IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

Supreme Court No. _____

(Court of Appeals No. 75676-1-I)

CENTRUM FINANCIAL SERVICES, INC.,

Petitioner,

v.

UNION BANK, N.A.,

Respondent.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Centrum Financial Services, the plaintiff in the trial court and the appellant in the Court of Appeals, asks this Court to reverse the Court of Appeals decision identified in Part II.

II. COURT OF APPEALS DECISION

Petitioner seeks review of the Published Opinion filed on December 18, 2017, attached hereto as Appendix A.

III. ISSUES PRESENTED FOR REVIEW

The Supreme Court should accept review pursuant to RAP 13(b)(4) as the opinion substantially impacts the public because it is controlling authority which creates conflicts with the Deed of Trust Act.

IV. STATEMENT OF THE CASE

The material facts are not in dispute. Prium Development Company LLC owned a large two-story office building in Monroe. On October 6, 2004, Frontier Bank loaned approximately $1,875,000 to Prium Development Company, L.L.C. The loan was evidenced by a promissory note and secured by a first deed of trust on Prium's Monroe, Washington property ("Monroe Property".) The note's maturity date was October 10, 2014.

The Appellant, Centrum Financial Services, Inc. ("Centrum"), is a Washington corporation, whose business since 1987 has been making short term commercial real estate loans, secured by real property collateral. On December 7, 2006, Centrum loaned Prium Development

Company L.L.C. $1,610,000, secured by a second deed of trust on the Monroe Property.

Prium defaulted on Centrum's loan, causing Centrum to foreclose its second deed of trust, taking title to the Monroe Property on January 21, 2011. Centrum purchased the Monroe property at the Trustee's Sale for $1,823,780.79, which was the amount of Prium's debt to Centrum. The Trustee's Deed conveying the Monroe Property to Centrum is recorded under Snohomish County Auditor's No. 201102040141. Centrum's title was subject to the first deed of trust securing Frontier Banks $1,875,000 loan to Prium.

The Respondent, Union Bank acquired Frontier Bank's Everett operations and assets on April 30, 2010, pursuant to a Purchase and Assumption Agreement with the FDIC, as receiver for Frontier Bank. The trustee issued a Notice of Default on June 22, 2011, followed by a Notice of Trustee's Sale issued on July 25, 2011.

Centrum contacted both Union Bank and the trustee in September 2011 to learn the amount required to reinstate the loan. The full balance of the Prium note was not due until October 10, 2014. The trustee repeatedly refused to provide the reinstatement information to Centrum. Instead, the trustee sent Centrum a "Union Bank, N.A. Demand/Statement for Loan Payoff," dated September 12, 2011, CP 208-209. Alena Marshak, an employee of Hacker & Willig responded to Centrum's inquiries by stating

in a September 28, 2012 email that "Union bank is only interested in a full payoff of this loan."

On October 14, 2011, Centrum notified the trustee that Centrum was "tendering a willingness and ability to reinstate this loan." On October 25, 2011, Centrum again sent the trustee another email, notifying them that Centrum "remains willing and able to reinstate the loan immediately." On October 27, 2011, Centrum sent the trustee an email stating Centrum's willingness to pay upcoming real estate taxes as part of reinstating the Prium loan, reiterating that "Centrum is prepared to immediately reinstate the loan and start making all payment to the Bank going forward, as well as keeping all the real estate taxes current." CP 211. The trustee responded to these emails on October 28, 2011, advising Centrum that Union Bank would be paying the real estate taxes and that "reinstatement of the loan is not a possibility." CP 216. On October 14, 2011, Centrum notified the trustee that Centrum would be forced to file a lawsuit against Union Bank, as required by RCW 61.24.090, to protect its interest in the Monroe Property because of Union Bank's continued rejecting Centrum's efforts to reinstate the loan.

On October 31, 2011, Centrum asked the Trustee to provide Centrum with backup details showing how the figures provided in the notice of default were calculated, in particular calculations for the Principal, Interest (with applicable interest rates that were used for the calculations), and Taxes. Centrum received no response.

After two months of fruitless attempts to persuade the Trustee to provide any reinstatement information or explain the questionable amounts stated in the Notice of Trustee's Sale, Centrum notified the Trustee that Centrum was exercising its right to reinstate the loan and to demand that the Trustee supply the reinstatement information. By letter to the trustee, dated November 7, 2011, Mr. Hathaway formally notified the Trustee that Centrum had acquired title to the property by trustee's deed, that Centrum required that the Trustee provide the amounts necessary to reinstate the loan and that Centrum was exercising its statutory right to do so. CP 218.

Centrum's November 7, 2011 letter also notified the Trustee that Centrum questioned several of the defaults listed in the Notice of Trustee's Sale and pointed out that the Property had had least $1 million in equity, so its loss would have disastrous consequences for Centrum. The letter asked the Trustee to provide the requested information by November 10, 2011. The Trustee avoided providing the requested information by discontinuing the Trustee's Sale.

Centrum sent multiple letters and communications over the next several months requesting reinstatement and information concerning the calculations in the notice of default. The trustee failed to respond.

The Trustee issued yet another Notice of Foreclosure and a new Notice of Trustee's Sale on August 14, 2012, fixing the Trustee's Sale for November 16, 2012. The new Notice of Trustee's Sale demanded

$533,687 to reinstate the loan. Centrum wrote the Trustee again on October 26, 2012, in a final attempt to obtain a reinstatement figure. CP 255-258.

Neither the Trustee nor Union Bank responded to any of the deficiencies addressed in Mr. Hathaway's October 26, 2012 letter. Having exhausted its efforts to reinstate the Prium loan, Centrum had no choice but to file suit to enjoin the Trustee's Sale for judicial determination of the reasonable charges for reinstating the loan.

The trial court ruled that Centrum had no right of reinstatement. The Court of Appeals affirmed that decision in a written decision filed on December 18, 2017.

V. ARGUMENT

The Petitioner, Centrum Financial, brings this Petition pursuant to RAP 13.4(b)(4) as the issue presented in the published decision presents an issue of substantial public interest that should be determined by the Supreme Court. The opinion will have a chilling effect on the secondary lending market such as home equity lines of credit (HELOC) and other lenders who take a second position deed of trust as security for making loans to consumers and businesses throughout the State of Washington. The opinion of the Court of Appeals discourages the orderly and timely foreclosure process. The opinion of the Court of Appeals encourages lender misconduct and allows inflated interest and penalty charge calculations without ever being subject to an accounting as contemplated

under the Deed of Trust Act ("DTA"). This case warrants review by the Supreme Court to harmonize the statute and give effect to the legislature's intent.

A. The Opinion of the Court of Appeals Defeats the Legislative Intent Rather Than Harmonizes the Deed of Trust Act.

RCW 61.24.005(7) defines Grantor as follows: "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 borrower's obligations." The Court of Appeals interpreted this provision to apply only to successors who execute a deed of trust. The problem with this interpretation is that it directly conflicts with the notice requirements described below. Had the Court of Appeals instead interpreted this provision to apply to a successor of a person who executed a deed of trust, this provision would then be in harmony with the rest of the DTA.

> The notice requirements to be sent in accordance with RCW 61.24.040(f) specifically include a section advising the recipients that they have a right to reinstate. Centrum Financial is one such required recipient. Thus, the legislature's clear intent is to allow parties such as Centrum Financial the right to reinstate. Otherwise the notice requirements under RCW 61.24.040 would be meaningless.

RCW 61.24.040 (1)(b)(iii) requires that notice be provided to "the holder of any conveyances of any interest or estate in any portion or all of

the property described in such notice . . . ." Centrum Financial was at all times material the holder of a conveyance, i.e., Trustee's deed in the Monroe property. As a result, the legislature required notice to be sent to Centrum. The legislature then proscribes the specific language which is to be used in the notice of trustee sale and the notice of foreclosure. RCW 61.24.040(f).

The statutorily required notice specifically advises the recipients of the right to "cure" and "reinstate." The legislature mandates that a party such as Centrum is entitled to notice and entitled to be advised of its right to "cure" and "reinstate." The intent of the legislation is to advise the recipients, i.e., Centrum as the holder of a conveyance, that it must cure and reinstate within certain proscribed timelines. The published opinion directly contradicts the DTA's intent.

In interpreting a statute, a court is obliged to construe the statute as a whole, giving effect to all language. Every provision must be viewed in relation to the other provisions and harmonized in order to eliminate a conflict. *In re Estate of Kerr*, 134 Wn.2d 328, 335, 949 P.2d 810 (1998). The opinion of the Court of Appeals creates a direct conflict with the notice requirements under the DTA. The DTA identifies who is entitled to "reinstate" as being the holder of ***any conveyance*** as opposed to the Court of Appeals decision which ostensibly limits the right to reinstate only to the borrower, grantor, guarantor, any beneficiary under a subordinate deed of trust, or any person having a subordinate lien or encumbrance. Rather

than harmonize the statute, the Court of Appeals creates further conflict within the statute itself. The arguments advanced by Centrum harmonize all parts of the statute without creating this conflict. *See* Appendix B and C, courtesy copies of Centrum's Appeal Brief and Reply. Given the importance of the interpretation of the Deed of Trust Act to all consumers within the state of Washington and all lenders in the state of Washington, the Supreme Court should accept review and harmonize the statute in order to give intent to all provisions of the statute.

B. The Opinion Will Lead to Absurd Results.

The opinion of the Court of Appeals makes no sense when construing the Deed of Trust Act as a whole. For example, if Centrum Financial had borrowed one hundred dollars from XYZ Financing Company and secured that loan with a deed of trust on the Monroe property, then XYZ Financing Company would have had a right to reinstate the first position note and deed of trust and yet Centrum Financial would not. This result makes no practical sense whatsoever. The Supreme Court should accept review and correct the decision in order to provide certainty and security for the lenders and consumers. The Deed of Trust Act should be construed in a way that harmonizes the legislation and gives effect to the intent of the statute. It is Centrum's position that the intent of the statute is to provide all junior creditors, owners of the property or those who succeed in ownership to the property, the right to reinstate a defaulted first position note and deed of trust in accordance with RCW 61.24 *et seq.*

C. The Opinion Harms Consumers by Making HELOCs and Other Equity Lending Difficult and Ultimately More Costly.

In this case, Centrum Financial followed all of the proper procedural steps and non-judicially foreclosed on the Monroe property. As a result of that foreclosure, the Trustee conveyed a deed making Centrum Financial the owner of the Monroe property subject to the first position deed of trust. The opinion of the Court of Appeals affirms the extinguishment of any rights Centrum Financial, or any other second position lender in the state of Washington, has under the DTA. The decision has significant ramifications for every consumer in the state of Washington.

The opinion encourages all lenders, such as Centrum Financial, to ***not*** proceed with the orderly foreclosure of defaulted loans in a non-judicial setting. Instead, the opinion discourages, if not mandates, that a second position lender like Centrum ***not*** take action to foreclose in order to preserve its rights under the DTA.

Default interest rates, fees, and penalties will skyrocket, exposing consumers to enormous deficiency judgments. The practical effect of the opinion would encourage a lender, such as Centrum Financial, to take no action to foreclose upon the second position deed of trust. All the while, the underlying note would accrue ongoing default interest rates, fees, and other charges pursuant to the terms of each individual note. Second position lenders would be discouraged from seeking non-judicial foreclosure but instead would be encouraged to seek judicial foreclosure in

order to obtain deficiency judgments against the underlying borrower in order to protect against further losses. *See Umpqua Bank v. Shasta Apartments LLC*, 194 Wn. App. 685 (2016) (lender entitled to deficiency judgment in judicial foreclosure sale).

If lenders such as Centrum undertake a non-judicial foreclosure, their rights to reinstatement are forever extinguished as per the opinion of the Court of Appeals. This is not consistent with the intent of the Deed of Trust Act and further has the potential of disastrous impact for all consumers and lenders on the secondary lending market. The Supreme Court should accept review of this decision and correct the ruling.

VI. CONCLUSION

The opinion of the Court of Appeals significantly impacts consumers and lenders in the state of Washington. This decision discourages all second position lenders such as Centrum from ever foreclosing upon a defaulted second position note and deed of trust. Instead, without a non-judicial foreclosure, the default interest, penalty, and fees will continue to accrue and will expose borrowers to excess deficiency judgments. In essence, the opinion of the Court of Appeals leaves lenders such as Centrum with no other alternative. This is not the legislative intent. Instead, the intent of RCW 61.24 *et seq.* is to provide lenders such as Centrum the right to reinstate a first position note and deed of trust consistent with the statute. Otherwise, the legislature would not have required notice to Centrum coupled with a statement indicating that it

has a right to reinstate. The arguments advanced by Centrum harmonize the statute whereas the decision of the Court of Appeals creates further conflict. Under these circumstances, the Supreme Court should accept review. Interpretation of this issue presents an issue of first impression for the Supreme Court and, given the substantial public impact, review should be accepted.

RESPECTFULLY SUBMITTED this 17th day of January, 2018.

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s/ Rick Wathen
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No.: 75676-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON DIVISION I

CENTRUM FINANCIAL SERVICES, INC.,

Appellant,

vs.

UNION BANK, N.A.,

Respondent.

CERTIFICATE OF SERVICE
PETITION FOR REVIEW

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CERTIFICATE OF SERVICE

The undersigned certifies that under penalty of perjury under the laws of the State of Washington that on the below date I caused to be served the foregoing document on:

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DATED at Seattle, Washington, this 17th day of January, 2018.

*s/ Sonia Chakalo*_____
Sonia Chakalo, Legal Assistant

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

CENTRUM FINANCIAL SERVICES, INC., a Washington Corporation, Appellant, v. UNION BANK, N.A., a California chartered commercial bank; HACKER & WILLIG, INC., P.S., a Washington Professional Services Corporation, as Trustee, Respondents.	No. 75676-1-I DIVISION ONE PUBLISHED OPINION FILED: December 18, 2017

SCHINDLER, J. — The "Deeds of Trust Act" (DTA), chapter 61.24 RCW, defines a "grantor" as a person or its successor "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."[1] The DTA gives the grantor the right to cure the default on the obligation and discontinue a nonjudicial foreclosure sale. Centrum Financial Services Inc. foreclosed on property owned by Prium Development Company LLC and obtained a "Trustee's Deed." Centrum's title to the property was subject to the first position "Deed of Trust" that secured the $1,875, 000 promissory note Prium executed in favor of Frontier Bank. Centrum claims that as the current owner of the property, Centrum

[1] RCW 61.24.005(7).

had the right to cure the default on the promissory note between Prium and Frontier Bank, reinstate the obligation, and discontinue the bank's nonjudicial foreclosure sale. Because Centrum is not a party to the promissory note and assumed no liability, we hold Centrum did not have the right to cure the default, reinstate the promissory note, or discontinue the nonjudicial foreclosure sale. The undisputed record also establishes the bank had the right to demand payment for the full amount due on the promissory note. We affirm dismissal of Centrum's lawsuit to enjoin the trustee's sale.

Frontier Bank First Position Deed of Trust

The material facts are not in dispute. Prium Development Company LLC owned a 43,124 square-foot parcel of property with a large two-story office building in Monroe. Prium leased approximately 20,000 square feet of office space to the State.

On October 6, 2004, Frontier Bank loaned Prium $1,875,000. Prium executed a promissory note payable to Frontier Bank for $1,875,000 with interest. The promissory note identifies Prium as the "Borrower" and Frontier Bank as the "Lender." Prium agreed to pay monthly installments or "119 regular payments of $12,376.80 each" beginning November 10, 2004 and a final payment "for all principal and all accrued interest not yet paid" on October 10, 2014.

On October 20, 2004, Prium executed and recorded a Deed of Trust on the Monroe property and an assignment of rents as security for the promissory note. The Deed of Trust identifies Prium as the "Grantor" and Frontier Bank as the "Lender" and "Beneficiary" of the note. Chicago Title Insurance Company is identified as the "Trustee" for the Beneficiary. The Deed of Trust states, in pertinent part:

> CONVEYANCE AND GRANT. For valuable consideration, Grantor conveys to Trustee in trust with power of sale, right of entry and

> possession and for the benefit of Lender as Beneficiary, all of Grantor's right, title, and interest in and to the following described real property . . . located in SNOHOMISH county, State of Washington:
>
> > LOT 25, MAIN STREET VILLAGE, ACCORDING TO THE PLAT THEREOF, RECORDED IN VOLUME 49 OF PLATS, PAGES 221 THROUGH 223, INCLUSIVE, RECORDS OF SNOHOMISH COUNTY, WASHINGTON.
>
> The Deed of Trust also states:
>
> THIS DEED OF TRUST, INCLUDING THE ASSIGNMENT OF RENTS AND THE SECURITY INTEREST IN THE RENTS AND PERSONAL PROPERTY, IS GIVEN TO SECURE (A) PAYMENT OF THE INDEBTEDNESS AND (B) PERFORMANCE OF ANY AND ALL OBLIGATIONS UNDER THE NOTE, THE RELATED DOCUMENTS, AND THIS DEED OF TRUST. THIS DEED OF TRUST IS GIVEN AND ACCEPTED ON THE FOLLOWING TERMS.

The Deed of Trust includes a "Due On Sale" provision that states if the property is sold without the written consent of Lender Frontier Bank, the bank has the right to "declare immediately due and payable all sums secured by this Deed of Trust."

> DUE ON SALE - CONSENT BY LENDER. Lender may, at Lender's option, (A) declare immediately due and payable all sums secured by this Deed of Trust or (B) increase the interest rate provided for in the Note or other document evidencing the indebtedness and impose such other conditions as Lender deems appropriate, upon the sale or transfer, without Lender's prior written consent, of all or any part of the Real Property, or any interest in the Real Property.

The Deed of Trust also states that if Prium defaults on the promissory note, either the Lender or the Trustee has the right to accelerate the maturity of the loan, foreclose on the Monroe property, and collect rents.

> RIGHTS AND REMEDIES ON DEFAULT. If an Event of Default occurs under this Deed of Trust, at any time thereafter, Trustee or Lender may exercise any one or more of the following rights and remedies:
>
> > Election of Remedies. Election by Lender to pursue any remedy shall not exclude pursuit of any other remedy, and an election to make expenditures or to take action to perform an obligation of

> Grantor under this Deed of Trust, after Grantor's failure to perform, shall not affect Lender's right to declare a default and exercise its remedies.
>
> Accelerate Indebtedness. Lender shall have the right at its option to declare the entire indebtedness immediately due and payable, including any prepayment penalty which Grantor would be required to pay.
>
> Foreclosure. With respect to all or any part of the Real Property, the Trustee shall have the right to exercise its power of sale and to foreclose by notice and sale, and Lender shall have the right to foreclose by judicial foreclosure, in either case in accordance with and to the full extent provided by applicable law.
>
> . . . .
>
> Collect Rents. Lender shall have the right, without notice to Grantor to take possession of and manage the Property and collect the Rents, including amounts past due and unpaid, and apply the net proceeds, over and above Lender's costs, against the indebtedness. In furtherance of this right, Lender may require any tenant or other user of the Property to make payments of rent or use fees directly to Lender. If the Rents are collected by Lender, then Grantor irrevocably designates Lender as Grantor's attorney-in-fact to endorse instruments received in payment thereof in the name of Grantor and to negotiate the same and collect the proceeds. Payments by tenants or other users to Lender in response to Lender's demand shall satisfy the obligations for which the payments are made, whether or not any proper grounds for the demand existed. Lender may exercise its rights under this subparagraph either in person, by agent, or through a receiver.[2]

The Deed of Trust includes a successors and assigns provision that states if the property "becomes vested in a person" other than Prium, Frontier Bank has the discretion to negotiate on "forbearance or extension" without releasing Prium from the obligations under the Deed of Trust or the promissory note.

> Successors and Assigns. Subject to any limitations stated in this Deed of Trust on transfer of Grantor's Interest, this Deed of Trust shall be binding upon and inure to the benefit of the parties, their successors and assigns.

---

[2] The Deed of Trust also states, "Trustee or Lender shall have any other right or remedy provided in this Deed of Trust or the Note or by law."

> If ownership of the Property becomes vested in a person other than Grantor, Lender, without notice to Grantor, may deal with Grantor's successors with reference to this Deed of Trust and the indebtedness by way of forbearance or extension without releasing Grantor from the obligations of this Deed of Trust or liability under the indebtedness.

Centrum Second Position Deed of Trust

Centrum Financial Services Inc. is a Washington corporation that makes "short term commercial real estate loans, secured by real property collateral." According to the Centrum chief executive officer, Centrum loans "typically have been for six months or less."

On December 7, 2006, Centrum loaned Prium $1,610,000. Prium signed a promissory note payable to Centrum. The promissory note was secured by a second position Deed of Trust on the Monroe property.

Union Bank

After Frontier Bank failed, the Federal Deposit Insurance Corporation (FDIC) was appointed as the receiver of the bank. On April 30, 2010, the FDIC entered into a "Purchase and Assumption Agreement" with Union Bank NA. Union Bank agreed to purchase the assets and continue the banking business. The FDIC agreed to sell, assign, transfer, convey, and deliver all of the assets of Frontier Bank to Union Bank, including the Prium promissory note and the first position Deed of Trust and assignment of rents for the Monroe property.

Default on Centrum Loan

Sometime in 2010, Prium defaulted on the Centrum loan. On October 11, 2010, Centrum commenced a nonjudicial foreclosure proceeding on the second position Deed of Trust. The Trustee issued a "Notice of Trustee Sale" for January 21, 2011.

The Deeds of Trust Act (DTA), chapter 61.24 RCW, does not require notice to the holder of the first position Deed of Trust. The DTA requires the Trustee to give notice of the nonjudicial foreclosure sale only to:

> (i) The borrower and grantor;
> (ii) The beneficiary of any deed of trust or mortgagee of any mortgage, or any person who has a lien or claim of lien against the property, that was recorded subsequent to the recordation of the deed of trust being foreclosed . . . ; [and]
> . . . .
> (iv) The last holder of record of any other lien against or interest in the property that is subject to a subordination to the deed of trust being foreclosed that was recorded before the recordation of the notice of sale.

RCW 61.24.040(1)(b).[3]

But the terms of the first position Deed of Trust Prium executed to secure the Frontier Bank loan required Prium to give notice and obtain written consent of the nonjudicial foreclosure and transfer of the property. Prium did not give notice of the nonjudicial foreclosure to Union Bank.

Centrum purchased the Monroe property at the "Trustee's Sale" for the amount Prium owed Centrum, $1,823,780.79. On January 21, 2011, the Trustee issued a Trustee's Deed to Centrum. The Trustee's Deed was subject to the first position Deed of Trust that secured the $1,875,000 Frontier Bank loan to Prium. After receiving title through the Trustee's Deed, Centrum began collecting rent from the State.

Default on Union Bank Loan

By January 10, 2011, Prium was in default on the promissory note with Frontier Bank. Prium had not been "current on its payment since December 2009" and had not paid the real property taxes in 2009, 2010, or 2011. Union Bank paid the delinquent taxes on behalf of Prium in the amount of $114,176.86. Under the terms of the Deed of

[3] Emphasis added.

Trust, "[A]n election to make expenditures or to take action to perform an obligation of Grantor under this Deed of Trust, after Grantor's failure to perform, shall not affect Lender's right to declare a default and exercise its remedies."

On June 22, 2011, Union Bank appointed a "Successor Trustee." On July 25, the Successor Trustee issued a Notice of Trustee Sale of the Monroe property for October 28, 2011.

In September, Centrum contacted Union Bank and the Successor Trustee about "the amount required to reinstate the loan." Centrum asserted that "as the property's owner," it was "entitled to reinstate the loan by paying the delinquent payments." Centrum notes the full amount owed on the promissory note was not due until October 10, 2014.

Union Bank was not interested in entering into "a lending relationship with Centrum." Union Bank exercised its right under the terms of the Deed of Trust to demand "the entire indebtedness immediately due and payable, including any prepayment penalty which Grantor would be required to pay." The Successor Trustee sent an e-mail to Centrum stating, "Union Bank is only interested in a full payoff of this loan." In an October 28 e-mail from Union Bank to Centrum, Union Bank asserts it "will continue to invoke the due on sale clause."

> Regarding the reinstatement, Union Bank will continue to invoke the due on sale clause in its Deed of Trust which means that the paramount default (among multiple other defaults of the note and deed of trust), is that the borrower did not pay off the loan in full at the time of the involuntary transfer of the property.
>
> Therefore, reinstatement of the loan is not a possibility.

Centrum maintained it had the right under the DTA to pay the amount in default and "reinstate the obligation secured by the Union Bank Deed of Trust."

> Centrum is exercising its right, under RCW 61.24.090 to reinstate the Union Bank loan and is ready, willing and able immediately to pay all sums necessary to reinstate the obligation secured by the Union Bank Deed of Trust, including all past due payments, late charges, the appraisal fee and any property taxes advanced by Union Bank.[4]

On November 2, 2012, Centrum filed a lawsuit to enjoin the Trustee's Sale and for declaratory relief and damages. Centrum alleged it was entitled to reinstate the loan between Prium and Union Bank under the DTA. After the Successor Trustee issued a notice of discontinuance of the Trustee's Sale, Union Bank filed an answer and counterclaims. Union Bank sought dismissal of the lawsuit and the appointment of a receiver to conduct the nonjudicial foreclosure sale of the Monroe property.

Union Bank filed a motion for partial summary judgment. Union Bank argued as a matter of law Centrum did not have a right under the DTA to cure the default and reinstate the obligation on the promissory note between Prium and Union Bank. The vice president of Union Bank submitted a declaration in support. The declaration states, in pertinent part:

> . . . Prium defaulted on its monthly payment to Union Bank on January 10, 2011. Prium has not been current on its payment since December 2009. . . .
>
> . . . Both Prium and Centrum failed to pay the Note in full when the Property was transferred without prior written consent of Union Bank or Frontier Bank. When Centrum acquired title to the Property, Centrum began collecting rents derived from the Property. Centrum acknowledged that this rent belongs to Union Bank, but refused to turn over the rent unless Union Bank allowed Centrum to reinstate and assume Prium's loan. Union Bank does not want to be in a lending relationship with Centrum.
>
> . . . Union Bank has asked Centrum to pay the amount owed to it under the Note, and has provided a calculation of interest charges, but

[4] Centrum sent similar letters on April 3, 2012 and October 26, 2012.

> Centrum has refused to pay. Thus, in order to recover the amount due under the Note, the Property will have to be sold. Because Centrum has indicated its intent to block any attempt to foreclose on the Property, Union Bank would like the Property to be sold by the Court's agent, the Receiver.

In opposition, Centrum claimed that under the DTA, it had the right to pay the amount in default and reinstate the promissory note as the successor in title to Prium.

The court ruled as a matter of law Centrum did not have the right under the DTA to cure the default and reinstate the loan. The court entered an order granting Union Bank's motion for partial summary judgment and appointed a receiver to conduct the nonjudicial foreclosure sale. The court ruled, "[T]here is good cause to allow the Receiver to sell the Property" and the court "confers upon the Receiver the authority to sell the Property, consistent with RCW 7.60.260." After the parties stipulated to dismissal of all claims, the court dismissed the lawsuit.

RCW 61.24.090

Centrum appeals the order granting Union Bank's motion for partial summary judgment. Centrum contends the court erred in ruling that Centrum did not have the right under RCW 61.24.090 of the DTA to cure and pay the amount in default and reinstate the promissory note between Prium and Union Bank.

We review the decision on summary judgment de novo. Michak v. Transnation Title Ins. Co., 148 Wn.2d 788, 794, 64 P.3d 22 (2003). Summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Michak, 148 Wn.2d at 794-95. Interpretation of a statute is a question of law we review de novo. City of Spokane v. Rothwell, 166 Wn.2d 872, 876, 215 P.3d 162 (2009).

When interpreting a statute, our objective is to ascertain and carry out legislative intent. Jametsky v. Olsen, 179 Wn.2d 756, 762, 317 P.3d 1003 (2014). Statutory interpretation begins with the statute's plain meaning. Lake v. Woodcreek Homeowners Ass'n, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010). The "plain meaning" of a statute is discerned from the ordinary meaning of the language at issue as well as the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole. Lake, 169 Wn.2d at 526. "While we look to the broader statutory context for guidance, we 'must not add words where the legislature has chosen not to include them,' and we must 'construe statutes such that all of the language is given effect.' " Lake, 169 Wn.2d at 526 (quoting Rest. Dev., Inc. v. Cananwill, Inc., 150 Wn.2d 674, 682, 80 P.3d 598 (2003)). Where the language of a statute is clear on its face, we give effect to the plain meaning as an expression of legislative intent. In re Forfeiture of One 1970 Chevrolet Chevelle, 166 Wn.2d 834, 838, 215 P.3d 166 (2009).

We construe a statute " 'so that all the language used is given effect, with no portion rendered meaningless or superfluous.' " Rapid Settlements, Ltd. v. Symetra Life Ins. Co., 134 Wn. App. 329, 332, 139 P.3d 411 (2006) (quoting Prison Legal News, Inc. v. Dep't of Corr., 154 Wn.2d 628, 644, 115 P.3d 316 (2005)). A construction that would render a portion of a statute meaningless or superfluous should be avoided. Ford Motor Co. v. City of Seattle, Exec. Servs. Dep't, 160 Wn.2d 32, 41, 156 P.3d 185 (2007). "[W]e avoid interpretations 'that yield unlikely, absurd or strained consequences.' " Broughton Lumber Co. v. BNSF Ry., 174 Wn.2d 619, 635, 278 P.3d 173 (2012) (quoting Kilian v. Atkinson, 147 Wn.2d 16, 21, 50 P.3d 638 (2002)). "Where the language of a statute is clear, legislative intent is derived from the language of the

statute alone." Rothwell, 166 Wn.2d at 876. If the statute is unambiguous, the inquiry ends. Lake, 169 Wn.2d at 526.

The DTA governs transactions where a borrower executes a promissory note to the lender that is secured by a deed of trust. Bain v. Metro. Mortg. Grp., Inc., 175 Wn.2d 83, 92-94, 285 P.3d 34 (2012). A statutory deed of trust is a three-party transaction. The borrower is the grantor of the deed of trust and the lender is the beneficiary. Bain, 175 Wn.2d at 92-93. The trustee holds title in trust for the lender as security for a loan. Bain, 175 Wn.2d at 92-93. If the borrower defaults on the debt, the DTA authorizes a nonjudicial foreclosure sale of the property by the trustee. RCW 61.24.030; Bain, 175 Wn.2d at 93.

RCW 61.24.090(1) gives "the borrower, grantor, any guarantor, any beneficiary under a subordinate deed of trust, and any person having a subordinate lien or encumbrance of record on the trust property" the right to cure the default as set forth in the nonjudicial foreclosure sale notice and discontinue the foreclosure. RCW 61.24.090(1) provides, in pertinent part:

> At any time prior to the eleventh day before the date set by the trustee for the sale in the recorded notice of sale, or in the event the trustee continues the sale pursuant to RCW 61.24.040(6), at any time prior to the eleventh day before the actual sale, the borrower, grantor, any guarantor, any beneficiary under a subordinate deed of trust, or any person having a subordinate lien or encumbrance of record on the trust property or any part thereof, shall be entitled to cause a discontinuance of the sale proceedings by curing the default or defaults set forth in the notice, which in the case of a default by failure to pay, shall be by paying to the trustee:
>
> (a) The entire amount then due under the terms of the deed of trust and the obligation secured thereby, other than such portion of the principal as would not then be due had no default occurred, and
>
> (b) The expenses actually incurred by the trustee enforcing the terms of the note and deed of trust, including a reasonable trustee's fee,

> together with the trustee's reasonable attorney's fees, together with costs of recording the notice of discontinuance of notice of trustee's sale.[5]

"Upon receipt of such payment the proceedings shall be discontinued, the deed of trust shall be reinstated and the obligation shall remain." RCW 61.24.090(3).

Under the plain and unambiguous language of RCW 61.24.090(1), only the borrower, grantor, guarantor, any beneficiary under a subordinate deed of trust, or any person having a subordinate lien or encumbrance has the right to cure the default as set forth in the notice, discontinue the nonjudicial foreclosure sale, and reinstate the deed of trust and the obligation.

Here, Centrum is not the borrower or a guarantor under the DTA because the undisputed record established the promissory note is between only Prium and Frontier Bank.[6] Centrum concedes that after obtaining a Trustee's Deed "subject to the first Deed of Trust held by . . . Union Bank," Centrum was no longer a beneficiary under a subordinate deed of trust. We accept the concession. Under the DTA, the Trustee's Deed conveys only "the right, title, and interest" in the property sold at the nonjudicial foreclosure sale. RCW 61.24.050(1).

> Upon physical delivery of the trustee's deed to the purchaser, . . . the trustee's deed shall convey all of the right, title, and interest in the real and personal property sold at the trustee's sale which the grantor had or had the power to convey at the time of the execution of the deed of trust.

RCW 61.24.050(1). The effect of the nonjudicial foreclosure on Centrum's Deed of Trust was to extinguish the debt Prium owed Centrum and transfer title subject to the

---

[5] Emphasis added.

[6] For the first time on appeal, Centrum contends it has an encumbrance of record and an equitable subordinate lien on the Monroe property. Under RAP 9.12, an appellate court will consider only the evidence and issues called to the attention of the trial court. Kofmehl v. Baseline Lake, LLC, 177 Wn.2d 584, 594, 305 P.3d 230 (2013). For the first time in its reply brief, Centrum also argues the lease with the State "contemplate[s] that lease being binding upon successors, i.e. the subsequent owner." "An issue raised and argued for the first time in a reply brief is too late to warrant consideration." Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

first position Deed of Trust on the Monroe property. Beal Bank, SSB v. Sarich, 161 Wn.2d 544, 548, 167 P.3d 555 (2007).

Centrum relies on the definition of "grantor" to argue it has the right to pay only the amount in default and to reinstate the obligation between Prium and Union Bank. It is an axiom of statutory interpretation that where a term is defined, we will use that definition. United States v. Hoffman, 154 Wn.2d 730, 741, 116 P.3d 999 (2005).

Whether Centrum had the right to cure the default and reinstate the loan turns on whether Centrum is a "successor" to the "grantor" as defined by RCW 61.24.005(7). RCW 61.24.005(7) defines "grantor" as follows:

> "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.

Centrum contends that by obtaining title to the property following the nonjudicial foreclosure on the second position Deed of Trust, Centrum became the successor to the rights of Prium as the grantor. We disagree.

The plain and unambiguous language of RCW 61.24.005(7) defines a "grantor" or "its successor" as a person "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." Under RCW 61.24.005(7), a successor to the grantor must assume all or part of the borrower's obligation. See also Fluke Capital & Mgmt. Servs. Co. v. Richmond, 106 Wn.2d 614, 622, 724 P.2d 356 (1986) (Absent assumption of the debt, the owner of land subject to a mortgage is not personally liable for the debt underlying the mortgage.).

The undisputed record establishes Centrum was never obligated to pay on the promissory note and did not assume any liability for the obligation between Prium and Frontier Bank. Centrum was not a party to the promissory note between Prium and Frontier Bank and did not execute a deed of trust to secure that loan. Union Bank was not interested in entering into an agreement to allow Centrum to assume the obligation of Prium under the promissory note. But Union Bank agreed Centrum could pay the full amount Prium owed on the note. Because the undisputed record establishes Centrum is not a successor to the grantor as defined by RCW 61.24.005(7), Centrum did not have the right to cure the default, reinstate the loan, and discontinue the nonjudicial foreclosure sale.

The cases Centrum cites are inapposite. In One Pacific Towers Homeowners' Association v. HAL Real Estate Investments, Inc., 108 Wn. App. 330, 338-46, 30 P.3d 504 (2001), the court addressed the meaning of the phrase "succeeds to" as used in the Condominium Act, chapter 64.34 RCW.[7] In Fidelity Mutual Savings Bank v. Mark, 112 Wn.2d 47, 53, 767 P.2d 1382 (1989), the Supreme Court concluded that a person is not a "successor in interest" to a judgment debtor's right of redemption where the "assignment of interest" was not recorded. In Stewart v. Beghtel, 38 Wn.2d 870, 875, 234 P.2d 484 (1951), the Supreme Court held a person was not a successor under a deed of trust where the person did not have a property interest. And in Lakewood Racquet Club, Inc. v. Jensen, 156 Wn. App. 215, 228, 232 P.3d 1147 (2010), we held that a coventee's heirs could not enforce a restrictive covenant because the heirs no longer had an ownership interest in the property. Centrum also argues public policy favors allowing a person with a financial interest in real property the right to cure a

[7] Former RCW 64.34.020(13)(b) (1992).

default and discontinue a foreclosure sale. Public policy arguments are best left to the legislature, not the courts. Doe v. Wash. State Patrol, 185 Wn.2d 363, 384, 374 P.3d 63 (2016).

We hold Centrum did not have the right to cure and reinstate the loan between Prium and Union Bank under RCW 61.24.090. In addition, the undisputed record establishes Union Bank had the unequivocal right under the Deed of Trust Due On Sale clause to demand payment of the full amount due.

We affirm dismissal of Centrum's lawsuit to enjoin the Trustee's Sale.

WE CONCUR:

APPENDIX B

No.: 75676-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON DIV. I

CENTRUM FINANCIAL SERVICES, INC.,

Appellant,

vs.

UNION BANK, N.A.,

Respondent.

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

This appeal presents a singular issue of law for this court to consider. The Appellant, Centrum Financial Services was a junior lender on a commercial property located in Monroe, Washington. Prium, the borrower, defaulted on the note. Centrum Financial Services foreclosed on its second position Note and Deed of Trust. As a result of that foreclosure, Centrum held title by Trustee's Deed to the real property.

At all times, Centrum acknowledged that the Trustee's Deed it held was subject to the first Deed of Trust held by the Respondent, Union Bank. Prium also defaulted on the first position note. Union Bank initiated foreclosure proceedings on the first position Note and Deed of Trust.

Upon learning of the defaults on the first position, Centrum Financial requested, on numerous occasions, an accounting for the amounts necessary to cure the default pursuant to RCW 61.24.090. Union Bank refused to provide reinstatement information to Centrum Financial and refused to allow Centrum to cure and reinstate the note.

Centrum filed suit to enjoin the Trustee's sale and sought relief allowing Centrum to reinstate the note and cure the default. After several cancellations of the Trustee's sale, Union Bank moved for summary judgment ostensibly on the sole issue that Centrum Financial as the foreclosing junior lien holder did not have a right to reinstate under RCW 61.24.090(1). The trial court agreed and granted summary judgment holding that Centrum, as the holder of title by virtue of a Trustee Deed and junior foreclosing creditor had no right to cure. As a result of the court's summary judgment ruling, Centrum was not allowed to reinstate the note. It is Centrum's position for this appeal that the trial court's ruling was contrary to the statute, the statute's intent, and contrary to public policy.

II. ASSIGNMENT OF ERROR

Centrum assigns error to the trial court's grant of summary judgment finding as a matter of law that Centrum was not entitled to reinstate. See CP 71-75. Centrum requests this court reverse the trial court's decision, find that a junior lien holder which has foreclosed, has a right to reinstate under RCW 61.24.090 and remand to the trial court for further proceedings.

III. STATEMENT OF THE CASE

A. Background

Appellant Centrum Financial Services, Inc. ("Centrum"), is a Washington corporation, whose business since 1987 has been making short term commercial real estate loans, secured by real property collateral. Centrum's loans typically have been for six months or less and often are bridge loans that provide borrowers with short term or "gap" financing for real estate acquisition or development. Centrum held title by Trustee's Deed to the real property in Monroe, Washington. CP 189.

On October 6, 2004, Frontier Bank loaned approximately $1,875,000 to Prium Development Company, L.L.C. The loan was evidenced by a promissory note and secured by a first Deed of Trust on Prium's Monroe, Washington ("Monroe Property".) The note's maturity date was October 10, 2014. CP 189-190.

On December 7, 2006, Centrum loaned Prium Development Company L.L.C. $1,610,000, secured by a second Deed of Trust on the Monroe Property. CP 190.

Prium defaulted on Centrum's loan, causing Centrum to foreclose its second deed of trust, taking title to the Monroe Property on January 21, 2011. Centrum duly directed its trustee in writing to sell the property by nonjudicial foreclosure. Centrum purchased the Monroe property at the Trustee's Sale for

$1,823,780.79, which was the amount of Prium's debt to Centrum. The Trustee's Deed conveying the Monroe Property to Centrum is recorded under Snohomish County Auditor's No. 201102040141. Centrum's title was subject to the first Deed of Trust securing Frontier Banks $1,875,000 loan to Prium. CP 190.

Union Bank acquired Frontier Bank's Everett operations and assets on April 30, 2010, pursuant to a Purchase and Assumption Agreement with the FDIC, as receiver for Frontier Bank. Shortly before June 22, 2011 Union Bank appointed Hacker & Willig, Inc., P.S. as trustee of the Prium deed of trust, replacing Chicago Title Insurance Company, the trustee designated in the deed of trust. The trustee, issued a Notice of Default on June 22, 2011, followed by a Notice of Trustee's Sale issued on July 25, 2011. CP 191.

B. Centrum attempts to cure.

Centrum contacted both Union Bank and the trustee in September 2011 to learn the amount required to reinstate the loan. The full balance of the first Prium note was not due until October 10, 2014. The trustee repeatedly refused to provide the reinstatement information to Centrum. Instead, the trustee sent Centrum a "Union Bank, N.A. Demand/Statement for Loan Payoff," dated September 12, 2011, CP 208-209. Alena Marshak, an

employee of Hacker & Willig responded to Centrum's inquiries by stating in a September 28, 2012 email that "Union bank is only interested in a full payoff of this loan." CP 191.

On October 14, 2011, Centrum notified the trustee that Centrum was "tendering a willingness and ability to reinstate this loan." On October 25, 2011, Centrum again sent the trustee another email, notifying them that Centrum "remains willing and able to reinstate the loan immediately." On October 27, 2011, Centrum sent the trustee an email stating Centrum's willingness to pay upcoming real estate taxes as part of reinstating the Prium loan, reiterating that "Centrum is prepared to immediately reinstate the loan and start making all payment to the Bank going forward, as well as keeping all the real estate taxes current." CP 211.

The trustee responded to these emails on October 28, 2011, advising Centrum that Union Bank would be paying the real estate taxes and that "reinstatement of the loan is not a possibility." CP 216. On October 14, 2011, Centrum notified the trustee that Centrum would be forced to file a lawsuit against Union Bank, as required by RCW 61.24.090, to protect its interest in the Monroe Property because of Union Bank's continued rejecting Centrum's efforts to reinstate the loan. CP 192.

That same day, October 14, 2011, the trustee informed Centrum by voicemail that Union Bank intended to postpone the Trustee's Sale scheduled for October 28, 2011. On October 27, 2011 the Trustee issued a Notice of Postponement of Trustee's Sale, continuing the Trustee's Sale to December 9, 2011. On October 31, 2011, Centrum once again sent an email to Union Bank seeking to reinstate the loan and the trustee responded by refusing to provide any amount to reinstate the loan, instead demanding that Centrum pay the entire loan balance in full. CP 192.

After two months of fruitless attempts to persuade the Trustee to provide any reinstatement information or explain the questionable amounts stated in the Notice of Trustee's Sale, Centrum notified the Trustee that Centrum was exercising its right to reinstate the loan and to demand that the Trustee supply the reinstatement information. By letter to the trustee, dated November 7, 2011, Centrum formally notified the Trustee that Centrum had acquired title to the property by Trustee's Deed, that Centrum required that the Trustee provide the amounts necessary to reinstate the loan and that Centrum was exercising its statutory right to do so:

Let me be clear. Centrum is exercising its right, under RCW 61.24.090, to reinstate the Union Bank loan and is ready, willing and able immediately to pay all sums necessary to reinstate the obligation secured by the Union bank Deed of Trust, including all past due payments, late charges, the appraisal fee and any property taxes advanced by Union Bank.

CP 218.

Centrum's November 7, 2011 letter also notified the Trustee that Centrum questioned several of the defaults listed in the Notice of Trustee's Sale and pointed out that the Property had had least $1 million in equity, so its loss would have disastrous consequences for Centrum. The letter asked the Trustee to provide the requested information by November 10, 2011. The Trustee avoided providing the requested information by discontinuing the Trustee's Sale. CP 193.

The trustee emailed a letter to Centrum on November 10, 2011 stating that he had forwarded Centrum's request for financial information to Union Bank and had discontinued the Trustee's Sale.

Please be advised that Hacker & Willig, Inc., P.S. caused to be recorded a Notice of Discontinuance of Trustee's Sale (Snohomish County Recording No. 201111100394), a copy of which is enclosed for your reference.

CP 193; CP 222.

Centrum sent the trustee another letter, dated April 3, 2012, reminding the trustee that he and Union Bank still had not provided

answers to the financial questions raised in Centrum's November 7, 2011 letter, even though the Trustee's November 10, 2011 response had assured Centrum that Union Bank would "soon respond to the additional matters addressed in [Hathaway's] letter." CP 222. Centrum's April 3, 2012 letter once again questioned the figures and amounts stated in the February 21, 2012 Notice of Default, reminding the Trustee that his November 7, 2011 letter

had asked for clarification regarding the manner in which interest was calculated and charged. To date we have received no response... even though your November 10, 2011 letter assured me that an explanation would be forthcoming.

CP 228; CP 194-195.

By letter dated April 3, 2012 Centrum objected to Union Bank's continued stonewalling of Centrum's ongoing attempts to reinstate the loan, as a violation of Centrum's rights under the Deed of Trust Act:

Centrum has a statutory right under RCW 61.24.090 to reinstate the loan and has been trying to exercise that right since November 2011 and before. Union Bank has refused to even communicate with Centrum and is aggressively trying to take from Centrum a valuable asset in spite of the fact that Centrum has tendered payment of the full benefit of Union Bank's bargain. We assume that Union Bank's actions are motivated by a desire to garner for itself an undeserved windfall at Centrum's expense. That is not right or equitable, and is in violation of the protections afforded Centrum by the Deed of Trust Act.

CP 195-196.

Centrum responded promptly to the Trustee's June 14, 2012 letter on July 3, 2012. CP 231-233. Centrum pointed out (1) that Union Bank's invoices did not record Prium's January and February 2011 payments, which were made; (2) that the interest shown on the provided invoices appears to have exceeded the default rate by $3,500/month and the nondefault rate by $5,600/month; (3) that "the default rate cannot apply to the months of January and February of 2011 because the monthly loan payment was made for each of those months;" (4) that "default interest should not be charged for the months following my client's tender of payment of all past due amounts, which tender was made in October 2011 and confirmed in my letter to you of November 7, 2011; (5) that late charges had been incorrectly calculated and why; (6) that charges for AIE Consultant and Appraisal were not authorized by the loan documents; and (7) that charges for the Trustee's fees were improper for the following reasons:

> According to the documentation you provided, Union Bank acquired its interest in the referenced loan by an instrument dated February 7, 2012, which was recorded with the Snohomish County Recorder on February 14, 2012. Accordingly, that is the first date that Union Bank had the power to appoint your firm as trustee under the deed of trust securing the loan. It follows that any charges by Hacker and Willig, Inc. P.S. before then, whether for the previous foreclosure or anything else, cannot be assessed against my client. In addition, since my client tendered all sums required to reinstate the loan in

October of 2011, charging legal fees for services performed after that date are also not appropriate. Please provide revised charges for expenses to be paid to reinstate the loan.

CP 196-197.

The Trustee issued yet another Notice of Foreclosure and a new Notice of Trustee's Sale on August 14, 2012, fixing the Trustee's Sale for November 16, 2012. The new Notice of Trustee's Sale demanded $533,687 to reinstate the loan. CP 197.

Centrum wrote the Trustee again on October 26, 2012, in a final attempt to obtain a reinstatement figure. CP 198. CP 255-258.

C. Centrum files suit pursuant to RCW 61.24.130.

Neither the Trustee nor Union Bank responded to any of the deficiencies addressed in Mr. Hathaway's October 26, 2012 letter. Having exhausted its efforts to reinstate the Prium loan, Centrum had no choice but to file suit to enjoin the Trustee's Sale for judicial determination of the reasonable charges for reinstating the loan and for Centrum's damages for Union Bank's violations of the Consumer Protection Act. CP 198.

Centrum Financial filed suit on November 2, 2012. CP 1106-1120. In short, Centrum filed suit seeking to enjoin the sale and have a determination of the appropriate fees and expenses

required to reinstate the loan as contemplated under RCW 61.24.090(1)(a-b).

In response to the Complaint, Union Bank discontinued the Trustee Sale thereby rendering Centrum's request for injunctive relief as moot. More than a year later, on January 24, 2014, Union Bank filed a motion for summary judgment seeking, in part, a declaration that Centrum Financial had no right under RCW 61.24.090 to cure the default before the Trustee Sale. See CP 289-300. Briefing on the matter was submitted by both parties. CP 86-126, CP 135-319. The court heard oral argument and granted summary judgment on February 21, 2014 in favor of Union Bank finding that Centrum Financial had no right to reinstate under the statute.

D. Procedural Delays

Centrum Financial filed its initial Notice of Appeal acknowledging that the court's ruling essentially rendered all other causes of action moot. See CP 62-67. In response to this Notice of Appeal, Union Bank then moved to amend its Answer to assert a counterclaim. In the interim, the trial court granted Union Bank's motion to amend its Answer to assert a counterclaim. Centrum acknowledged that this procedural maneuver precluded the

summary judgment from being a final order entitling Centrum to appeal. Centrum voluntarily dismissed its appeal.

Thereafter, Union Bank did virtually nothing to prosecute its purported counterclaim. As a result, on July 15, 2016 Centrum filed its motion for dismissal based upon want of prosecution. In response to the motion for dismissal based upon want of prosecution, Union Bank voluntarily dismissed its counterclaims. Centrum timely filed this Notice of Appeal.

IV. ARGUMENT

RCW 61.24.090 provides rights of reinstatement to parties who hold an interest in the subject property to reinstate a senior defaulted loan in order to avoid the elimination of the junior position by a subsequent Trustee Sale. Centrum, as the foreclosing junior lien holder had a right under the statute to cure and reinstate the loan. Union Bank, by refusing to provide reinstatement information and allowing reinstatement violated RCW 61.24.090.

A. Standard of Review

The trial court's ruling in this particular matter is based strictly upon the trial court's interpretation of RCW 61.24.090 although somewhat unclear in the court's order itself, it appears as though this constitutes the court's only basis for granting summary

judgment in favor of the respondent. As a result, this court reviews statutory interpretation de novo. *Dep't of Ecology v. Campbell & Gwinn*, LLC, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). In doing so, it is this court's fundamental goal to "discern and implement the legislature's intent." *State v. Armendariz*, 160 Wn.2d 106, 110 ¶ 7, 156 P.3d 201 (2007).

In this particular case, Centrum believes that the legislature's intent behind RCW 61.24.090(1) is to allow interested parties, junior to a foreclosing lender, the opportunity to cure and reinstate a senior note. By allowing a junior interested party the right to reinstate and cure, the senior foreclosing entity is fully protected and compensated for all losses caused by the underlying borrower's default.

B. Centrum, by definition, is a "grantor" entitled to cure under RCW 61.24.090(1).

RCW 61.24.090(1) provides:

Curing defaults before sale—Discontinuance of proceedings—Notice of discontinuance—Execution and acknowledgment—Payments tendered to trustee.

(1) At any time prior to the eleventh day before the date set by the trustee for the sale in the recorded notice of sale, or in the event the trustee continues the sale pursuant to RCW 61.24.040(6), at any time prior to the eleventh day before the actual sale, the borrower, grantor, any guarantor, any beneficiary under a

subordinate deed of trust, or any person having a subordinate lien or encumbrance of record on the trust property or any part thereof, shall be entitled to cause a discontinuance of the sale proceedings by curing the default or defaults set forth in the notice, which in the case of a default by failure to pay, shall be by paying to the trustee:

The clear intent of the statute is to provide certain categories of persons the right to cure a default before a Trustee Sale. A "grantor" is one such person entitled to cure.

RCW 61.24.005(7) defines "grantor" as follows:

(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. (Emphasis added.)

Although the statute does not define the term "successors", the term has a very common understanding which has been addressed by the courts of this state on numerous other occasions. For example, in the decision of *Homeowners Ass'n v. Hal Real Estate Invs.*, 108 Wn. App., 330, 341, 30 P.3d 504 (2001)(aff'd in part, reversed in part on other grounds 148 Wn.2d 319 (2001), the court analyzed the term successor. The court held:

> Turning to the phrase "succeeds to," we look to several dictionary definitions to assist us in construing that term as it is used in the statute. *Black's Law Dictionary* defines a "successor in interest," as "[o]ne who follows another in ownership or *control of property. . . .*" Courts have recognized this principal in holding that one may succeed to the rights of another by operation of law.

Black's ***definition*** of "***successor***" is consistent with the above concept of control of property: *A person who succeeds to* the office, *rights,* responsibilities, or place *of another;* one who replaces or follows another.

And *Webster's* defines "succession" as follows:

The change in legal relations by which one person *comes into the enjoyment of* or becomes responsible for one or more of *the rights* or liabilities *of another person: the act or process of one person's taking the place of another in the enjoyment of* or liability for *his rights or duties or both.*

Under the common and ordinary meaning of the term "successor", Centrum clearly became the successor to Prium when it foreclosed upon the property and obtained a Trustee Deed. Centrum succeeded to the rights of Prium. Centrum obtained control of the property and took the place of Prium with respect to Prium's enjoyment of the subject property. Thus given the common and ordinary meaning of the term successor, Centrum was the successor. Pursuant to RCW 61.24.005(7) Centrum would then be defined as the grantor which at all times material had full right to cure the defaults pursuant to RCW 61.24.090(1).

Centrum's reading of the term "successor" is also consistent with the use of the term in other circumstances. For example, under

the redemption statute at RCW 6.23.010 (former RCW 6.24.130) a successor is one who acquires the interest of the debtor in the subject property. In *Fidelity Mutual Savings Bank v. Mark*, 112 Wn.2d 47, 52, 767 P.2d 1382 (1989), the court recognized that a "successor" is one who acquires the debtor's interest in the property. *Id.* Clearly Centrum obtained Prium's interest in the property by virtue of the Trustee's Sale. A successor may be a grantee, a Trustee under a Trust Deed, the purchaser of a mortgagor's interest at a receivership sale, or the purchaser at an execution sale acquiring title. Washington Real Property Deskbook, 2d Ed., WSBA § 48.79, 48-43 (1986). Clearly under these working definitions of the term successor, Centrum is in fact the successor of Prium's interest in the property.

The term successor is widely used to encompass subsequent owners in a wide variety of other real property transactions. In *Stewart v. Beghtel*, 38 Wn.2d 870, 875, 234 P.2d 484 (1951), the court held that the term "successors", as used in a deed, refers to those who subsequently become owners of the land at issue. As successor, Centrum became the owner of the land at issue in this dispute. See also, *Messett v. Cowell,* 194 Wash. 646, 649, 79 P.2d 337 (1938) (restrictions on the burning of lime are

binding on successors, i.e. subsequent owners of the property); *Lakewood Racquet Club, Inc. v. Jensen*, 156 Wn. App. 215, 225-226, 232 P.3d 1147 (2010) (a successor is one who subsequently obtains an interest in the land.) In real estate transactions, a successor is commonly the party who subsequently owns the property.

In this particular case, there is no dispute but that Centrum became the property owner and succeeded to all interests in the property of Prium. The common and ordinary understanding of the term "successor" means subsequent owner of the property who controls the property, obtains the rights to the property and enjoys the benefits of that ownership. *Supra*, *Homeowners Ass'n v. Hal Real Estate Invs.*, 108 Wn. App. at 341. Given the common ordinary understanding of the term successor, Centrum is clearly the successor to Prium.

By virtue of the statutory definition of grantor in the deed of trust act, Centrum is the grantor for purposes of determining whether or not Centrum had a right to cure the default. Given the plain language of the statute, Centrum had a right to cure the default. The court erred as a matter of law when it determined otherwise.

Centrum respectfully requests this court reverse the trial court's grant of summary judgment determining as a matter of law that Centrum did not have a right to cure the default before the sale and remand to the state court for further proceedings.

C. Alternatively, Centrum had an encumbrance of record on the property thus entitling Centrum the right to cure.

As with the term successor, the legislature did not define the term "encumbrance" for purposes of RCW 61.24.090(1). However, the courts of this state have defined encumbrance. An encumbrance has been defined by this court to be any right to or interest in land. *Herb Hebb v. Severson*, 32 Wn.2d 159, 167, 201 P.3d 156 (1948). The common meaning of an undefined statutory term can be determined by dictionary definition. *In re Application for Approval*, 133 Wn. App. 350, 358, 136 P.3d 765 (2003) the court analyzed the term encumbrance. An "encumbrance" is a burden that impedes action or renders it difficult. *Id*, 358-359, citing Websters 3rd New Int'l Dictionary 747 (1986). *In re Application for Approval*, the court found that the mere presence of a power of attorney encumbered the transaction. Black's Law Dictionary defines encumbrance as any right to, or interest in land... Black's Law Dictionary, 6th ed. (West Publishing,1990)

In this particular case, Centrum's interests go far beyond power of attorney and instead have ripened into a claim of ownership pursuant to a Trustee Deed. Given the plain definition of encumbrance, Centrum's involvement and claim of right impedes action or renders it more difficult. This is evidenced by the underlying litigation in this matter which, according to Union Bank itself, rendered it difficult to foreclose on the underlying property by evidence of the fact that Union Bank did not and could not foreclose upon the property for years. See CP 293.

Centrum recorded its encumbrance on the Trust property. Pursuant to the plain language of RCW 61.24.090(1), Centrum as the holder of an encumbrance had a right to cure. The court's decision to the contrary was in error and should be reversed.

D. At a bare minimum, Centrum has an equitable lien entitling it to a right to cure.

At all times material, Centrum held an equitable subordinate lien. It is well established by statute as well as judicial decisions that proceeds of a foreclosure sale shall be applied first to the payment of the amount due on the senior lienor for payment of principal, interest, expenses, etc. with the remaining proceeds to be applied to all interests of junior lienors. See RCW 61.12.150;

Worden v. Smith, 178 Wn. App. 309, 320-321, 314 P.3d 1125 (2003).

In *Worden*, the court recognized that foreclosure affects the rights of all mortgagees junior to the first position foreclosing mortgagee. *Id.* In *Worden*, the court specifically recognized that the "appropriate relief was an order imposing an equitable lien in the bank's favor against the property acquired..." *Id* at 328. In this particular case, at the time of the foreclosure process, there was substantial equity in the property. Centrum would have been entitled to payment of any surplus proceeds. Centrum's situation is parallel to the situation of the bank in *Worden* in which the court recognized an equitable lien. Under the plain reading of the statute, Centrum would have had a lien which would have entitled Centrum to cure and reinstate Union Bank's note. The court erred in ruling as a matter of law that Centrum had no right to cure.

E. The court's ruling in this matter is contrary to public policy.

As set forth above, the intent of the cure statute is to allow those parties whose interests may be affected by the foreclosure of a senior lien to protect their interests. The statute has set forth a mechanism in RCW 61.24.090 which ensures that a senior lender

will be made whole in the event any such interested party seeks to cure and reinstate the note. The statute ensures that all late charges, legitimate fees and expenses, etc. are to be paid to the senior lender to cure the default. Once these amounts are paid, the lender is absolutely made whole and suffers no harm or prejudice whatsoever by being statutorily required to reinstate the loan. The lender receives exactly the benefit for which it bargained.

By disallowing Centrum's right to reinstate, or any other party with an interest in the subject property, the court's ruling encourages first position lenders to engage in improper lending practices. When a property has substantial equity beyond the payoff amount of the first position note, a lender is encouraged to impose default interest rates and penalties and expenses all the while delaying a foreclosure sale as long as possible. A lender engaging in such practices is encouraged to drive up these fees and expenses for its own profit which in turn diminishes the surplus proceeds which are available to other legitimate payees under RCW 61.24.080. When the first position lender has driven up the payoff figure through the increased default interest rate and expenses to the point wherein the property has no further equity,

then the lender can sell the property at foreclosure sale depriving all other interest parties from receiving any surplus proceeds.

This is exactly what occurred in this particular case. Union Bank reaped the benefit of default interest rates at nearly four times the principal interest rate on the note. The Trustee discontinued the sale on multiple occasions. At each turn this increased the amount owed to the bank. Then, when the available equity had effectively been wiped out and no party was allowed to cure and reinstate, Union Bank then sold the property. The trial court's ruling encourages this type of practice by lenders. This is not the intent of the cure statute.

V. CONCLUSION

The clear intent of the cure statute is to protect those parties whose interest may be extinguished by a senior foreclosure. For purposes of who is entitled to cure and reinstate the statute defines grantor to include the original grantor and its successor. Based upon a plain reading and understanding of the word successor, Centrum is the successor to Prium and should have been allowed to reinstate. Centrum also had an encumbrance on the property entitling it to cure and reinstate. And finally, at a bare minimum, Centrum had an equitable lien entitling it to the right to cure. The

trial court committed reversible error when it ruled Centrum had no such rights. Centrum respectfully requests this court reverse the trial court's decision and remand for further proceedings.

Dated this 22nd day of November, 2016.

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No.: 75676-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

CENTRUM FINANCIAL SERVICES, INC.,

Appellant,

vs.

UNION BANK, N.A.,

Respondent.

CERTIFICATE OF SERVICE
BRIEF OF APPELLANT

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CERTIFICATE OF SERVICE

The undersigned certifies that under penalty of perjury under the laws of the State of Washington that on the below date I caused to be served the foregoing document on:

Counsel for Defendant/Counterclaim Plaintiff: DLA Piper LLP 701 Fifth Ave. Suite 7000 Seattle, WA 98104 Katherine.heaton@dlapiper.com Stellman.keehnel@dlapiper.com	[X] Via US Mail [X] Via E-filing
Court of Appeals, Division I One Union Square 600 University St Seattle, WA 98101-1176	[X] Via E-filing

DATED at Seattle, Washington, this 22nd day of November, 2016.

Kathleen M. Forgette, Legal Assistant

APPENDIX C

No.: 75676-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON DIV. I

CENTRUM FINANCIAL SERVICES, INC.,

Appellant,

vs.

UNION BANK, N.A.,

Respondent.

APPELLANT'S REPLY BRIEF

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Appendix 13

I. OVERVIEW OF UNDISPUTED MATERIAL FACTS

Rather than squarely address the issues before the court on ***this*** appeal the respondent has provided the court with a multitude of factual allegations which are not supported by the record and were not utilized by the court in the underlying motion at issue.[1] Centrum is confident this court will recognize the hyperbole and remain focused on the issues in ***this*** appeal.

There are central material facts which are not in dispute.

- Centrum was a secured lender under a second position Deed of Trust and Promissory Note.
- Centrum foreclosed upon the Deed of Trust following a default under the Note.
- By virtue of that foreclosure, Centrum became the title owner of the subject property.
- Centrum became aware that the first position Note and Deed of Trust held by Union Bank was in default.

[1] For example, allegation of $600,000 in rent which Union Bank claims Centrum conceded that it was owed to Union Bank is only based upon the declaration of the bank's own representative. Quite the contrary, Centrum believed it was not obligated to reimburse or otherwise pay the rents to Union Bank. Additionally, Union Bank claims that it dropped all allegations and counterclaims related to the $600,000 loss of rents because it determined that Centrum had no financial wherewithal to satisfy the debt. There is nothing in the record supporting this spurious allegation.

- On numerous occasions Centrum requested reinstatement from Union Bank.
- Union Bank refused to provide a reinstatement amount and refused to allow reinstatement.
- The Respondent's underlying Note states:

  "**SUCCESSOR INTEREST**. The terms of this note shall be binding upon Borrower, and upon Borrower's heirs, personal representatives, ***successors and assigns***, and shall inure to the benefit of Lender and its successors and assigns."

  CP 307. Emphasis added.

- The Respondent's Deed of Trust states:

  Successors and Assigns. Subject to any limitations stated in the deed of trust on transfer of Grantor's Interest, this Deed of Trust shall be binding upon and inure to the benefit of the parties, their ***successors*** and assigns. ***If ownership of the Property becomes vested in a person other than Grantor, Lender, without notice to Grantor, may deal with Grantor's successors*** with reference to this Deed of
  Trust and the indebtedness by way of forbearance or extension without releasing Grantor from the obligations of this Deed of Trust or liability under the indebtedness.

  CP 316. Emphasis added.

- The underlying lease states:

  "...for its heirs, executors, administrators, ***successors***, and assigns, hereby called the Lessor,..."

  CP 702, introductory paragraph.

- The subsequent lease with the State of Washington further states:

  > **Effect of Sale:** A sale, conveyance, or assignment of the premises will operate to release Lessor and Receiver from liability under this Lease, from and after the effective date of such sale, conveyance, or assignment, except for liabilities that arose prior to such effective date and Lessee will attorn to Lessor's ***successor in interest*** to this Lease.
  >
  > CP 718. Emphasis added.

Union Bank moved for the appointment of a receiver. Union Bank selected the receiver and the court approved that receiver. The court-appointed receiver put, in his own declaration,: "Centrum Financial Services, Inc. ("Centrum"), ***as the successor in interest to Prium Development Company, LLC***, ..." CP 700, l. 4-5. Emphasis added.

II. ARGUMENT

Respondent's primary arguments are predicated upon two unpublished district court decisions. First, unpublished federal district court decisions are not controlling authority in the State of Washington. Second, the authority relied upon by Respondents has been reversed and remanded on appeal. Third, both unpublished decisions are factually distinct from the issues presented in this case.

Nevertheless, when this court reviews the undisputed record on appeal, Centrum is the successor entitled to cure. Respondent's own documentation supports this conclusion. Moreover, the legislative intent behind the Deed of Trust Act is to protect parties such as Centrum by allowing them the right to cure a default. In doing so, the first position lender suffers no damages or harm whatsoever.

A. Respondent's reliance upon unpublished district court decisions is not well-founded.

Respondent's reliance upon the decision of *Barnhart v. Fidelity Nat. Title Ins. Co.*, No. 13-CV-0090-TOR, 2013 WL 5739023 (E.D. Wash. Oct. 22, 2013) is not persuasive. The citation to the record provided by the Respondent actually cites this court to the decision on the motion for reconsideration, not the underlying decision itself.

The underlying decision itself is found at *Barnhart v. Fidelity Nat. Title Ins. Co.*, 2013 U.S. Dist. LEXIS 121248 (2013). The actual issue raised on appeal was "[a]ssuming that Barnhart is a 'grantor' or 'borrower' within the meaning of the DTA who would have standing to bring a damages claim, the Washington Supreme Court has held that no damages action may be brought where no

foreclosure sale has occurred." *Id.* Because no sale occurred, the Court of Appeals, in an unpublished decision, held that there was no independent cause of action for damages pursuant to the Washington decision of *Lyons v. U.S. Bank. Nat'l Ass'n*, 181 Wn.2d 775, 336 P.3d 1142, 1147 (2014). The Court of Appeals ultimately affirmed in part and reversed and remanded. Attached hereto as **Appendix A** is a copy of the appellate's decision.[2] The *Barnhart* decision is simply not controlling or on point.

Respondent's reliance upon *Ramirez-Melgoza v. Countrywide Home Loan Servicing LP*, 2010 U.S. Dist. LEXIS 123712 (2002) presents an entirely different factual scenario not applicable to this case. Attached hereto as **Appendix B** is a copy of the *Ramirez-Melgoza* decision. In *Ramirez-Melgoza*, the appellants claimed an interest in the subject property pursuant to a lease agreement with an option to purchase.

The underlying borrower subsequently filed for bankruptcy protection. An adversary claim was brought by Ramirez-Melgoza against the bankrupt owner. As part of a settlement agreement reached in the context of the bankruptcy matter, the property was

[2] Appellants are cognizant of GR 14.1 prohibiting citation to unpublished decisions. The rule is unclear as to whether or not it also applies to unpublished federal district court decisions and citation is presented to refute Respondent's claims that the *Barnhart* decision somehow provides controlling authority.

deeded to Ramirez-Melgoza. Significantly, the terms of the settlement agreement also provided that in the event the loan was not paid off in full within fourteen days, the lender was entitled to proceed with its foreclosure action. Whether or not Ramirez-Melgoza ever obtained any cognizable interest in the property was never resolved prior to the settlement agreement. The court drew the following keen distinction:

> Similarly, appellants are not similarly situated to a junior lienholder whereas a hypothetical lienholder would have a valid recorded interest in the property, appellants did not.

Id, at p. 3 of 6, end of first column.

Whereas in this case, Centrum was a junior lienholder which did have validly recorded interests in the property.

Respondent's reliance upon these decisions illustrates the danger of relying upon unpublished decisions without a full record. The courts of this state have long held that federal district court trial decisions are not controlling in state courts. *Shaughnessy v. Northland S.S. Co.*, 94 Wash. 325, 162 P. 546 (1917); *State v. Woods*, 143 Wn.2d 561, 612, 23 P.3d 1046 (2001).

Centrum has pointed this court to a variety of judicial interpretations and definitions of the terms "succeeds", "successor

in interest", etc. for the purposes of establishing a legislative intent. Although Respondent attempts to take issue with the usage of this term in common, ordinary parlance as well as standard usage in the lending and real estate industry, these distinctions have no merit. Respondent is merely attempting to separate the Promissory Note and the Deed of Trust when in common practice and a matter of common sense, the two are not separable under the Deed of Trust Act and modern lending.

When a junior lender, such as Centrum forecloses upon a property, it takes its subject to the superior lending instruments, i.e. the Promissory Note and Deed of Trust. Union Bank's own lending documents contemplate the exact usage of the term "successor" as is being advocated by Centrum in this matter. Any successor in interest took the property subject to the Deed of Trust. Indeed, this is the exact argument the Respondent (and perhaps every lender universally) takes in this litigation. i.e. Centrum as a successor in interest takes the property subject to the underlying lending documents, i.e. the Deed of Trust and Promissory Note.

Respondent's argument that Centrum does not take subject to the Promissory Note and Deed of Trust belies the reality of modern lending. If Centrum or any other junior creditor does not

make payments consistent with the Promissory Note, then the lender will always be entitled to foreclose. Simply stated, if the junior creditor wishes to maintain its equity position in a property, it ***must*** make payments in accordance with the underlying Promissory Note. The successor is always subject to the Deed of Trust.

Both the prior lease and subsequent lease executed by the receiver contemplate that lease being binding upon successors, i.e. the subsequent owner. Under these circumstances, the Deed of Trust Act specifically allows a junior creditor, just like Centrum, to protect its interest in the property by reinstating a defaulted senior loan. Respondent provides no controlling authority to the contrary or any compelling argument to the contrary.

And finally, the court appointed receiver, requested by the Respondent and approved by the trial court identified Centrum "as the successor in interest to Prium Development Company, LLC..." CP 700:4-5. The trial court committed reversible error in holding that Centrum was not the successor and had no right to reinstatement. Thus Centrum had no right to an accounting or ability to cure the underlying default. This court should reverse and remand.

B. Centrum's encumbrance entitles it to the right of reinstatement.

Centrum's encumbrance should be recognized by this court. Any claim by Centrum for reimbursement for management expenses, expenditures for the improvement of the real property, payment of taxes, etc. all give rise to claims as against the property such that those are encumbrances. Respondent's argument that because Centrum foreclosed on the property that it has somehow lost its right to claim encumbrance is not persuasive. The mere claim of an "equitable lien" as set forth below creates an encumbrance.

C. Centrum had an equitable lien.

At the time Centrum foreclosed upon the property, the property had net equity of approximately $1,000,000. If Union Bank had foreclosed immediately and sold the property at fair market value, and satisfied the first position deed of trust, Centrum would have been entitled to the remaining proceeds from that sale. Rather than address the decision of *Worden v. Smith,* 178 Wn. App. 309, 320-321, 314 P.3d 1125 (2003) the Respondent merely attempts to

advance an argument regarding the $600,000 in lost rents – of which there is virtually no support for in the record.[3]

Respondents fail to address the decision of *Worden* which specifically recognizes that surplus proceeds from a foreclosure sale shall be applied to those claims eliminated by that foreclosure sale. *Id*, at 320-321. Centrum is precisely an entity whose claims would be extinguished by a foreclosure sale. Under these circumstances, Centrum had a statutory right and at a very bare minimum, an equitable right, to the net proceeds and/or net equity in the property as a result, Centrum had a right under the Deed of Trust Act to reinstate the note, the court committed reversible error.

D. Public policy favors Centrum to reinstate.

The cure statute is intended to allow those parties with an interest in the property the right to cure a superior defaulted note. The statute also fully protects any superior lender by requiring all past due amounts, interest, fees, etc. to be paid in order to reinstate. Once the amounts are paid, the lender receives exactly

[3] Respondent fails to acknowledge to this court that the rents are merely ***collateral*** to secure the underlying promissory note and deed of trust. Just like any other provision in the promissory note and deed of trust, it is not a self-enacting provision. The Respondent must take action in order to execute against the collateral. In addition, Centrum tendered the full amount needed to reinstate, which tender was refused by Respondent.

what it bargained for; repayment of money under the terms it originally agreed to.

Respondent fails to address the improper lending practices at issue and alleged by Centrum. At the time this process began, Centrum had approximately $1,000,000 in net equity in the property. And yet, by refusing to allow reinstatement, the bank was allowed to deplete all equity in the property for its own benefit prior to foreclosure. Public policy strongly favors allowing anyone with a financial interest in the property the right to reinstate in order to protect that financial interest. A holding to the contrary will further discourage any subordinate lender from ever loaning money on property if there is a chance that a subordinate lender cannot reinstate loans as contemplated under the statute. Public policy favors allowing Centrum to reinstate.

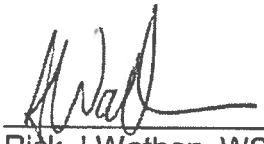
III. CONCLUSION

Centrum has presented this court with a multitude of working definitions of the term successor. Centrum's borrower, Prium, signed a Deed of Trust giving the trustee authority to convey title in the event of a default. A default did occur and the trustee, using the authority it obtained from Prium, deeded the property to Centrum, thereby making Centrum Prium's successor. The

Respondent's own Promissory Note and Deed of Trust clearly contemplate a successor, just like Centrum. The court appointed trust receiver concluded that Centrum was the successor to Prium. The undisputed facts establish that Centrum requested reinstatement and the bank refused. Under these circumstances, this court should find that Centrum was entitled to reinstate. This court should reverse and remand.

Dated this 25th day of January, 2017.

COLE | WATHEN | LEID | HALL, P.C.



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APPENDIX
75676-1-I

Appendix A - *Barnhart v. Fidelity Nat. Title Ins. Co.*, 2013 U.S. Dist. LEXIS 121248 (2013)

Appendix B - *Ramirez-Melgoza v. Countrywide Home Loan Servicing LP*, 2010 U.S. Dist. LEXIS 123712 (2002)

APPENDIX A

Barnhart v. Fid. Nat'l Title Ins. Co.

United States Court of Appeals for the Ninth Circuit

June 9, 2016, Argued and Submitted, Seattle, Washington; June 16, 2016, Filed

No. 13-36036

Reporter
654 Fed. Appx. 297 *; 2016 U.S. App. LEXIS 10924 **; 2016 WL 3355359

JOY LEE BARNHART, Plaintiff - Appellant, v. FIDELITY NATIONAL TITLE INSURANCE COMPANY; et al., Defendants - Appellees.

Notice: PLEASE REFER TO *FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1* GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Prior History: [**1] Appeal from the United States District Court for the Eastern District of Washington. D.C. No. 2:13-cv-00090-TOR. Thomas O. Rice, Chief District Judge, Presiding.

Barnhart v. Fid. Nat'l Title Ins. Co., 2013 U.S. Dist. LEXIS 121248 (E.D. Wash., Aug. 26, 2013)

Core Terms

claim for damages, foreclosure sale, district court, foreclosure, damages, violations, borrower, injunctive relief, cause of action, grantor, motion to dismiss, standing to bring, trust deed, misrepresentation, non-judicial, cancelled, analyzed, waived, moot

Counsel: For JOY LEE BARNHART, Plaintiff - Appellant: Melissa A. Huelsman, Attorney, LAW OFFICES OF MELISSA A. HUELSMAN, Seattle, WA.

For FIDELITY NATIONAL TITLE INSURANCE COMPANY, Defendant - Appellee: Matthew Cleverley, Trial Attorney, Fidelity National Law Group, Seattle, WA.

For WELLS FARGO BANK, NA, as Trustee for Soundview Home Loan Trust 2007-OPT1, Asset Backed Certificates, Series 2007-OPT1, HOMEWARD RESIDENTIAL, INC., FKA American Home Mortgage Servicing, Inc., Defendants - Appellees: Jan T. Chilton, Attorney, Jon D. Ives, Esquire, Attorney, Severson & Werson APC, San Francisco, CA.

Judges: Before: EBEL,** PAEZ, and BYBEE, Circuit Judges.

Opinion

[*297] MEMORANDUM*

Plaintiff-appellant Joy Barnhart filed suit against defendant-appellees Fidelity National Title Insurance Co., Homeward Residential, and Wells Fargo Bank alleging claims arising [**2] out of the attempted non-judicial foreclosure on property she obtained from her mother, Virginia Barnhart, who had taken out a loan secured by the property prior to her death. Plaintiff brings claims for damages under the Washington Deed of Trust Act ("DTA"), and the Washington Consumer Protection Act ("CPA"), as well as claims for intentional and negligent misrepresentation. The district court granted the defendants' motion to dismiss with prejudice, analyzing all of Barnhart's claims together and finding that Barnhart had no standing to bring her claims for damages under the DTA. The district court also dismissed as moot Barnhart's claim for injunctive relief under the DTA, because the defendants cancelled the foreclosure sale and conceded that, in light of Virginia Barnhart's death, foreclosure must now proceed judicially. We have jurisdiction under *28 U.S.C. § 1291*, and we affirm in part and reverse and remand in part.

[*298] We review the decision on a motion to dismiss de novo. *See Watson v. Weeks, 436 F.3d 1152, 1157 (9th Cir. 2006)*. Because Barnhart raised no argument

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** The Honorable David M. Ebel, Senior Circuit Judge for the U.S. Court of Appeals for the Tenth Circuit, sitting by designation.

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

on appeal regarding her claims for negligent and intentional misrepresentation, these claims are waived and we do not consider them. *Indep. Towers of Wash. v. Washington, 350 F.3d 925, 929 (9th Cir. 2003)*.

Regarding Barnhart's claims for damages under the **[**3]** DTA, *see Wash. Rev. Code § 61.24.127(1)*,[1] even assuming that Barnhart is a "grantor" or "borrower" within the meaning of the DTA who would have standing to bring a damages claim, the Washington Supreme Court has held that no damages action may be brought where no foreclosure sale has occurred. *Frias v. Asset Foreclosure Servs., Inc., 181 Wn.2d 412, 334 P.3d 529, 537 (Wash. 2014)*. The defendants here cancelled the foreclosure sale upon learning that Virginia Barnhart, the original borrower, had died. No sale took place, therefore Barnhart's claim for damages is barred under *Frias*. ("[T]here is no actionable, independent cause of action for monetary damages under the DTA based on DTA violations absent a completed foreclosure sale."); *Lyons v. U.S. Bank Nat'l Ass'n, 181 Wn.2d 775, 336 P.3d 1142, 1147 (Wash. 2014)* ("Without the sale of the property, damages are not recoverable under the DTA.").

Likewise, the district court properly dismissed as moot Barnhart's claim for injunctive relief, as the defendants **[**4]** have conceded that foreclosure must proceed judicially in light of Virginia Barnhart's death. As to the dismissal of the DTA damages claim and the claim for injunctive relief, we affirm.

However, Barnhart also brought separate claims under the CPA, *see Wash. Rev. Code §§ 19.86.020, .090*, *premised* on DTA violations. In *Frias*, the state supreme court noted that DTA violations could also be compensable under the CPA, even where no foreclosure sale has occurred. *334 P.3d at 537*; *see also Lyons, 336 P.3d at 1148* ("The availability of redress for wrongs during non-judicial foreclosure under the CPA is well supported in our case law."). Those claims should be analyzed like any other CPA claim. *Frias, 334 P.3d at 537*. To prove a CPA claim, a plaintiff must show: (1) an unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) a public interest impact; (4) that the plaintiff suffered injury to her business or property; and (5) causation. *See, e.g., Bain v. Metro. Mortg. Grp., Inc., 175 Wn.2d 83, 285 P.3d 34, 49 (Wash. 2012)*. The district court did not address Barnhart's CPA claims independently of her DTA damages action, although it is clear that these are separate causes of action with distinct elements. This led appellant's counsel to conclude that by raising her arguments regarding the DTA claim on appeal, she also addressed the CPA claims. **[**5]** Because of the confusion caused by the district court's decision, we find that the CPA claims have not been waived on appeal. Because the CPA claims were not addressed below, we reverse the dismissal of these claims and remand for the district court to consider the CPA claims in the first instance in light of *Frias, 181 Wn.2d 412, 334 P.3d 529*. We express no views as to the merits of these claims.

[*299] AFFIRMED in part, REVERSED AND REMANDED in part. The parties shall bear their own costs on appeal.

End of Document

[1] The DTA creates a statutory cause of action for damages resulting from violations of the DTA, which may be brought by either the grantor of the deed of trust or the borrower who incurred the loan obligation. *See Wash. Rev. Code § 61.24.127(1)* ("The failure of the borrower or grantor to bring a civil action to enjoin a foreclosure sale under this chapter may not be deemed a waiver of a claim for damages . . . .").

APPENDIX B

Ramirez-Melgoze v. Countrywide Home Loan Servicing LP

United States District Court for the Eastern District of Washington

November 8, 2010, Decided; November 8, 2010, Filed

NO. CV-10-0049-LRS

Reporter
2010 U.S. Dist. LEXIS 123712 *; 2010 WL 4641948

ESTEBAN RAMIREZ-MELGOZE, MARTHA A RAMIREZ, Plaintiffs-Appellants, v. COUNTRYWIDE HOME LOAN SERVICING LP, RECONTRUST COMPANY NA, Defendants-Appellees.

Prior History: [*1] Bankruptcy Case No. 09-00801-PCW13; Adversary No. 09-80101-PCW.

Core Terms

successor, trustee sale, trust deed, notice, cure, registered agent, borrower, restrain, qualify, state law, foreclosure, impaired, grantor, parties, unfair business practice, impartiality, Lender, holder, fail to state a claim, beneficiary, adversary proceeding, restraining order, delinquency, scheduled, strangers, recorded

Counsel: For Esteban Ramirez-Melgoze, Martha A Ramirez, Plaintiffs: Rodney M Reinbold, Rodney Reinbold Law Office, Okanogan, WA.

For Countrywide Home Loan Servicing LP, also known as Bac Home Loan Servicing LP, Recontrust Company NA, Defendants: Melissa Williams Romeo, LEAD ATTORNEY, Routh Crabtree Olsen PS, Bellevue, WA.

Daniel H Brunner, Trustee, Pro se, Spokane, WA.

Mike Todd, Trustee, Pro se, Spokane, WA.

Judges: LONNY R. SUKO, Chief United States District Judge.

Opinion by: LONNY R. SUKO

Opinion

ORDER DENYING PLAINTIFFS' MOTION TO APPEAL ORDER DISMISSING ADVERSARY PROCEEDING

BEFORE THE COURT is Appellants-Plaintiffs' Appeal of the Bankruptcy Court's Order Dismissing Appellants' Adversary Proceeding Following Appellees' Motion to Dismiss for Failure to State a Claim (Ct. Rec. 1) filed February 24, 2010 and noted without oral argument for October 4, 2010, by agreement of the parties. Appellants appealed two orders of the Bankruptcy Court: 1) Order Granting Defendants' Motion to Dismiss entered in the adversary proceeding on February 18, 2010; and 2) Order Denying Plaintiff's Motion for Summary Judgment entered in the adversary proceeding on February 18, 2010. [*2] This Court has already denied Appellants' Motion for Leave to Appeal Order Denying Motion for Summary Judgment in its Amended Order entered on July 29, 2010 (Ct. Rec. 31). The only matter left before this Court is Appellants' appeal of the bankruptcy Court's order dismissing Appellants' adversary proceeding following Appellees' motion to dismiss for failure to state a claim.

I. SUMMARY OF FACTS

On or about August 8, 2004, Esteban and Martha Ramirez ("Appellants") entered into a Lease Option to Purchase Contract ("Option Contract") with William and Kyna Easter ("Easters" or "Borrowers"), whereby Appellants rented the property commonly described as 201 3rd Street South, Brewster, Washington 98812 ("Property") with the option to purchase the Property. Appellants failed to properly record their interests under the Option Contract.

The Easters subsequently executed a promissory note in favor of America's Wholesale Lender in the amount of $84,150.00 ("Note") on or around March 1, 2006. The Note was secured by a Deed of Trust encumbering the Property. America's Wholesale Lender was not aware of Appellants' interest in the Property at the time the Easters executed the Note and Deed of Trust due [*3] to Appellants' failure to record their interests under

the Option Contract.

Appellee Countrywide Home Loans, Inc. was "doing business as" and operating under the name of America's Wholesale Lender at the time the Easters originated the loan. On or about August 30, 2006, Countrywide Home Loans, Inc., doing business as America's Wholesale Lender, indorsed the Note in blank. On or around April 26, 2007, upon learning that the Easters had encumbered the Property, Appellants filed a state court action against the Easters in Okanogan County Superior Court under cause number 07-2-00184-2 ("Okanogan Litigation").

On July 27, 2007, the Easters filed a Chapter 7 bankruptcy petition in the United States Bankruptcy Court, Western District of Washington, under cause number 07-13476-SJS. Appellants filed a bankruptcy adversary case against the Easters ("Easter Adversary Litigation"). On or around August 15, 2008, the parties entered into a Settlement Agreement in order to resolve all of the disputes arising from the Okanogan County and Easter Adversary Litigation. Pursuant to the terms of the Settlement Agreement, the Property at issue was deeded to Appellants. Countrywide Home Loans, Inc. was permitted [*4] to proceed with foreclosure action in the event the loan was not paid in full within 14 days. Countrywide Home Loans, Inc. agreed to the 14 day delay in order to allow Appellants an opportunity to seek alternate financing and pay off the entire obligation owed by William and Kyna Easter.

On November 19, 2008, and as a direct result of Appellants' and Borrowers' failure to satisfy the Easter obligation in full, Countrywide Home Loans, Inc., through its appointed trustee, Appellee ReconTrust Company, N.A., caused a Notice of Trustee's sale to be recorded. The Trustee's sale was scheduled to occur on February 20, 2009.

In November of 2008, Corporation Service Company, located at 202 North Phoenix Street, Olympia, WA 98506, served as ReconTrust Company, N.A.'s registered agent in Washington. After November 2008, ReconTrust Company, N.A. undertook a project to change its Washington registered agent to CT Corporation System, located at 1801 West Bay Drive NW, Ste 205, Olympia, WA 98502. Effective February 1, 2009, CT Corporation System became ReconTrust Company, N.A.'s registered agent in Washington.

On February 20, 2009, the date scheduled for the Trustee's sale, Appellants filed a Chapter [*5] 13 bankruptcy petition in the United States Bankruptcy Court, Eastern District of Washington, under cause number 09-00801. At the time of the bankruptcy filing, the Easter loan was contractually due for the April 1, 2007 payment. The pre-petition arrears totaled $22,612.33. Appellants filed a Chapter 13 plan which proposed to cure the delinquency owed on the Easter Note and maintain the Easter's ongoing loan payments. Countrywide Home Loans Servicing, LP filed a proof of claim in order to object to Appellants' Chapter 13 plan.

On April 27, 2009, and subsequent to the filing of Appellants' Chapter 13 petition, Bank of America, N.A. acquired Countrywide Bank, FSB, its affiliates and subsidiaries. As a result, "Countrywide Home Loans Servicing, LP" underwent a name change and began operating as "BAC Home Loans Servicing, LP."

II. SUMMARY OF ARGUMENTS

A. Appellants' Argument

Appellants allege that Appellees are liable for violations of the Washington Deed of Trust Act and Unfair Business Practices Act as a result of Appellees' non-communicative policies and alleged failure to act impartially in the administration of the Easter loan. More specifically, Appellants assert that Appellees' "conduct [*6] and non-communication policies" impaired their right to cure the Easter loan delinquency in violation of the Washington Deed of Trust Act. Appellants contend that they qualify as "successors" of the Easters because they became liable for the Easter obligation under the Settlement Agreement. In essence, Appellants argue that they qualify as the Easters' "successor" because they succeeded the Easters in ownership. Appellants contend that it is unreasonable to allow a junior lien holder to cure a payment deficiency owing on a third party's loan, while denying this right to a party like Appellant Ramirez.

Appellants allege that ReconTrust Company, N.A. breached its duty of impartiality by failing to maintain a local office and phone number, as required by R.C.W. 61.24.030(6). Appellants also argue that there was "considerable confusion about the identity of the Trustee, because "'Recontrust' can be either Recontrust, Inc, a Nevada Corporation; or Recontrust NA, a Banking Association." Similarly, Appellants allege that "the legal identity of the noteholder, which turned out to [be] BAC Home Loans Servicing, LP, remained a mystery until after creditor's claim was filed in the bankruptcy. [*7] Up to that point Ramirez reasonably believed [the] noteholder to be Countrywide Home

Loans, Inc."

Appellants allege that Appellees are liable for "Unfair Business Practices" due to Appellees' "non communication policy." Appellants also allege that Appellees prepared certain unspecified documents and such documents were prepared by "persons practicing law without a license."

Finally, Appellants assert that Appellees' conduct impaired their ability to effectively restrain the Trustee's sale scheduled for February 2009.

B. Appellees' Argument

Appellees argue that Appellants fail to state a claim upon which relief may be granted as to their claims for violations of the Washington Deed of Trust Act and Unfair Business Practices Act. Appellees assert that the Bankruptcy Court correctly concluded that Appellees' actions "did not deprive the [Appellants], nor prevent the [Appellants] from exercising any legal rights related to the foreclosure. Even though the [Appellees'] contact [sic] may have precluded the [Appellants] from curing the delinquency under the note, the [Appellants] had no right to do so under state law."

Appellees argued that Appellants did not qualify as a borrower, grantor, a **[*8]** beneficiary under a subordinate deed of trust, or a person having a subordinate lien or encumbrance of record on the Property. Further, Appellees assert that as a "third party" to the Easter loan, state law did not afford Appellants the right to cure the loan delinquency in order to stop the foreclosure sale. Appellees rely on the Washington Deed of Trust Act which provides that only a "borrower, grantor, any guarantor, any beneficiary under a subordinate deed of trust, or any person having a subordinate lien or encumbrance of record on the trust property or any part thereof" may cause a discontinuance of a Trustee sale by curing the the default. R.C.W.61.24.090.

Appellees argue that Appellants do not qualify as a "Borrower" as that term is defined by the Deed of Trust Act because Appellants are not liable for the obligation owed by the Easters. Therefore, Appellants did not have the right to cure the payment deficiency on the Easter loan under R.C.W. 61.24.090. Similarly, Appellants are not similarly situated to a junior lien holder. Whereas a hypothetical junior lien holder would have a valid, recorded interest in the Property, Appellants did not.

Appellees explain that the Settlement **[*9]** Agreement imposed no liability on Appellants. Under the terms of the Settlement Agreement, Countrywide Home Loans, Inc. allowed Appellants a fourteen day window of opportunity to refinance the loan in its entirety. Thereafter, Appellees could proceed with foreclosure. This agreement can be distinguished from an actual assumption of the loan, which would have imposed personal liability on Appellants for the Easter obligation. Neither Countrywide Home Loans, Inc. nor its successors, as part of the Settlement Agreement or under any other circumstance, consented to assumption of the Easter Loan by Appellants. The Appellants never assumed the obligations of the Note. Appellees argue that there is no contractual relationship which would render Appellants liable for performance under the Easter Note.

Appellees argue that instead of refinancing the loan, Appellants filed a bankruptcy petition and submitted a Chapter 13 plan in an effort to force a loan modification. Countrywide Home Loans Servicing, LP filed a proof of claim to preserve its interests and objected to Appellants' plan, which proposed to maintain the ongoing monthly payments owed by the Easters. This conduct indicates, Appellees **[*10]** contend, that Countrywide Home Loans, Inc. and its successors never intended for the Settlement Agreement to operate as a formal loan assumption. Appellees point out that a formal loan assumption would have required a written contract. Appellants have failed to produce a writing which memorializes a formal loan assumption. Finally, from the public policy standpoint, Appellees argue that there is a compelling need to protect lenders from "strangers" to a loan based on privacy considerations, principles of freedom of contract, and fairness and stability in the marketplace. Lenders should not be forced into contractual relationships with parties with whom they have no desire to transact business.

Appellees further argue that ReconTrust Company, N.A. did not breach any duty of impartiality in the administration of the Easter Loan. Appellees concede that the Deed of Trust Act, as it applied in November of 2008, imposed a duty on the Trustee to act "impartially between the borrower, grantor, and the beneficiary." Wash. Rev. Code Ann. 61.24.010 (4) (West 2008). Appellants fail, however, to qualify as a borrower, grantor or beneficiary so ReconTrust Company, N.A. owed no duty of impartiality **[*11]** to Appellants.

The last argument that Appellees raise before this Court is that their conduct did not impair Appellants' ability to restrain the foreclosure sale in February 2009. In fact,

Appellees point out, Appellants obtained an order restraining the sale and the February 2009 sale was effectively restrained. Appellees state that because Appellants had no right to tender the payment deficiency pursuant to R.C.W. 61.24.090, Appellants were not deprived of any legal right as a result of ReconTrust Company N.A. changing its registered agent prior to the foreclosure sale. Moreover, although Appellants argue that Corporation Service Company failed to maintain a local phone number, Appellants have introduced no evidence to support this contention. [1] As occupants of the Property, Appellants only had a right to receive notice of the trustee's sale, which they received.

As to Appellants' argument below that there existed "considerable confusion about the identity of the Trustee," Appellees respond that Appellants are simply trying to create an ambiguity where none exists. Appellees state that the foreclosing Trustee was identified as ReconTrust, Company, N.A. on the Notice of Trustee's sale. Nowhere does the Notice of Trustee's sale mention "ReconTrust, Inc., a Nevada Corporation." Additionally, the recorded Appointment of Successor Trustee also identifies "ReconTrust Company, N.A." as the successor trustee.

Appellees also address Appellants' claim that confusion existed as to the legal identity of the noteholder. Appellees argue that as a stranger to the loan, Appellants lack standing to raise any arguments relating to the Note. Thus, Appellants fail to state a claim upon which relief may be granted.

With respect to Appellants' Unfair Business Practices claim regarding "non communication" and refusal to disclose information on the Easter Loan to Appellants, Appellees respond that: 1) Appellants cannot maintain **[*13]** an action for "unfair business practices" related to a loan under which Appellants were never a party; 2) the Gramm-Leach-Bliley Act ("GLBA") prohibits financial institutions from disclosing information on a customer's loan to a third party pursuant to 15 U.S.C. § 6801, et seq. Appellees conclude Appellants lack the requisite standing to bring a claim for Unfair Business Practices in relation to a loan under which Appellants were never a party and had not assumed. Appellees also did not owe Appellants any duty to provide access to the Easter account information or an opportunity to cure the payment deficiency telephonically, or otherwise.

With respect to Appellants' allegation that documents were prepared by persons unauthorized to practice law, raised for the first time on appeal, Appellees note that Appellants fail to specify which documents were prepared by persons unauthorized and any authority in support of their allegation. Appellees note, however, that Appellants are not a party to the loan at issue, and thus lack standing to raise any issues regarding the administration of the loan.

As for Appellants' claim that Appellees' conduct impaired Appellants' ability to restrain the **[*14]** Trustee's sale, Appellees assert that this claim is without merit. Appellants obtained an order restraining the sale and the February 2009 sale did not take place. In conclusion, Appellees state that Appellants have come to federal court in an attempt to force a modification of a Note and Deed of Trust under which Appellants were never a party. To force such a modification and compel the substitution of the original obligors for a third party would defy all principles of freedom of contract.

III. BANKRUPTCY COURT FINDINGS

The Bankruptcy Court concluded that Appellees' actions "did not deprive the [Appellants], nor prevent the [Appellants] from exercising any legal rights related to the foreclosure. Even though the [Appellees'] contact [sic] may have precluded the [Appellants] from curing the delinquency under the note, the [Appellants] had no right to do so under state law." The Bankruptcy Court held that Appellants did not qualify as "successors" because they did not assume the Easter Note. The Bankruptcy Court construed "successor" under R.C.W. 61.24.005(6) to mean "successor in liability" as to the obligation secured by the Deed of Trust, not "successor in title" as to the property **[*15]** serving as the security.

The Bankruptcy Court held that because Appellants did not qualify as the "successors" to the Easters in accordance with state law, and they did not have the right to cure the payment deficiency on the Easter loan. The court reasoned:

> [i]f state law did provide that, then the holder of a note secured by a deed of trust would be required

[1] Appellees explain that the allegation regarding failure to maintain a local phone number is based on Appellants' inability to contact one of ReconTrust Company, N.A.'s representatives in order to cure the payment deficiency on the Easter loan prior to the scheduled foreclosure sale. Appellees explain that Appellants were **[*12]** allegedly disconnected after ReconTrust Company, N.A.'s representatives learned that Appellants and their counsel were not the original borrowers.

> to accept cure from any party who is a stranger to the underlying transaction, payment from a party against whom the note could not be legally enforced. No holders and beneficiaries would [sic] be required to deal on a long term basis under the note with strangers to the underlying transaction who had not assumed any liability in the transaction, and state law simply doesn't mandate that result.

The Bankruptcy Court held "[t]he [Appellants] are not liable under the note. The note cannot be enforced against them by the holder. They are not successors to the borrower as there is no written agreement with the beneficiary by which the plaintiff assumed liability under the note." The Bankruptcy Court held that Appellants failed to qualify as a borrower or grantor and did not qualify as a beneficiary.

The Bankruptcy Court also concluded **[*16]** that "Recon Trust [Company] N.A., did maintain a registered agent and physical address in this state. Whether or not it was required to do so under state law, it complied with this requirement."

IV. ANALYSIS

A. Standard of Appellate Review

A bankruptcy court's findings of fact are reviewed for clear error and its conclusions of law are reviewed de novo on appeal. *In re Fowler, 394 F.3d 1208, 1212 (9th Cir. 2005)*; *Fed. R. Bankr. P. 8013*.

B. Bankruptcy Court Did Not Err in Finding that Appellants Failed to State a Claim Upon Which Relief May be Granted as to Appellants' Claims for Violations of the Deed of Trust Act and Unfair Business Practices Act

To support this construction, the Bankruptcy court reasoned that the Deed of Trust Act provides an additional list of parties who are entitled to receive notice of the trustee's sale pursuant to *R.C.W. 61.24.040*. In addition to the "grantor," *R.C.W. 61.24.040(1)(b)(iii)* provides that both a "vendee in any real estate contract" and "holder of any conveyances . . . in any portion or all of the property . . . recorded after the recordation of the deed of trust being foreclosed" must receive notice of the trustee's sale. Appellants qualified as a party **[*17]** entitled to receive notice of the sale under *R.C.W. 61.24.040(1)(b)(iii)*, which Appellants received. However, entitlement to receive notice is fundamentally different than entitlement to cure a default and the Deed of Trust Act commits separate sections to each action.

This Court agrees with the Bankruptcy Court's reasoning. As Appellees note, the legislature would not have provided an additional, separate list of parties entitled to receive notice of the sale, which includes parties similarly situated to Appellants, if the term "grantor" already encompassed the grantor's "successors in title." If so, the inclusion of the parties described in *R.C.W. 61.24.040(1)(b)(iii)* would be redundant. Moreover, the definition of "successor" under *R.C.W. 61.24.005(6)* is limited to the successor in liability on the loan because a deed of trust is executed to serve as security for the performance of the borrower's obligations under the loan. It would be illogical to extend the definition of "successor" to a party which had no liability on the underlying obligation. In limiting the definition of "successor" to "successors in liability," the lender is protected from strangers to the loan. The Bankruptcy Court's **[*18]** construction of the term "successor" under *R.C.W. 61.24.005(3)* and *R.C.W. 61.24.005(6)* was reasonable given the foregoing public policy considerations raised by Appellees.

C. Bankruptcy Court Did Not Err in Finding Appellees' Conduct Did Not Impair Appellants' Ability to Restrain the Trustee's Sale When Appellants Obtained an Order Restraining the Sale and the Trustee's Scheduled Sale for February 20, 2009 Did Not Occur

As for Appellants' contention that the registered agent requirements were not followed, this Court finds that the Bankruptcy Court properly concluded that Recontrust complied with the requirement to maintain a registered agent in this state. The Notice of Trustee Sale identified the local agent for service of process as "Corporation Services Company, 202 North Phoenix Street, Olympia, WA 98506." This appears to have been the correct name and address for ReconTrust Company, N.A.'s registered agent in November 2008, at the time the Notice of Trustee Sale was executed and recorded. Though the registered agent for ReconTrust Company, N.A. changed to CT Corporation Systems, effective February 1, 2009, ReconTrust Company, N.A. maintained a registered agent and physical presence **[*19]** in Washington at all relevant times and was thus in compliance with *R.C.W. 61.24.030(6)*. [2] This Court

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[2] *R.C.W. 61.24.030(6)* provides:

agrees with the Bankruptcy Court which found that Appellants' legal rights were not impaired as a result of ReconTrust Company, N.A. changing its registered agent.

Finally, this Court finds that Appellees owed no duty of impartiality to Appellants, therefore, Appellants' allegation that ReconTrust Company, N.A. breached a duty of impartiality fails to state a claim upon which relief may be granted. Even if Appellants were such a party to whom a duty was owed, the Bankruptcy Court correctly found that "Plaintiffs' right to effectively restrain the trustee's sale had not impaired because Plaintiffs did obtain an order which purportedly restrained the sale . . . ". Regardless of whether service of the application for the restraining order was effectuated **[*20]** in a manner consistent with state law, the record establishes that Appellants accepted service of process by mail. Appellees' counsel sent Appellants' attorney confirmation that the sale would be postponed. [3] Clearly Appellees' conduct did not impair Appellants' ability to restrain the Trustee's sale.

V. CONCLUSION

Based upon the reasons and authorities cited above, **IT IS HEREBY ORDERED** that Appellants' complaint fails to state any claim upon which relief may be granted and this Court affirms the Bankruptcy Court's order and **dismisses Appellants' case with prejudice.**

IT IS SO ORDERED. The District Court Executive is directed to enter this order, enter judgment accordingly, provide copies to counsel and the Clerk of the Bankruptcy Court, and CLOSE FILE.

DATED this 8th day of November, 2010.

/s/ Lonny R. Suko

LONNY R. SUKO

Chief United States District Judge

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> That prior to the date of the notice of trustee's sale and continuing thereafter through the date of the trustee's sale, the trustee must maintain a street address in this state where personal service of process may be made, and the trustee must maintain a physical presence and have telephone service at such address.

[3] Appellants contend that the Order Conditionally Restraining Sale was "defective on its face" and "could not be enforced" because R.C.W. 61.24.130(2) requires that notice of the application for a restraining order be served on the Trustee, not just mailed.

No.: 75676-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

CENTRUM FINANCIAL SERVICES, INC.,

Appellant,

vs.

UNION BANK, N.A.,

Respondent.

CERTIFICATE OF SERVICE
REPLY BRIEF OF APPELLANT

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CERTIFICATE OF SERVICE

The undersigned certifies that under penalty of perjury under the laws of the State of Washington that on the below date I caused to be served the foregoing document on:

Counsel for Defendant/Counterclaim Plaintiff: DLA Piper LLP 701 Fifth Ave. Suite 7000 Seattle, WA 98104 Katherine.heaton@dlapiper.com Stellman.keehnel@dlapiper.com	[X] Via US Mail [X] Via E-filing
Court of Appeals, Division I One Union Square 600 University St Seattle, WA 98101-1176	[X] Via E-filing

DATED at Seattle, Washington, this 24th day of January, 2017.

Kathleen M. Forgette, Legal Assistant

COLE WATHEN LEID HALL P.C.

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