Court of Appeals, Division One, Case No. 69352-2

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

DANIEL J. WATSON and KETWARIN ONNUM

Respondents/Cross-Petitoners,

v.

NORTHWEST TRUSTEE SERVICES, INC.

Petitioner/Cross-Respondent

NORTHWEST TRUSTEE SERVICES, INC.'S MOTION FOR DISCRETIONARY REVIEW BY THE WASHINGTON SUPREME COURT

PRN

Submitted By:
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I. IDENTITY OF MOVING PARTY

Petitioner/Cross-Respondent Northwest Trustee Services, Inc. ("NWTS") seeks the relief as designated in Part 2 below.

II. STATEMENT OF RELIEF SOUGHT

NWTS requests that the Washington Supreme Court accept discretionary review of the published decision in this case by the Court of Appeals, Division One (hereinafter the "Court of Appeals"). Case No. 69352-2-I (Jan. 21, 2014), *reconsid. denied, publication ordered* (Mar. 18, 2014).

III. FACTS RELEVANT TO THIS MOTION

On August 27, 2012, King County Superior Court Judge Kimberley Prochnau issued a written ruling granting in part, and denying in part, NWTS' Motion for Summary Judgment. *See* Appendix 1.[1]

On September 21, 2012, NWTS filed a Notice of Discretionary Review with the Court of Appeals, and subsequently filed its Motion for Discretionary Review. On October 29, 2012, Respondents/Cross-Petitioners Watson and Onnum (hereinafter "the Watsons") filed their Notice of Cross-Review.

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[1] Defendant CitiMortgage, Inc. was also granted summary judgment, although Respondent/Cross-Petitioners did not seek appellate review against that party.

On January 16, 2014, the Court of Appeals considered the parties' briefing without oral argument. On January 21, 2014, the Court of Appeals issued an unpublished opinion denying NWTS' petition for review and granting the Watsons' cross-petition. *See* Appendix 2.

On February 7, 2014, NWTS moved for reconsideration, and the Watsons moved to publish the opinion. On March 18, 2014, the Court of Appeals issued orders denying NWTS' motion and granting the Watsons' motion to publish. *See* Appendix 3.

IV. SUMMARY OF ISSUES PRESENTED

1. The Court of Appeals erred when it held that the July 22, 2011 amendments ("FFA amendments") to the Deed of Trust Act ("DTA") applied retroactively. The FFA amendments should not be read to simply invalidate a properly-issued Notice of Default. Instead, the FFA Amendments gave specific and superior rights to borrowers who had already received a properly-issued Notice of Default as of the effective date. The Court of Appeals' decision defeats *each* of the DTA's three primary goals.

2. The Court of Appeals erred when it held that the Watsons' DTA and Consumer Protection Act ("CPA") claims survived summary judgment because NWTS should have issued a second Notice of Default before scheduling a trustee's sale. Rather, compliance with pre-

foreclosure outreach requirements are tied to the Notice of Default, not the Notice of Trustee's Sale. Therefore, the Notice of Default in question was in compliance with the law at the time of its issuance, and the DTA does not require that a subsequent Notice of Default be issued.

3. Whether the Supreme Court should stay publication of the Court of Appeals' decision while review is pending.

V. GROUNDS FOR RELIEF AND ARGUMENT

A. Standard for Review.

Discretionary review of an interlocutory decision can be granted if:

> (1) If the Court of Appeals has committed an obvious error which would render further proceedings useless; or
> (2) If the Court of Appeals has committed probable error and the decision of the Court of Appeals substantially alters the status quo or substantially limits the freedom of a party to act; or
> (3) If the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a trial court or administrative agency, as to call for the exercise of revisory jurisdiction by the Supreme Court.

R.A.P. 13.5(b).[2] Discretionary review can be appropriate to interpret the import of a statute and avoid a useless trial. *See Hartley v. State*, 103 Wn.2d 768,773-74, 698 P.2d 77 (1985).

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[2] In a March 18, 2014 letter accompanying the order denying reconsideration, the Court of Appeals stated that a petition for review could be filed pursuant to R.A.P. 13.4. However, the Court of Appeals' decision was interlocutory, as both NWTS and the Watsons sought discretionary review of a trial court ruling that did not fully terminate the case. Therefore, this motion is brought in accordance with R.A.P. 13.5.

Here, review should be accepted because the Court of Appeals committed an obvious error of law that would render further proceedings useless, as NWTS cannot go back to re-issue a new Notice of Default and cure the supposed deficiency that the Court of Appeals identified because the sale of the property at issue is final. RCW 61.27.127(2)(c).

The Court of Appeals also committed probable error that substantially alters the status quo of the subject foreclosure, and substantially limits the freedom of lienholders to enforce their security interests, because the Court's Opinion unsettles their reliance on existing state law.

B. The Court of Appeals Committed Obvious Error in Finding the FFA Amendments Were Retroactive.

The Court of Appeals recognized – and yet oddly disregarded the settled rule of statutory construction – that "statutory amendments operate prospectively and generally disfavor retroactive application because 'individuals should have an opportunity to know what the law is and to conform their conduct accordingly'." Appendix 2 (Opinion) at 5, *citing Loeffelholz v. Univ. of Wash.*, 175 Wn.2d 264, 271, 285 P.3d 854, 857 (2012).

The presumption in favor of prospective application can *only* be overcome if a statute is explicitly retroactive, curative, or remedial. *See*

Densley v. Dep't of Ret. Sys., 162 Wn.2d 210, 223, 173 P.3d 885, 891 (2007). Because the FFA amendments were not retroactive on their face, or curative to correct an ambiguity, the key question is whether they were remedial. *Accord Myles v. Clark Cnty.*, 170 Wn. App. 521, 530, 289 P.3d 650, 655 (2012), *review denied*, 176 Wn.2d 1015, 297 P.3d 706 (2013).

There is a strong presumption against retroactive application for any new law or amendment to an existing law. Statutes and amendments are not retroactive if they affect a substantive or vested right. *Densley*, *supra.*, *citing State v. McClendon,* 131 Wn.2d 853, 861, 935 P.2d 1334 (1997); *see also In re Flint*, 174 Wn.2d 539, 547, 277 P.3d 657, 661 (2012) ("A statute has retroactive effect if it takes away or impairs a party's vested rights acquired under existing laws.")

Densley held that amendments to the Public Employees' Retirement System created a "new substantive right" for the petitioner, and therefore, could not be "remedial legislation." 162 Wn.2d at 224; *see also Loeffelholz*, 175 Wn.2d at 271, *citing Johnston v. Beneficial Mgmt. Corp. of Am.,* 85 Wn.2d 637, 641, 538 P.2d 510 (1975) ("[a] statute is not remedial when it creates a new right of action.").

Here, the FFA amendments affected substantive rights in three different ways, and applying *Densley*, it was obvious error for the Court of Appeals to have made them retroactive.

1. The Court of Appeals Erred in Finding the FFA Amendments Were Remedial Despite Creating a New Cause of Action.

First, the Court of Appeals incorrectly reversed the trial court's finding that "creation of a new cause of action... affects a substantive right and therefore the FFA is not retroactive with respect to the Consumer Protection Act claim." Appendix 2 at 8.

Contrary to the Court of Appeals' retroactivity analysis, the FFA amendments created a new "per se" CPA right of action for borrowers based on violations of RCWs 61.24.031, 61.24.163, or 61.24.174. *See* RCW 61.24.135(2). This subsection, and these claims, *did not exist* prior to July 22, 2011. *See* Session Law 2011 c 58 § 14.

Thus, the accrual of additional substantive rights under the CPA cuts firmly against the Court of Appeals' retroactive application of the FFA amendments. Individuals and corporations can only conform their conduct to rules that are in effect when the impacted actions take place.

2. The Court of Appeals Erred in Finding the Watsons' Right to Mediation was More Limited Because of a Pre-Amendment Notice of Default.

Second, the Court of Appeals wrongfully concluded that the Watsons' right to mediation was somehow impaired by the FFA amendments when the Legislature actually crafted the amendments to not only *preserve* those rights, but to *expand* them in comparison to other

borrowers with post- amendment Notices of Default. *See* Appendix 2 (Opinion) at 6. Here, the Watsons' right to mediation was not abridged, but rather expanded by the Legislature to allow them to request FFA mediation all the way up to the foreclosure sale date, as opposed to other borrowers with later-issued Notices of Default who can request mediation only through the twentieth day after a Notice of Trustee's Sale is recorded.

RCW 61.24.165(2) provides that "[a] borrower under a deed of trust on owner-occupied residential real property who has received a notice of default on or before July 22, 2011, may be referred to mediation under RCW 61.24.163 by a housing counselor or attorney." That statute placed *no* time limitation on the mediation referral for borrowers receiving a pre-July 22, 2011 Notice of Default, meaning that mediation could be elected beyond a Notice of Trustee's Sale and up to the sale date.[3]

In contrast, however, borrowers with a post-July 22, 2011 Notice of Default could only be referred to mediation "any time after a notice of default has been issued but *no later than twenty days after the date a notice of sale has been recorded.*" RCW 61.24.163(1) (emphasis added).[4]

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[3] This is precisely what the Washington Department of Commerce advises borrowers. *See* http://www.commerce.wa.gov/Documents/REFERRAL-ELIGIBILTY-GUIDANCE-2013-12-23.pdf. ("Borrowers who received a Notice of Default prior to July 22, 2011 are eligible to be referred up to one day prior to the date of the Trustee Sale.")

[4] Again, this is consistent with information from the Department of Commerce. *Id.* ("Borrowers who received a Notice of Default after July 22, 2011 are eligible to be referred until 20 days after the date a Notice of Trustee Sale has been recorded.")

If the Legislature intended to require issuance of a new Notice of Default on foreclosures initiated before the FFA amendments became effective, it would have said just that. Instead, the Legislature specifically allowed borrowers like the Watsons, who had already been issued a Notice of Default, to participate in mediation with an *extended timeframe for doing so*, *i.e.*, up to the date of sale, compared to individuals receiving a Notice of Default dated after July 22, 2011.

Therefore, contrary to the Court of Appeals' decision, the FFA amendments could not be remedial and retroactive in that circumstance.

Furthermore, one of the "principal goals" of the DTA is "preventing wrongful foreclosure." *Frizzell v. Murray*, 179 Wn.2d 301, 313, 313 P.3d 1171, 1177 (2013) (González, J., concurring). The reliance on a Notice of Default issued before the FFA amendments did not defeat that goal. This is because *any* borrowers who believed a right was not properly afforded to them had notice of options to contest the foreclosure, because that information was contained in the Notice of Trustee's Sale, issued at least 45 days before the sale date.

Clearly, the Watsons should have known how to pursue means of restraining the foreclosure, or how to elect mediation even up to the sale date, but they failed to take action. Their decision should not serve to ascribe liability onto the trustee who informed them of available rights.

3. The Court of Appeals Erred in Finding the Watsons Demonstrated Issues of Material Fact Regarding the Lawfulness of NWTS' Actions.

Third, the Court of Appeals' retroactive application of the FFA amendments "severely impinge[s] upon the vested right" of a trustee's sale purchaser. This is because neither a lender nor trustee is required to restart a completed non-judicial process when challenges to the same have been waived. *See Frizzell v. Murray, supra.*; *accord In re F.D. Processing, Inc.*, 119 Wn.2d 452, 832 P.2d 1303 (1992); *Miebach v. Colasurdo*, 102 Wn.2d 170, 181, 685 P.2d 1074, 1081 (1984); *Burch v. Monroe*, 67 Wn. App. 61, 65, 834 P.2d 33, 35 (1992).

By holding that the Watsons "demonstrated issues of material fact regarding the lawfulness of NWTS's nonjudicial sale...," the Court of Appeals improperly allowed any foreclosed borrower to challenge a completed process that results, as here, in unsettling an innocent third-party purchaser's acquisition of property with clear title.

The Court of Appeals' Opinion undermines the second core tenet of the DTA, namely, "to promote stability of land titles." *Albice v. Premier Mortgage Servs. of Wash., Inc.*, 174 Wn.2d 560, 567, 276 P.3d 1277, 1281 (2012), *citing Cox v. Helenius,* 103 Wn.2d 383, 387, 693 P.2d 683 (1985).

C. The Court of Appeals Committed Obvious Error When it Concluded that the Valid Notice of Default was Rendered Invalid by the Later FFA Amendments.

The Court of Appeals states that "a statute operates prospectively when the precipitating event for operation of the statute occurs after enactment, even when the precipitating event originated in a situation existing prior to enactment." Appendix 2 (Opinion) at 5, *quoting In re Estate of Burns*, 131 Wn.2d 104, 110-11, 928 P.2d 1094 (1997). In this case, the "event" in question concerns outreach requirements designed to afford borrowers with opportunities to discuss foreclosure alternatives. Appendix 1 (Order) at 6; RCW 61.24.031, RCW 61.24.163.

While there must be proof of satisfying these outreach requirements before the Notice of Trustee's Sale is recorded, the provisions of RCW 61.24.031 all must occur *before* a trustee, beneficiary, or authorized agent can issue *the Notice of Default*. *Compare* RCW 61.24.030(9), RCW 61.24.031(1)(a).[5]

Nowhere does the DTA mandate that a new Notice of Default should be issued after the one required under RCW 61.24.030(8). The

[5] RCW 61.24.030(9) states that proof of compliance with RCW 61.24.163 must be accomplished prior to recording the Notice of Trustee's Sale "if applicable." Because the Watsons had the aforementioned right to request mediation up to the sale date itself under RCW 61.24.165, no proof of compliance with the DTA's mediation provisions was "applicable" when the Amended Notice of Sale was recorded. The only provisions at issue were thus found in RCW 61.24.031.

only requirement is that a Notice of Default must pre-date the Notice of Trustee's Sale by at least thirty days, and contain certain information. RCW 61.24.030(8).

For example, in *Meyers Way Dev. Ltd. P'ship v. Univ. Sav. Bank*, the foreclosing creditor added requirements to cure an existing default; the Supreme Court recognized that the DTA "does not explicitly include or exclude a requirement that the notices of default and sale issued after the bankruptcy mirror those before the bankruptcy." 80 Wn. App. 655, 672, 910 P.2d 1308, 1319 (1996). *Meyers Way* focused on the fact that a new Notice of *Sale* was mandated post-bankruptcy, and rejected the argument that the *entire* foreclosure process should have been reinitiated. *Id.*

Here, the Court of Appeals' reasoning improvidently overturns the precedent established in *Meyers Way*. In doing so, the Court of Appeals misreads the DTA, which absolutely does not require issuing a new Notice of Default regardless of how many times a new or "amended" Notice of Trustee's Sale gets later-recorded.

The Notice of Default issued in this case was in full compliance with the DTA *as it existed* on February 5, 2011, and met all requisites listed in RCW 61.24.030(8) *at that time*. The Watsons were afforded, and took advantage of, their full opportunity to engage in mediation and seek to avoid foreclosure. Consequently, when NWTS recorded the Amended

Notice of Sale on November 8, 2011, the action was taken pursuant to RCW 61.24.130(4) and predicated on the earlier, legitimate Notice of Default.

The Legislature had the opportunity to require a new Notice of Default when it passed the FFA amendments, but plainly did not impose that obligation, *instead* providing additional remedies to those borrowers who had received a Notice of Default in advance of the FFA amendments' effective date.

As a result, the Court of Appeals was incorrect to have found that the Watsons' DTA and CPA claims could be maintained merely on the pled assertion that the FFA amendments required a new Notice of Default – a proposition contradicted by the plain language of the statute.

D. The Court of Appeals Committed Probable Error that Alters the Status Quo and Substantially Limits the Ability of Lienholders to Rely on Existing Law.

The Court of Appeals' published holding calls into question the validity of any type of foreclosure that occurs after a change in the operative law; this ruling is contrary to the well-settled presumption against retroactivity of statutes and the equivalent of an ex post facto law.

As a result, the enforceability of judgment liens, mechanic's liens, child support liens, and condominium liens would all be affected by a Legislative enactment that alters the legal landscape upon which

lienholders rely. *Accord 1000 Virginia L.P. v. Vertecs Corp.*, 127 Wn. App. 899, 903, 112 P.3d 1276, 1278 (2005), *aff'd sub nom.*, 158 Wn.2d 566, 146 P.3d 423 (2006) (a statute of limitations change was *not* retroactive in a contract action); *Yuan v. Chow*, 96 Wn. App. 909, 915, 982 P.2d 647, 650 (1999) (UCC amendment expanding liability on an instrument was *not* retroactive).

Moreover, any Legislative change to the pre-foreclosure process could compel rewinding the clock on thousands of foreclosures despite the DTA authorizing Notices of Trustee's Sale to rely on the previous, and solely-mandated, Notice of Default.[6] This outcome undercuts the third goal of the DTA, namely that the non-judicial process "should be efficient and inexpensive." *Albice v. Premier Mortgage Servs. of Wash., Inc., supra.* at 567.

In sum, a lawful Notice of Default should be deemed proper as of its issuance date, and the Court of Appeals erred in finding otherwise in this case.

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[6] *See, e.g.*, RCW 61.24.008 (effect of June 2012 amendments on mediation rights); 2013 WA H.B. 2723 (additional FFA amendments, effective 2014).

VI. CONCLUSION

NWTS respectfully suggests that the Court of Appeals misconstrued the effect of the FFA amendments based on substantive rights that were created and given to the Watsons in July 2011.

The resulting Opinion contained clear errors of law, because no provision in the DTA compels the issuance of a subsequent Notice of Default because of prospective changes in the law during the intervening period prior to the Notice of Trustee's Sale. As such, the Amended Notice of Trustee's Sale issued here followed an accurate Notice of Default conforming to borrower outreach requirements contained in the pre-FFA amendments.

If the Court of Appeals' published decision is left to stand, lienholders and foreclosure trustees across the state will be unable to rely on existing state law, and the validity of their actions will became open to post-enforcement challenges and subject to monetary damages. A trustee should not face liability simply because a lender does not start over every time prospective non-remedial amendments are made to the DTA; such outcome does not serve any of the Act's three main purposes.

Therefore, NWTS requests that the Supreme Court grant review on the issues of whether the FFA amendments were retroactive, and whether

NWTS violated either the DTA or CPA when it proceeded to schedule a now-completed trustee's sale after the Watsons' bankruptcy had ended.

DATED this 7th day of April, 2014.

RCO LEGAL, P.S.

By: _____
Joshua S. Schaer, WSBA #31491
Of Attorneys for Petitioner/Cross-Respondent Northwest Trustee Services, Inc.

Declaration of Service

The undersigned makes the following declaration:

1. I am now, and at all times herein mentioned was a resident of the State of Washington, over the age of eighteen years and not a party to this action, and I am competent to be a witness herein.

2. On April 7, 2014, I caused a copy of **Northwest Trustee Services, Inc.'s Motion for Discretionary Review by the Washington Supreme Court** to be served to the following in the manner noted below:

Michelle K. McNeill David I. Goldstein Skyline Law Group, PLLC 2155 112th Ave. NE, Suite 290 Bellevue, WA 98004 Attorneys for Appellants	[ ] US Mail, Postage Prepaid [ ] Hand Delivery [X] Federal Express Overnight Delivery [ ] Facsimile
Washington State Court of Appeals Division I One Union Square 600 university St. Seattle, WA 98101	[ ] US Mail, Postage Prepaid [ ] Hand Delivery [X] Federal Express Overnight Delivery [ ] Facsimile

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Signed this 7th day of April, 2014.

Kristine Stephan, Paralegal

APPENDIX 1

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

WATSON

Plaintiff,

vs.

NORTHWEST TRUSTEE SERVICES

Defendant.

No. 12-2-01729-8 SEA

MEMORANDUM RULING

I. Facts

In April of 2003, Plaintiffs executed a promissory note for $280,000 payable to ABN AMRO Mortgage, Inc. After mergers and business transactions, CitiMortgage came to own the Note, and appointed NWTS as a Successor Trustee.

The Plaintiffs fell behind in their payments, and on February 5, 2011, a Notice of Default and Loss Mitigation Declaration were sent to Plaintiffs. The plaintiffs were not notified prior to the issuance of the Notice of Default that they could obtain a foreclosure mediation referral from a HUD Counselor or attorney. The plaintiffs assert and the court must accept as true, for the purposes of this summary judgment motion, that had they received a notice containing this information that they would have obtained a foreclosure mediation referral from a HUD counselor or an attorney to stop the sale. And, indeed, the plaintiffs make some efforts to contact

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the lender by hiring in the fall of 2011 a California entity entitled the "National Help Legal Center" to negotiate with the lender. It appears, however, that this entity is neither a HUD approved counselor or attorney nor contrary to its representations to the plaintiffs that it was stopping the sale that it never even made contact with the lender or trustee.

On March 22, 2011, a Notice of Trustee's Sale was recorded, setting a sale date of June 24, 2011.

However, on June 20, 2011, the Plaintiffs filed for bankruptcy, postponing the sale. This sale was eventually cancelled because of the bankruptcy proceedings.

After bankruptcy proceedings had been completed, NWTS recorded, posted and mailed to the plaintiffs an Amended Notice of Trustee's Sale on or about November 8, 2011. The notice set a sale date of December 23, 2011.

Defendants did not contact the Plaintiffs prior to recording the Amended Notice of Trustee's Sale. No new Notice of Default was sent to Plaintiffs.

The property was sold to a third party at the trustee's sale resulting in issuance of a Trustee's deed and surplus funds being deposited into the court registry. Plaintiffs filed this Complaint for Wrongful Foreclosure and Quiet Title on January 11, 2012 and were permitted by the Court to amend their complaint on April 26, 2012. Plaintiffs allege that NWTS and CitiMortgage violated the Foreclosure Fairness Act by failing to provide plaintiff with the pre-foreclosure notices required by the FFA and by failing to exercise due diligence as required by the FFA before recording the Amended Notice of Trustee's Sale. Defendants argue in this motion for summary judgment that the FFA does not apply as the FFA did not go into effect until July 22, 2011. Plaintiffs argue that the statute should be retroactively applied.

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After hearing oral argument, the Court dismissed claims against CitiMortgage with prejudice and invited additional briefing with respect to the claims against NWTS. The court has now considered this briefing.

II. Analysis

On July 22, 2011 the operative statute, the Washington Deed of Trust Act, RCW 61.24 was amended by the Foreclosure Fairness Act. (FFA). The FFA states that a trustee, or beneficiary may not issue a notice of default (and thus may not proceed with a trustee's sale) unless the beneficiary or authorized agent attempts contact with the borrower by letter to provide the borrower with specific information including the right to a meeting with the beneficiary before the notice of default is issued. The FFA requires specific information (sometimes called a Pre-Foreclosure Options letter), be provided to a borrower prior to issuance of the Notice of Default and before a Trustee's sale can be scheduled or held. This letter must inform the borrower that they have a right to meet with their lender before a notice of default may be issued and gives them up to an additional 90 days to request and participate in such a meeting. The letter also must inform the borrower of their right to meet with a HUD approved housing counselor or attorney who can assist them with mediation, to meet with the lender, and/ or work with their lender to seek a resolution such as a loan modification or some other work out plan. The letter must provide toll-free numbers for the borrower to find HUD approved housing counselors as well as civil legal aid resources. A resolution may include, but is not limited to, a loan modification, an agreement to conduct a short sale, or a deed in lieu of foreclosure transaction, or some other workout plan. RCW 61.24.030-.031. The FFA states that it "shall be requisite to a trustee's sale" that at least 30 days before the notice of trustee's sale is recorded, transmitted or served, that a

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written notice of default be transmitted to the borrower containing specific information outlined in the statute.

Defendants assert that the FFA does not apply to this matter because the FFA did not take effect until July 22, 2011—before the Amended Notice of Trustee's Sale had been generated or the Trustee's Sale had occurred, but after the Notice of Default had been issued.

Defendants also assert that even if the FFA is applicable to this matter that plaintiffs were not entitled to notice of pre-foreclosure options because the property was not an owner-occupied residential property. However, Plaintiffs have produced some evidence to support their claim that the property was their principal residence and therefore this particular issue cannot be determined on summary judgment. For the purposes of the remainder of this ruling, the Court assumes that the property was owner-occupied within the meaning of RCW 61.24.

Although the operative Notice of Trustee's Sale (designating December 23, 2011 as the date of sale) is styled as an "Amended" Notice, it meets all of the prerequisites of a notice setting a new sale date pursuant to a subsequent notice of trustee's sale under 61.24.130(4). Under the special provisions concerning a bankruptcy, the trustee is not normally required to re-start the process from the beginning but may issue a new Notice of Trustee's Sale with a new sale date provided the applicable deadlines are followed and the appropriate notice and recording made. The applicable deadlines and processes for notice and recording were followed in this case. However, the plaintiffs argue that this Notice of Sale and subsequent Trustee's Sale was defective because the Pre-Foreclosure Options letter requirement established by the FFA was not provided to the Plaintiffs prior to issuance of the Notice of Default. Defendants argue that no such requirement was in effect when the Notice of Default was issued and that the statute should not be construed to be retroactive.

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The Legislature must indicate that a statute is intended to operate retroactively; otherwise, statutes are presumed to act prospectively. *State v. McClendon*, 131 Wn.2d 853, 861, 935 P.2d 1334 (1997). This presumption can be overcome in three ways:

1. The Legislature explicitly provides for retroactivity;
2. The amendment is "curative;" or
3. The statute is "remedial."

Densley v. Dept. of Retirement Systems, 162 Wn.2d 210, 223, 173 P.3d 885 (2007).

A. *Remedial Statutes*

Although the Legislature did not explicitly state that The Foreclosure Fairness Act (FFA), would be applied retroactively, and the FFA is not a curative statute[1], it does act as a remedial statute. To be deemed remedial, a statute must relate to "practice, procedure, or remedies" and must not "affect a substantive or vested right." *Miebach v. Colasurdo*, 102 Wn.2d 170, 181,685 P.2d 1074 (1984). Here, the statute relates to the procedure for initiating a foreclosure sale.

A remedial statute will be applied retroactively if this application will "further its remedial purpose." *Macumber v. Shafer*, 96 Wn.2d 568, 570, 637 P.2d 645 (1981). In the discussion of the bill, the Legislature explained that high foreclosures rates are a serious problem in the state, and that the legislation was intended to help provide ways to avoid foreclosure. S.S.H.B. 1362, Chapter 58, Laws of 2011. The amendment was enacted in order to help lower the rate of foreclosures[2]. One of the ways to do this is to provide more notice and options for the homeowner before

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[1] "An amendment is curative only if it clarifies or technically corrects an ambiguous statute." *McGee Guest Home, Inc. v. Dept. of Social and Health Services of State of Wash.*, 142 Wn.2d 316, 325, 12 P.3d 144 (2000) (quoting *In re F.D. Processing, Inc.*, 119 Wn.2d 452, 461, 832, P.2d 1303 (1992)).

[2] This is similar to the situation in *Macumber v. Shafer*, which dealt with the Homestead statutes. The Court explained that the amendment in that case "was enacted in response to the constant rise in the cost of living," as it provided for an increase in the amount of the homestead exemption. The Court found that this was a remedial statute. *Macumber v. Shafer*, 96. Wn.2d 568, 570, 637 P.2d 645 (1981).

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commencing foreclosure proceedings. Further, the Legislature stated that it intended to encourage homeowners to utilize the skills and professional judgment of housing counselors as early as possible in the foreclosure process. This instant case appears to be a textbook example of the harms the Legislature was intending to cure. Plaintiffs were not referred prior to the start of the foreclosure process to legitimate housing counselors or attorneys that might have assisted them in either stopping the foreclosure or negotiating an alternative to a Trustee's Sale. Too late in the process, Plaintiffs attempted to find assistance and instead ended up hiring an entity that lulled them into a false sense of complacency and may have even defrauded them. [3]

B. *Transaction as One Continuous Action*

The Defendants contend that no new notice of default was needed, as they provided the required notice before Plaintiffs filed for bankruptcy. They argue that by recording another Notice of Trustee's Sale, they were still taking action under the same transaction, which was simply stalled by the bankruptcy proceedings.

After the discharge of bankruptcy proceedings which has stayed a trustee sale, a new sale date may be set. RCW 61.24.130(4). The trustee may simply continue a sale for not more than 120 days or may set a new sale date not less than 45 days from the date of the bankruptcy court order. The parties appear to agree that the Notice of Sale was in conformity with the latter procedure, as the 120 day period had expired. Unlike a continuance of sale under the first option, the trustee must record, post, publish and serve the new notice of Trustee's Sale. The trustee complied with these procedures. However, RCW 61.24.130(4) is predicated upon compliance with all of the

[3] Although the FFA had not yet been enacted before issuance of the Notice of Default was issued, it appears the trustee was either prescient or was well informed as to the likely requirements of the FFA. The form of the Notice of Default itself is identical or nearly identical to the FFA requirements. It includes a suggestion that the plaintiff obtain professional resources although it does not appear to provide contact information for such resources. The 2012 Legislature amended the statute (after the foreclosure proceedings were completed in this case) by directing that such specific contact information be provided to borrowers. *See,* 2012 C 185 Sec. 9.

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statutory prerequisites at the time of issuance of the Notice of Sale. The Notice of Sale was issued after the FFA went into effect. While under *Meyers Way*, 80 Wn. App. 655, the trustee is not required to re-initiate the foreclosure or issue a new Notice of Default merely because of new facts that have arisen i.e. additional defaults or cures, this does not obviate the trustee's obligation to comply with the law then in effect in issuing a new Notice of Sale.

If the Defendants had created a vested right before the amendment went into effect, the provisions could not be applied retroactively. In order for a right to be vested, it must be more than an expectation that the laws will continue as they are at the present time. Miebach, 102 Wn.2d at 181 (quoting *Gillis v. King Cy.*, 42 Wn.2d 373, 377, 255 P.2d 546 (1953)). Instead, the right must be "a title, legal or equitable, to the present or future enjoyment of property..." Id.

In this case, the Defendants had recorded notice of the trustee sale, but had not yet sold the property. This means that the Plaintiffs still had the opportunity to cure the default to avoid losing possession of the property. RCW 61.24.040(2). Therefore, the Defendants had not created a vested right to title.

The agency charged with implementation of the FFA and the development of rules concerning the mediation program appears to consider the protections of the FFA to be retroactive. See Department of Commerce, Foreclosure Fairness Act, http://www.commerce.wa.gov/site/1367.default.aspx (Exhibit 4 to MSJ materials). ("the FFA recognizes the eligibility of the homebuyer for mediation if: 1) the homeowner has received...a Notice of Default and a Notice of Sale ..has not been recorded 2) The homeowner received a NOD on or before July 22, 2011. These homeowners are eligible until 12:00 pm the day before the foreclosure sale.") Without being advised of the right to mediation such as through a pre-foreclosure options letter, , this right would be meaningless or would lead to unequal application

Judge Kimberley D. Prochnau
King County Superior Court
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of the protections of the statute with only those borrowers "in the know" being afforded its remedies. When a statute is ambiguous, "the construction placed upon a statute by an administrative agency charged with its administration and enforcement, while not absolutely controlling upon the courts, should be given great weight in determining legislative intent." *Hama Hama Co. v. Shoreline Hearings Bd.*, 85 Wn.2d 441, 448, 536 P.2d 157 (1975). The special expertise of administrative agencies is the "primary foundation and rationale" for this deference. *Id.* An administrative agency may "fill in the gaps" but may not purport to amend a statute. *Id. See, also,* 18 Wa. Prac. Real Estate Sec. 20.1A (2d Ed.) (The FFA applies to "any property where on the effective date of the act the notice of foreclosure had been sent but the property has not been sold.")

In the current case, it is nowhere specified whether the Foreclosure Fairness Act should be applied retroactively. Therefore, the Department of Commerce's position that mediation is available to those who received notice prior to the amendment would be "filling in a gap" in the statute and is entitled to deference.

Because the Deed of Trust Act dispenses with many protections enjoyed by borrowers under judicial foreclosures, courts must strictly construe the statute in the borrower's favor. Albice v Premier Mortgage, 174 Wn.2d 560, 276 P.3d 1277 (2012).

C. *Alternatively – The FFA Need Not Be Applied Retroactively*

In the alternative, it is not necessary to find that the FFA applies retroactively. Instead, the laws that were in effect at the time of the new Notice of Sale are simply being applied.

At the time the new Notice of Sale was issued, the FFA required that: "before the notice of the trustee's sale is recorded, transmitted, or served, the beneficiary has complied with RCW 61.24.031 and, if applicable, section 7 of this act." Furthermore, the FFA requires that a sale must

Judge Kimberley D. Prochnau
King County Superior Court
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be "conducted in compliance with all of the requirements" of RCW 61.24. RCW 61.24.040(7). At the time of the new Notice of Sale, the FFA was in effect, and therefore, the trustee was required to conduct the sale in compliance with all of its requirements. A statute operates prospectively when "the precipitating event for operation of the statute occurs after enactment, even when the precipitating event originated in a situation existing prior to enactment." Matter of Estate of Burns, 131 Wn.2d 104, 110-11, 928 P.2d 1094 (1997). Here, the "precipitating event" was the failure to provide information regarding Pre-Foreclosure Options before recording the second notice of sale. Although steps toward foreclosure had been taken prior to the implementation of the FFA, the "precipitating event" occurred after the amendment had become effective.

D. *Consumer Protection Act Claim*

The FFA states that: "It is an unfair or deceptive act in trade or commerce and an unfair method of competition in violation of the consumer protection act, chapter 19.86 RCW, for any person or entity to: (a) Violate the duty of good faith under section 7 of this act; (b) fail to comply with the requirements of section 12 of this act; or (c) fail to initiate contact with a borrower and exercise due diligence as required under RCW 61.24.031." Neither Sec. 7 nor 12 of the FFA are applicable. Although the lender did not send the pre-foreclosure options letter as required by RCW 61.24.031, creation of a new cause of action (a per se violation of the Consumer Protection Act) affects a substantive right and therefore the FFA is not retroactive with respect to the Consumer Protection Act claim. Johnston v Beneficial, 85 Wn. 2d 637 (1975). Thus while the Trustee's sale did not comply with the remedial portions of the FFA, it was not a per se violation of the Consumer Protection Act.

Judge Kimberley D. Prochnau
King County Superior Court
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III. Conclusion

The FFA is a remedial statute (with the exception of the Consumer Protection Act provisions) and, therefore, is applied retroactively. Although the Defendant sent out the Notice of Default prior to the passage of the FFA, its requirements may still be enforced against them. RCW 61.24.127 (enacted in 2009) allows a borrower to seek monetary damages for an improper non-judicial sale. Failure to give the pre-options foreclosure letter is not a per se violation of the Consumer Protection Act. For these reasons, the court grants the defendants' motion for summary judgment as to the Consumer Protection Act claim and denies defendant's motion as to the damages claim for failure to comply with the FFA.

ENTERED this 27 day of Aug, 2012.

KIMBERLEY D. PROCHNAU, JUDGE

I certify that I have mailed/e-mailed a copy of this order to all parties.
Date: 8/27/2012
Signature:

Judge Kimberley D. Prochnau
King County Superior Court
516 Third Avenue
Seattle, WA 98104
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APPENDIX 2

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

32052

DANIEL J. WATSON and KETWARIN ONNUM, husband and wife,

Respondents,

v.

31491

NORTHWEST TRUSTEE SERVICES, INC.,

Petitioner,

19732

CITIMORTGAGE, INC.; NATIONAL LEGAL HELP CENTER, INC.; and JOHN DOES 1-10,

Defendants.

No. 69352-2-I

DIVISION ONE

UNPUBLISHED OPINION

FILED: January 21, 2014

LEACH, C.J. — Northwest Trustee Services Inc. (NWTS) seeks discretionary review of the superior court's denial of NWTS's motion for summary dismissal of the claim by Daniel Watson and Ketwarin Onnum (the Watsons) for damages allegedly caused by NWTS's breach of the foreclosure fairness act, chapter 61.24 RCW (FFA). The Watsons cross petition, seeking review of the superior court's dismissal of their claims under the Consumer Protection Act, chapter 19.86 RCW (CPA). Because the trial court committed probable error and substantially altered the status quo when it dismissed the Watsons' CPA claims, we grant the Watsons' petition and reverse the trial court's decision. Because the trial court did not commit error when it denied NWTS's

motion for summary dismissal of the Watsons' FFA claims, we deny NWTS's petition.

Background

In April 2003, Daniel Watson and his wife, Ketwarin Onnum, financed the purchase of a home by executing a promissory note payable to ABN AMRO Mortgage Inc. and a companion deed of trust. Through various mergers and business transactions, CitiMortgage acquired the note and a beneficial interest under the deed of trust. It later appointed NWTS as successor trustee.

On February 5, 2011, NWTS sent the Watsons a notice of default. On March 22, 2011, NWTS recorded a notice of trustee's sale, with the sale scheduled for June 24, 2011. On June 20, 2011, the Watsons filed for bankruptcy, which caused the trustee sale to be postponed and then canceled.

On July 22, 2011, the FFA amended the deeds of trust act, chapter 61.24 RCW (DTA).[1] Among other changes, the FFA changed the requirements for preforeclosure notice[2] and allowed recovery of damages for violations of the CPA.[3]

On September 22, 2011, the bankruptcy court discharged the Watsons' debts, including the note. On November 8, 2011, NWTS recorded an amended notice of trustee's sale, with a new sale date of December 23, 2011. NWTS mailed a copy of the notice by certified and first class mail to the Watsons and

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[1] RCW 61.24.005-.177 (LAWS of 2011, ch. 364, § 3).
[2] RCW 61.24.030, .031, .040.
[3] RCW 61.24.135.

posted a copy of the notice at the premises. NWTS did not send a new notice of default or otherwise contact the Watsons before recording this notice.[4] A third party purchased the Watsons' house at a trustee's sale on December 23, 2011. The trustee's deed recorded by NWTS on January 10, 2012, referred to the March 22, 2011, notice of trustee's sale, which described the notice of the sale that was ultimately canceled, but did not mention the notice recorded November 8, 2011.

The Watsons filed a lawsuit against NWTS and CitiMortgage, alleging wrongful foreclosure and to quiet title. They later amended the complaint to include additional claims for violation of the CPA. The amended complaint also added National Legal Help Center as a defendant. NWTS and CitiMortgage filed an amended joint motion for summary judgment. The court dismissed all claims against CitiMortage and requested additional briefing on the claims against NWTS, which the parties provided. The trial court dismissed the Watsons' CPA claim, but not their claim for wrongful foreclosure for failure to comply with the FFA.

Both NWTS and the Watsons seek discretionary review.

Analysis

Discretionary review is available in the following circumstances:

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[4] The Watsons attempted to seek legal help by contacting a California entity called the "National Legal Help Center," but this entity is apparently not an attorney or counsel approved by HUD (U.S. Department of Housing and Urban Development), and contrary to its representations to the Watsons, it did not stop the foreclosure.

> (1) The superior court has committed an obvious error which would render further proceedings useless;
>
> (2) The superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act;
>
> (3) The superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by an inferior court or administrative agency, as to call for review by the appellate court; or
>
> (4) The superior court has certified, or all the parties to the litigation have stipulated, that the order involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation.[5]

NWTS contends that by denying its motion for summary judgment as to the wrongful foreclosure claim, the trial court "committed an obvious error which would render further proceedings useless." The Watsons argue that the court committed error warranting review by dismissing their CPA claims.

Wrongful Foreclosure under the FFA

The trial court denied NWTS's motion to dismiss the Watsons' wrongful foreclosure claims on two alternative grounds. First, the court ruled that the FFA is a remedial statute and, as such, should be applied retroactively. Alternatively, the trial court ruled that it did not need to apply the FFA retroactively because the "precipitating event" triggering the statute's application was not the February 2011 notice of default but the amended notice of trustee's sale, recorded in November 2011, after the effective date of the FFA.

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[5] RAP 2.3(b).

Courts presume that statutory amendments operate prospectively and generally disfavor retroactive application because "'individuals should have an opportunity to know what the law is and to conform their conduct accordingly.'"[6] A statute applies retroactively if it changes the legal effect of "'prior facts or transactions'"[7] or "'attaches new legal consequences to events completed before its enactment.'"[8] But a statute does not apply retroactively "merely because it is applied in a case arising from conduct antedating the statute's enactment or upsets expectations based in prior law."[9] "A statute operates prospectively when the precipitating event for operation of the statute occurs after enactment, even when the precipitating event originated in a situation existing prior to enactment."[10]

NWTS argues that under the FFA, the preforeclosure requirements are linked to the original notice of default sent in February 2011, before the FFA took effect. NWTS contends that the process that culminated in the trustee's sale was one continuous transaction. Therefore the trial court erred by applying the July 2011 FFA amendments to the sale process.

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[6] Loeffelholz v. Univ. of Wash., 175 Wn.2d 264, 272, 285 P.3d 854 (2012) (quoting Landgraf v. USI Film Prods., 511 U.S. 244, 265, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994)); In re Pers. Restraint of Flint, 174 Wn.2d 539, 546, 277 P.3d 657 (2012).

[7] Flint, 174 Wn.2d at 547 (internal quotation marks omitted) (quoting State v. Varga, 151 Wn.2d 179, 195, 86 P.3d 139 (2004)).

[8] Flint, 174 Wn.2d at 548 (internal quotation marks omitted) (quoting State v. Pillatos, 159 Wn.2d 459, 471, 150 P.3d 1130 (2007)).

[9] Landgraf, 511 U.S. at 269 (citation omitted).

[10] In re Estate of Burns, 131 Wn.2d 104, 110-11, 928 P.2d 1094 (1997).

Because the DTA eliminates many protections enjoyed by borrowers under judicial foreclosures, "lenders must strictly comply with the statutes and courts must strictly construe the statutes in the borrower's favor."[11] Under the FFA it "shall be requisite to a trustee's sale" that a written notice of default containing specific information set forth in the statute first be transmitted by the beneficiary or the trustee to the borrower.[12] A trustee, beneficiary, or authorized agent may not issue this notice of default until 30 days after satisfying certain due diligence requirements.[13] The beneficiary or agent first must send a letter that includes information such as the borrower's right to meet with a HUD-approved housing counselor or attorney who can help with mediation, assist in arranging a meeting with the lender, or work toward a resolution such as a loan modification.[14] This "Pre-Foreclosure Options Letter" or a "Notice of Pre-Foreclosure Options" must provide toll-free numbers to help borrowers find HUD-approved housing counselors or civil legal aid resources.[15]

Where the filing of a bankruptcy court petition has stayed a trustee's sale, the trustee may set and give notice of a new sale date not less than 45 days after the date of the bankruptcy court order permitting the sale.[16] RCW 61.24.130(5) through (6) allow a trustee's sale "on any date to which such sale has been

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[11] Albice v. Premier Mortg. Servs. of Wash., Inc., 174 Wn.2d 560, 567, 276 P.3d 1277 (2012).
[12] RCW 61.24.030(8).
[13] RCW 61.24.031(1)(a), (5).
[14] RCW 61.24.031(1)(c)(iii), (iv), (f), (2)-(4).
[15] RCW 61.24.031(1)(c)(ii).
[16] RCW 61.24.130(4).

properly continued in accordance with RCW 61.24.040(6)." This statute allows a trustee to continue the sale for a period or periods not exceeding a total of 120 days.[17]

NWTS claims its original March 22, 2011, notice of trustee's sale fulfilled its obligations under the DTA. But this notice described a sale scheduled for June 24, 2011. NWTS first continued and ultimately canceled this sale. RCW 61.24.040(6) allowed continuance of the June 24, 2011, sale date for no more than 120 days, or until October 22, 2011.[18] After that date, the DTA required a new notice. Therefore, although NWTS labeled its second notice an "amended" notice of trustee's sale, this notice necessarily scheduled a new sale. Because NWTS recorded the "amended" notice in November 2011, the notice requirements of the FFA applied.

Because NWTS failed to comply with the FFA's notice requirements before recording its November 2011 notice of trustee's sale, the Watsons have demonstrated issues of material fact regarding the lawfulness of NWTS's nonjudicial sale of the Watsons' property. NWTS has failed to establish grounds for discretionary review. We dismiss its petition for review.

Violation of the CPA

We next address the Watsons' petition for review. Because the trial court committed probable error and substantially altered the status quo when it

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[17] RCW 61.24.040(6).

[18] See Rouse v. Wells Fargo Bank, N.A., No. C13-5706, 2013 WL 5488817, at *2 (W.D. Wash. Oct. 2, 2013).

dismissed the Watsons' CPA claims, we grant the Watsons' petition and reverse the trial court's dismissal of this claim.

The FFA states in a section added in 2011,

> It is an unfair or deceptive act in trade or commerce and an unfair method of competition in violation of the consumer protection act, chapter 19.86 RCW, for any person or entity to: (a) Violate the duty of good faith under RCW 61.24.163; (b) fail to comply with the requirements of RCW 61.24.174; or (c) fail to initiate contact with a borrower and exercise due diligence as required under RCW 61.24.031.[19]

Relying on its retroactivity analysis, the trial court ruled that "creation of a new cause of action (a per se violation of the Consumer Protection Act) affects a substantive right and therefore the FFA is not retroactive with respect to the Consumer Protection Act claim." Because we conclude that the FFA applied to NWTS's November 2011 notice, we also conclude that the FFA provisions addressing the CPA apply. The trial court erred and substantially altered the status quo when it dismissed the Watsons' CPA claims. We reverse the trial court's dismissal of the Watsons' CPA claims and remand for further proceedings.

Conclusion

Because the trial court did not commit error when it denied NWTS's motion for summary dismissal of the Watsons' FFA claims, we deny NWTS's petition. Because the trial court committed probable error and substantially altered the status quo when it dismissed the Watsons' CPA claims, we grant the

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[19] RCW 61.24.135(2) (LAWS of 2011, ch. 58, §14).

Watsons' petition, reverse the trial court's dismissal of their CPA claims, and remand for further proceedings consistent with this opinion.

Leach, C.J.

WE CONCUR:

Spearman, J.

Appelwick, J.

APPENDIX 3

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington

DIVISION I
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March 18, 2014

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CASE #: 69352-2-I
Daniel J. Watson, Respondent / Cross-Petitioner v.
Northwest Trustee Services, Petitioner / Cross-Respondent

Counsel:

Enclosed please find a copy of the order denying motion for reconsideration entered in the above case.

Within 30 days after the order is filed, the opinion of the Court of Appeals will become final unless, in accordance with RAP 13.4, counsel files a petition for review in this court. The content of a petition should contain a "direct and concise statement of the reason why review should be accepted under one or more of the tests established in [RAP 13.4](b), with argument." RAP 13.4(c)(7).

In the event a petition for review is filed, opposing counsel may file with the Clerk of the Supreme Court an answer to the petition within 30 days after the petition is served.

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

emp

Enclosure

c: The Honorable Kimberley Prochnau
Reporter of Decisions

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

DANIEL J. WATSON and KETWARIN ONNUM, husband and wife,

Respondents,

v.

NORTHWEST TRUSTEE SERVICES, INC.,

Petitioner,

CITIMORTGAGE, INC.; NATIONAL LEGAL HELP CENTER, INC.; and JOHN DOES 1-10,

Defendants.

No. 69352-2-I

DIVISION ONE

ORDER DENYING MOTION FOR RECONSIDERATION

The petitioner, Northwest Trustee Services, Inc., having filed a motion for reconsideration herein, and the hearing panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration be, and the same is, hereby denied.

DATED this 18th day of March, 2014.

For the Court:

Leach C.J.
Judge

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington

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March 18, 2014

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CASE #: 69352-2-I
Daniel J. Watson, Respondent / Cross-Petitioner v.
Northwest Trustee Services, Petitioner / Cross-Respondent

Counsel:

Enclosed please find a copy of the order granting motion to publish opinion entered by this court in the above case today.

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

c: The Honorable Kimberley Prochnau
Reporter of Decisions

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

DANIEL J. WATSON and KETWARIN ONNUM, husband and wife,

Respondents,

v.

NORTHWEST TRUSTEE SERVICES, INC.,

Petitioner,

CITIMORTGAGE, INC.; NATIONAL LEGAL HELP CENTER, INC.; and JOHN DOES 1-10,

Defendants.

No. 69352-2-I

DIVISION ONE

ORDER GRANTING MOTION TO PUBLISH OPINION

The respondents, Daniel J. Watson and Ketwarin Onnum, having filed a motion to publish opinion, and the hearing panel having reconsidered its prior determination and finding that the opinion will be of precedential value; now, therefore it is hereby:

ORDERED that the unpublished opinion filed January 21, 2014, shall be published and printed in the Washington Appellate Reports.

DATED this 18th day of March, 2014.

For the Court:

Leach C.J.
Judge