, PROFITS AND LICENSES
   1. EXPRESS
   2. IMPLIED
   3. PRESCRIPTION

D. MINERALS
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II. CONVEYANCING

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   2. REMEDIES, LIQUIDATED DAMAGES
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C. DEEDS
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E. POWERS OF ATTORNEY

F. RECORDING
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G. TRANSFER OF WATER RIGHTS

H. TRANSFER OF MINING CLAIMS

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B. ESCROW SERVICE
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G. DEFAULT AND REMEDIES.
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   3. RESIDENTIAL FORECLOSURES

(Cont’d on Page 4)
Proposed Outline for Real Property Manual
(cont'd from page 3)

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F. LATERAL AND SUBJACENT SUPPORT; PARTY WALLS
G. ADR

TRANSACTIONS AND FORMS
With several new opinions, the Nevada Supreme Court answered many of the questions raised by its 2014 SFR v. U.S. Bank decision. Three recent decisions look at the various defenses raised by first deed of trust holders and provide some answers and create some questions.

With regard to a “tender defense,” the Court held, in Bank of America, N.A. v. SFR Inv’s Pool I LLC (the “BofA Decision”), that a tender of nine months of assessments was sufficient to discharge the layer of superpriority rights as a matter of law, even if the tender was rejected by the HOA or its agents. Id. To arrive at this conclusion, the Court confirmed that a demand to release the subset of superpriority rights was not a “conditional offer.” Id. Ultimately, the Court held that an otherwise valid assessment lien sale was “void” as to the subset of superpriority rights of the assessment lien. Id.

In Wells Fargo Bank, N.A. v. Radecki (the “Radecki Decision”) the Court addressed the equitable defense of a commercially unreasonable sale. In particular, the Court looked at two primary factual arguments: 1) the effect that a pending state court foreclosure lawsuit had on the “fairness” of the assessment lien sale; and 2) the buyer’s belief that the sale was a subpriority sale. The Court held that the mere existence of the litigation did not affect the validity of the sale, and the buyer’s belief did not change the legal effect of the sale. Id.

Regarding the federal court due process challenges, the Court in SFR Inv’s Pool I, LLC and Star Hill Homeowners Ass’n v. Bank of New York Mellon (the “Star Hill Case”) responded to a certified question from the United States District Court and interpreted the foreclosure provisions of NRS 116.31168(1) to require notice to all lienholders and not just those that requested notice. In making this ruling, the Court rejected the holding of the Ninth Circuit in Bourne Valley Court Trust v. Wells Fargo Bank, N.A. Id.

The BofA Decision and the Radecki Decision raise analytical and evidentiary questions. First, in the BofA Decision, it is not clear why any portion of the sale is “void” because the subset of superpriority rights were discharged. Rather, given that the unconditional priority rights of NRS 116.3116(2) apply to the entire lien, the Court could have simply affirmed a valid assessment lien sale of the entire lien with only standard priority that does not extinguish the first deed of trust. The discharge of the subset of superpriority rights does not obviously render any portion of the sale void. Moreover, with the Court’s ruling, the parties must resolve the impact on title of a sale that is deemed partially void and resolve the various claims that affected parties may have.

Second, the Radecki Decision presents an issue where none of the involved parties believed that the assessment lien sale for $4,000 was a superpriority lien sale. The Court did not address this issue, and a reader is left to guess the evidentiary record that allowed the Court to find satisfaction of the subset of superpriority conditions where the evidence suggests they did not exist. As a result, one hopes that the Court will provide guidance on the relative evidentiary burdens of the parties regarding superpriority assessment lien rights.

**Radecki Decision**

By Therese Shanks, Robison Sharp Sullivan Brust

In addition to addressing the issue of whether the association foreclosure sale was commercially unreasonable (Wells Fargo v. Radecki, 134 Nev., Adv. Op. 74 (Sept. 13, 2018)), the Nevada Supreme Court also rejected Wells Fargo’s request to set aside Radecki’s purchase under Nevada’s Uniform Fraudulent Transfer Act on the basis that Radecki’s purchase was a fraudulent transfer under NRS 112.190, holding that homeowner’s association foreclosure sale is an exempt “regularly conducted, noncollusive foreclosure sale” for “reasonable value” under NRS 112.170(2).
Liquidated Damages or Unenforceable Penalty?
What You Need to Know about Enforceability of Liquidated Damages Provisions

By Brandi M. Planet, Fennemore Craig

Liquidated damages provisions are common in real estate contracts. But is such a provision enforceable? In Nevada, the answer is: it depends. Understanding how a liquidated damages provision may be enforced is incredibly valuable and can assist parties in crafting real estate agreements. The purpose of liquidated damages is to have a mechanism in place to compensate an injured party in the event of a breach when the amount of any actual damages is uncertain.

The Nevada Supreme Court has addressed the enforceability of these provisions in a number of cases. The Court concluded that while these provisions are presumed valid, this is a rebuttable presumption. It’s up to the challenging party to prove that the purported liquidated damages are not an attempt to estimate actual damages but rather an unenforceable penalty. The distinction between liquidated damages and a penalty is that a penalty is punishment of the defaulting party, rather than compensation for the breach.1

To rebut the presumption of validity, the challenging party must convince the court that the liquidated damages are disproportionate to the actual damages sustained.2 Strange as it may seem, disproportionality is determined based on actual damages at the time of breach, not on what they may have reasonably been estimated to be at the time the contract was written. In real estate matters, it can be difficult to determine the amount of actual damages. If the actual damages can’t be determined, then the court is more likely to find a liquidated damages provision is valid.3 Essentially, the easier it is to prove actual damages, the more likely a liquidated damages provision will be invalidated because it becomes easier to prove disproportionality. However, invalidation isn’t the end of the damages analysis. A liquidated damages calculation is really the starting point. If the liquidated damages provision is invalidated, actual damages are likely recoverable, which means that liquidated damages may not be the exclusive remedy, even with contract language to the contrary.4

So what can you do about liquidated damages? You can consider adding a provision that the injured party can recover only actual damages but not consequential, specials, etc. But, this could weaken language that actual damages were difficult to calculate—a benefit to any challenging party. The bottom line is that liquidated damages are never guaranteed. However, the more reasonable the liquidated damages provision, the more likely it will be that liquidated damages can be recovered in the event of a breach since a court is less likely to find them to be an unenforceable penalty.

COMMERCIAL LEASE REMEDIES: PLANNING REQUIRED FOR INJUNCTIVE RELIEF

By Christopher R. Childs, Childs Watson & Gallagher, PLLC

If you have spent any time puzzling over what your commercial lease should say for a Nevada court to issue injunctive relief when a tenant attempts to leave early, spend some time studying a recent order issued by the Nevada Supreme Court in Swarovski Retail Ventures Ltd. v. JGB Vegas Retail Lessee, LLC (Nevada Supreme Court Order No. 71618, issued April 27, 2018). In the Swarovski order, the Supreme Court upheld the long-standing notion that when a Nevada tenant breaches a lease by closing a store, the harm to the landlord is generally considered to be purely economic. The Court determined that “for injunctive relief to issue in the context of a commercial lease, there must be evidence within the agreement that the tenant’s importance to the project and the potential for irreparable harm upon early termination were reasonably contemplated by both parties at the time they made the contract.” The Court found that the “particularized language” that is necessary to make injunctive relief appropriate (i.e., a clear statement that the landlord would suffer irreparable harm for which economic damages would not make the landlord whole) was not found in the Swarovski documents. If you expect a Nevada court to grant injunctive relief based upon a provision in a Nevada commercial lease, the adage “say what you mean and mean what you say” certainly seems to apply.

3 This was the case in Mason because the challenging party failed to show that the liquidated damages were disproportionate to the actual damages.
4 It is unnecessary for liquidated damages provision to be deemed invalid for a party to recover actual damages, especially when the provision doesn’t apply. See Spinelina v. B-Neva, Inc., 94 Nev. 373, 580 P.2d 945 (1978), where the court permitted recovery of liquidated damages for a delay in performance and actual damages for defective workmanship.