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COURT OF APPEALS NO. 73406-7
KING COUNTY NO. 13-2-29758-2

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

FRANK BUCCI, in individual,

Appellant,

v.

NORTHWEST TRUSTEE SERVICES, INC., SUCCESSOR BY MERGER TO NORTHWEST TRUSTEE SERVICES PLLC FKA NORTHWEST TRUSTEE SERVICES, LLC, a Washington corporation; RCO Legal, P.S., Washington Professional Services Organization; JPMORGAN CHASE BANK, N.A. a national banking association; U.S. BANK, NATIONAL ASSOCIATION, a national banking association; SELECT PORTFOLIO SERVICING, INC., a Foreign Corporation registered in Washington,

Respondents.

APPELLANT FRANK BUCCI'S PETITION FOR REVIEW TO THE SUPREME COURT

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I. IDENTITY OF PETITIONER

Petitioner Frank Bucci ("Mr. Bucci") asks this Court to accept review of the decision designated in Part II.

II. DECISION BELOW

Mr. Bucci seeks review of the opinion, published in part, by the Court of Appeals for Division 1 on December 27, 2016, in the case *Bucci v. Northwest Trustee Services, Inc.*, case no. 73406-7, 387 P.3d 1139 (Wash. Ct. App. Dec. 27, 2016). A copy of the Opinion is included as appendix A.

On January 13, 2017, Mr. Bucci filed a motion for reconsideration of the Court of Appeal's Opinion. The Court of Appeals denied Mr. Bucci's motion for reconsideration on January 30, 2017. (App. B).

III. ISSUE PRESENTED FOR REVIEW

1. Did the court of appeals err in concluding predatory notes that provide for increasing principal,[1] such as Mr. Bucci's note, constitute negotiable instruments under Ch. 62A.3 RCW? (Short Answer: Yes)

2. Did the court of appeals err in concluding production of a negatively amortizing note at summary judgment, that was materially different from the "true and correct" copy relied on by Respondents in their moving papers, was sufficient to establish Respondents had right to nonjudicially foreclose years before? (Short Answer: Yes).

[1] Known as "negative amortization." RCW 19.144.010(9).

IV. STATEMENT OF THE CASE

A. Mr. Bucci Signs a Predatory Note that Facially Provides for a Range of Money Due, Not a "Fixed Amount"

On May 22, 2007, Mr. Bucci borrowed money from Washington Mutual Bank, FA ("WAMU") to purchase his home. CP 325 at ¶ 3. The transaction involved a note that allowed the principal amount owed to increase. CP 224-29. This is known as negative amortization. RCW 19.144.010(9) ("'Negative amortization' means an increase in the principal balance of a loan caused when the loan agreement allows the borrower to make payments less than the amount needed to pay all the interest that has accrued on the loan. The unpaid interest is added to the loan balance and becomes part of the principal.") After Mr. Bucci signed the note, the Washington Legislature found this type of predatory loan unlawful. RCW 19.144.050.

Mr. Bucci's Note was structured to increase the principal owed. In Paragraph 1, the borrower promises to pay $1,530,000 (defined as "Principal"), plus interest, to the order of Lender, WAMU. CP 224. In a subsequent paragraph, "Changes in My Unpaid Principal Due to Negative Amortization or Accelerated Amortization," the Principal may increase by paying less than the interest accrued during a month. CP 226.

Since my payment amount changes less frequently than the

> interest rate, and since the monthly payment is subject to the payment limitations . . .my monthly payment could be less or greater than the amount of the interest portion of the monthly payment that would be sufficient to repay the unpaid Principal I owe at the monthly payment date in full on the maturity date in substantially equal payments. **For each month my monthly payment is less than the interest portion, the Note Holder will subtract the monthly payment from the amount of the interest portion and will add the difference to my unpaid Principal, and interest will accrue in the amount of this difference...**

Id. (emphasis added).

Under the Note, the Principal may increase up to 115% of the original Principal for a range from $1,530,000 to $1,759,500. *Id.* at 4(H).

Importantly, negative amortization is not a mere possibility, but will inevitably occur under the terms of the note. The note is dated May 27, 2007, and provides "up until the first day of the calendar month that immediately precedes the first payment due date set forth in section 3 of this Note, I will pay interest at a yearly rate of 7.529%. CP 568 at ¶ 2. It also states, "[t]hereafter, until the first Change Date (as defined in Section 4 of this Note) I will pay interest at a yearly rate of 1.100%." *Id.*

In a subsequent section, "Interest Rate and Monthly Payment Change," the note states: "[t]he interest rate I will pay may further change on the 1ST day of JULY 2007, and on that day every month thereafter on the "Change Date". CP 569 ¶4(A). Next, the note states, "On each Change Date, my Interest rate will be based on an Index. The "Index" is the

Twelve-Month Average, determined as set forth below, of the annual yields on actively traded United States Treasury Securities adjusted to a constant maturity of one year as published by the Federal Reserve Board in the Federal Reserve Statistical Release entitled 'Selected Interest Rates (H.15)' (the "Monthly Yields")." CP 569 at ¶4(B). "Note Holder will calculate my new interest rate by adding two and 50/100 percentage point(s) 2.500% ("Margin") to the Current Index." CP 569 at ¶4(C).

In this case, the principal was guaranteed to increase because the note based the payments from July 2007 to July 2008 on an interest rate of 1.1%, but charged an interest rate equal to the index plus a margin of 2.5%.[2] CP 224-25. Thus, the actual rate of interest being charged on the unpaid principal was more than twice the rate used to calculate the monthly payment amount. CP 569 at ¶4. Additionally, Mr. Bucci was charged an interest rate of 7.529% from May 27, 2007 through July 2007, which per the terms of Paragraph G, would have been added to his principal, despite having no payment due. CP 569 at ¶¶2-30, 570 at ¶4(G).

The note states, "Changes in My Unpaid Principal Due to Negative Amortization of Accelerated Amortization, . . . For each month that the monthly payment is less than the interest portion, the Note Holder will

[2] Even if the Current Index, the "'Twelve-Month Average' of the annual yields on actively traded United States Treasury Securities adjusted to a constant maturity of one year as published by the Federal Reserve Board," was zero, the interest rate would be a minimum of 2.5%.

subtract the monthly payment from the amount of interest portion and **will add the difference to my unpaid Principal,** and interest will accrue on the amount of this difference at the current rate." CP 570 at ¶4(G) (emphasis added).

In sum, the note provides Mr. Bucci owes a principal amount between $1.53 and $1.76 million, and was structured to immediately increase the principal balance above $1.53 million, even if he made full payments.

B. Mr. Bucci, Based on the Advice of the Servicer, Attempts to Remedy the Effects of the Predatory Loan

After the housing market crashed in 2008, the value of Mr. Bucci's home plummeted causes it to become significantly underwater, while his payments were dramatically increasing. CP 325 at ¶ 4. In response, Mr. Bucci inquired about a loan modification with WAMU. *Id.* at ¶ 5. Both WAMU and the subsequent servicer, JP Morgan Chase Bank, N.A. ("Chase"), advised Mr. Bucci to miss his payments to qualify for a modification. CP 325-26 at ¶¶ 5-8; CP 1544-45 at ¶¶ 3-4. Mr. Bucci relied on their advice and missed his payments. *Id.* Instead of providing a modification, Chase, in conjunction with the other respondents, dual tracked Mr. Bucci and began nonjudicial foreclosing. CP 324-28.

C. Mr. Bucci is Provided Inconsistent and Misleading Information By a New Servicer Who Initiates Foreclosure Proceedings

Unfortunately, the "modification" process proved to be a ruse. CP 325-26. On June 28, 2009, after Mr. Bucci missed 3 payments on WAMU and Chase's advice and while being reviewed for a loan modification, Northwest Trustee Services, Inc. ("NWTS") issued a Notice of Default as "duly authorized agent" for Bank of America, N.A. ("BANA") claiming to be trustee for the WAMU Mortgage Pass-Through Certificates Series 2007-0A6 Trust, by way of merger with LaSalle Bank NA. CP 352-55; CP 393:21-23. This was the first time Mr. Bucci became aware that BANA and a securitized trust were claiming to be involved. CP 327 at ¶12.

On July 6, 2009, Chase, as attorney in fact for BANA as trustee, purported to appoint NWTS as successor trustee of the Deed of Trust. CP 348. Additionally, on August 13, 2009, NWTS as "duly authorized agent" for BANA executed a Notice of Trustee's Sale listing WAMU as its client. CP 352-55. In the 2009 Notice of Trustee's Sale, NWTS listed the principal as $1,607,986.49, a rise in principal of over $77,000. CP 265, 267. This is further evidence the note does not represent a fixed amount of money. A holder could not ascertain from the face of the note that Mr. Bucci owed $77,000 more in principal than the original principal balance.

D. Mr. Bucci Files Suit Seeking Help From the Trial Court

On August 16, 2013, Mr. Bucci filed a complaint against Respondents contesting the nonjudicial foreclosure. Supp. CP 1-57. Between January 30, 2015 and February 27, 2015, all parties moved for summary judgment. CP 203-219, CP 538-561, CP 1074-1098, CP 1101-1112, CP 1139-1163.

E. The Trial Court Dismisses Mr. Bucci's Suit

On February 27, 2015, the Trial Court granted Respondents SPS and U.S. Bank's Motion for Summary Judgment, which they had sought on the theory they were the holder of Mr. Bucci's note in 2009 because in 2015 they brought the note to the hearing, endorsed in blank. CP 1099-1100, CP 203-219. The Trial Court erroneously agreed, despite the fact Respondents provided different versions of the note as true and correct copies. *Id.* Respondent Chase moved for summary judgment claiming the the true and correct copy had no endorsements. CP 927-34. Respondent USB moved for summary judgment on a copy with an endorsement. CP 224-229.

F. The Court of Appeals Publishes a Case Establishing a Minority Rule Related to a Uniform Law

Mr. Bucci appealed the Trial Court's decision on April 21, 2015. The Court of Appeals affirmed the Trial Court's decision on December 27, 2016, holding that a negative amortizing note is a negotiable instrument under RCW 62A.3-102. Mr. Bucci requested the Court of Appeals

reconsider its opinion, but the Court denied the request. App. B.

V. GROUNDS FOR REVIEW

A. This Court Should Accept Review of the Court of Appeals' Published Opinion Because it: 1) involves an issue of substantial public interest that should be determined by the Supreme Court; and, 2) Conflicts with Washington Supreme Court Precedent and Other States' Interpretation of a Uniform Law

This Court may grant review and consider a Court of Appeals opinion if it conflicts with a Supreme Court or another Court of Appeals decision, or "if the petition involves an issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b)(1)-(4).

Here, the Court of Appeals opinion conflicts with *Anderson v. Hoard*, 63 Wn.2d 290, 292-293, 387 P.2d 73 (1963), other states' interpretation of a uniform law, and presents "an issue of substantial public interest."

Crucially, due to the predatory nature of negatively amortizing notes, the legislature outlawed their creation in 2008. RCW 19.144.050. RCW 19.144.050 prohibits financial institutions from making or facilitating a loan with negative amortization.

> "Negative amortization" means an increase in the principal balance of a loan caused when the loan agreement allows the borrower to make payments less than the amount needed to pay all the interest that has accrued on the loan. The unpaid interest is added to the loan balance and becomes part of the principal.

RCW 19.144.010(9).

The legislative intent was to eradicate these non traditional mortgages[3] because they resulted in widespread financial loss to Washington residents and were one of the practices that led to the national financial crisis that occurred while this bill was being passed in 2008. H.R. Rep. No. 2770 at *5-6 (2008). The House described the presence of these predatory notes as follows: "In recent years, many lenders lessened their standards and provided new and exotic loans and product features." *Id.* The purpose of the law was to eliminate notes that were structured to increase the principal: "the bill limits negative amortization where the borrower can end up owing more than the amount of the loan." *Id.* at *6.

Here, the Court of Appeals declared that even though the principal owed can increase, and even there is no way to ascertain the principal amount from the face of the note, it is still a negotiable instrument: "[b]ecause Bucci's note contains an unconditional promise to pay a fixed amount of $1.53 million plus any amounts added in accordance with the provisions in Section 4(G) of the note, it is a negotiable instrument as defined in RCW 62A.3-104(a)." App. A. at *12.

Importantly, review is needed to correct this erroneous holding because it is premised on a superficial reading of the Note, misapplies the

[3] "Nontraditional" mortgage product include interest-only mortgages, payment option adjustable rate mortgages, and other products that have negative amortization (certain products that result in monthly payments where the payment is insufficient to cover the interest due on the loan.)" H.R. Rep. No. 2770 at *2 (2008).

provisions of RCW 62A-3, and creates precedent opposite of other state's holdings, establishing a minority rule for Washington under the UCC.

B. The Court of Appeals Erred on an Issue of Substantial Public Importance when it Departed From the Majority Rule Related to a Uniform Law and Did Not Properly Apply RCW 62A-3.

Here, the Appellate Court conflated the requirements of an "unconditional promise" with the requirements of a "fixed amount of money" to arrive at the erroneous conclusion that is contradictory to other states' interpretation of the same language contained in RCW 62A.3-104.

i. In Order to be Negotiable a Note Must, Inter Alia, Contain an Unconditional Promise or Order, to pay a Fixed Amount of Money.

A negotiable instrument is defined by 62A.3-104 as "an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order, . . ." The comments to the definition clarify that all five components of the definition must exist:

> **First, the promise or order must be "unconditional." The quoted term is explained in Section 3-106. Second, the amount of money must be "a fixed amount * * * with or without interest or other charges described in the promise or order." Section 3-112(b) relates to "interest."** Third, the promise or order must be "payable to bearer or to order." The quoted phrase is explained in Section 3-109. An exception to this requirement is stated in subsection (c). Fourth, the promise or order must be payable "on demand or at a definite time." The quoted phrase is explained in Section 3- 108. Fifth, the promise or order may not state "any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money" with three

exceptions. . .

Accordingly, the requirement that the instrument be "unconditional" and the requirement that the instrument be for "a fixed amount of money" are distinct. *Id.* For the citation following each requirement, only "unconditional" is further explained by RCW 62A.3-106, not the separate requirement for "a fixed amount of money." *Id.*

Importantly, the note at issue here, and the crux of why it is not a negotiable instrument, is not based on the first requirement, whether or not it represents an unconditional promise or order. Instead, the issue here, which is the basis of Mr. Bucci's appeal and argument, is that his note does not represent "a fixed amount of money."

However, in holding that Mr. Bucci's note, and negative amortization notes in general, are negotiable instruments, the Court of Appeals used the analysis of what makes a note "unconditional" and applied it to the separate requirement of what makes a note for "a fixed amount of money." The Court reasoned that what makes an instrument negotiable is not being able to ascertain the principal balance from its face, but rather whether "the rights, duties, and obligations of the transferee" are ascertainable from the face of the note. App. A at * 12.

In support of this proposition, the Court of Appeals cited to, *Alpacas of America, LLC v. Groome*, 179 Wn. App. 391, 397, 317 P.3d 1103 (Div. II

2014) and comment 1 of RCW 62A.3-106. App. A. at *12. Importantly, neither *Alpacas of America* or Comment 1 to RCW 62A.3-106 analyze whether or not a promissory note represents a fixed amount of money.

The issue in *Alpacas of America* was not whether the promissory notes contained a fixed amount of money, but whether promissory notes used to secure sales contracts were governed by the four year statute of limitations for contracts or the six year statute of limitations for promissory notes. *Alpacas of America*, 179 Wn. App. at 393. The parties argued over whether the note's reference to the sales contract destroyed its negotiability by making the note conditional. *Id.* at 397-98. In response, the Court held the borrower's promise to pay was not conditioned on the sales contract; therefore, negotiability was not destroyed under RCW 62A.3-106(a). *Id.*

> For purposes of determining whether a reference to an outside writing destroys a note's negotiability, the language "pursuant to" is not the same as "governed by" or "subject to" and does not condition one's promise to pay because "pursuant to" simply requires conformance with something and does not provide that something else controls or conditions it.

Id. Here, the Court of Appeals erred in applying Div. II's analysis of what makes a "promise or order unconditional" to the separate issue presented here, i.e. what makes a promissory note "for a fixed amount of money."

Along the same lines, RCW 62A.3-106 does not apply to what

constitutes a fixed amount of money. It only defines the first requirement of a negotiable instrument, "unconditional" promise:

> (a) Except as provided in this section, for the purposes of RCW 62A.3-104(a), a promise or order is unconditional unless it states (i) an express condition to payment, (ii) that the promise or order is subject to or governed by another writing, or (iii) that rights or obligations with respect to the promise or order are stated in another writing. A reference to another writing does not of itself make the promise or order conditional.
> (b) A promise or order is not made conditional (i) by a reference to another writing for a statement of rights with respect to collateral, prepayment, or acceleration, or (ii) because payment is limited to resort to a particular fund or source.

Further, Comment 1 to RCW 62A.3-106, titled "[u]nconditional promise or order" states:

> . . . In some cases it may be convenient not to include a statement concerning collateral, prepayment, or acceleration in the note, but rather to refer to an accompanying loan agreement, security agreement or mortgage for that statement. Subsection (b)(i) allows a reference to the appropriate writing for a statement of these rights. . .

Accordingly, it was error for the Court of Appeals to hold Mr. Bucci's note, and notes that list a dollar range as principal, are negotiable instruments by applying the law of what makes a note "unconditional" to the separate requirement that the note be for "a fixed amount of money."

ii. Unconditional Promise to Pay

The Court of Appeals' reasoned that Mr. Bucci's note was a negotiable instrument because it described how the interest rate and principal may

change. However, the requirement that a party's obligations be ascertainable from the face of the document is only the first requirement, that it represent an "unconditional" promise, which Mr. Bucci did not contend the note failed to contain. *See* RCW 62A.3-104 comment 1.

iii. The Majority Rule Clearly States A Fixed amount of Money Cannot be a Range of Money or a Maximum Amount of Money

The Court of Appeals erred by holding that predatory notes that provide for increasing principal, such as Mr. Bucci's note, constitute negotiable instruments. App. A. The Court reached this conclusion by reasoning that because the current definition of negotiable instrument in RCW 62A.3-104(a) does not require the amount of interest to be ascertainable from the document, as long as the document provides how the interest will be calculated, it is negotiable. App. A at 11-12.

It is true there is no ascertainable interest rate on the face of the note. However, this has nothing to do with Mr. Bucci's argument.[4] Mr. Bucci's note is not negotiable because the principal owed is not ascertainable from the Note's face. CP 305-306.

Crucially, the principal identified on the note serves as nothing more than the starting point of a range of money. CP 224. The face of the note

[4] Mr. Bucci did not argue his note was non-negotiable because it contains an adjustable interest rate that can only be ascertained by looking to extrinsic documents.

clearly states the principal amount owed on the loan may be between $1.53 million and $1.76 million. This is a range of money, and therefore not a "fixed amount." RCW 62A.3-104(a) (requires a fixed amount of money contained within the four corners of the document, not a range).

Counter to the Court of Appeals reasoning, a fluctuating principal amount is not simply a borrower caused result of choosing to make a lesser payment, but a result of a complicated and predatory scheme to increase the principal from inception. In this case, negative amortization was guaranteed to occur because the note based the payments for July 2007 to July 2008 on an interest rate of 1.1%, while at the same providing that the interest rate actually charged during that time period would be the index plus a margin of 2.5 %. The actual rate being charged is more than twice the rate used to calculate the monthly payment. CP 569 at ¶4.

Importantly, Mr. Bucci was charged an interest rate of 7.529% from May 27, 2007 through July 2007, which, per the terms of Paragraph G, was added to his principal, despite having no payment due. CP 569 at ¶¶2-3. 570 at ¶4(G).

Crucially, it is of public import that uniform laws are interpreted and applied in a uniform manner throughout the several states. *Lige Dickson Co. v. Union Oil Co. of California*, 96 Wn.2d 291, 299, 635 P.2d 103, 107 (1981); RCW 62A.1-103(a)(3). Importantly, "[a] court deciding a Code

question should follow the majority rule in order to achieve uniformity." 15A Am. Jur. 2d Commercial Code § 22.

Numerous other states interpreted the language in RCW 62A.3-104(a) as requiring the document represent a fixed amount of money, not a range of money or a maximum amount of money owed. *Heritage Bank v. Bruha*, 283 Neb. 263, 269–71, 812 N.W.2d 260, 267–68 (2012); *Bank of Am., N.A. v. Alta Logistics, Inc.*, 05-13-01633-CV, 2015 WL 505373, at *3 (Tex. App. Feb. 6, 2015); *Wattles v. Agelastos*, 27 Mich. App. 624, 183 N.W.2d 906 (1970); *Resolution Trust Corp. v. Oaks Apartments Joint Venture*, 966 F.2d 995, 1001 (5th Cir. 1992); *Cobb Bank & Trust Co. v. American Mfr's. Mut. Ins. Co.*, 459 F. Supp. 328 (N.D. Ga. 1978).

If this decision is left in place, Washington will not only fail to follow the majority rule, but will establish a minority rule.

iv. Cases prior to adoption of 62A.3 Are Relevant and Material

The Court of Appeals held Mr. Bucci's reliance on cases, such as *Anderson*, 63 Wn.2d at 292-293, arising before the most recent version of RCW 62.01.001 was replaced by RCW 62A.3-104(a) were of no import. App. A at 10-11. Yet, these cases provide insight regarding the fundamental purpose of negotiable instruments and why they came into existence, which has not changed. RCW 62A.3-104(a) still requires a fixed amount of money because negotiable instruments were intended to

be as precise as a dollar bill in the amount of money it represents:

> An indefinite obligation is obviously unadapted to the exigencies of commercial paper, which derives its peculiar qualities from the intended freedom and facility of its circulation, and the consequent necessity that it should carry upon its face unambiguous evidence of the maker's liability, and should denote, with precision, how much the maker is bound to pay and the holder is entitled to receive.

Anderson, 63 Wn.2d at 292-293 (citing *Farquhar v. Fidelity Ins., Trust & Safe Deposit Co.*, 13 Phila. 473, 474, 8 Fed. Cas. 1068 (C.C.E.D. Pa, 1878)); *Vancouver Nat. Bank v. Starr*, 123 Wash. 58, 62, 211 P. 746 (1923); *see also* J.P.T., Annotation, *Negotiability of note as affected by provision therein, or in mortgage securing the same for payment of taxes, assessments, or insurance,* 45 A.L.R. 1074 (1926) ("The reason for this rule is that negotiable paper is used as a substitute for money, and therefore it must indicate precisely how much money it represents.")

The requirement for certainty of the principal amount makes sense when viewed with the understanding that payment of a note is an affirmative defense that the maker must prove. CR 8(c); *Frick v. Wash. Water Power Co.*, 76 Wash. 12, 13-14, 135 P. 470 (1913). If the principal amount cannot be ascertained on its face and the note is negotiable, a holder could claim the upper limit of the range is due, and the maker would not be able to defend against such a claim with proof of payment.

C. The Court of Appeals Erred in Holding Production of a Note on the Day of Summary Judgment Was Sufficient to Establish Holdership at the Time the Nonjudicial Foreclosure Was Initiated Years Earlier.

The Court of Appeals erred in affirming the Trial Court's ruling that Respondent USB was the holder of the Bucci-WAMU note when Respondents initiated foreclosure because they produced a copy of the note, indorsed in blank for the Trial Court to inspect years later. App. A at * 9 (citing *Deutsche Bank Nat. Trust Co. v. Slotke*, 192 Wn. App. 166, 175-76, 367 P.3d 600 (Div. I 2016).

To nonjudicially foreclose, the foreclosing entity must be a beneficiary under RCW 61.24.005(2) at all statutorily relevant times. "'Beneficiary' means the holder of the instrument or document evidencing the obligations secured by the deed of trust, excluding persons holding the same as security for a different obligation." RCW 61.24.005(2). Because the DTA does not define the term holder, courts look to the UCC for guidance. *Bain v. Metro Morg. Grp., Inc.*, 175 Wn.2d 83, 104, 285 P.3d 34 (2012).

At the time of the summary judgment hearing, Respondents provided different versions of the note as true and correct copies. CP 1099-1100. Respondent Chase moved for summary judgment claiming the true and correct copy of the note had no endorsements. CP 927-34. Respondent USB moved for summary judgment on a copy of the note with

an endorsement. CP 224-29. Accordingly, the Trial Court erred by ruling that USB as trustee was the beneficiary of Mr. Bucci's non-negotiable note at the time the nonjudicial foreclosure was initiated in 2013 simply because their attorney claimed to possess a version of the note, different than the other versions, years later at summary judgment, as such a finding is not supported by the law. *See* RCW 62A.3-102; *see also Brown v. Washington State Dep't of Commerce*, 184 Wn.2d 509, 524, 359 P.3d 771 (2015).

VI. CONCLUSION

Review is necessary to align Washington with the majority rule in other states by holding predatory notes that provide for an increasing range of principal on their face, such as Mr. Bucci's Note, are not negotiable instruments. The Appellate Court's ruling is premised on a misapplication of RCW 62A-3 that warrants review in order to keep Washington from establishing a minority rule related to Article 3 of the UCC.

DATED this 1st day of March, 2017 at Arlington, Washington.

JBT & Associates, P.S.

Joshua B. Trumbull, WSBA# 40992

Emily A. Harris, WSBA# 46571

CERTIFICATE OF SERVICE

I, Ashley Brogan, certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct:

1. At all times hereinafter mentioned I am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen years, not a party to the above-entitled action, and competent to be a witness herein.

2. That on the 1st day of March, 2017, I caused to be served a true and correct copy of Appellant Frank Bucci's Petition for Review to the Supreme Court to respondents in the above title matter by causing it to be delivered to:

John Glowney Stoel Rives, LLP 600 University St, Suite 3600 Seattle, WA 98101 jeglowney@stoel.com	☐Express Mail ✓ U.S. First Class Mail Postage Paid ☐Hand Delivery ☐Legal Messenger ✓ Electronic-Email
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DATED this 1st day of March, 2017 at Arlington, Washington.

Ashley Brogan

Ashley Brogan
Paralegal
JBT & Associates, P.S.

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

FRANK BUCCI, Appellant, v. NORTHWEST TRUSTEE SERVICES, INC., a Washington corporation, RCO LEGAL P.S., Washington Professional Services Organization, JPMORGAN CHASE BANK, N.A., a national banking association, US BANK, NATIONAL ASSOCIATION, a national banking Association, SELECT PORTFOLIO SERVICING, INC., a Foreign Corporation registered in Washington, Respondents.	No. 73406-7-I DIVISION ONE PUBLISHED OPINION (IN PART) FILED: December 27, 2016

MANN, J. — In 2009, Frank Bucci defaulted on a $1.53 million promissory note secured by a deed of trust on his home. In 2013, U.S. Bank, N.A. as trustee (USB), the current beneficiary and holder of Bucci's promissory note, initiated nonjudicial foreclosure proceedings. Bucci responded by filing an action for declaratory and injunctive relief seeking to enjoin the nonjudicial foreclosure. Bucci's action included

claims under the Consumer Protection Act, chapter 19.86 RCW, and for negligence against USB; Select Portfolio Servicing, Inc. (SPS), the current loan servicer; JPMorgan Chase Bank, N.A. (Chase), the previous beneficiary of Bucci's promissory note; Northwest Trustee Services (NWTS), the trustee; and RCO Legal, P.S. (RCO), NWTS's law firm. The trial court dismissed Bucci's action on the respondents' motions for summary judgment. In the published portion of this decision, we conclude that the note was negotiable and properly admitted; we therefore affirm the dismissal of claims against USB and SPS. In the unpublished portion of this decision, we affirm the trial court's dismissal of all other claims.

FACTS

I.

In May 2007, Frank Bucci received a $1.53 million refinance loan from Washington Mutual bank, F.A. (Washington Mutual) and signed an adjustable rate note (note) as evidence of his obligation to repay the loan. To secure repayment of the debt, Bucci granted Washington Mutual a deed of trust (deed) encumbering his personal home and property located on the Reserve at Newcastle golf course in Washington.

The note and deed contain several key provisions relevant to this appeal. At the outset, the note explained that changes in the interest rate may result in an increase in the principal:

> THIS NOTE CONTAINS PROVISIONS ALLOWING FOR CHANGES IN MY INTEREST RATE AND MY MONTHLY PAYMENT. MY MONTHLY PAYMENT INCREASES WILL HAVE LIMITS WHICH COULD RESULT IN THE PRINCIPAL AMOUNT I MUST REPAY BEING LARGER THAN THE AMOUNT I ORIGINALLY BORROWED, BUT NOT MORE THAN 115% OF THE ORIGINAL AMOUNT (OR

> $1,759,500.00). MY INTEREST RATE CAN NEVER EXCEED THE LIMIT STATED IN THIS NOTE OR ANY RIDER TO THIS NOTE. A BALLOON PAYMENT MAY BE DUE AT MATURITY.

Section 1 of the note contains Bucci's promise to pay $1.53 million "plus any amounts added in accordance with Section 4(G) below, (this amount is called 'Principal'), plus interest, to the order of the Lender."

Section 4 of the note is titled "Interest Rate and Monthly Payment Changes." Sections 4(A) through (C) explain that the interest rate charged is subject to change on a monthly basis and determined by adding 2.5 percentage points to the "index"–a twelve-month average of the annual yields of United States Treasury Securities. Section 4(D) caps the interest rate at 9.7 percent.

Under the note, Bucci's payments are also subject to change. Section 4(E) explains that, unlike the interest rate that can change monthly, Bucci's monthly payments are calculated once a year. Bucci pays the amount set on July 1st each month for twelve months until the monthly payments are recalculated on July 1st of the following year. Bucci's monthly payment is the "monthly payment that would be sufficient to repay the projected principal balance [Bucci is] expected to owe as of [July 1st] in full on the Maturity Date at the interest rate in effect 45 days prior to [July 1st] in substantially equal payments." Section 4(F) explains that the newly calculated monthly payment is capped at 7.5 percent more or less than the amount of the monthly payment during the year before.

Section 4(G) of the note is titled "Changes in [the] Unpaid Principal Due to Negative Amortization or Accelerated Amortization." Section 4(G) explains:

> Since my payment amount changes less frequently than the interest rate and since the monthly payment is subject to the payment limitations described in Section 4(F), my monthly payment could be less or greater than the amount of the interest portion of the monthly payment that would be sufficient to repay the unpaid Principal I owe at the monthly payment date in full on the maturity date in substantially equal payments. For each month that the monthly payment is less than the interest portion, the Note Holder will subtract the monthly payment from the amount of the interest portion and will ad[d] the difference to my unpaid Principal, and interest will accrue on the amount of this difference at the current interest rate. For each month that the monthly payment is greater than the interest portion, the Note Holder will apply the excess toward a reduction of the Note.

Section 7(B) of the note states, "[i]f I do not pay the full amount of each monthly payment on the date it is due, I will be in default."

Section 22 of the deed provides, "If the default is not cured . . . Lender at its option may require immediate payment in full of all sums secured by this Security Instrument without further demand and may invoke the power of sale and/or any other remedies permitted by Applicable Law."

II.

In June 2007, Washington Mutual indorsed in blank,[1] sold, and deposited Bucci's loan into a loan trust titled WaMu Mortgage Pass-Through Certificates Series 2007-OA6 Trust (WaMu Trust).[2] As a result of the sale, the WaMu Trust owned and was the beneficiary of Bucci's note. Under the terms of the sale, the original trustees of the Wamu Trust was LaSalle Bank, N.A. Washington Mutual continued to service the note.

After Washington Mutual failed in September 2008, the Federal Deposit Insurance Corporation (FDIC) placed the bank into receivership. The FDIC then sold

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[1] A note indorsed in blank is payable to the bearer and "may be negotiated by transfer of possession alone." RCW 62A.3-205(b).

[2] The parties refer to the pooled trust as either the "Loan Trust" or "WaMu Trust." We use "WaMu Trust" in this opinion.

Washington Mutual's assets to Chase.[3] Under the sale agreement, "[Chase] specifically purchase[d] all mortgage servicing rights and obligations of [Washington Mutual]." As of September 2008, Chase began servicing the note for the WaMu Trust.

In October 2008, LaSalle Bank N.A., merged into, and subsequently operated as part of, Bank of America, N.A. (BofA). As of October 2008, BofA became trustee of the WaMu Trust, and was the beneficiary of the note.[4]

On January 29, 2009, BofA executed a limited power of attorney in favor of Chase authorizing Chase to, among other things, complete a nonjudicial foreclosure and appoint a successor trustee to serve under the deed. Chase continued to service the loan and as its attorney-in-fact, held the note on behalf of the beneficiary BofA.

Bucci defaulted on the note in March 2009. In April 2009, Chase notified Bucci that he was in default. Chase's notification letter included contact information for its loan modification hotline.

On July 16, BofA, through Chase, recorded an appointment of successor trustee. The appointment named NWTS as successor trustee under the deed.

NWTS recorded the first notice of trustee's sale in King County on August 14, 2009, setting the sale for November 13, 2009. The trustee's sale was postponed and later discontinued. NWTS recorded a second notice of trustee's sale on July 8, 2010, setting the sale for October 8, 2010. The second sale was also discontinued.

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[3] (Purchase and Assumption Agreement between FDIC and Chase; see also Purchase and Assumption Agreement, Federal Deposit Insurance Corporation (2008), https://www.fdic.gov/about/freedom/washington_mutual_p_and_a.pdf (same)).

[4] The full name of the beneficiary was "Bank of America, National Association as successor by merger to "LaSalle Bank NA as trustee for WaMu Pass-Through Certificates Series 2007-0A6 Trust." For simplicity we will refer to the beneficiary as "BofA."

On May 12, 2011, NWTS was notified that USB had succeeded BofA as trustee of the WaMu Trust. Consequently USB was the new beneficiary of the note.[5]

Almost two years later on March 12, 2013, NWTS sent Bucci a second notice of default. The notice identified the owner of the note as "U.S. Bank National Association, as Trustee, [of the WaMu Trust]."

In April 2013, Bucci elected to pursue foreclosure mediation through a referral from the Washington Department of Commerce. The referral identified the owner of the Note as "U.S. Bank National Association, as Trustee, [of the WaMu Trust]." Bucci unilaterally cancelled the mediation.

NWTS recorded the third notice of trustee's sale on June 25, 2013, and set the sale date for October 25, 2013. One day before the scheduled sale, NWTS received confirmation that USB was the deed's beneficiary. The third sale was postponed to January 24, 2014, but did not occur.

On August 1, 2013, Select Portfolio Servicing, Inc., (SPS) took over for Chase as the loan servicer for USB.

Bucci filed suit in August 2013, seeking declaratory judgment and injunctive relief to prevent the nonjudicial foreclosure and sale. The complaint alleged that all defendants were negligent, violated the deed of trust act (DTA), chapter 61.24 RCW, and Washington's Consumer Protection Act (CPA) chapter 19.86 RCW, and their duties of good faith.

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[5] The full name of the beneficiary was "U.S. Bank National Association, as Trustee, successors in interest to Bank of America, National Association as Trustee as successor by merger to Lasalle Bank, National Association as Trustee for WaMu Mortgage Pass-Through Certificates Series 2007-0A6 Trust." For simplicity we refer to the beneficiary as "USB as trustee."

All the defendants moved for summary judgment. The trial court granted the defendants' motions and dismissed all of Bucci's claims. Subsequent to the dismissal, the trial court granted a motion on the merits previously filed by Chase seeking dismissal based on federal preemption. Bucci timely appealed both orders. We affirm.

ANALYSIS

This court reviews summary judgment decisions de novo, engaging in the same inquiry as the trial court. Michack v. Transnation Title Ins. Co., 148 Wn.2d 788, 794-95, 64 P.3d 22 (2003). Summary judgment is appropriate if, viewing the facts and reasonable inferences in the light most favorable to the nonmoving party, no genuine issues of fact exist and the moving party is entitled to a judgment as a matter of law. Michak, 148 Wn.2d at 794-95. "A genuine issue of material fact exists if reasonable minds could differ about the facts controlling the outcome of the lawsuit." Barkley v. Greenpoint Mortg. Funding, Inc., 190 Wn. App. 58, 65, 358 P.3d 1204 (2015).

Summary judgment "is subject to a burden shifting scheme." Ranger Ins. Co. v. Pierce County, 164 Wn.2d 545, 552, 192 P.3d 886 (2008). The moving party meets its initial burden by submitting evidence demonstrating that it is entitled to a judgment as a matter of law. Ranger, 164 Wn.2d at 552. The burden then shifts to the nonmoving party to set forth "specific facts which sufficiently rebut the moving party's contentions and disclose the existence of a genuine issue as to a material fact." Ranger, 164 Wn.2d at 552 (quoting Meyer v. Univ. of Wash., 105 Wn.2d 847, 852, 719 P.2d 98 (1986)). To accomplish this, the nonmoving party "may not rely on speculation [or] argumentative assertions that unresolved factual issues remain." Ranger, 164 Wn.2d at 552 (quoting Seven Gables Corp. v. MGM/UA Entm't Co., 106 Wn.2d 1, 13, 721 P.2d 1 (1986).

I.

Under the Uniform Commercial Code (UCC) Title 62A RCW, the "holder" of an instrument, including a promissory note, is the "person entitled to enforce" the terms of the note. RCW 62A.3-301; RCW 62A.3-104(e). The holder of the note is the beneficiary of a deed of trust securing the note and is entitled to enforce the deed of trust through the nonjudicial foreclosure procedure set out in Washington's DTA. Bain v. Metropolitan Mortg. Group, Inc., 175 Wn.2d 83, 104, 285 P.3d 34 (2012).

USB sought dismissal of Bucci's claims on summary judgment claiming that as the holder of the note, it was entitled to enforce the terms of the note. The trial court agreed and granted summary judgment in favor of USB. Bucci assigns three errors to the trial court's decision: (1) the court erred in accepting testimony and evidence offered by USB's attorney; (2) the note was not a "negotiable instrument" and therefore fell outside of the UCC; and (3) the court erred in weighing evidence. We disagree and address each argument in turn.

A.

Bucci argues the trial court erred in admitting a declaration from USB's attorney, J. Will Eidson. Bucci objects specifically to the statement in Eidson's declaration attaching a true and correct copy of the note and declaring that "[t]he current holder of the Note and Deed of Trust is U.S. Bank N.A., as trustee." Bucci argues that Eidson was prohibited from testifying by the Rules of Professional Conduct, the Rules of Evidence, and CR 56(e) because he lacked personal knowledge of whether USB was the holder of the note.

But whether Eidson's testimony was admissible is irrelevant because the declaration was not necessary to prove that USB was the holder of the note. USB did not rely on Eidson's declaration or the copy of the note; instead at the summary judgment hearing USB offered the original note. As the trial court confirmed:

> For the purposes of the record and for clarity I am reviewing the adjustable rate note involving the property at 8102 155th Avenue Southeast Newcastle, Washington 98059. A copy of which was previously provided.
>
> There being no articulable basis to dispute authenticity, I would note that same on page 3 of 6 it appears identical to the one submitted. There are no modifications to the original thus far at page 4. There's the original signature. And the prepayment fee note addendum also made May 22, 2007. I didn't include the date, did I, -- which is also the date of the adjustable rate note. Also signed by the borrower.
>
> Thank you, Counsel. The originals, as presented to the Court, are identical to the copies provided. I did have an opportunity to observe the original signature of Mr. [Bucci].[6]

Under the UCC, the "holder" of the note is "the person in possession of a negotiable instrument that is payable either to the bearer or to an identified person that is the person in possession." RCW 62A.1-201(b)(21)(A). The "[m]ere production of a note establishes prima facie authenticity and is sufficient to make a promissory note admissible." United States v. Varner, 13 F.3d 1503, 1509 (11th Cir. 1994) (citing United States v. Carriger, 592 F.2d 312, 316-17 (6th Cir. 1979)). USB produced the original note, indorsed in blank, for inspection by the trial court. This was sufficient to prove the status of USB as the holder of Bucci's note. See Deutsche Bank Nat. Trust Co. v. Slotke, 192 Wn. App 166, 175-76, 367 P.3d 600 (2016).[7]

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[6] Report of Proceedings (Feb. 27, 2015) at 7.

[7] As stated in Deutsche Bank, "we express no opinion whether this is the exclusive method for the holder of a note to prove its right to enforce the note." 192 Wn. App. at 175-76. See e.g., Barkley, 190 Wn. App. at 66-68 (note and deed of trust admissible as business records pursuant to RCW 5.45.020).

B.

Bucci argues next that a negative amortizing note is not a negotiable instrument under Washington's UCC because there must be a promise to pay "a fixed amount of money" and the note provides that the principal may change depending on the borrower's payments and interest.[8] Bucci contends that because the note falls outside of the UCC, contract law applies and in order to enforce the note USB needs to establish their rights under common law contracts and demonstrate valid assignments and a chain of title from the original lender.

Under the UCC, a "'negotiable instrument' means an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order. RCW 62A.3-104(a). Negotiability is determined from the face, the four corners, of the instrument at the time it is issued without reference to extrinsic facts. 5A RONALD A. ANDERSON, ANDERSON ON THE UNIFORM COMMERCIAL CODE § 3-104:13, at 115 (3d ed. 1994) (citing Holsonback v. First State Bank of Albertville, 394 So. 2d 381, (Ala. Civ. App. 1980)).

Bucci relies primarily on Anderson v. Hoard, 63 Wn.2d 290, 387 P.2d 73 (1963), to support his claim that the note is not negotiable because the principal may increase. Bucci's reliance on Anderson is misplaced. The promissory note in Anderson applied the debtor's installment payments first to the accrued interest, and then, "at the option of the holder, . . . such advances as the holder may have made for taxes, assessments or insurance premiums and other charges on any property mortgaged or pledged to

[8] A year after Bucci executed the note, the Washington State Legislature passed legislation prohibiting a financial institution from making a residential mortgage loan with "any provisions that impose negative amortization." RCW 19.144.050 (effective June 12, 2008). In May 2007, however, a residential loan with negative amortization provisions was lawful.

secure this note," and finally to the reduction of principal. Anderson, 63 Wn.2d at 291. At the time of the Anderson decision, former RCW 62.01.001 (1995), required a negotiable instrument to "contain an unconditional promise or order to pay a sum certain in money." (Emphasis added.) Because the promissory note in Anderson provided for the repayment of unknown amounts of future taxes, assessments, insurance premiums, and other charges, the court found that the note did not contain a promise to pay a sum certain and was therefore not negotiable. Anderson, 63 Wn.2d at 293-94.

RCW 62.01.001 was subsequently repealed and replaced by the current definition of a "negotiable instrument" in RCW 62A.3-104(a).[9] Under the current definition, a "'negotiable instrument' means an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order." RCW 62A.3-104(a) (emphasis added). Further, under RCW 62A.3-112(b): "Interest may be stated in an instrument as a fixed or variable amount of money or it may be expressed as a fixed or variable rate or rates. The amount or rate of interest may be stated or described in the instrument in any manner and may require reference to information not contained in the instrument." (Emphasis added.) Thus,

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[9] Bucci also relies on brief passages in two law review articles to support the argument that a loan with a negative amortization feature is not negotiable. Neither article is persuasive. In the first, Elizabeth Renuart, Uneasy Intersections: The Right To Foreclose and the U.C.C., 48 WAKE FOREST L. REV. 1205, 1231 (2013), the author relies on the unpublished California U.S. District Court opinion in Ralston v. Mortgage Investors Grp., Inc., No. C 08-536 JF (PVT), 2010 WL 3211931 (N.D. Cal. Aug. 12, 2010) for the proposition that inevitable negative amortization renders the actual principal amount uncertain. Ralston concerned a fraudulent omission claim under California law. It is not a UCC case and does not address whether a negative amortization feature renders a promissory note nonnegotiable.

In Kathleen C. Engel and Thomas J. Fitzpatrick IV, Complexity, Complicity, and Liability up the Securitization Food Chain: Investor and Arranger Exposure to Consumer Claims, 2 Harv. Bus. L. Rev. 345, 358 n.50 (2012), the authors state, "Arguably, loans with negative amortization could be for uncertain sums because the principal balance can increase over time." The authors provide no support this claim other than a contrary authority in Goss v. Trinity Savings & Loan Ass'n., 1991 OK 19, 813 P.2d 492.

negotiability exists if the fixed amount can be determined from the face of the instrument, except for amounts of interest, for which reference to information not contained in the note is allowable.

As Division Two of this court recently explained: "A reference to another writing does not of itself make the promise or order conditional. We analyze the promissory notes' contents to determine whether the notes' holder could determine her or his rights, duties, and obligations with respect to the payment on the notes without having to examine any other documents." Alpacas of America, LLC v. Groome, 179 Wn. App. 391, 397, 317 P.3d 1103 (2015) (citing RCW 62A.3-106 cmt. 1). Indeed, as explained in comment 1 of RCW 62A.3-106, the rights, duties, and obligations of the transferee—not the current balance—must be found on the face of instrument:

> The rationale is that the holder of a negotiable instrument should not be required to examine another document to determine rights with respect to payment. But subsection (b)(i) permits reference to a separate writing for information with respect to collateral, prepayment, or acceleration.
>
> Many notes issued in commercial transactions are secured by collateral, are subject to acceleration in the event of default, or are subject to prepayment, or acceleration does not prevent the note from becoming an instrument if the statement is in the note itself.

RCW 62A.3-106 cmt. 1.

The note here describes Bucci's obligations on its face: "I promise to pay U.S. $1,530,000.00 plus any amounts added in accordance with Section 4(G) below, (this amount called "Principal"), plus interest, to the order of the Lender." Bucci's note fully discloses how interest accrual may result in negative amortization, depending on the amount Bucci chooses to make as a monthly payment. Negative amortization only occurs under the note if Bucci chooses not to pay the full amount of interest due each

month and only if the monthly payment is insufficient to cover the accrued interest. Bucci's note provides for a monthly payment, but Bucci is not limited to paying only the monthly payment amount. The note expressly permits Bucci to make prepayments towards the principal.

RCW 62A.3-104(a) defines a negotiable instrument as "an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order." RCW 62A.3-104(a). Because Bucci's note contains an unconditional promise to pay a fixed amount of $1.53 million plus any amounts added in accordance with the provisions in Section (4)(G) of the note, it is a negotiable instrument as defined in RCW 62A.3-104(a).

C.

Bucci next argues that in granting USB's motion for summary judgment, the trial court erroneously weighed the credibility of the parties' evidence. Specifically, Bucci contends that the trial court weighed evidence concerning whether USB, was the holder of the note and beneficiary of the deed. We disagree.

The UCC sets forth the rules for challenging the originality of a note. A note is original if it contains the original signature of the maker. Under RCW 62A.3-308(a), the validity of signatures are admitted unless specifically denied:

> In an action with respect to an instrument, the authenticity of, and authority to make, each signature on the instrument is admitted unless specifically denied in the pleadings. If the validity of a signature is denied in the pleadings, the burden of establishing validity is on the person claiming validity, but the signature is presumed to be authentic and authorized unless the action is to enforce the liability of the purported signer and the signer is dead or incompetent at the time of trial of the issue of validity of the signature.

(Emphasis added.) Here, USB produced the original of the note before the trial court and the trial court confirmed it contained Bucci's original signature. Bucci did not dispute the originality of the note or the authenticity of his signature on the note. Thus, the validity of the signatures is admitted.

Under RCW 62A.3-308(b), if the validity of the signatures is admitted, then so long as the plaintiff producing the instrument is the "holder" of the instrument under RCW 62A.3-301, the plaintiff is "entitled to payment" unless "the defendant proves a defense or claim in recoupment." RCW 62A.3-308(b). Here, USB was the holder of the original note and the signature on the note was not disputed.

The only defenses raised by Bucci in response to USB's offer of the original note were that (1) the trial court either erred in admitting Eidson's declaration and evidence; and (2) that the note was not negotiable. As discussed above, both of Bucci's defenses fail as a matter of law. The trial court did not err in weighing the evidence. Because Bucci failed to introduce valid evidence disputing that USB was the holder of the original note, there was no evidence for the trial court to weigh. Summary judgment in favor of USB is affirmed.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and the remainder having no precedential value shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

II.

Bucci next assigns error to the trial court's dismissal of his CPA claims against USB, loan servicer SPS, Chase, NWTS, and its law firm RCO. To prevail in a CPA action the plaintiff must prove (1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, (3) affecting the public interest, (4) injury to a person's business or property, and (5) causation. Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 784, 719 P.2d 531 (1986). "Failure to satisfy even one of the elements is fatal to a CPA claim." Sorrel v. Eagle Healthcare, Inc., 110 Wn. App. 290, 298, 38 P.3d 1024 (2002). A presale violation of the DTA may establish an unfair or deceptive act and be compensable under the CPA. Frias v. Asset Foreclosure Servs. Inc., 181 Wn.2d 412, 432-333, 334 P.3d 529 (2014); Lyons v. U.S. Bank, N.A., 181 Wn.2d 775, 784, 336 P.3d 1142 (2014).

A.

Bucci claims that USB and servicer SPS, committed an unfair and deceptive act when it initiated a nonjudicial foreclosure against Bucci on June 26, 2009, in violation of the DTA. We disagree.

Bucci's claim against USB and SPS fails for two reasons. First, USB did not initiate the nonjudicial foreclosure in 2009. The 2009 foreclosure was initiated on behalf of BofA. USB did not become the trustee of the WaMu Trust until May 2011—prior to the third notice of sale. Second, when USB did ultimately initiate nonjudicial foreclosure in 2013, it was the holder of the note and, contrary to Bucci's assertion, the note was a negotiable instrument.

Summary judgment dismissing Bucci's CPA claims against USB and SPS was appropriate as Bucci failed to demonstrate that either entity committed an unfair or deceptive act.

B.

Bucci asserts that Chase committed an unfair or deceptive act when it induced him to stop making his mortgage payments and failed to inform him that if he defaulted they could foreclose on his property. Bucci also asserts that Chase committed an unfair or deceptive act because it lacked authority to appoint NWTS as successor trustee to conduct the nonjudicial foreclosure.[10] We disagree.

1.

In response to Chase's motion for summary judgment, Bucci supported his claim that Chase induced him to quit making loan payments by explaining that after the 2007 housing crash, his property lost approximately one half of its value. In response, while he was still able to make his loan payments, he "hoped to negotiate" new loan terms reflecting "market conditions and the new value" of his property. He then claimed that "on numerous occasions, WaMu told me that it would not work with me regarding a loan modification while I was current on my loan payments."[11] He then relied on the media to support this belief: "'everybody' knew this to be the case and, by that, I mean that due to strong media attention it was basically public knowledge that you had to be behind on your mortgage payments to qualify for a loan modification."

[10] Bucci also claims that Chase failed to provide him a preforeclosure letter under RCW 61.24.031. Bucci failed to present substantive argument in support of this claim and it is deemed waived. RAP 10.3(a)(3); Ang v. Martin, 154 Wn.2d 477, 486-87, 114 P.3d 637 (2005).

[11] Bucci later recalled it was Chase that continued to advise him to miss payments.

In response to a motion for summary judgment, a party must "set forth specific facts showing that there is a genuine issue for trial." CR 56(e). A declaration containing only conclusory statements without adequate factual support does not create an issue of material fact that defeats a motion for summary judgment. Lane v. Harborview Medical Center, 154 Wn. App. 279, 288, 227 P.3d 297 (2010).

Bucci failed to meet his burden of demonstrating that Washington Mutual or Chase induced him to stop making loan payments. He offered nothing other than his belief that he needed to default in order to obtain a loan modification. In essence, Bucci alleged only that Washington Mutual, then Chase, informed him that they do not modify performing loans. Bucci failed to demonstrate that Chase induced him to default. Bucci does not allege that he was promised a loan modification if he defaulted—only that he believed that one of the requirements for obtaining a loan modification was to be behind on payments.

Bucci also does not argue that Chase's alleged inducement in any way prevented him from curing his default. To the contrary, while Bucci admitted an obligation to pay, he also admitted that he did not attempt to pay the arrears on his loan after he defaulted because he "didn't want to" since there was "negative equity" in the property. Thus, Bucci failed to cure his default, but does not allege that his failure to cure the default was attributable to Chase's alleged inducement.

Bucci also asserts that Chase acted deceptively by "failing to disclose that if failed to make his payments, they would take his home and not provide him a loan modification."

At the outset, Bucci's disappointment over the denial of his desire for a loan modification is not actionable: "While the parties may choose to renegotiate their agreement, they are under no good faith obligation to do so." Badgett v. Sec. State Bank, 116 Wn.2d 563, 572 87 P.2d 356 (1991). The record shows that Chase tried to help Bucci with a loan modification. Bucci was in favor of a loan modification, but was denied because his unpaid principal exceeded the amount allowed under the Home Affordable Foreclosure Alternative Program limit. Bucci was also denied a short sale because he failed to provide the documents requested by Chase. Further, Bucci unilaterally cancelled his Foreclosure Fairness Act mediation based on his belief that the beneficiary wouldn't mediate in good faith.

Bucci also cannot demonstrate that Chase failed to disclose that the remedy for default was a potential foreclosure sale. Bucci does not dispute that the note includes his express agreement that: "If I do not pay the full amount of each monthly payment on the date it is due, I will be in default." Nor does Bucci dispute that the deed expressly allows for foreclosure sale in the event of a default under the note. While Chase worked with Bucci on a possible loan modification, it was under no obligation to do so.

Bucci also alleges that Chase acted unfairly and deceptively by "dual tracking" him and working with him on a loan modification while simultaneously moving forward with nonjudicial foreclosure. Bucci relies on the unpublished federal district court opinion Singh v. Federal National Mortgage Ass'n, No. C13-1125 RAJ, 2014 WL 504820, at *4-5 (W.D. Wash. Feb. 7, 2014) (court order) for the proposition that "'dual tracking'" is unlawful. But in Singh, there was evidence that the plaintiff "'continually received promises from the representatives at the service center that the foreclosure

sale would not proceed while their loan modification was being processed." Singh, 2014 WL 504820, at *5. Here, Bucci offered no evidence of any such promises. Moreover, Bucci offers no evidence that Chase followed through on a foreclosure sale while he was attempting a loan modification. Both the 2009 and 2010 foreclosure sales were cancelled. Chase was under no obligation to give up its rights to foreclosure while considering a modification. The deed expressly provides that the lender's willingness to consider modification or forbearance does not waive the lender's rights or remedies.

Bucci argues next that Chase committed an unfair or deceptive act by appointing NWTS as successor to the original trustee without authority. This is true, according to Bucci, because BofA, not Chase, was the beneficiary of the WaMu Trust in July 2009. Bucci asserts that because Chase was not the beneficiary, Chase lacked authority to appoint NWTS as successor trustee.

Under the DTA, the beneficiary has the power to appoint any trustee that is qualified to act as such pursuant to law. RCW 61.24.010(2). But "only a proper beneficiary has the power to appoint a successor to the original trustee named in the deed of trust." Bavand v. OneWest Bank, F.S.B., 176 Wn. App. 475, 486, 309 P.3d 636 (2013). "[W]hen an unlawful beneficiary appoints a successor trustee the putative trustee lacks the legal authority to record and serve a notice of trustee's sale. Walker v. Quality Loan Serv. Corp., 176 Wn. App. 294, 306, 308 P.3d 716 (2013). "Such actions by the improperly appointed trustee . . . constitute 'material violations of the DTA.'" Rucker v. Novastar Mortg., Inc., 177 Wn. App. 1, 14, 311 P.3d 31 (2013) (quoting Walker, 176 Wn. App. at 308).

Chase acquired Washington Mutual's assets on September 25, 2008, including its servicing obligations for the WaMu Trust. On January 29, 2009, BofA executed a limited power of attorney in favor of Chase authorizing Chase to, among other things, complete a nonjudicial foreclosure and appoint a successor trustee to serve under the deed. Thus, while BofA was the beneficiary of Bucci's note in July 2009, Chase was acting as BofA's agent and attorney-in-fact with the express authority to appoint a successor trustee.

While Bucci agrees that the DTA allows the use of agents, he asserts that the DTA "does not allow an agent to appoint a successor trustee." We disagree. In Bain, our Supreme Court held that "nothing in this opinion should be construed to suggest an agent cannot represent the holder of a note," and that "Washington law, and the deed of trust act itself, approves of the use of agents." 175 Wn.2d 83, 106, 285 P.3d 34 (2012). In July 2009, BofA was the holder of the note and the beneficiary under the DTA. BofA was entitled to initiate foreclosure proceedings. BofA also had authority to appoint Chase as its agent and attorney-in-fact. As BofA's agent, Chase had the authority to appoint a successor trustee to carry out the nonjudicial foreclosure.

Summary judgment dismissing Bucci's CPA claims against Chase was appropriate as Bucci failed to demonstrate an unfair or deceptive act.

C.

Bucci argues that NWTS and RCO committed an unfair or deceptive act by (1) violating the DTA and relying on an ambiguous beneficiary declaration to initiate nonjudicial foreclosure in violation of RCW 61.24.070(7)(a); and (2) violating its duty of good faith by failing to conduct a cursory investigation. We disagree.

RCW 61.24.010(4) imposes a duty of good faith on the trustee toward the borrower, beneficiary, and grantor. See RCW 61.24.010(4). The Lyons court confirmed that the duty of good faith requires the trustee to "remain impartial and protect the interests of all the parties." Lyons, 181 Wn.2d at 787. "[T]he trustee in a nonjudicial foreclosure action has been vested with incredible power. Concomitant with that power is an obligation to both sides to do more than merely follow an unread statute and the beneficiary's directions." Klem v. Washington Mutual Bank, 176 Wn.2d 771, 791, 295 P.3d 1179 (2013). "A foreclosure trustee must 'adequately inform' itself regarding the purported beneficiary's right to foreclose, including, at a minimum, a 'cursory investigation' to adhere to its duty of good faith." Lyons, 181 Wn.2d at 787 (quoting Walker,176 Wn. App. at 309-10. "A trustee does not need to summarily accept a borrower's side of the story or instantly submit to a borrower's demands. But a trustee must treat both sides equally and investigate possible issues using its independent judgment to adhere to its duty of good faith." Lyons, 181 Wn.2d at 787. A trustee's failure to act impartially can support a CPA claim. Klem, 176 Wn.2d at 792.

1.

Bucci argues first that NWTS violated RCW 61.24.070(7)(a) by relying on an ambiguous beneficiary declaration.

RCW 61.24.030(7)(a) requires a trustee have proof that the beneficiary is the owner of any promissory note before recording the notice of trustee's sale. "Although ownership can be proved in different ways, the statute itself suggests one way: 'A declaration by the beneficiary made under the penalty of perjury stating that the beneficiary is the actual holder of the promissory note . . . shall be sufficient proof as

required under this subsection.'" Lyons, 181 Wn.2d at 789-90 (quoting RCW 61.24.030(7)(a)).

In Lyons, our Supreme Court held that a successor trustee could not rely on an ambiguous beneficiary declaration that states an entity either held the note or had authority under RCW 62A.3-301 to enforce the note. Lyons, 181 Wn.2d at 791. The beneficiary declaration in Lyons read, "Wells Fargo Bank, NA, is the actual holder of the promissory note or has requisite authority under RCW 62A.3-301 to enforce said obligation." Lyons, 181 Wn.2d at 780 (emphasis added). Strictly construing RCW 61.24.030(7), the court found the declaration ambiguous on its face as it did not prove whether "Wells Fargo is the holder, or whether Wells Fargo is a nonholder in possession or person not in possession who is entitled to enforce." Lyons, 181 Wn.2d at 791.

It is undisputed in this case that the July 30, 2009, beneficiary statement provided to NWTS suffered from the same defect as the declaration in Lyons. The declaration read "Bank of America, National Association as successor by merger to "LaSalle Bank NA as trustee for WaMu Mortgage Pass-Through Certificates Series 2007-0A6 Trust is the actual holder of the promissory note or other obligation evidencing the above-referenced loan or has requisite authority under RCW 62A.3-301 to enforce said obligation." (Emphasis added.) Thus, if NWTS had relied solely on the July 30, 2009, equivocal beneficiary declaration, Bucci would be correct—that NWTS violated the DTS.

The Lyons court, however, noted that the trustee could still comply with RCW 61.24.030(7)(a) by relying on evidence other than the equivocal beneficiary declaration.

Lyons, 181 Wn.2d at 791. Similarly, in Trujillo v. Northwest Trustee Services, Inc., 183 Wn.2d 820, 828, 833-34, 355 P.3d 1100 (2015), the court reviewed a similarly defective ambiguous beneficiary declaration. But, while the declaration in Trujillo failed to satisfy RCW 61.24.030(7)(a), the Court remanded with instructions that the borrower "have the opportunity to prove that the [trustee] actually relied on the impermissibly ambiguous declaration as a basis for issuing the notice of trustee's sale." Trujillo, 183 Wn.2d at 834.

Here, there is adequate evidence to demonstrate that NWTS possessed information that satisfied RCW 61.24.030(7)(a)'s proof requirement before issuing its 2009 Notice of Trustee's Sale. First, NWTS received a foreclosure referral through a secure messaging platform on June 26, 2009, that identified BofA of WaMu Trust as the foreclosing entity.[12] Along with the referral NWTS received a copy of the note, indorsed in blank. Second, NWTS obtained a trustee's sale guarantee dated June 23, 2009, from First American that identified BofA of the WaMu Trust as the owner of Bucci's Note. Third, Chase, as attorney-in-fact for BofA of the WaMu Trust appointed NWTS as successor trustee of Bucci's deed on July 10, 2009. Fourth, an assignment of deed of trust was recorded in King County on July 10, 2009, that identified BofA of the WaMu Trust as the beneficiary of Bucci's note. The appointment unambiguously states that BofA "is the owner and holder of the obligation secured by the subject deed of trust and

[12] Mr. Stenman, NWTS's Vice President and Director of Operations, stated in a declaration that the secure-messaging system is "routinely relied upon in the course of [NWTS's] business as containing accurate information." CP at 1286.

is not holding the same as a security for a different obligation." On July 30, 2009, Chase, the attorney-in-fact for BofA, issued the ambiguous beneficiary declaration.[13]

Even with the lacking beneficiary declaration, it is clear from the record before us that NWTS had sufficient proof of the foreclosing beneficiary's identity prior to serving its first notice of trustee's sale on August 13, 2009.[14]

2.

Bucci asserts that NWTS committed an unfair or deceptive act when it violated its duty of good faith under RCW 61.24.010(4) by failing to perform a "cursory investigation" into whether Chase was BofA's attorney-in-fact and whether BofA or USB, were in fact proper beneficiaries. Other than citing Lyons and Walker, Bucci provides no argument in support of his contention.

In Lyons, there was evidence Lyon's attorneys repeatedly communicated with Wells Fargo and NWTS and informed them of significant errors and conflicting information before the nonjudicial foreclosure. Cf. Lyons, 181 Wn.2d at 787-88. Here, Bucci never contacted NWTS. But even if Bucci had notified NWTS of improprieties, it is clear that NWTS would not have breached its duty of good faith by proceeding with the foreclosure process. NWTS possessed reliable information showing that Chase was the attorney-in-fact for BofA and that BofA and USB were the beneficiaries of the

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[13] At the time the declaration was issued, Lyons had not been decided. NWTS only learned that the beneficiary declaration was ambiguous after the Lyons opinion was published in 2014.

[14] After NWTS issued its first notice of trustee's sale, evidence that BofA as trustee of the WaMu Trust was the beneficiary of Bucci's note, continued to accrue. First, On September 9, 2013, First American issued an indorsement to its June 23, 2009, trustee's sale guarantee that confirmed—again—BofA as Trustee of the Loan Trust as beneficiary. Second, prior to issuance of the third notice of trustee sale, NWTS was informed that USB became the successor in interest to BofA as trustee of the WaMu Trust. Finally, on July 7, 2011, NWTS received screenshots from Chase's electronic records that identified USB as trustee of the WaMu Trust as the beneficiary of the note.

note prior to issuing the notices of trustee sale. Here, NWTS met its duty of good faith under RCW 61.24.010(4).

Summary judgment dismissing Bucci's CPA claims against NWTW and RCO was appropriate as Bucci failed to demonstrate an unfair or deceptive act.

III.

Bucci next assigns error to the dismissal of his negligence claims against all the respondents. Bucci argue that the respondents had a duty to use reasonable care because they created a risk of harm when they made "errors, misrepresentations, and omissions . . . during the loan modification and nonjudicial foreclosure." Bucci relies solely on his alleged violations of the DTA and CPA to demonstrate the duty of care. Bucci does not argue the elements of breach, causation, or damage.

Because Bucci does not argue independent grounds for negligence, and his claims against respondents for violations of the DTA and CPA fail, his negligence claims similarly fail. Summary judgment dismissing Bucci's negligence claims was appropriate.

IV.

After the trial court dismissed Bucci's claims against Chase on summary judgment, the trial judge granted in part and denied in part Chase's motion to dismiss based on its argument that Bucci's claims were preempted by the Home Owners' Loan Act of 1933 (HOLA), 12 U.S.C. §§ 1461-1468. Bucci assigns error to the trial court's decision.

Because the trial court was correct in dismissing Bucci's underlying claims against Chase under the CPA and for negligence, we decline to address whether Bucci's claims were also preempted by HOLA.

V.

Bucci's amended complaint and appeal included RCO, NWTS's law firm, as a party. NWTS asks us to sanction Bucci for including RCO as a party on appeal.

Washington Rules of Appellate Procedure 18.9 allows this court to order a party or counsel who files a frivolous appeal to pay terms or compensatory damages to this court or any other party who has been harmed by the failure to comply. "An appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal." Lee v. Kennard, 176 Wn. App. 678, 692, 310 P.3d 845 (2013). "RAP 18.9(a) does not speak in terms of filing one or more frivolous issues or assignments of error—only a frivolous appeal as a whole." Lee, 176 Wn. App. at 693.

Here, while Bucci did not assign error to the trial court's grant of summary judgment to RCO, and neglected to address RCO's liability, the appeal, when considered as a whole, is not frivolous. We decline to impose sanctions.

The trial court's decision granting summary judgment in favor of the respondents is affirmed.

Mann, J.

WE CONCUR:

Dwyer, J.

Appelwick, J.

APPENDIX B

RICHARD D. JOHNSON,
Court Administrator/Clerk

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of the
State of Washington

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January 30, 2017

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CASE #: 73406-7-I
Frank Bucci, App. vs. Northwest Trustee Services, et al., Resps.

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

jh
Enclosure
c: The Hon. Tanya Thorp

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

FRANK BUCCI, Appellant, v. NORTHWEST TRUSTEE SERVICES, INC., a Washington corporation, RCO LEGAL P.S., Washington Professional Services Organization, JPMORGAN CHASE BANK, N.A., a national banking association, US BANK, NATIONAL ASSOCIATION, a national banking Association, SELECT PORTFOLIO SERVICING, INC., a Foreign Corporation registered in Washington, Respondents.	No. 73406-7-I DIVISION ONE ORDER DENYING MOTION FOR RECONSIDERATION

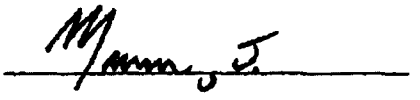
Appellant Frank Bucci has filed a motion for reconsideration of the court's opinion filed on December 27, 2016. The panel has determined that the motion should be denied.

Therefore, it is

ORDERED that the motion for reconsideration is denied.

Dated this 30th day of January 2017.

FOR THE PANEL:



RELEVANT STATUTES

RCW 19.144.010

Definitions.

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) "Adjustable rate mortgage" or "ARM" means a payment option ARM or a hybrid ARM (commonly known as a 2/28 or 3/27 loan).

(2) "Application" means the same as in Regulation X, Real Estate Settlement Procedures, 24 C.F.R. Sec. 3500, as used in an application for a residential mortgage loan.

(3) "Borrower" means any person who consults with or retains a person subject to this chapter in an effort to seek information about obtaining a residential mortgage loan, regardless of whether that person actually obtains such a loan.

(4) "Department" means the department of financial institutions.

(5) "Director" means the director of the department of financial institutions.

(6) "Financial institution" means commercial banks and alien banks subject to regulation under Title 30A RCW, savings banks subject to regulation under Title 32 RCW, savings associations subject to regulation under Title 33 RCW, credit unions subject to regulation under chapter 31.12 RCW, consumer loan companies subject to regulation under chapter 31.04 RCW, and mortgage brokers and lenders subject to regulation under chapter 19.146 RCW.

(7) "Fully indexed rate" means the index rate prevailing at the time a residential mortgage loan is made, plus the margin that will apply after the expiration of an introductory interest rate.

(8) "Mortgage lending process" means the process through which a person seeks or obtains a residential mortgage loan or residential mortgage loan modification including, but not limited to, solicitation, application, or origination; negotiation of terms; third-party provider services; underwriting; signing and closing; and funding of the loan. Documents involved in the mortgage lending process include, but shall not be limited to, uniform residential loan applications or other loan applications, appraisal reports, settlement statements, supporting personal documentation for loan applications such as W-2 forms, verifications of income and employment, bank statements, tax returns, payroll stubs, and any required disclosures.

(9) "Negative amortization" means an increase in the principal balance of a loan caused when the loan agreement allows the borrower to make payments less than the amount needed to pay all the interest that has accrued on the loan. The unpaid interest is added to the loan balance and becomes part of the principal.

(10) "Person" means individuals, partnerships, associations, limited liability companies, limited liability partnerships, trusts, corporations, and all other legal entities.

(11) "Residential mortgage loan" means an extension of credit secured by residential real property located in this state upon which is constructed or intended to be constructed, a single-family dwelling or multiple-family dwelling of four or less units. It does not include a reverse mortgage or a borrower credit transaction that is secured by rental property. It does not include a bridge loan. It does not include loans to individuals making or acquiring a residential mortgage loan solely with his or her own funds for his or her own investment. For purposes of this subsection, a "bridge loan" is any temporary loan, having a maturity of one year or less, for the purpose of acquisition or construction of a dwelling intended to become the borrower's principal dwelling.

(12) "Residential mortgage loan modification" means a change in one or more of a residential mortgage loan's terms or conditions. Changes to a residential mortgage loan's terms or conditions include, but are not limited to, forbearances; repayment plans; changes in interest rates, loan terms, or loan types; capitalizations of arrearages; or principal reductions.

(13) "The interagency guidance on nontraditional mortgage product risks" means the guidance document issued in September 2006 by the office of the comptroller of the currency, the board of governors of the federal reserve system, the federal deposit insurance corporation, the office of thrift supervision, and the national credit union administration, and the guidance on nontraditional mortgage

product risks released in November 2006 by the conference of state bank supervisors and the American association of residential mortgage regulators.

(14) "The statement on subprime mortgage lending" means the guidance document issued in June 2007 by the office of the comptroller of the currency, the board of governors of the federal reserve system, the federal deposit insurance corporation, the office of thrift supervision, and the national credit union administration, and the statement on subprime mortgage lending released in July 2007 by the conference of state bank supervisors, the American association of residential mortgage regulators, and the national association of consumer credit administrators.

[2015 c 229 § 2; 2008 c 108 § 2.]

RCW 19.144.050

Negative amortization—Limitation.

A financial institution may not make or facilitate a residential mortgage loan that includes any provisions that impose negative amortization and which are subject to the interagency guidance on nontraditional mortgage product risks and the statement on subprime mortgage lending.

[2008 c 108 § 6.]

RCW 19.144.110

Civil and administrative penalties.

Any penalty imposed for violation of this chapter is in addition to, and not in lieu of, any civil or administrative penalty or sanction otherwise authorized by law.

[2008 c 108 § 12.]

RCW 61.24.005

Definitions.

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) "Affiliate of beneficiary" means any entity which controls, is controlled by, or is under common control with a beneficiary.

(2) "Beneficiary" means the holder of the instrument or document evidencing the obligations secured by the deed of trust, excluding persons holding the same as security for a different obligation.

(3) "Borrower" means a person or a general partner in a partnership, including a joint venture, that is liable for all or part of the obligations secured by the deed of trust under the instrument or other document that is the principal evidence of such obligations, or the person's successors if they are liable for those obligations under a written agreement with the beneficiary.

(4) "Commercial loan" means a loan that is not made primarily for personal, family, or household purposes.

(5) "Department" means the department of commerce or its designee.

(6) "Fair value" means the value of the property encumbered by a deed of trust that is sold pursuant to a trustee's sale. This value shall be determined by the court or other appropriate adjudicator by reference to the most probable price, as of the date of the trustee's sale, which would be paid in cash or other immediately available funds, after deduction of prior liens and encumbrances with interest to the date of the trustee's sale, for which the property would sell on such date after reasonable exposure in the market under conditions requisite to a fair sale, with the buyer and seller each acting prudently, knowledgeably, and for self-interest, and assuming that neither is under duress.

(7) "Grantor" means a person, or its successors, who executes a deed of trust to encumber the person's interest in property as security for the performance of all or part of the borrower's obligations.

(8) "Guarantor" means any person and its successors who is not a borrower and who guarantees any of the obligations secured by a deed of trust in any written agreement other than the deed of trust.

(9) "Housing counselor" means a housing counselor that has been approved by the United States department of housing and urban development or approved by the Washington state housing finance commission.

(10) "Owner-occupied" means property that is the principal residence of the borrower.

(11) "Person" means any natural person, or legal or governmental entity.

(12) "Record" and "recorded" includes the appropriate registration proceedings, in the instance of registered land.

(13) "Residential real property" means property consisting solely of a single-family residence, a residential condominium unit, or a residential cooperative unit. For the purposes of the application of RCW **61.24.163**, owner-occupied residential real property includes residential real property of up to four units.

(14) "Senior beneficiary" means the beneficiary of a deed of trust that has priority over any other deeds of trust encumbering the same residential real property.

(15) "Tenant-occupied property" means property consisting solely of residential real property that is the principal residence of a tenant subject to chapter **59.18** RCW or other building with four or fewer residential units that is the principal residence of a tenant subject to chapter **59.18** RCW.

(16) "Trustee" means the person designated as the trustee in the deed of trust or appointed under RCW **61.24.010**(2).

(17) "Trustee's sale" means a nonjudicial sale under a deed of trust undertaken pursuant to this chapter.

[**2014 c 164 § 1.** Prior: **2011 c 364 § 3; 2011 c 58 § 3;** prior: **2009 c 292 § 1; 1998 c 295 § 1.**]

NOTES:

Findings—Intent—2011 c 58: "(1) The legislature finds and declares that:

(a) The rate of home foreclosures continues to rise to unprecedented levels, both for prime and subprime loans, and a new wave of foreclosures has occurred due to rising unemployment, job loss, and higher adjustable loan payments;

(b) Prolonged foreclosures contribute to the decline in the state's housing market, loss of property values, and other loss of revenue to the state;

(c) In recent years, the legislature has enacted procedures to help encourage and strengthen the communication between homeowners and lenders and to assist homeowners in navigating through the foreclosure process; however, Washington's nonjudicial foreclosure process does not have a mechanism for homeowners to readily access a neutral third party to assist them in a fair and timely way; and

(d) Several jurisdictions across the nation have foreclosure mediation programs that provide a cost-effective process for the homeowner and lender, with the assistance of a trained mediator, to reach a mutually acceptable resolution that avoids foreclosure.

(2) Therefore, the legislature intends to:

(a) Encourage homeowners to utilize the skills and professional judgment of housing counselors as early as possible in the foreclosure process;

(b) Create a framework for homeowners and beneficiaries to communicate with each other to reach a resolution and avoid foreclosure whenever possible; and

(c) Provide a process for foreclosure mediation when a housing counselor or attorney determines that mediation is appropriate. For mediation to be effective, the parties should attend the mediation (in person, telephonically, through an agent, or otherwise), provide the necessary documentation in a timely manner, willingly share information, actively present, discuss, and explore options to avoid foreclosure, negotiate willingly and cooperatively, maintain a professional and cooperative demeanor, cooperate with the mediator, and keep any agreements made in mediation." **[2011 c 58 § 1.]**

Short title—2011 c 58: "This act may be known and cited as the foreclosure fairness act." **[2011 c 58 § 2.]**

Chapter 62.01.001 RCW Dispositions

NEGOTIABLE INSTRUMENTS

Chapter Comparative Table

Sections

62.01.001 through 62.01.196

[1955 c 35 §§ 62.01.001 through 62.01.196.]
Repealed effective midnight June 30, 1967, by section 10-102 of the Uniform Commercial Code, 1965 ex.s. c 157 (Title 62A RCW).
Comparative Table

62.01.300 Liability for interest, fees, and costs relative to dishonored check or bill of exchange payable on demand.

[1965 ex.s. c 53 § 1.]
Repealed by 1969 c 62 § 4.

RCW 62A.1-103

Construction of uniform commercial code to promote its purposes and policies; applicability of supplemental principles of law.

(a) This title must be liberally construed and applied to promote its underlying purposes and policies, which are:

(1) To simplify, clarify, and modernize the law governing commercial transactions;

(2) To permit the continued expansion of commercial practices through custom, usage, and agreement of the parties; and

(3) To make uniform the law among the various jurisdictions.

(b) Unless displaced by the particular provisions of this title, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, and other validating or invalidating cause supplement its provisions.

[**2012 c 214 § 103;** 1965 ex.s. c 157 § 1-103. Cf. former RCW sections: (i) RCW **22.04.570**; **1913 c 99 § 56**; RRS § 3642. (ii) RCW **23.80.180**; **1939 c 100 § 18**; RRS § 3803-118; formerly RCW **23.20.190**. (iii) RCW **62.01.196**; **1955 c 35 § 196**; RRS § 3586. (iv) RCW **63.04.030**; **1925 ex.s. c 142 § 2**; RRS § 5836-2. (v) RCW **81.32.511**; **1961 c 14 § 81.32.511**; prior: **1915 c 159 § 51**; RRS § 3697; formerly RCW **81.32.600**.]

NOTES:

Application—Savings—2012 c 214: See notes following RCW **62A.1-101**.

*Application of common law: RCW **4.04.010**.*

RCW 62A.1-201

General definitions.

(a) Unless the context otherwise requires, words or phrases defined in this section, or in the additional definitions contained in other articles of this title that apply to particular articles or parts thereof, have the meanings stated.

(b) Subject to definitions contained in other articles of this title that apply to particular articles or parts thereof:

(1) "Action," in the sense of a judicial proceeding, includes recoupment, counterclaim, set-off, suit in equity, and any other proceeding in which rights are determined.

(2) "Aggrieved party" means a party entitled to pursue a remedy.

(3) "Agreement," as distinguished from "contract," means the bargain of the parties in fact, as found in their language or inferred from other circumstances, including course of performance, course of dealing, or usage of trade as provided in RCW **62A.1-303**.

(4) "Bank" means a person engaged in the business of banking and includes a savings bank, savings and loan association, credit union, and trust company.

(5) "Bearer" means a person in control of a negotiable electronic document of title or a person in possession of a negotiable instrument, negotiable tangible document of title, or certificated security that is payable to bearer or indorsed in blank.

(6) "Bill of lading" means a document of title evidencing the receipt of goods for shipment issued by a person engaged in the business of directly or indirectly transporting or forwarding goods. The term does not include a warehouse receipt.

(7) "Branch" includes a separately incorporated foreign branch of a bank.

(8) "Burden of establishing" a fact means the burden of persuading the trier of fact that the existence of the fact is more probable than its nonexistence.

(9) "Buyer in ordinary course of business" means a person that buys goods in good faith, without knowledge that the sale violates the rights of another person in the goods, and in the ordinary course from a person, other than a pawnbroker, in the business of selling goods of that kind. A person buys goods in the ordinary course if the sale to the person comports with the usual or customary practices in the kind of business in which the seller is engaged or with the seller's own usual or customary practices. A person that sells oil, gas, or other minerals at the wellhead or minehead is a person in the business of selling goods of that kind. A buyer in ordinary course of business may buy for cash, by exchange of other property, or on secured or unsecured credit, and may acquire goods or documents of title under a preexisting contract for sale. Only a buyer that takes possession of the goods or has a right to recover the goods from the seller under Article 2 of this title may be a buyer in ordinary course of business. "Buyer in ordinary course of business" does not include a person that acquires goods in a transfer in bulk or as security for or in total or partial satisfaction of a money debt.

(10) "Conspicuous," with reference to a term, means so written, displayed, or presented that a reasonable person against which it is to operate ought to have noticed it. Whether a term is "conspicuous" or not is a decision for the court. Conspicuous terms include the following:

(A) A heading in capitals equal to or greater in size than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same or lesser size; and

(B) Language in the body of a record or display in larger type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from surrounding text of the same size by symbols or other marks that call attention to the language.

(11) "Consumer" means an individual who enters into a transaction primarily for personal, family, or household purposes.

(12) "Contract," as distinguished from "agreement," means the total legal obligation that results from the parties' agreement as determined by this title as supplemented by any other applicable laws.

(13) "Creditor" includes a general creditor, a secured creditor, a lien creditor, and any representative of creditors, including an assignee for the benefit of creditors, a trustee in bankruptcy, a receiver in equity, and

an executor or administrator of an insolvent debtor's or assignor's estate.

(14) "Defendant" includes a person in the position of defendant in a counterclaim, cross-claim, or third-party claim.

(15) "Delivery," with respect to an electronic document of title means voluntary transfer of control and with respect to an instrument, a tangible document of title, or chattel paper, means voluntary transfer of possession.

(16) "Document of title" means a record (i) that in the regular course of business or financing is treated as adequately evidencing that the person in possession or control of the record is entitled to receive, control, hold, and dispose of the record and the goods the record covers and (ii) that purports to be issued by or addressed to a bailee and to cover goods in the bailee's possession which are either identified or are fungible portions of an identified mass. The term includes a bill of lading, transport document, dock warrant, dock receipt, warehouse receipt, and order for delivery of goods. An electronic document of title means a document of title evidenced by a record consisting of information stored in an electronic medium. A tangible document of title means a document of title evidenced by a record consisting of information that is inscribed on a tangible medium.

(17) "Fault" means a default, breach, or wrongful act or omission.

(18) "Fungible goods" means:

(A) Goods of which any unit, by nature or usage of trade, is the equivalent of any other like unit; or

(B) Goods that by agreement are treated as equivalent.

(19) "Genuine" means free of forgery or counterfeiting.

(20) "Good faith," except as otherwise provided in Article 5 of this title, means honesty in fact and the observance of reasonable commercial standards of fair dealing.

(21) "Holder" with respect to a negotiable instrument, means:

(A) The person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession;

(B) The person in possession of a negotiable tangible document of title if the goods are deliverable either to bearer or to the order of the person in possession; or

(C) The person in control of a negotiable electronic document of title.

(22) "Insolvency proceeding" includes an assignment for the benefit of creditors or other proceeding intended to liquidate or rehabilitate the estate of the person involved.

(23) "Insolvent" means:

(A) Having generally ceased to pay debts in the ordinary course of business other than as a result of bona fide dispute;

(B) Being unable to pay debts as they become due; or

(C) Being insolvent within the meaning of federal bankruptcy law.

(24) "Money" means a medium of exchange currently authorized or adopted by a domestic or foreign government. The term includes a monetary unit of account established by an intergovernmental organization or by agreement between two or more countries.

(25) "Organization" means a person other than an individual.

(26) "Party," as distinguished from "third party," means a person that has engaged in a transaction or made an agreement subject to this title.

(27) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision, agency, or instrumentality, public corporation, or any other legal or commercial entity.

(28) "Present value" means the amount as of a date certain of one or more sums payable in the future, discounted to the date certain by use of either an interest rate specified by the parties if that rate is not manifestly unreasonable at the time the transaction is entered into or, if an interest rate is not so specified, a commercially reasonable rate that takes into account the facts and circumstances at the time the transaction is entered into.

(29) "Purchase" means taking by sale, lease, discount, negotiation, mortgage, pledge, lien, security interest, issue or reissue, gift, or any other voluntary transaction creating an interest in property.

(30) "Purchaser" means a person that takes by purchase.

(31) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(32) "Remedy" means any remedial right to which an aggrieved party is entitled with or without resort to a tribunal.

(33) "Representative" means a person empowered to act for another, including an agent, an officer of a corporation or association, and a trustee, executor, or administrator of an estate.

(34) "Right" includes remedy.

(35) "Security interest" means an interest in personal property or fixtures which secures payment or performance of an obligation. "Security interest" includes any interest of a consignor and a buyer of accounts, chattel paper, a payment intangible, or a promissory note in a transaction that is subject to Article 9A of this title. "Security interest" does not include the special property interest of a buyer of goods on identification of those goods to a contract for sale under RCW **62A.2-401**, but a buyer may also acquire a "security interest" by complying with Article 9A of this title. Except as otherwise provided in RCW **62A.2-505**, the right of a seller or lessor of goods under Article 2 or 2A of this title to retain or acquire possession of the goods is not a "security interest," but a seller or lessor may also acquire a "security interest" by complying with Article 9A of this title. The retention or reservation of title by a seller of goods notwithstanding shipment or delivery to the buyer under RCW **62A.2-401** is limited in effect to a reservation of a "security interest." Whether a transaction in the form of a lease creates a "security interest" is determined pursuant to RCW **62A.1-203**.

(36) "Send" in connection with a writing, record, or notice means:

(A) To deposit in the mail or deliver for transmission by any other usual means of communication with postage or cost of transmission provided for and properly addressed and, in the case of an instrument, to an address specified thereon or otherwise agreed, or if there be none to any address reasonable under the circumstances; or

(B) In any other way to cause to be received any record or notice within the time it would have arrived if properly sent.

(37) "Signed" includes using any symbol executed or adopted with present intention to adopt or accept a writing.

(38) "State" means a State of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

(39) "Surety" includes a guarantor or other secondary obligor.

(40) "Term" means a portion of an agreement that relates to a particular matter.

(41) "Unauthorized signature" means a signature made without actual, implied, or apparent authority. The term includes a forgery.

(42) "Warehouse receipt" means a document of title issued by a person engaged in the business of storing goods for hire.

(43) "Writing" includes printing, typewriting, or any other intentional reduction to tangible form. "Written" has a corresponding meaning.

[2012 c 214 § 109; 2001 c 32 § 9; 2000 c 250 § 9A-802; **1996 c 77 § 1.** Prior: 1993 c 230 § 2A-602; **1993 c 229 § 1; 1992 c 134 § 14; 1990 c 228 § 1; 1986 c 35 § 53; 1981 c 41 § 2;** 1965 ex.s. c 157 § 1-201.]

NOTES:

Reviser's note: This table indicates the latest comparable former Washington sources of the material contained in the various subsections of RCW **62A.1-201**. Complete histories of the former sections are carried in the Revised Code of Washington Disposition Tables.

HEREIN	COMPARE
SUBD.	FORMER

(1)	RCW:	(i) 22.04.585(1) (ii) 62.01.191 (iii) 63.04.755(1) (iv) 81.32.531(1)
(2)		None
(3)		None
(4)	RCW:	(i) 30.52.010 (ii) 62.01.191
(5)	RCW	62.01.191
(6)	RCW	81.32.011[1]
(7)		None
(8)		None
(9)	RCW	61.20.010
(10)		None
(11)	RCW:	(i) 63.04.040 (ii) 63.04.720
(12)		None
(13)	RCW	63.04.755(1)
(14)	RCW:	(i) 22.04.585(1) (ii) 62.01.191 (iii) 63.04.755(1) (iv) 81.32.531(1)
(15)	RCW	63.04.755(1)
(16)	RCW	63.04.755(1)
(17)	RCW:	(i) 22.04.585(1) (ii) 63.04.060 (iii) 63.04.070 (iv) 63.04.755(1)
(18)		None
(19)	RCW:	(i) 22.04.585(2) (ii) 23.80.220(2) (iii) 63.04.755(2) (iv) 81.32.531(2)
(20)	RCW:	(i) 22.04.585(1) (ii) 62.01.191 (iii) 81.32.531(1)
(21)		None
(22)		None
(23)	RCW	63.04.755(3)
(24)	RCW	62.01.006(5)
(25)	RCW	62.01.056
(26)		None

(27)		None
(28)	RCW:	(i) 22.04.585(1)
		(ii) 23.80.220(1)
		(iii) 61.20.010
		(iv) 62.01.191
		(v) 63.04.755(1)
		(vi) 81.32.531(1)
(29)		None
(30)	RCW:	(i) 22.04.585(1)
		(ii) 23.80.220(1)
		(iii) 61.20.010
		(iv) 62.01.191
		(v) 63.04.755(1)
		(vi) 81.32.531(1)
(31)		None
(32)	RCW:	(i) 22.04.585(1)
		(ii) 23.80.220(1)
		(iii) 61.20.010
		(iv) 63.04.755(1)
		(v) 81.32.531(1)
(33)	RCW:	(i) 22.04.585(1)
		(ii) 23.80.220(1)
		(iii) 61.20.010
		(iv) 63.04.755(1)
		(v) 81.32.531(1)
(34)		None
(35)		None
(36)		None
(37)	RCW	61.20.010
(38)		None
(39)		None
(40)		None
(41)		None
(42)		None
(43)		None
(44)	RCW:	(i) 22.04.585(1)
		(ii) 23.80.220(1)
		(iii) 61.20.010
		(iv) 62.01.025
		(v) 62.01.026
		(vi) 62.01.027
		(vii) 62.01.191

		(viii) 63.04.755(1)
		(ix) 81.32.531(1)
(45)	RCW:	(i) 22.04.020
		(ii) 63.04.755(1)
(46)	RCW	62.01.191

[1]The repeal of RCW sections 81.32.010 through 81.32.661 ". . . shall not affect the validity of sections 81.29.010 through 81.29.050, chapter 14, Laws of 1961 (RCW 81.29.010 through 81.29.050)." Section 10-102(a)(xvii), chapter 157, Laws of 1965 ex. sess.

Application—Savings—2012 c 214: See notes following RCW **62A.1-101**.

Effective date—2001 c 32: See note following RCW **62A.9A-102**.

Effective date—2000 c 250: See RCW **62A.9A-701**.

Effective date—1993 c 230: See RCW **62A.11-110**.

Recovery of attorneys' fees—Effective date—1993 c 229: See RCW **62A.11-111** and **62A.11-112**.

Short title—1992 c 134: See RCW **63.19.900**.

Effective date—1981 c 41: See RCW **62A.11-101**.

RCW 62A.3-102

Subject matter.

(a) This Article applies to negotiable instruments. It does not apply to money, to payment orders governed by Article 4A, or to securities governed by Article 8.

(b) If there is conflict between this Article and Article 4 or 9A, Articles 4 and 9A govern.

(c) Regulations of the Board of Governors of the Federal Reserve System and operating circulars of the Federal Reserve Banks supersede any inconsistent provision of this Article to the extent of the inconsistency.

[2001 c 32 § 12; 1993 c 229 § 4; 1965 ex.s. c 157 § 3-102. Cf. former RCW sections: (i) RCW 62.01.001(5); 1955 c 35 § 62.01.001; prior: 1899 c 149 § 1; RRS § 3392. (ii) RCW 62.01.128; 1955 c 35 § 62.01.128; prior: 1899 c 149 § 128; RRS § 3518. (iii) RCW 62.01.191; 1955 c 35 § 62.01.191; prior: 1899 c 149 § 191; RRS § 3581.]

NOTES:

Effective date—2001 c 32: See note following RCW **62A.9A-102.**

Recovery of attorneys' fees—Effective date—1993 c 229: See RCW **62A.11-111** and **62A.11-112.**

RCW 62A.3-104

Negotiable instrument.

(a) Except as provided in subsections (c) and (d), "negotiable instrument" means an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order, if it:

(1) Is payable to bearer or to order at the time it is issued or first comes into possession of a holder;

(2) Is payable on demand or at a definite time; and

(3) Does not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money, but the promise or order may contain (i) an undertaking or power to give, maintain, or protect collateral to secure payment, (ii) an authorization or power to the holder to confess judgment or realize on or dispose of collateral, or (iii) a waiver of the benefit of any law intended for the advantage or protection of an obligor.

(b) "Instrument" means a negotiable instrument.

(c) An order that meets all of the requirements of subsection (a), except subsection (a)(1), and otherwise falls within the definition of "check" in subsection (f) is a negotiable instrument and a check.

(d) A promise or order other than a check is not an instrument if, at the time it is issued or first comes into possession of a holder, it contains a conspicuous statement, however expressed, to the effect that the promise or order is not negotiable or is not an instrument governed by this Article.

(e) An instrument is a "note" if it is a promise and is a "draft" if it is an order. If an instrument falls within the definition of both "note" and "draft," a person entitled to enforce the instrument may treat it as either.

(f) "Check" means (i) a draft, other than a documentary draft, payable on demand and drawn on a bank, or (ii) a cashier's check or teller's check. An instrument may be a check even though it is described on its face by another term, such as "money order."

(g) "Cashier's check" means a draft with respect to which the drawer and drawee are the same bank or branches of the same bank.

(h) "Teller's check" means a draft drawn by a bank (i) on another bank, or (ii) payable at or through a bank.

(i) "Traveler's check" means an instrument that (i) is payable on demand, (ii) is drawn on or payable at or through a bank, (iii) is designated by the term "traveler's check" or by a substantially similar term, and (iv) requires, as a condition to payment, a countersignature by a person whose specimen signature appears on the instrument.

(j) "Certificate of deposit" means an instrument containing an acknowledgment by a bank that a sum of money has been received by the bank and a promise by the bank to repay the sum of money. A certificate of deposit is a note of the bank.

[1993 c 229 § 6; 1965 ex.s. c 157 § 3-104. Cf. former RCW sections: RCW 62.01.001, 62.01.005, 62.01.010, 62.01.126, 62.01.184, and 62.01.185; 1955 c 35 §§ 62.01.001, 62.01.005, 62.01.010, 62.01.126, 62.01.184, and 62.01.185; prior: 1899 c 149 §§ 1, 5, 10, 126, 184, and 185; RRS §§ 3392, 3396, 3401, 3516, 3574, and 3575.]

NOTES:

Recovery of attorneys' fees—Effective date—1993 c 229: See RCW 62A.11-111 and 62A.11-112.

RCW 62A.3-106

Unconditional promise or order.

(a) Except as provided in this section, for the purposes of RCW 62A.3-104(a), a promise or order is unconditional unless it states (i) an express condition to payment, (ii) that the promise or order is subject to or governed by another writing, or (iii) that rights or obligations with respect to the promise or order are stated in another writing. A reference to another writing does not of itself make the promise or order conditional.

(b) A promise or order is not made conditional (i) by a reference to another writing for a statement of rights with respect to collateral, prepayment, or acceleration, or (ii) because payment is limited to resort to a particular fund or source.

(c) If a promise or order requires, as a condition to payment, a countersignature by a person whose specimen signature appears on the promise or order, the condition does not make the promise or order conditional for the purposes of RCW 62A.3-104(a). If the person whose specimen signature appears on an instrument fails to countersign the instrument, the failure to countersign is a defense to the obligation of the issuer, but the failure does not prevent a transferee of the instrument from becoming a holder of the instrument.

(d) If a promise or order at the time it is issued or first comes into possession of a holder contains a statement, required by applicable statutory or administrative law, to the effect that the rights of a holder or transferee are subject to claims or defenses that the issuer could assert against the original payee, the promise or order is not thereby made conditional for the purposes of RCW 62A.3-104(a); but if the promise or order is an instrument, there cannot be a holder in due course of the instrument.

[**1993 c 229 § 8; 1989 c 13 § 1;** 1965 ex.s. c 157 § 3-106. Cf. former RCW sections: (i) RCW **62.01.002; 1955 c 35 § 62.01.002;** prior: **1899 c 149 § 2;** RRS § 3393. (ii) RCW **62.01.006**(5); **1955 c 35 § 62.01.006;** prior: **1899 c 149 § 6;** RRS § 3397.]

NOTES:

Recovery of attorneys' fees—Effective date—1993 c 229: See RCW **62A.11-111** and **62A.11-112.**

HOUSE BILL REPORT

HOUSE BILL REPORT
HB 2770

As Reported by House Committee On:
Insurance, Financial Services & Consumer Protection

Title: An act relating to homeownership security, responsible mortgage lending, and improving protections for residential mortgage loan consumers.

Brief Description: Enacting the governor's homeownership security task force recommendations regarding responsible mortgage lending and homeownership.

Sponsors: Representatives Kenney, Lantz, Upthegrove, Conway, Morrell, Schual-Berke, McIntire, Hudgins, Simpson and Rolfes; by request of Governor Gregoire.

Brief History:
Committee Activity:
Insurance, Financial Services & Consumer Protection: 1/22/08, 1/29/08 [DPS].

Brief Summary of Substitute Bill

- Requires additional disclosure to mortgage borrowers.
- Prohibits prepayment penalties that extend beyond 60 days prior to the initial reset of an adjustable rate mortgage in residential loans.
- Prohibits negative amortization for a borrower in residential loans.
- Prohibits the steering of consumers into higher cost loans.
- Establishes the framework and penalties for crimes related to mortgage fraud.

HOUSE COMMITTEE ON INSURANCE, FINANCIAL SERVICES & CONSUMER PROTECTION

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 8 members: Representatives Kirby, Chair; Kelley, Vice Chair; Roach, Ranking Minority Member; Hurst, Loomis, Santos, Simpson and Smith.

Staff: Jon Hedegard (786-7127).

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Background:

Regulation of Financial Institutions
Financial institutions are regulated in accordance with their charters. A financial institution may be chartered in Washington, a different state, or the federal government. An institution that is chartered in Washington is subject to the regulatory authority of the Department of Financial Institutions (DFI).

State and Federal Issuances on Mortgage Lending
In October 2006 federal financial regulators published the final *Guidance on Nontraditional Mortgage Product Risks* (*Guidance*). "Nontraditional" mortgage product include interest-only mortgages, payment option adjustable rate mortgages, and other products that have negative amortization (certain products that result in monthly payments where the payment is insufficient to cover the interest due on the loan). The National Associations for State Financial Regulators adopted parallel standards to address state-licensed mortgage entities that are not subject to the federal guidance.

In June 2007 federal financial regulators published the final *Statement on Subprime Mortgage Leaning* (*Statement*). The *Statement* addresses the use of hybrid adjustable rate 30-year mortgages that have low rates for a two- or three-year period before adjusting for 27- or 28-year period. The National Associations for State Financial Regulators adopted parallel standards to address state-licensed mortgage entities that are not subject to the federal statement.

Mortgage Broker Licensing
The DFI licenses mortgage brokers and loan originators under the Mortgage Broker Practices Act (MBPA). The MBPA has provisions regarding licensing, continuing education, prohibited practices, examinations, investigations, and criminal, civil, and administrative penalties.

Foreclosure on Mortgages and Deeds of Trust
Mortgages and deeds of trust are two forms of security interest in real property used for real estate financing. A mortgage is a pledge of real property as security for a debt owed to the debtor. A mortgage creates a lien on the real property. A mortgage may be foreclosed only through a judicial proceeding according to detailed statutory requirements and procedures.

A deed of trust is, in essence, a three-party mortgage. The borrower grants a deed creating a lien on the real property to a third party (the trustee) who holds the deed in trust as security for an obligation due to the lender. The deed of trust transfers title to the borrower, yet the trustee has a lien against the property until the borrower pays off the obligation in full. If the borrower defaults on the obligation, a deed of trust may be foreclosed without a judicial proceeding. The trustee may foreclose on the property by conducting a public trustee sale when the required procedural and notice requirements are met. The trustee must provide notice to the borrower 30 days prior to the recording of a notice of sale. At least 90 days prior to a sale, the trustee must record a notice of sale in the office of the auditor in the county where the property is located.

Criminal Profiteering

In 1985 the Legislature passed laws regarding "criminal profiteering." These laws are similar to the federal Racketeering Influenced and Corrupt Organizations (RICO) Act. Criminal profiteering involves the commission of a crime listed in the statute for financial gain. Crimes that are included in the statute are: violent felonies and felonies associated with gambling, drugs, pornography, prostitution, extortion, identity theft, insurance fraud, and securities fraud. There are criminal penalties and civil remedies for criminal profiteering. The civil remedies include monetary penalties, injunctive remedies, and forfeiture.

In September 2007 Governor Gregoire established the Task Force for Homeowner Security (Task Force) to evaluate instability in the mortgage market and minimize the impact in Washington. The Task Force met six times between September and mid-December and issued a report on December 21, 2007. The report included approximately 24 recommendations, including:

- improving disclosure;
- notice to homeowners facing potential foreclosure;
- adoption of the federal guidance and statement by rule by the DFI;
- prohibiting the steering of consumers into higher cost loans;
- limiting prepayment penalties;
- prohibiting certain products that result in negative amortization;
- clarifying the duty a mortgage broker owes to a customer; and
- increasing the penalties for mortgage fraud.

Summary of Substitute Bill:

A number of definitions are provided. "Financial institution" is defined to include: state chartered banks, consumer loan companies, credit unions, mutual savings banks, savings and loans, and mortgage brokers.

Disclosure

The DFI must adopt a disclosure summary understandable to the average person that includes:

- the fees and discount points on the loan;
- the interest rate of the loan;
- the broker's yield spread premium;
- the presence of any prepayment penalties;
- the presence of a balloon payment;
- whether or not property taxes and property insurance is escrowed; and
- other key terms and conditions of the loan.

A residential mortgage loan may not be made unless the summary is provided by a financial institution to a borrower within three days of a loan application. If the terms of the loan change, a new summary must be provided to the borrower within three days of the change or at least three days before closing, whichever is earlier.

State and Federal Issuances on Mortgage Lending

The DFI must adopt rules and apply the *Guidance* and *Statement* to financial institutions. The financial institutions must adopt and adhere to policies that are reasonably intended to achieve the objectives in the *Guidance* and *Statement*.

Prepayment Penalties
A financial institution may not make or facilitate the origination of a residential mortgage loan that includes a prepayment penalty that extends beyond 60 days prior to the initial reset of an adjustable rate mortgage.

Negative Amortization
A financial institution may not make or facilitate the origination of a residential mortgage loan that is subject to the *Guidance* and *Statement* if the loan includes any provisions that result in negative amortization for a borrower.

Steering
A person subject to licensing under the MBPA or the Consumer Loan Act may not steer, counsel, or direct any potential borrower to accept a residential mortgage loan with a risk grade less favorable than what the borrower would qualify under the lender's existing underwriting standards. The licensee must prudently apply the underwriting standards to the information provided by the borrower.

Rules
The DFI is given general authority to adopt rules.

Mortgage Fraud
In the lending process, it is a Class B felony to:
- defraud or mislead any borrower, lender, or person;
- engage in deceptive practices;
- obtain any property by fraud or misrepresentation;
- knowingly make, use, or facilitate a misstatement, misrepresentation, or omission knowing that it may be relied on by another; and
- receive anything of value in connection with a closing that resulted from a fraudulent practice.

A knowing violation or knowingly aiding or abetting a violation is "ranked" on the sentencing grid in the III tier. This places it on a level that gets a sentence ranging from one to three months up to five years in prison.

Mortgage fraud is added to the list of felonies that are subject to the criminal profiteering laws.

Any person who knowingly alters, destroys, or conceals information to impair the investigation of mortgage fraud is guilty of a class B felony.

Examinations, Investigations, and Enforcement
The DFI has the authority to investigate or examine mortgage brokers, state-chartered banks, state-licensed consumer loan companies, state-chartered credit unions, state-chartered mutual

savings banks, and state-chartered savings and loans to enforce applicable provisions of the MBPA.

Duties of Mortgage Brokers
Mortgage brokers, loan originators, and people working with or for mortgage brokers must:
- be actuated by good faith;
- abstain from deception; and
- practice honesty and equity in all matters related to their profession.

Notice of Foreclosure On a Deed of Trust
If the property is owner-occupied residential property, the notice must include a statement that provides some specific information for the homeowner to consider about the foreclosure and the possible options the homeowner may have available to them, including low-cost or free counseling and legal help.

Substitute Bill Compared to Original Bill:

A number of changes to the definitions are made. A definition of "adjustable rate mortgage" or "ARM" definition is added. The definition of "borrower" is modified. The definition of "negative amortization" is modified. The definition of "residential mortgage loan" is modified. "Single family dwelling" language is modified. The disclosure of yield spread premium is modified to add "as a dollar amount." A new disclosure component is added – whether there is price added because a loan has reduced documentation. A grant of rule-making authority to the DFI is limited to residential mortgage loans. The provision regarding the residential mortgage loans with negative amortization provisions is limited to loans that are subject to the *Guidance* or *Statement*. The steering provisions are limited to "residential mortgage loans." In the authority for the DFI to adopt rules to implement the chapter, a provision is added where the DFI may identify which parts of this act apply to open-ended lines of credit. In the criminal provisions, the word "deliberate" is struck and the words "negligent" and "knowingly" are added. A number of language and grammatical changes are made to the bill.

Appropriation: None.

Fiscal Note: Avaliable.

Effective Date of Substitute Bill: The bill takes effect 90 days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony:

(In support) Homeownership is an important path to build wealth. Home building is an important aspect of our economy. In recent years, many lenders lessened their standards and provided new and exotic loans and product features. Some of those products included 100 percent financing, interest-only loans, and loans with low introductory rates and adjustable terms. These practices helped lead to the current national crisis. Washington has not been hit

as hard as other areas but the default and foreclosure rates in the state are rising. The United States Congress may act and address some of these issues but the Legislature also has a duty to advocate for homeowners in Washington. A bill should help all homeowners. In the bill, there must be a requirement that mortgage brokers act in the interest of the borrowers and act in the utmost good faith. A ban or limitation on flipping loans is needed. The current lending practices have lead to lost wealth, suffering, and homelessness.

There are some technical issues in the bill that were a result of the compressed time-lines associated with the Task Force. In some areas, the language may be drafted slightly more broadly than the Task Force recommendation it was intended to implement. The disclosure summary provisions will help people understand their loan terms. Most people do not read all of their loan documents. The bill prohibits steering. Many borrowers who could have qualified for a prime loan ended up with a subprime loan. In some cases, that was an informed choice by the borrower. Other times, it may have been due to steering by a mortgage broker. The bill limits negative amortization where the borrower can end up owing more than the amount of the loan. There are criminal penalties in the bill. There is currently a Mortgage Broker Fraud Account to help us fight mortgage fraud. These increased penalties are another tool in that fight.

The Task Force was a broad, diverse group that agreed to 24 recommendations. This bill could codify many of those recommendations into law. The technical changes that would better reflect the Task Force's recommendations will also be supported by Task Force members. All of these recommendations where agreed to by all members of the Task Force. There is a duty of good faith for mortgage brokers in the bill. There was a minority report by the Task Force that preferred a fiduciary duty.

The Task Force had a thoughtful process and developed recommendations that will protect consumers. There are some technical challenges in the current draft of the bill that are being worked on for a proposed substitute. Those changes will better conform the bill to the Task Force recommendations and ensure that the bill can be fully implemented. There is always a concern that Washington-based financial institutions will be placed at a disadvantage because the Legislature has more authority to regulate those entities than other financial institutions. This bill does not place those Washington financial institutions at a disadvantage.

This bill will help address abuses in the subprime market. A disproportionate amount of those impacts fall on poor and minority members of the community. There are some ways the bill could be strengthened. First, the lenders and brokers should be required to use sound underwriting. They should have to verify income. Property insurance and taxes should be escrowed. Second, there should be a ban on loan flipping. Third, the prepayment penalties should be strengthened. A ban is the best option. At a minimum, the time-frame prior to the initial reset period should be increased. Fourth, the duty of the mortgage broker to the borrower should be increased to a fiduciary duty. Mortgage brokers make 70 percent of the subprime loans. They are not currently required to work in the borrower's best interest. All four of these suggestions have broad community support. The bill is a good start. Some provisions should be strengthened. Subprime lending is the reason for the current lending crisis. This state is starting to see the impacts and problems associated with the national

crisis. The problem is not subprime loans or borrowers. The problem is the practices of the lenders. One major issue is disclosure. There is often inadequate disclosure, incorrect disclosure, or outright deception. The underwriting rules were not relaxed in the lending boom, they were ignored. A fiduciary duty upon mortgage brokers would solve many of the problems in the market. People expect that a mortgage broker is working in their best interest and rely on the experience of that broker. The Task Force members support the technical changes to the underlying bill.

(Opposed) None.

Persons Testifying: Representative Kenney, prime sponsor; Deb Bortner, Department of Financial Institutions; Kim Herman, Washington State Housing Finance Commission; Denny Eliason, Washington Bankers Association; Brad Tower, Community Bankers of Washington; Greg Pierce, Washington Financial League; Gary Gardner, Boeing Employees Credit Union; Kim Justice, Statewide Poverty Action Network; Tony Brooks, Association of Community Organizations for Reform Now; Ari Brown, Brown Sayre Law Group; and Steve Buckner, Washignton Association of Mortgage Brokers.

Persons Signed In To Testify But Not Testifying: None.