

NO. 40367-6-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

MARK OLLA, an individual,

Appellant,

v.

ROBERT H. WAGNER, as an individual and as TRUSTEE of
THE ROBERT H. WAGNER MONEY PURCHASE PENSION PLAN (aka
"THE ROBERT H. WAGNER PENSION PLAN"), and DOES 3
through 50, inclusive,

Respondents.

APPEAL FROM THE SUPERIOR COURT
OF KITSAP COUNTY, WASHINGTON

THE HONORABLE RUSSEL W. HARTMAN, JUDGE

MARK OLLA, Appellant

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original

PM 7-29-10

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DECLARATION OF SERVICE

Genetta A. Hughes states as follows:

I am a citizen of the United States of America and a resident of the State of Oregon , I am over the age of 21 years, I am not a party to this action, and I am competent to be a witness herein.

On this 29th day of July, 2010, I caused copies of the foregoing APPELLANT’S BRIEF and APPELLANT’S MOTION TO FILE OVER-LENGTH APPEAL BRIEF to be served on the following parties as indicated below:

Attorney for Defendants/Respondents **[X] Certified US Mail**
Law Office of Isaac A. Anderson
19717 Front Street
Poulsbo, WA 98370
Phone: 360-779-4292

Court of Appeals: Division II **[X] Certified US Mail**
State of Washington
950 Broadway, Suite 300
Tacoma, WA 98402

I declare under penalty of perjury under the laws of the State of Oregon that the foregoing is true and correct.

Executed at Medford, Oregon this 29th day of July, 2010.


Genetta Hughes

DECLARATION OF SERVICE

Mark Olla states as follows:

I am a citizen of the United States of America and a resident of the State of Oregon , I am over the age of 21 years, I am not a party to this action, and I am competent to be a witness herein.

On this 29th day of July, 2010, I caused copies of the foregoing APPELLANT’S BRIEF and APPELLANT’S MOTION TO FILE OVER-LENGTH APPEAL BRIEF to be served on the following parties as indicated below:

Attorney for Defendants/Respondents **[X] Certified US Mail**
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19717 Front Street
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State of Washington
950 Broadway, Suite 300
Tacoma, WA 98402

I declare under penalty of perjury under the laws of the State of Oregon that the foregoing is true and correct.

Executed at Medford, Oregon this 29th day of July, 2010.


Mark Olla

II. INTRODUCTION

Appellant MARK OLLA (hereinafter referred to as "OLLA") filed suit in this matter in Kitsap County Superior Court of the State of Washington on June 25, 2009 against the Respondents ROBERT H. WAGNER, as an individual and as Trustee of THE ROBERT H. WAGNER MONEY PURCHASE PENSION PLAN (aka "THE ROBERT H. WAGNER PENSION PLAN") (hereinafter referred to as "WAGNER Defendants") based on dispute and controversy over the manner in which said Defendants unlawfully sought to conclude matters between the parties concerning three subject consumer credit installment loans as made to OLLA by said Defendants over a period from September 26, 2007 through March 16, 2008.¹

The WAGNER Defendants made a first installment loan to OLLA on September 26, 2007 for which they retained a security interest in the form of a second deed of trust in OLLA'S then principal dwelling being the real property located at 6368 Sea Star Drive in Malibu, California, such deed of trust being second in priority after OLLA'S first mortgage on such property for which first mortgagee Washington Mutual Bank (now

¹ Plaintiff's EXLST Nos. 7, 18 & 179.

Chase Home Finance) held a first deed of trust. The WAGNER Defendants co-secured such first installment loan by retaining their first deed of trust against the real property located in Indianola, Washington with the net proceeds of such loan was purchased on October 1, 2007 to become OLLA'S principal dwelling located at 10305 NE Shore Drive, Indianola, Washington 98342. The Wagner Defendants followed that loan with two successive and smaller Consumer Credit installment loans in the amounts of \$150,000 and \$160,000 respectively on November 7, 2007 on March 16, 2008. Monthly interest payments on 1st and 2nd, which were not legally enforceable proving the third was an outgrowth of the first and second loans.

The WAGNER Defendants motioned the court for an order granting a preliminary fact finding hearing and which was granted on August 21, 2009 by Judge Hartman who set the matter for trial as did take place on November 16, 2009. The purpose of such fact finding hearing was to be the issue of the enforceability of the certain Real Estate Purchase and Sale Agreement as signed by OLLA on October 17, 2008 purportedly in settlement of the aforementioned subject three loans

made under which the WAGNER Defendants alleged that OLLA was in default. This Real Estate Purchase and Sale Agreement provided that OLLA was to transfer the equity of his two real properties to the WAGNER Defendants respectively by two separate deeds in lieu of foreclosure for the net cash sum to OLLA of \$165,000.00 (One Hundred and Sixty Five Thousand Dollars), which two real properties had at such time a combined tax-assessed valuation in excess of \$6,700,000.00 (Six Million Seven Hundred Thousand Dollars)² and upon which stood loan amounts owing to first mortgagee Washington Mutual Bank of \$2,600,000.00 (Two Million Six Hundred Thousand Dollars) and to the WAGNER Defendants in the amount of approximately \$2,100,000.00 (Two Million One Hundred Thousand Dollars) for their bridge loan to OLLA together with deferred interest payments and fees. The monthly interest payments were deferred and charged a principle in advance for the first two loans and by extension in the third.³

III. ASSIGNMENT OF ERRORS AT TRIAL

² EXLST 23 & see clerk's papers for Plaintiff's Response Brief in Opposition to Presentation of Orders Exhibit 2.

³ See EXLST Nos. 179 and 180.

Assignment of Error No. 1: Pursuant to RAP 2.5
(a) (1)

THE TRIAL COURT DID NOT HAVE SUBJECT MATTER JURISDICTION TO ENABLE IT TO REACH A FULL AND FAIR DETERMINATION OF THE ENFORCEABILITY OF THE REAL ESTATE PURCHASE AND SALE AGREEMENT PURPORTING TO SETTLE THE THREE SUBJECT LOANS IN THE FACE OF OLLA'S AFFIRMATIVE DEFENSES TO SIGNING

Issue on Appeal: Should the Court of Appeals remand the case to the trial court for purpose of either applying California law or should it more properly reserve for the prior commenced and preceding California action as pending at Los Angeles Superior Court matters clearly outside the subject matter jurisdiction of the trial court and squarely within the exclusive jurisdiction of such California court?

Assignment of Error No. 2: Pursuant to RAP 2.5
(a) (1);

THE TRIAL COURT FAILED TO PROPERLY APPLY THE LAWS OF THE STATE OF CALIFORNIA TO THE ISSUE OF THE ENFORCEABILITY OF THE REAL ESTATE PURCHASE AND SALE AGREEMENT AND THE MUTUAL RELEASES OF LIABILITY CLAUSES CONTAINED THEREIN IN ACCORDANCE WITH THE CHOICE OF LAW TERM AS CONTAINED IN EACH AND ALL OF THE THREE SUBJECT INSTALLMENT LOAN NOTES.

A) Issue on Appeal: Should the Court of Appeals order remand of the case to trial court in order for it to retry the issues outside of its subject matter jurisdiction for the purpose of applying California law to accord with the choice of law provision as contained in each and all of the three subject consumer credit installment loan notes which provision as contracted term of the parties governs the associated deeds of trust securing such as well as by implication any agreement purporting to have been in settlement of such loans?

Assignment of Error No. 3: PURSUANT TO RAP 2.5
(a) (1):

THE TRIAL COURT FAILED TO APPLY CALIFORNIA LAW TO DETERMINE ENFORCEABILITY OF THE CLAUSE RELEASING THE WAGNER DEFENDANTS FROM LIABILITY AS CONTAINED IN THE SUBJECT REAL ESTATE PURCHASE AND SALE AGREEMENT WHICH AGREEMENT PURPORTED TO BE IN SETTLEMENT OF THE SUBJECT THREE LOANS ONLY ONE OF WHICH LOANS WAS EVEN IN PART SECURED BY OLLA'S WASHINGTON PROPERTY AND AT THAT EXECUTED BY OLLA IN THE STATE OF CALIFORNIA AT A TIME WHEN HE WAS A DOMICILIARY RESIDENT SOLELY OF THE STATE OF CALIFORNIA.

Issue on Appeal: Should the Court of Appeals order remand for trial court either to apply California law to the issue of the enforceability of paragraph 9 of the subject Real Estate Purchase and Sale Agreement which contains language releasing the WAGNER Defendants from liability or more properly reserve adjudication of such issue to the California court which bears truly exclusive jurisdiction over the enforceability of and affirmative defenses to such clause in release of liability?

Assignment of Error No. 4: PURSUANT TO RAP 2.5
(a) (2):

THE TRIAL COURT FAILED TO ESTABLISH FACTS UPON WHICH RELIEF TO THE WAGNER DEFENDANTS COULD HAVE BEEN GRANTED BECAUSE THE TRIAL COURT HAD OVERWHELMING EVIDENCE AT TRIAL AS SUBMITTED AND THROUGH TESTIMONY THAT THE WAGNER DEFENDANTS MISREPRESENTED MATERIAL FACTS THE TRUTH OF WHICH HAD OLLA KNOWN WOULD HAVE BEEN GROUNDS FOR OLLA TO HAVE AVOIDED THE SUBJECT REAL ESTATE PURCHASE AND SALE AGREEMENT AND FOR WHICH RESCISSION SHOULD HAVE BEEN GRANTED IN ACCORDANCE WITH CALIFORNIA LAW.

(A) Issue on Appeal: Should the Court of Appeal remand the case to the trial court for failure to make a full and fair determination as to the legality of the transfer of OLLA'S Malibu real property in the manner so intended by the WAGNER Defendants and in which OLLA was induced by them to do and in accordance with California law despite having no subject matter jurisdiction over either the real estate purchase and sale agreement and the disposition of the OLLA's

Malibu real property through such agreement's companion October 18, 2008 deed in lieu of foreclosure.

(B) Issue on Appeal: Should the Court of Appeal disaffirm and reverse the trial court's judgment dismissing OLLA'S claims with prejudice on January 15, 2010 and order expunging lis pendens and awarding attorney fees in favor of the WAGNER Defendants given that the trial court had no subject matter jurisdiction to fully and fairly pass on the merits of the enforceability of the Real Estate Purchase and Sale Agreement or the fraud elements as contained in OLLA'S Complaint as filed with the court on June 25, 2009?

(C) Issue on Appeal: Could the trial court refuse to hear evidence of extrinsic fraud which vitiated the Real Estate Purchase and Sale Agreement discovered after trial but before presentation of the orders and judgment in the form of OLLA'S Malibu real property's Washington Mutual Bank's first mortgage documents which were Exhibit 1 of OLLA'S January 13, 2009 Response Brief in Opposition to Presentation of the Orders, and which first mortgage had priority over the three subject loans as made by the WAGNER Defendants and which mortgage documents specifically barred a sale or other transfer of the beneficial interest in borrower in the subject real property in the manner in which the WAGNER Defendants sought to induce and in fact did induce OLLA into so transferring to them when the WAGNER Defendants suppressed such material fact throughout trial and given that the proper foundation of such concealment of material fact which vitiated the Real Estate Purchase and Sale Agreement was properly laid at trial by OLLA'S numerous reference to an existing due on sale clause which he had been told in early 2009 was standard feature of said bank's home loans and given that such loan documents as OLLA had had been in the possession of the WAGNER Defendants since September 13, 2007 and OLLA did not successfully obtain further copies until January 7 and 8, 2010 from acquiring bank Chase Home Finance?

Assignment of Error No.5: Pursuant to RAP 2.5
(a) (2):

THE TRIAL COURT FAILED TO ESTABLISHED FACTS UPON WHICH RELIEF TO THE WAGNER DEFENDANTS COULD HAVE BEEN GRANTED UNDER WASHINGTON LAW PERTAINING TO MATTERS FOR WHICH THE WASHINGTON COURT HAD SUBJECT MATTER JURISDICTION.

Issue on Appeal: Should the Court of Appeal remand the case to the trial court for purpose of conscientiously identifying numerous errors of fact which pertain to the issues over which it did have subject matter jurisdiction and to which it could apply the laws of the state of Washington in order that it comprehensively and fairly administer substantial justice to the merits of the case and the issues over which the trial court did possess subject matter jurisdiction?

Assignment of Error No. 6: PURSUANT TO RAP 2.5
(a) (2):

THE TRIAL COURT FAILED TO PROPERLY APPLY THE LAW OF WASHINGTON TO THE ISSUES PRESENTED IN COMMON BY THE VARIOUSLY ENUMERATED CAUSES OF ACTION IN OLLA'S COMPLAINT AND BRIEF FOR NOVEMBER 16, 2010 FACT-FINDING HEARING/TRIAL AND OVER WHICH THE TRIAL COURT DID LEGALLY POSSESS SUBJECT MATTER JURISDICTION:

Issue on Appeal: Should the Court of Appeals remand the case to the trial court for the purpose of applying the laws of the state of Washington including pertinent Revised Code of Washington statutes to the matter of unlawful acts by the WAGNER as alleged by OLLA in his trial Brief and as developed in testimony and submitted into evidence at trial over which it had the subject matter to decide and in the interests of substantial justice?

III. STATEMENT OF THE CASE

Having made an initial subject "Bridge" loan to OLLA on September 27, 2007,^{4,5,6,7,8} which loan funded on October 1, 2007, for the purpose of OLLA'S purchase of the subject Indianola, Washington real property⁹ out of the proceeds of such loan, and with such loan being secured by a first deed of trust¹⁰ as held by the WAGNER Defendants on such Washington real property and a second deed of trust¹¹ as held by the WAGNER Defendants on OLLA'S then principal dwelling, the subject Malibu, California real property, located at 6368 Sea Star Drive,¹² as executed in the state of California, the WAGNER Defendants should have reasonably expected that they were both subjecting themselves to and availing themselves of the laws of both the state of California and the state of Washington by their actions associated with the first installment loan as made to OLLA by them on September

⁴ Plaintiff's Evidence Exhibit List No. 7.

⁵ See RP page 208 at lines 24-25 from November 19, 2009.

⁶ See RP page 209 at lines 1-7 from November 19, 2009.

⁷ See RP page 213 at lines 9-10 WAGNER Defendant's admission that 1.545 million dollars funded on the first consumer credit installment loan from November 19, 2009.

⁸ See RP page 220 at lines 22-24 from November 19, 2009.

⁹ Plaintiff's Evidence Exhibit List No. 2.

¹⁰ Plaintiff's Evidence Exhibit List No. 11.

¹¹ Plaintiff's Evidence Exhibit List No. 12.

¹² Plaintiff's Evidence Exhibit List No. 5, which is a legal description of such real property.

27, 2007¹³ and its first companion deed of trust¹⁴ as to OLLA'S Malibu real property (hereinafter referred to as the WAGNER Defendants' First Deed of Trust¹⁵ signed on September 27, 2007 and its second companion deed of trust as to OLLA'S Indianola, Washington real property.¹⁶ The second and third loans, whose respective loan amounts of \$150,000.00 (One Hundred and Fifty Thousand Dollars) and \$160,000.00 (One Hundred and Sixty Thousand Dollars),¹⁷ were not even secured by real property within the state of Washington.¹⁸

By making such first installment loan in part secured by real property within the state of Washington and then succeeded at exiting such loan by having induced OLLA to sign over by deed in lieu of foreclosure on November 18, 2008¹⁹, the WAGNER Defendants necessarily had to conform their actions to the requirements as codified by the Revised Code of

¹³ Plaintiff's Evidence Exhibit List No. 7.

¹⁴ Plaintiff's Evidence Exhibit List Nos. 11 and 19.

¹⁵ EXLST no. 12.

¹⁶ Plaintiff's Evidence Exhibit List No. 12.

¹⁷ Plaintiff's Evidence Exhibit List Nos. 18 and 179, respectively.

¹⁸ Plaintiff's Evidence List Exhibit Nos. 19 and 178, respectively.

¹⁹ Plaintiff's Evidence Exhibit List No. 90

Washington § 61.24.031²⁰ which has an analogue in the California Civil Code § 2923.5 outlining proper procedure for a lender/originator seeking to file a notice of default whose loan has been secured by a deed of trust.

There is no dispute that by mid-September 2008 differences arose between the parties, followed by a series of actions and activities by the WAGNER Defendants to "gain control of the Malibu property as quickly as possible" through which actions and activities OLLA alleged in his Complaint to be unlawful, fraudulent and unconscionable. Any reasonably conscientious review of the record will thus reveal that there was sharp dispute over alleged improprieties of the means by which Defendant ROBERT H. WAGNER sought to induce and did in fact succeed at inducing OLLA to sign the subject Real Estate Purchase and Sale Agreement on October 17, 2008²¹ and its two companion Deeds in Lieu of Foreclosure on October 18, 2008²² and November 18, 2008²³ respectively.

²⁰ See appendix No. 11.

²¹ EXLST no. 84.

²² EXLST no. 85.

²³ EXLST no. 90.

On September 22, 2008, Defendant ROBERT H. WAGNER made a demand^{24,25,26,27,28,29,30,31,32,33,34} to an initial third party Joseph Privitera who was under no authority to "sell" OLLA'S two real properties to said Defendant. The WAGNER Defendants, despite that OLLA had not requested such beforehand and also was not interested in signing,^{35,36,37,38} not only sought over a period between approximately September 26, 2008 and October 17, 2008 to induce OLLA^{39,40} into signing the subject Real Estate Purchase and Sale Agreement⁴¹ which they themselves had drafted and presented to OLLA without OLLA initiating such in writing as can conscientiously be determined by the record,^{42,43} but they also included

²⁴ See RP page 339 at lines 3-25 (WAGNER Defendants) from November 19, 2009.

²⁵ See RP page 537 lines 23-24 from November 30, 2009.

²⁶ See RP page 84 lines 22-25 from November 17, 2009.

²⁷ See RP page 85 lines 1-2 from November 17, 2009.

²⁸ See RP page 86 lines 20-21 from November 17, 2009.

²⁹ See RP page 90 lines 1-6 from November 17, 2009.

³⁰ See RP page 92 line 1 from November 17, 2009.

³¹ See RP page 117 lines 8-10 from November 17, 2009.

³² See RP page 117 lines 18-23 from November 17, 2009.

³³ See RP page 136 page 14-16 from November 17, 2009.

³⁴ See RP page 143 lines 12-18 from November 17, 2009.

³⁵ See RP page 130 lines 4-6 from November 17, 2009.

³⁶ See RP page 130 lines 15-17 from November 17, 2009.

³⁷ See RP page 155 lines 23-25 from November 17, 2009.

³⁸ See RP page 156 lines

³⁹ See RP page 346 lines 3-7 from November 19, 2009.

⁴⁰ See RP page 128 lines 17-20 from November 17, 2009.

⁴¹ Plaintiff's Evidence Exhibit List No. 84.

⁴² See RP page 360 lines 7-11 from November 19, 2010.

⁴³ See RP page 575 lines 9-11 from November 30, 2009.

a time constraint within which time if OLLA did not sign then the WAGNER Defendants would have filed Notice(s) of Default.^{44,45}

WAGNER Defendants basis was default of interest payments not calling loan balloon payment due⁴⁶, yet they refused to take back or accept tender of the Washington real property.⁴⁷

At no time was OLLA contacted by the WAGNER Defendants^{48,49,50,51,52,53} by certified letter or provided with his right thereunder for an initial meeting to discuss avoidance of foreclosure as are two of the requirements under Revised Code of Washington § 61.24.031, and this can be confirmed throughout the record. The WAGNER Defendants threatened filing of notice(s) of default in a manner which misrepresented OLLA'S rights as a borrower against whom a lender was seeking to file such notice of

⁴⁴ See RP at page 159 lines 16-21 for Freedman's testimony and RP at page 86 lines 20-21 for Privitera's testimony.

⁴⁵ See RP page 133 lines 14-16 from November 17, 2009.

⁴⁶ See RP p 219 lines 11-19 on November 19, 2009.

⁴⁷ See RP p 240 lines 24-25. See also evidence exhibit 28/33

⁴⁸ See RP page 537 lines 23-24 from November 30, 2009.

⁴⁹ See RP page 463 lines 16-18 from November 30, 2009.

⁵⁰ See RP page 322 lines 3-24, line 8 in particular, from November 19, 2009.

⁵¹ See RP page 233 lines 12-14 from November 19, 2009.

⁵² See RP page 273 lines 301- from November 19, 2009.

⁵³ See RP page 327 lines 7-13 from November 19, 2009.

default on a loan secured by real property within the state of Washington. OLLA was not afforded any opportunity to do any loan workout.⁵⁴

After having refused to sign the subject agreement purportedly in settlement for nearly two weeks after having been presented with it by third party Freedman on October 3, 2008,^{55,56} OLLA signed the subject agreement. The actual manner in which such purported settlement was offered and induced by the WAGNER Defendants rather than preventing litigation actually served to promote further litigation. The WAGNER Defendants used borrower OLLA'S necessity to drive a hard bargain OLLA essentially sought for the Kitsap County Superior Court of Washington to uphold a lis pendens upon the subject Indianola, Washington real property, and to proceed to hear and decide the merits of his variously enumerated claims against the WAGNER Defendants for illegally threatened filing of notices of default in initiation of foreclosure upon their loans made to OLLA and for fraudulent misrepresentation as an inducement to his signing the

⁵⁴ RP p. 159, lines 7 & 8.

⁵⁵ Plaintiff's Evidence Exhibit List Nos. 47 and 133.

⁵⁶ See RP page 128 lines 21-23 from November 17, 2009.

subject Real Estate Purchase and Sale Agreement, and upon the findings of fact as to such in his favor for the Court to have imposed a constructive trust over the aforementioned Indianola, Washington real property pending the outcome of the prior commenced trial, as yet pending, in the single property action filed by OLLA in the state of California against the WAGNER Defendants concerning their actions as took place within the state of California,⁵⁷ regarding the loans either partly (the first installment loan) or exclusively or exclusively (the second and third installment loans) secured by real property within the state of California and the disposition of such security and finally concerning OLLA'S allegations of the WAGNER Defendants' unlawful lending practices, violations of California and federal lending statutes and for rescission of each and all of the three subject loans, their deeds of trust as well as the Real Estate Purchase and Sale Agreement which purported to settle the dispute and obligations of the parties associated with such loans,⁵⁸ as based numerous

⁵⁷ Plaintiff's Evidence Exhibit List No. 125.

⁵⁸ Plaintiff's Evidence Exhibit List No. 84.

affirmative defenses raised by OLLA. In order to make the case for such OLLA had to lay the proper foundation and necessarily discuss the three subject loans as alleged by OLLA to be in violation of the TILA and Regulation Z (12 C.F.R. 226 Et Seq).

While OLLA chiefly alleged that the WAGNER Defendants had misrepresented the lawful nature of the loans as made to him as well as his rights as a borrower to contest them, and illegally threatened foreclosure in violation of the Revised Code of Washington. OLLA'S Complaint further alleged that the WAGNER Defendants coerced him into signing the subject Real Estate Purchase and Sale Agreement through a campaign of economic duress and undue influence.⁵⁹

Venue in the Kitsap County Superior Court of Washington was proper not only because OLLA'S Complaint sought determination of an interest in real property located in such county and state, but also because such Complaint sought redress for the harms allegedly sustained by OLLA as a result of the WAGNER Defendants' actions alleged to have been committed by

⁵⁹ See RP page 575 lines 9-11 from November 30, 2009.

them in such county and state in relation such real property located in such county and state.

The WAGNER Defendants sought for the trial court to convert its limited jurisdiction to hear the matter to dispose of the allegations of unlawful acts of the WAGNER Defendants within the state of Washington into a full-blown determination of the enforceability of the subject Real Estate Purchase and Sale Agreement which only the California court of the prior commenced action possesses the exclusive jurisdiction over not only the real property and its disposition under its October 18, 2008 deed in lieu of foreclosure⁶⁰ through which the WAGNER Defendants acquired their current title thereto as situated within such state but also over any determination as to the legalities of all three loans, the second and third of which were exclusively secured by California real property in the form of OLLA'S Malibu real property⁶¹ and the first of which, though secured in part by Washington real property in the form of what

⁶⁰ Plaintiff's Evidence Exhibit List No. 85.

⁶¹ Plaintiff's Evidence Exhibit List Nos. 18 and 19 for the second on November 7, 2007 and Nos. 179 and 178 for the third on March 16, 2008.

was to be OLLA'S Indianola, Washington real property, was signed by OLLA while he remained a domiciliary and exclusive resident of the state of California as determinative by his sole drivers license being of the state of California at all relevant times until November 6, 2007 and his tax returns through years 2007 as filed within the state of California.

By bifurcating⁶² the case for Fact-Finding Hearing the trial court concentrated its focus solely on paragraph 9 of the subjects Real Estate Purchase and Sale Agreement⁶³ on whom was the burden at trial to prove the reasonableness of the subject agreement which they themselves had drafted and presented to third parties to give to Olla⁶⁴ not only misunderstood the nature of OLLA'S chief claims as contained in his Complaint but also failed at trial to have applied to the evidence the law of the state which held subject matter jurisdiction as to the issue to be determined as was its avowed function which resulted in the

⁶² See Clerk's Paper's SUB# 17, Order Scheduling Fact-Finding Hearing.

⁶³ Plaintiff's Evidence Exhibit List No. 84 at page 4, par. 9 pertaining to release of buyer Wagner Respondent Defendants

⁶⁴ Plaintiff's Evidence Exhibit List Nos. 47 and 133, as well as No. 182 which is correspondence between WAGNER Defendants and their evident hiree lawyer draftsment Sterken.

egregious error of failing to apply the parties' choice of law term of each and all of the three subject loans as had been designated by the parties as part of the terms of each and all of the three subject loans that the law of the state of California should apply as to the legality of the loan when and where challenged legally.⁶⁵

The oral verdict as delivered December 11, 2009 by the trial court was not the product of truly conscientious findings of fact. Moreover, the erroneous judgment and order as entered on January 15, 2010 was not legitimately defensible as such and has already horrendously wrought ill effect spurring the adoption of a wait and see attitude by the Los Angeles Court at the promptings the WAGNER Defendants' counsel in that Court which serves to unfairly prejudice OLLA'S right to have a trial in such Court which has the exclusive power to properly render a full and fair determination as to OLLA'S claims as were filed there. The trial court assured OLLA that all of the loan instruments would be reviewed in addition to all

⁶⁵ Plaintiff's Evidence Exhibit List Nos. 7, 18 and 179 respectively, for the first, second and third consumer credit installment loans secured by real property belonging to OLLA.

the evidence admitted on OLLA'S behalf, and more than once in course of the proceedings enunciated its understanding that OLLA'S defenses to signing and therefore enforceability of the subject Real Estate Purchase and Sale Agreement was that in the main the loan(s) themselves were alleged to be unlawfully made, therefore any agreement purporting to settle such was in furtherance of fraud and secondly that the loans were unlawfully settled through fraudulent misrepresentation, duress and undue influence. Somehow this review by the Court failed to note that each and all of the three subject loan instruments had a choice of law provision on their page 2 in favor of the state of California as a contractually bargained for term as well as to note that the first subject loan was executed in the state of California where OLLA then held his principal residence and that the second and third loans were secured by California real property only.^{66, 67, 68, 69, 70, 71, 72, 73, 74}

⁶⁶ See RP at page 396 lines 4-7 from November 19, 2009.

⁶⁷ See RP at December 11, 2009 Oral Decision pages 3 through 5.

⁶⁸ See RP at page 258 lines 18-25 from November 19, 2009.

⁶⁹ See RP at page 259 lines 1-5 from November 19, 2009.

⁷⁰ See RP at page 260 lines 1-11 from November 19, 2009.

⁷¹ See RP at page 592 lines 16-19 from November 30, 2009.

⁷² See RP at page 162 lines 10-11 from November 17, 2009.

Pursuant to RAP 6.1 OLLA has now appealed from the trial court decision as a matter of right.

IV. ARGUMENT

Assignment of Error No. 1: PURSUANT TO RAP 2.5 (a) (1) for lack of trial court subject matter jurisdiction:

THE TRIAL COURT ACCEDED TO DEFENSE COUNSEL'S TRIAL MOTION FOR BIFURCATED PROCEEDING IN WHICH WAS MADE LEGAL DETERMINATION OF MATTERS NOT WITHIN THE TRIAL COURT'S JURISDICTION AS CAN BE SEEN WITH THEIR ATTEMPT TO ASK FOR DAMAGES FOR OLLA'S PLACING A LIS PENDENS ON THE MALIBU REAL PROPERTY WITHIN THE CONTEXT OF THE EARLIER COMMENCED ACTION STILL PENDING AS LOS ANGELES SUPERIOR COURT AT DEPARTMENT 61, WITH THE END RESULTANT POTENTIAL RES JUDICATA AND COLLATERAL ESTOPPEL EFFECT THEY DESIRE TO SUCCEED AT COMPROMISING THE FIRST COMMENCED ACTION AGAINST THEM IN CALIFORNIA.⁷⁵

The trial court was without a legitimately defensible right to pass on matters outside of its subject matter jurisdiction let alone grant judicial fiat to effectively shut down OLLA'S lawsuit still pending in Los Angeles Superior Court against the WAGNER Defendants, based on WAGNER Defendants' counsel characterization of the prior and pending action as a form of relitigation.⁷⁶

⁷³ See RP page 162 lines 19-20 from November 17, 2009.

⁷⁴ See RP page 596 lines 1-4 showing OLLA closing argument raised California law.

⁷⁵ RP closing argument of Defense counsel.

⁷⁶ See RP, page 630, lines 5 through 10 and lines 22 through 24.

Had the trial court adhered to its statement that all of the evidence submitted which was not properly legally objected to would be reviewed by the Judge before making his decision⁷⁷ then the trial court would have properly noted that each and all of the three subject installment loan notes have a choice of law provision and term on their page two.⁷⁸

The Real Estate Purchase and Sale Agreement was an agreement purporting to settle such loans and as such would be subject to the same choice of law of construction requiring California state law as its operative choice of governing law. Moreover given OLLA'S allegations of a lack of enforceability of such agreement as due to the various affirmative defenses he advanced in his Amended Brief for Trial and the fact that the trial court based its orders on the fact that the Defendants would have a legal right to foreclose on both of OLLA'S subject real properties would further necessitate that the trial

⁷⁷ RP p. 396 lines 4 through 7.

⁷⁸ See Plaintiff's Evidence at Trial Exhibits 7, 18 and 179 for the September 26, 2007, November 7, 2007 and March 14, 2008 Installment loan notes. See Plaintiff's Evidence at Trial Exhibits 7, 18 and 179 for the September 26, 2007, November 7, 2007 and March 14, 2008 Installment loan notes.

court's inquiry properly apply California state law given that the legality of the underlying subject three loans was a presumption based on the representations made by the WAGNER Defendants as inducement to OLLA'S signing such agreement on October 17, 2008 and the falsity of those misrepresentation was an affirmative defense to OLLA'S signing the subject agreement.

Even if there were no existing choice of law provisions in the three subject loan notes, the contacts to be taken into account for proper jurisdiction of the trial court over the issue of the three subject loans which the Real Estate Purchase and Sale Agreement purported to settle, would be the place of contracting, the place of negotiation, the place of initial performance, the location of the subject matter of such contract and the domicile of the parties at the time of the signing of the contract of the first loan,⁷⁹ which the second and third merely were outgrowths of, the proper subject matter jurisdiction lies with the state of California.

⁷⁹ RP p. 162 lines 10-11 WAGNER Defendants' view that loans were done in California, November 17, 2009

By Defendant ROBERT H. WAGNER'S own admission in testimony⁸⁰ "loans were all done in California" which was not an entirely accurate statement, and the first installment loan "was executed in Malibu, California"⁸¹ and that the second and third installment loans were only secured on the Malibu real property.⁸² The true security in the WAGNER Defendants' eyes going into the loan was the Malibu real property.⁸³

Moreover, the true security exiting the loans in settlement of the obligations, which was the Malibu real property as the avowed most important purpose of the subject Real Estate Purchase and Sale Agreement by admission of the WAGNER Defendants⁸⁴ was to "gain control of the Malibu equity as quickly as possible" which was also the exclusive first phase of performance of such subject agreement, and upon which the deal of the subject agreement was conditioned by the WAGNER Defendants⁸⁵ and which took place within the state of California on October 18, 2008 by deed in

⁸⁰ RP page 162 lines 10 and 11.

⁸¹ RP p. 231 lines 16 through 19.

⁸² RP page 162 lines 19 and 20, November 17, 2009.

⁸³ See RP page 188 at lines 10 through 14.

⁸⁴ See EXLST, Defendants' September 16, 2008 e-mail to drafting attorney Tom Sterken. See also RP 355, lines 13-14.

⁸⁵ See RP page 40 at lines 22-25.

lieu of foreclosure thereon and upon recordation of that deed in lieu of foreclosure on October 23, 2008 or thereabouts.

While the WAGNER Defendants should have reasonably anticipated being sued in the state of Washington for their substantial and purposeful actions in the state of Washington in facilitating the purchase of the subject Washington real property by OLLA, securitizing it and ultimately demanding that it be transferred back to them by deed in lieu of foreclosure, and while all of the transactions of the parties were essentially completed by the WAGNER Defendants outside the forum state of Washington, and while it was only their actions within instant forum state that were the predominant object of OLLA'S Complaint as filed on June 25, 2009, the contacts remain overwhelmingly in favor of the state of California as to the issues of the legalities of the three subject loan. Any legal scrutiny of an agreement purporting to be in settlement of them must take account of the fact that all three subject loans were secured by OLLA'S Malibu, California real property and only he first of which was "secured by the on property

commonly known as 10305 N.E. Shore Drive, Indianola, Wa. 98342"⁸⁶ which just so happened to be the property in which WAGNER Defendant held their first deed of trust.⁸⁷

Thus the trial court could not properly pass on the fraud elements as contained in OLLA'S Complaint as filed on June 25, 2009 and while it could hear OLLA's claims as to unenforceability of the subject agreement, as based on the falsity of misrepresentation of Washing laws protecting borrowers against whom have been threatened a filing of a notice of default, the trial court could not properly make a full and fair determination of enforceability of the subject agreement based on falsity of the other misrepresentations as made by the WAGNER Defendants in order to induce OLLA into signing the subject agreement.

Without proper subject matter jurisdiction, as so precluded by contract of the parties to each and all of the three respective loan instruments and by implication their associated deeds of trust, the trial

⁸⁶ See Plaintiff's Evidence Exhibit at Trial No. 7.

⁸⁷ See Plaintiff's Evidence Exhibit at Trial No. 1.

court was powerless to pass on the merits of OLLA'S case in so upholding the subject agreement as enforceable without regard to the laws of the state of California. "Lack of jurisdiction over subject matter renders the superior court powerless to pass on the merits of the controversy before it." See Deaconess Hosp. v. Washington State Highway, Comm'n, 66 Wash. 2d 378, 409, 403 P. 2d 54 (1965), enunciating that standard of procedural law in the state of Washington. Given that a major part of OLLA'S affirmative defenses concerned the fact that the WAGNER Defendants had represented to third parties they self-appointed to be OLLA's agents for the purpose of conducting sale of OLLAs properties without any permission or authorization from OLLA that the loans had fully complied with any and all applicable legal requirements and statutes governing such, the question of legal enforceability of these subject loans themselves were a truly unavoidable issue of trial court concerned as it was with the enforceability of an agreement purporting to be in settlement thereof, but over which issue of property the trial court had no subject matter jurisdiction, and a "settlement"

through which the WAGNER Defendants admittedly primarily sought to "gain control of the Malibu house equity as soon as possible."^{88,89}

It does not matter that OLLA followed the Court-Ordered bifurcated proceedings directives.

"While litigants.....may waive their right to assert a lack of personal jurisdiction, litigants may not waive subject matter jurisdiction." Deaconess Hosp., 66 Wash. 2d at 410, 403 P. 2d 54.

OLLA has properly raised subject matter jurisdiction as a standard of review on appeal pursuant to RAP 2.5 (a)(1). "Any party to an appeal, including one who was properly served, may raise the issue of lack of subject matter jurisdiction at any time." In re Saltis, 94 Wash. 2d 889, 893, 621 P.2nd 716 (1980).

Assignment of Error No. 2:

PURSUANT TO RAP 2.5 (a) (1):

THE TRIAL COURT LACKED SUBJECT MATTER JURISDITITION

The Real Estate Purchase and Sale Agreement was purportedly in "settlement" of OLLA'S monthly payments

⁸⁸ See Plaintiff's Evidence Exhibit at Trial No. 182 at email dated September 26, 2008 @ 3:17 p.m.

⁸⁹ RP page 348 lines 11 through 25 and page 349 lines 1 through 25.

that were in default in succession for balance of the total amounts owing under the loans as made by the WAGNER Defendants to OLLA, and therefore any full and final determination of enforceability of such agreement as was the trial court's purpose of bifurcated proceeding necessitated inquiry as to whether the loans themselves were legally made and in compliance with all applicable statutes of the highly regulated industry of lending secured by deeds of trust on real property, because if the loans themselves were not legal then any agreement purporting to settle them and by exempting a party to such agreement for violation of a statute or law would be void as against public policy and the choice of law of construction was and is the law of the state of California.

Apart from the obvious requirement that California law be invoked to determine legality of the underlying loans and the legal power that the WAGNER Defendants claimed to have possessed to foreclose on as their chief inducement to OLLA'S ultimately signing the subject agreement and its associated deeds in lieu of foreclosure, and that California law should apply

to any defenses of OLLA to his signing the agreement purporting to be in settlement thereof, the trial court had an absolute duty to determine if such agreement effected a fully lawful purpose and whether it was void for any other reason under California law.

The subject agreement clearly violated the mirror image rule of California contract law and the non-negotiable terms and recitals imposed therein was achieved by the disproportionate bargaining power and unfair advantage that the WAGNER Defendants had over OLLA in all matters regarding real estate lending laws.

California Civil Code § 1668 makes plain that the subject agreement would be void as a matter of public policy cause, notwithstanding the release clauses contained therein (which are themselves not enforceable because neither knowing nor intelligent, see *infra* at Assignment of Error No. 3), and specifically holds:

"All contracts which have for their object, directly or indirectly, to exempt any one from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law." So much so that a Plaintiff will not be precluded from showing he justifiably relied on

intentional misrepresentation of the other party as to the character of the subject property and his loans.

California Civil Code § 1667 makes plain as to such that:

"That is not lawful which is:

1. Contrary to an express provision of law;
2. Contrary to the policy of express law, though not expressly prohibited; or,
3. Otherwise contrary to good morals.

The trial court decidedly looked askance at the WAGNER Defendants concealment of the governing terms of OLLA'S Malibu real property's first mortgage note and first deed of trust which had priority of the loans as made to OLLA by the WAGNER Defendants, which terms specifically barred the transfer of OLLA'S beneficial interest in such Malibu real property to the WAGNER Defendants in the manner they sought to and did in fact succeed at inducing OLLA into so transferring to them through the subject Real Estate Purchase and Sale Agreement and its associated October 18, 2008 deed in lieu of foreclosure, in spite of the fact that the first mortgage was referenced at trial⁹⁰ and its due on sale type clause, which Chase Bank had

⁹⁰See RP page 20, lines 2-4.

divulged to OLLA in January 2010 was standard feature of WAMU mortgage loans, was referenced numerous times at trial.⁹¹ Such a fraudulent inducement to OLLA'S signing documents purportedly intended to be in avoidance of foreclosure⁹² is not permitted under the law of the state of California.⁹³

The subject agreement purporting to settle all three loans in avoidance of foreclosure actually created potential for foreclosure by the first mortgagee Washington Mutual and as such it was both procedurally and substantively unconscionable, involving thus improprieties of misrepresentation in process of forming such contract and with various clauses within such contract shocking to the conscience because OLLA was remaining the sole mortgagee on the Washington Mutual first mortgage loan and thereby would be the one potentially foreclosed upon and thus was not "benefiting" in the manner stated by Defense Counsel in opening argument.⁹⁴

⁹¹ See RP page 195 at lines and RP page 196 at lines 1 through 4.

⁹² See Plaintiff's Evidence Exhibit List No., which is email to Defendant Robert H. Wagner, at page, paragraph, evincing OLLA'S rightful expectations.

⁹³ See *infra* at Assignment of Error No. 4.

⁹⁴ RP defense counsel.

Moreover, the WAGNER Defendants could not have survived even judicial foreclosure to successfully foreclose on OLLA'S two subject real properties given the failure of the WAGNER Defendant to have complied with lending disclosure laws codified under the Federal Truth in Lending Act (TILA) (15 U.S.C. § 1601 (a)), which act is remedial in nature and must be liberally construed in favor of homeowners⁹⁵ as applied by California Civil Code Section. The TILA is a strict liability statute.⁹⁶

In fact, the March 14, 2008, and third, installment loan as made to OLLA contained a waiver of the three business day advance disclosure rules that did not comply with the TILA. The WAGNER Defendants were aware⁹⁷ of such requirement because they obviously drafted a clause waiving it but such waiver was not in satisfaction with governing statute. Similarly the WAGNER Defendants admitted to failure on September 26,

⁹⁵ See King v. California, 784 F.2d 910 (9th Cir. 1986) and Regulation Z (12 C.F.R. Section 226.23).

⁹⁶ See Yamamoto v. Bank of New York 329 F. 3d 1167 (9th Cir. Hawaii)

⁹⁷ See RP page 227 lines 8 through 11.

2007 to satisfy the three day disclosure requirement of the September 27, 2007 first installment loan.⁹⁸

Misrepresentation of such and OLLA'S existing rights as a borrower further establishes actionable extrinsic fraud as according to the laws of the state of California.

California Civil Code § 2889 makes plain that the subject agreement would be void as a matter of public policy because, notwithstanding the release clauses contained therein (which are themselves not enforceable because neither knowing nor intelligent, see *infra* at Assignment of Error No. 3), the state of California specifically holds:

"All contracts for the forfeiture of property subject to a lien, in satisfaction of the obligation secured thereby, and all contracts in restraint of the right of redemption from a lien, are void."

A buyer of a deed in lieu of foreclosure cannot take the position that he ".....stands in shoes of the rightful borrower."⁹⁹ The WAGNER Defendants represented to Freedman to relay to OLLA, repeatedly, and then between the dates of October 15, 2008 and October 17,

⁹⁸ RP p. 228 lines 18 through 20.

⁹⁹ See Hapres v First Federal Bank of Cal, Case No. E044500 (4th Dist., Div. 2 September 17, 2008).

2008, directly to OLLA as well as to Freedman and Privitera, that the WAGNER Defendants (see Report of Proceedings pages) had uncircumscribed legal ability to foreclose on both of OLLA'S subject two real properties¹⁰⁰ unless OLLA signed the subject agreement and companion deeds in lieu of foreclosure ultimately by the weekend of October 17, 2008.

Apart from the very real misrepresentation of the WAGNER Defendants' legal ability to foreclose on the three subject loans for violations of lending statutes made by them and not known by OLLA at the time of signing, the WAGNER Defendants alternately misrepresented to Messrs. Freedman and Privitera that the WAGNER Defendants could in restraint of OLLA'S right of redemption under the separately executed subject second and third subject loans proceed to foreclose on OLLA'S Malibu real property for the subject second and third loans (secured solely by the OLLA'S Malibu real property) even for any deficiency associated with non-judicial foreclosure of the first loan (which had to be foreclosed upon in Washington state).

¹⁰⁰ RP page 136 lines 13 through 16.

OLLA had rescinded all three subject loans as well as the subject Real Estate Purchase and Sale Agreement¹⁰¹ as was stated intent of his Complaint filed in the prior commenced California action which further fixed the issue of enforceability of the subject Real Estate Purchase and Sale Agreement as a matter raised by OLLA in a Complaint as filed with a court squarely there.

Moreover, the trial court should not be permitted to have set a dangerous precedent whereby a trial court in Washington can adjudicate a case involving subject matter outside of its jurisdiction and where the subject matter bears contacts overwhelmingly connected to another state.

Assignment of Error No. 3: PURUANT TO RAP 2.5

(a) (1): The trial court lacked subject matter jurisdiction:

The trial court had no factual basis on which to utilize OLLA'S emailed statement¹⁰² that he assumed his subject agreement concludes mutual obligations in order to enforce the clause of mutual release as

¹⁰¹ See Trial Exh. No., Notice of Rescission dated Jan. 26, 2009.

¹⁰² EXLST No. 50 October 10, 2008 and by OLLA to Defendant Robert H. Wagner.

contained in paragraph 9 of the Real Estate Purchase and Sale Agreement, rather such case shamelessly took OLLA'S remark out of the limited context where OLLA was confirming that mutual contractual obligations were being met¹⁰³ and as yet to be met at which time of writing OLLA had not yet definitively discovered the various improprieties and unlawful aspects of each and all of the three subject loans and had as yet no reasonable ability to have known of the existence of such.

There can have been no effective and enforceable waiver of any rights to mitigate or to sue the WAGNER Defendants in the paragraph purporting to release the WAGNER Defendants which was paragraph 9 of the subject Real Estate Purchase and Sale Agreement because for such release of liability to be enforceable it must have been an intentional and voluntary relinquishment of a known right. California Civil Code § 1542 provides:

A general release does not extend to claims which the creditor does not know or suspect to exist in his or

¹⁰³ RP page 506 lines 1-4 WAGNER Defendants aware WAMU power to foreclose. Also PR page 477 lines 2-3, November 30, 2009, Defense Counsel enunciation Defendants obligation to keep WAMU paid up.

her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor.

Such release would only be enforceable if it represented a knowing and intelligent waiver of a Plaintiff's statutory rights to cancel the loans and lacking waiver because cure of statutory omission not yet complied with by the lender.

Further, such release¹⁰⁴ cannot withstand voidness as being a part of a contract vitiated by frauds which so procured the contract and with such release being of liability for matters involving statutory rights of rescission such as the three business day right of rescission notice that the WAGNER Defendants omitted to include in each and all of the three subject loans as prescribed by Regulation Z (12 C.F.R. § 226.23) and which not having cured yet survives however OLLA has rescinded timely and properly not once (January 20, 2009 at Plaintiff's Trial Exhibit No. 125) but a second time dated January 26, 2010 which the WAGNER Defendants were ultimately undoubtedly served with by Golden Gate Legal of Marin County, California on May 9, 2010.

¹⁰⁴ Trial Evidence Exhibit No.84, the REPSA par.9

It was also a release of the WAGNER Defendants from gross negligence as drafted by the WAGNER Defendants themselves, and, therefore, barred under California Civil Code § 1667.¹⁰⁵

Assignment of Error No. 4: PURSUANT TO RAP 2.5

(a) (2):

THE TRIAL COURT DID NOT HAVE SUFFICIENT FACTS TO BASE ITS CONCLUSIONS OF LAW IN FAVOR OF THE WAGNER DEFENDANTS.

The trial court had no factual basis on which to utilize OLLA'S emailed statement that he assumed his subject agreement concludes mutual obligations in order to enforce of the clauses of mutual release as contained in the Real Estate Purchase and Sale Agreement, rather such case shamelessly took OLLA'S remark out of the limited context where OLLA was confirming that mutual contractual obligations were being met and as yet to be met at which time of writing OLLA had not yet definitively discovered the various improprieties and unlawful aspects of each and all of the three subject loans and had as yet no reasonable ability to have known of the existence of such.

¹⁰⁵ See above at Argument for Assignment Error No. 1.

Also see EXLST No. 50, email October 10, 2009

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The trial court specifically failed to determine whether the Malibu house property was even able to be transferred to the WAGNER Defendants in the manner that they sought to and did indeed successfully induce OLLA into transferring to them on October 18, 2008 as a product of the October 17, 2008 Real Estate Purchase and Sale Agreement. OLLA'S Response Brief in Opposition to Presentation of the Orders at page 4¹⁰⁶ made plain newly discovered evidence attached thereto at its attached Exhibit 1 (Adjustable Rate Mortgage Note, Washington Mutual Bank) that the transfer of OLLA'S beneficial interest in the Malibu real property in the manner that the WAGNER Defendants sought for him to do and succeeded at inducing him to so transfer to them was not contractually permitted. Such document as belonging to OLLA was in the possession of Defendant ROBERT H. WAGNER since September 13, 2007 and was never returned. After being informed in March of 2009 while seeking a response from first mortgagee Washington Mutual legal department to OLLA'S January and February 2009 letters alerting such bank's legal department (and then its

¹⁰⁶ found at Designation of Trial court Clerk's papers 516-537

acquiring bank Chase) of his dispute with the WAGNER Defendants and of the transfer----such response not made until June 11, 2009 by Carol Masters, Chase Bank Executive Resolution Analyst---- that a due on sale type clause was standard on all loans made by Washington Mutual, OLLA repeatedly requested that such bank send him such first mortgage to no avail likely because of the acquisition of such bank by Chase Bank. OLLA'S efforts finally succeeded with his December 28, 2009 letter to Chase Bank to which he finally received in response the document on January 7, 2010 and then said bank's companion First Deed of Trust January 8, 2010, post verdict but pre-judgment and immediately filed January 13, 2010 his Response Brief in Opposition to Presentation of the Orders. Such documents have mirror image clauses restricting the transfer of the Property or a beneficial interest in Borrower, the Adjustable rate note at its page 5, paragraph 11, and the First Deed of Trust at its page 11, paragraph 18. These documents contain a material fact which not only governed the legal transferability of the Malibu real property to the WAGNER Defendants in the manner they intended and

demanded but also evidences bad faith on the part of the WAGNER Defendants who thus induced OLLA to sign the subject agreement under the guise of benefit to avoid foreclosure whilst leading him potentially to foreclosure as the WAMU first mortgage loan was to remain in OLLA'S name exclusively as mortgagor and such two WAMU first mortgage loan documents explicitly provide for the acceleration of OLLA'S (borrower's) first mortgage debt under circumstances as took place in the manner of the transfer of the Malibu real property to the WAGNER Defendants as was made by the parties of which only the WAGNER Defendants had reason to know the truth of such material fact and who were also imputed with having had such knowledge being loan originators seeking deed in lieu of foreclosure on such real property in settlement of loans secured by such property and who regularly did business making secondary residential consumer installment loans to people like OLLA and whom were licensed real estate brokers within the state of California. Such concealment and fraudulent misrepresentation of such material fact were facts upon which the outcome of the litigation depended in whole or in part of the kind

recognized by the court in Atherton Condo. Apartment--
-Owners Ass'n Bd. of Directors v. Blume Dev. Co., 115
Wn. 2d 506, 516, 799 P. 2d 250 (1990) (citing Morris
v. McNichol, 83 Wn. 2d 491, 519 P. 2d 7 (1974)).

The WAGNER Defendants have admitted to having had
in their possession OLLA'S Washington Mutual Bank
first mortgage documents¹⁰⁷ since having met OLLA on
September 13, 2007 at which time they requested to
borrow such from OLLA¹⁰⁸ and further admitted to
knowledge of a due on sale clause and which they
quickly retracted,¹⁰⁹ yet the trial court refused prior
to January 15, 2010 presentation of the orders to
acknowledge OLLA'S submitted evidence as filed just
prior thereto on January 13, 2010 as an exhibit to his
Opposition to Presentation of the Orders and Findings
of Fact and Conclusions of Law, in spite of the fact
that a due on sale clause had been mentioned at trial
numerous times by OLLA¹¹⁰ because in the Court's own
words there was no evidence that OLLA could not have

¹⁰⁷ RP p. 506 lines 1-4 WAGNER Defendants admitted awareness of
WAMUs powers to foreclose November 30, 2009. See also RP p. 477
line 2-3 and p. 542 lines 6-8.

¹⁰⁸ RP p. 164 lines 1 through 6.

¹⁰⁹ See RP page 391, lines 7 through 14.

¹¹⁰ See RP page 8 lines 10 through 16.

been able to submit such before the close of the taking of evidence at trial even though the Court heard Defendant ROBERT H. WAGNER state in testimony he had possession of OLLA'S copy of such loan documents since September 13, 2007. Clearly this was most disingenuous because had OLLA had such in his possession he would clearly have submitted it as evidence being that he referenced the due on sale type clause numerous times throughout trial. And further the Court had asked questions about the WAMU first mortgage such as "What was the balance on the Washington Mutual first on the Malibu house?",¹¹¹ but decidedly sidestepped the most important and potentially dispositive fact of whether any clause like the due on sale clause OLLA kept mentioning at trial would have barred the transfer so made to the WAGNER Defendants. As such the trial court did nothing to possess copies of the documents evidencing legal authority and ability of the conveying entity OLLA to enter into the transaction and to execute the conveyance documents.

¹¹¹ See RP page 20 at lines 2 through 3.

Such Washington Mutual Bank's first mortgage Adjustable Rate Note¹¹² explicitly states on its page 5 at paragraph 11 s, (see Appendix No. 2 and Exhibit 1 of Opposition to Orders Jan 13, 2009, that the transfer of any beneficial interest of the borrower OLLA in the underlying subject MALIBU house real property could not be transferred without prior approval of said bank.

The WAGNER Defendants not only have been licensed real estate brokers within the state of California since 1981 but also had a statutory fiduciary duty to borrower OLLA to act in good faith pursuant to RCW 19.85.030. (Appendix No. 9)

Coupled with the fact that Defendant ROBERT H. WAGNER stated that he knew he was always a second behind Washington Mutual Bank's first mortgage and they were first¹¹³ there can be little doubt as to the knowledge imputed by law to the WAGNER Defendants given their professional capacity, Defendant ROBERT H. WAGNER has had a real estate broker's license from the state of California since 1981 (license no. 00811101)

¹¹² See King v. California, 784 F.2d 910 (9th Cir. 1986) and Regulation Z (12 C.F.R. Section 226.23).

¹¹³ RP p. 388 lines 4 and 5

and he is a licensed attorney in the same state (CA state bar No. 84090) and to the fact that they sought to and did ultimately succeed at having OLLA transfer to them his equity in his subject Malibu real property. Regardless of the fact that such a transfer hawked as beneficial to both parties, and specifically to OLLA as a means to avoid the risk of foreclosure, such transfer in the manner contemplated by the Real Estate Purchase and Sale Agreement and consummated by the October 18, 2008 Deed in Lieu of Foreclosure, actually served to place OLLA in danger of being foreclosed upon by Washington Mutual Bank (now Chase Home Finance, purchaser of such bank). Quite clearly such was a fraudulent misrepresentation of facts that the WAGNER Defendants had strong reason to know were and the truth of which would have been grounds for OLLA to have avoided the subject Real Estate Purchase and Sale Agreement. If one of the bases for OLLA to have signed at all was to avoid foreclosure why on earth would OLLA sign a document that could potentially put him at risk of foreclosure by Washington Mutual Bank, because OLLA finally chose to sign after having been made by the WAGNER

Defendants to believe signing would avoid foreclosure. This is why OLLA'S closing argument reference to Mumford v. Smith 89 Wash. 98, No. 12665, Supreme Court of Washington, 89 Wash. 98; 154 P. 153; 1916 Wash. LEXIS 644, Jan. 6, 1916 is compelling as it relates to the facts of this case. The Real Estate Purchase and Sale Agreement was a procedurally unconscionable contract because of such impropriety during the formation process resulted in one of the parties not having a meaningful choice as to whether to enter into the contract.¹¹⁴

Meaningful choice is definitely affected by the manner in which the contract was formed by fraud in the inducement. A contract is unconscionable if, given all the facts and circumstances surrounding the transaction, it is one no one in his senses, not under delusion, would make and which no fair and honest person would accept. It should be shocking to equity and good conscience and therefore a court of equity may with propriety interpose.¹¹⁵

¹¹⁴ See Nelson v. McGoldrick 73 Wn. App. 763; 871 P. 2d 177; 1994 Wash. App. Lexis 170.

¹¹⁵ See Gooden v. Hamilton, 172 Wash. 60, 63, 19 P.2d 392 (1933).

Additionally, what the WAGNER Defendants characterized as "extensive negotiations" was truly anything but legitimate because it was not by any means of the taint of fraud misrepresentations. Smith v. Gallard & Associates No. 3002-3 Court of Appeals of Washington, Division Three, 24 Wn. App. LEXIS 2764, November 13, 1979, decided.

While OLLA repeatedly referred to the fact that there had been some variant of a due on sale clause as a term of his Washington Mutual first mortgage loan in his Complaint¹¹⁶ with the WAGNER Defendants not only testifying that such documents had so been in their possession since September 13, 2007¹¹⁷ and also even nearly admitting to having known of the due on sale clause.¹¹⁸

The trial court refused to acknowledge the extrinsic evidence of fraud submitted to it as newly discovered evidence¹¹⁹ in the form of the Washington Mutual Bank first mortgage note and deed of trust

¹¹⁶ See page 53, par. 52.

¹¹⁷ RP page 167 lines 1 and 2.

¹¹⁸ RP page 220, lines 18-19 on November 19, 2009.

¹¹⁹ See Exhibit of OLLA'S January 13, 2010 Opposition to Presentation of the Orders and Findings of Fact and Conclusions of Law.

which still exists as of the date of this writing on the subject Malibu real property and which explicitly provide on page 6 and page 11 respectively that transfer to the WAGNER Defendants of the Malibu house equity in the manner they sought to induce and did successfully induce OLLA into deeding over to them in lieu of foreclosure was not contractually permitted and could be grounds for such bank to foreclose upon OLLA.

The trial court sustained an agreement which the WAGNER Defendants touted to OLLA as being beneficial to him,¹²⁰ after having just recently dissuaded OLLA from renting out such property to pay it and the WAGNER Defendants' debt service costs.¹²¹

Thus the trial court refused to hear and accept such extrinsic evidence which went to the heart of issues of bad faith of the WAGNER Defendants and the legal transferability of the Malibu house in the manner that had been transferred on October 18, 2008 to the WAGNER Defendants. In spite of such evidence as to the issue of an effective due on sale clause as

¹²⁰ RP p. 45 lines 6 through 8.

¹²¹ See Vassallo testimony and see Plaintiff's Trial Exhibit No. 28/33.

raised,¹²² the trial upheld the subject agreement that no rational person would have signed purportedly in avoidance of foreclosure and avoiding blemish to his credit where instead he was actually thereby signing potentially triggering foreclosure. The trial court repeatedly faced the issue of the existence of a due on sale clause which the WAGNER Defendants had knowledge of from the time of their first meeting OLLA on September 13, 2007 during which time they accepted monies from OLLA as consideration for their drafted Agreement to Hold Funds on that day presented to OLLA¹²³ as the record reveals and the foregoing has painstakingly shown.

The trial court was thus in error and the evidence of material fact concealed by the WAGNER Defendants, though discovered after verdict as not having reasonably been within possession of OLLA, and for which proper foundation was laid by OLLA at trial, should be a matter for consideration on appeal since such evidence as was Exhibit 1 of OLLA'S Response Brief in Opposition to Presentation of the Orders

¹²² See RPs p. 236 par.1 through 4.

¹²³ OLLA'S Complaint at page 17, middle paragraph

since such action and material fact indicate violations of RCW § 19.146.0201 (1) (Appendix 19) and breach of fiduciary duty under RCW § 19.146.095 (1) (c) (Appendix 21) noting that RCW Chapter 19.146.010 (Appendix 26) does not exempt bridge loans from definition of residential mortgage loans for the purposes of the Chapter 19.146 and also does not exempt the WAGNER Defendants from loan originators or from the definition of a mortgage broker.¹²⁴ Without doubt the WAGNER Defendants knew that Washington Mutual could foreclose¹²⁵ should they not continue to meet what they termed at trial as their obligations¹²⁶ to pay the first mortgage current.

Assignment of Error No. 5: PURSUANT TO RAP

2.5(a)(2):

THE TRIAL COURT DID NOT ESTABLISH FACTS SUFFICIENT TO FIND IN FAVOR OF THE WAGNER DEFENDANTS.

While the Honorable Judge Hartman opines his Oral Decision as delivered on December 11, 2009, that this is "a case where, really, what happened from a factual standpoint was not seriously disputed by the

¹²⁴ In spite of how Defendant ROBERT H. WAGNER characterized himself at trial, RP 226 lines 13 through 16.

¹²⁵ RP page 375, lines 1 through 4.

¹²⁶ RP page 542 lines 6 and 7.

parties"¹²⁷, nothing could be further from the truth and the testimony and evidence at trial bears this out.¹²⁸ Thus while it could hear OLLA'S claims as to unenforceability of the subject agreement as based on the falsity of the misrepresentation of Washington law protecting borrowers against whom have been threatened a filing of a notice of default, the trial court could properly make a full and fair determination of enforceability of the subject agreement based on falsity of the misrepresentations as made by the WAGNER Defendants.

Another source of error was the trial courts indulgence in sideshow critique of OLLA'S personal expenditures as if the source and use of funds, which failed to even subtract the Malibu yearly expenses paid of over One Hundred Fifty Thousand Dollars, were somehow an issue at a trial¹²⁹ which was professed to be determinative on the enforceability of the Real Estate Purchase and Sale Agreement the reasonableness of which the defendants had the burden of proving at

¹²⁷ See RP page 2 at lines 23 and 24.

¹²⁸ See RP pages 462 and 463 at lines.

¹²⁹ RP page 625 lines 1 through 25.

trial. Moreover, defense counsel emphasized¹³⁰ OLLA'S May 23, 2007 first mortgage loan refinance application for which they also suggested OLLA Offered the WAGNER Defendants to somehow qualify himself for their loans to him six months later on October 1, 2007. The trial court failed to note that the document was not submitted in its entirety and that if it were the trial court would have noted the OLLA'S proceeds from such refinance was a great deal less than what was inferred.¹³¹

The trial court failed to make determination of voluntariness and heed to the long-standing rule that a deed in lieu of foreclosure must be offered by the borrower and gave no weight to the fact that the WAGNER Defendants presented OLLA with a draft of a contract in settlement of the three subject loans before OLLA had even registered any intention at all to sign any such thing let alone its two companion deeds in lieu of foreclosure. The trial court scoffs at the longstanding rule gauging voluntariness that a

¹³⁰ RP pages 416 through 422 basis for such odyssey at trial on its Evidence Exhibit no 183 Tab 1

¹³¹ RP Verdict Page 26, lines 13 through 16 and page 7 lines 4 through 9.

deed in lieu of foreclosure and settlement must be offered by the borrower. In fact most title companies will only insure a deed in lieu of foreclosure if there is proof that the borrower drafted such as well as a companion settlement agreement acknowledging that the value of the real property being transferred in settlement by deed in lieu of foreclosure was indeed worth less than the amount of the loans purportedly being settled.

The trial court had no basis to conclude that in all respects no articulation of bad faith on the part of the WAGNER Defendants was evident, when in fact there was more than ample evidence of the reverse. In fact the WAGNER Defendants actually placed OLLA in peril of potential of foreclosure by Malibu real property first mortgagee Washington Mutual (and currently Chase Home Finance) by concealing the material fact of the operative bar on transfer of borrower's beneficial interest in such Malibu real property.¹³² And the WAGNER Defendants breached the

¹³² See OLLA'S Opposition to Defendants' Presentation of the Orders at Exhibit No. 1.

implied covenant of good faith and fair¹³³ dealing they improperly and illegitimately used their superior knowledge and position in real estate lending and finance to intentionally hide the fact that they were obligated to but failed to comply with the mandatory disclosure requirements of TILA and 12 C.F.R. § 226.23.

The trial court further had insufficient facts to conclude that the WAGNER Defendants did not articulate bad faith at all at trial given that on one hand they claimed OLLA could have taken another two weeks until October 31, 2008 to sign¹³⁴ and on the other they admitted OLLA had to sign on October 17, 2008.¹³⁵

Defendant ROBERT H. WAGNER evinced bad faith when demonstrated willingness to conceal his identity as the second lender in his suggestion of approaching WAMU to lower their principal.¹³⁶

Had there been no articulation of bad faith there could not have been admission by the WAGNER Defendants, who claim they merely sought interest

¹³³ See RP p. 124 lines 11-13, even though WAGNER Defendants held themselves out as acting in good faith.

¹³⁴ RP page 368 lines 15 through 17.

¹³⁵ RP page 371 lines 20 through 21.

¹³⁶ RP p. 313 through 25 and p.314 lines 1 and 2.

payments to start being made and that they were not looking for any balloon payment due,¹³⁷ while at once maintaining they would not accept back the Washington house in lieu of the far lesser amount of such interest due.¹³⁸ In spite of having led OLLA to believe loans would be continuing and once Malibu sold could get OLLA a "chunk of money" leaving him in possession of Washington real property¹³⁹ that WAGNER Defendants would carry^{140,141} as represented during Sept 18, 2008 that "this guy WAGNER will carry it (the Malibu real property for a yes on two."¹⁴²

And yet again the trial court had no basis on which to grant relief to the WAGNER Defendants in the manner it as based in part that the WAGNER Defendants portrayed themselves as having gotten caught in some financial web just as they told Freedman¹⁴³ when in fact they had just previously told OLLA that they still believed OLLA and the WAGNER Defendants could

¹³⁷ RP page 219 13 through 19.

¹³⁸ RP page 248 lines 24 and 25.

¹³⁹ RP p. 298 lines 1-25 and p 299 lines 1 through 6.

¹⁴⁰ RP p. 302 lines 6-17.

¹⁴¹ RP p. 303 lines 3-12 and 17-20.

¹⁴² RP p. 298 lines 1 -25 and p. 299 lines 1 through 6.

¹⁴³ RP page 159 lines 11-14.

sell the Malibu real property¹⁴⁴ offered OLLA financing for any party to buy the Malibu property,¹⁴⁵ and that the WAGNER Defendants and OLLA were in a plan together as late as September 18, 2008¹⁴⁶, and continued to offer such up to 2 million dollars as part of their 4.495 million dollar listing of such for sale after having acquired the deed in lieu of foreclosure thereto.

Further, the Exhibit number 2 of OLLA'S Response Brief in Opposition to Presentation of the Orders,¹⁴⁷ which is the Los Angeles Tax Assessor's valuation \$5,500.000.00 (Five Million Five Hundred Thousand Dollars) of the Malibu real property after transfer was made to the WAGNER Defendants makes plain that the Malibu real property was worth far more than the WAGNER Defendants allowed. The trial court rejected this newly discovered (January 10, 2010) evidence--- OLLA had finally located his former taxpayer ID for L.A. County Tax Assessor website to allow him to search the tax assessed value records---- instead

¹⁴⁴ RP p. 315 lines 24 and 25.

¹⁴⁵ RP p. 302 lines 13 through 17.

¹⁴⁶ RP page 316 lines 23 through 25 and page 317 lines 1 through 3.

¹⁴⁷ As found in Clerks papers pages 526-537.

placed weight on biased appraisals in hindsight from licensed appraisers whom the WAGNER Defendants hired¹⁴⁸ to testify at trial one of whom stated the Malibu real property was worth only \$4,000,000.00 as just over one month before such tax reassessment by L.A. County.

Moreover, the Court overlooked that the WAGNER Defendants did not have a third party appraisal done at the time they demanded OLLA sign the Real Estate Purchase and Sale Agreement with its non-negotiable terms including allegation of valuation of the real property as less than the outstanding loans. Such an independent third party appraisal to show that the values of the properties were indeed worth less than the loans outstanding normally would have been de rigueur for any title company seeking to insure deeds in lieu of foreclosure. The WAGNER Defendants did nothing to substantiate their claims of their proffered settlement agreement which they demanded that OLLA sign by October 17, 2008 lest the WAGNER

¹⁴⁸ See RP page 186 lines 3 through 16.

Defendants file notice(s) of default which they alleged they had on their desk.^{149,150}

The trial court additionally placed weight on the other hired WAGNER Defendants appraiser's valuation of the Washington real property at the time of the execution of the Real Estate Purchase and Sale Agreement at \$1,000,000.00 when the CMA's run by Robert S. Butcher¹⁵¹ indicated a valuation of about \$1,200,000.00 at least and at time of trial which was deeper into the housing market recession. The trial court lacked ability to conclude that the values of OLLA'S two properties at the time of his signing the subject agreement were less than the amount of the loans outstanding at such time. Defendants admitted that the total loans had to have been 2.12 million to them¹⁵² which when coupled to WAMU's 2.6 million would give 4.7 million loans outstanding.

¹⁴⁹ See RP page 86, lines 20-21, page 91, line 25, page 92, line 1 for testimony of Joseph Privitera, and page 133, lines 14-16 for testimony of Robert Freedman.

¹⁵⁰ See also Findings of Fact and Conclusions of Law, submitted by Defense counsel on January 15, 2010 at paragraph 19, admitting how the WAGNER Defendants emailed their proposed draft, before which time no evidence existed which shows any permission or confirmation of any negotiations by OLLA.

¹⁵¹ See Plaintiff's Trial Ex List No. 125.

¹⁵² RP p. 556 lines 12 and 13.

In actuality, at trial, Defendant ROBERT H. WAGNER stated that at the time of signing the subject agreement "nobody knew for sure what these things were worth,"¹⁵³ and thus the WAGNER Defendants had no legitimate third party basis on which to substantiate his statement admitted to at trial that he told Privitera when he demanded both of OLLA'S real properties for Fifty Thousand Dollars: "The loans are under water now."¹⁵⁴

Moreover, Defense counsel and the trial court clung throughout to the statement at trial by Defendants¹⁵⁵ that OLLA never made payments without noting that all monthly payments were deferred at all relevant times as their terms and/or by extension in the March 14, 2008 loan.

Further the Court made a determination about figures on OLLA'S Washington Mutual Bank's first mortgage loan application without the Defendants having placed the whole application into evidence allowing for erroneous fact finding of the trial court thereon.

¹⁵³ RP p. 376 lines 21 through 25.

¹⁵⁴ RP p. 533 line 9.

¹⁵⁵ RP p. 504 lines 15 and 16.

The trial court had no factual basis on which to conclude that OLLA was part to any negotiation that took place prior to October 2, 2008 which is the date that the WAGNER Defendants emailed their own draft of the subject agreement purporting to settle the three loans in default¹⁵⁶ and not as mistakenly stated by defense counsel.¹⁵⁷ Moreover, no contact was ever made by either party regarding any such appointment of either Freedman or Privitera to negotiate any kind of sale of OLLA'S twos subject real properties. In fact by his own testimony Defendant ROBERT H. WAGNER admitted to not responding to any emails OLLA wrote to him over the period from September 2008 through October 3, 2008 being the day Freedman received and forward a draft of the subject agreement to OLLA. In fact, Defense counsel¹⁵⁸ that Freedman stepped in as an intermediary to try to negotiate, but an "intermediary" is not an "agent".

Privitera's testimony¹⁵⁹ makes clear that he took it upon himself to find out why Defendant ROBERT H.

¹⁵⁶ See Exhibit List No. 47.

¹⁵⁷ RP page 43 line 16 through 18

¹⁵⁸ States in RP page 43 lines 11-14

¹⁵⁹ RP pge 84 lines 10 through 12.

WAGNER was up to and that in fact said Defendant told Privitera of his demand for both houses in lieu of foreclosure and confirmed that later when he talked with said Defendant again said Defendant stated he came to a decision with OLLA'S brother in law independent of any mention of OLLA and he also went on to state that were OLLA not to sign papers in transfer of the two subject real properties that he would file for foreclosure with the papers on his desk¹⁶⁰ and further stated OLLA did not want to accept this offer right away¹⁶¹ and that said Defendant sought for other people to come up with OLLA'S decision to sign for OLLA.¹⁶² Freedman, in his testimony more than seems to concur with "because he knew I was your brother in law, that I think he thought that in conversations with another party might, in fact, lead towards resolving the issue."¹⁶³ Later still in the record Freedman states that he was viewed as a go-between by the WAGNER Defendants and that Mr. Olla never asked

¹⁶⁰ RP page 86 at lines 20 and 21.

¹⁶¹ RP page 89 line 17 through 19.

¹⁶² RP page 90 lines 1 through 4.

¹⁶³ RP page 117 at lines 8 through 10.

him or formally requested or certify that he should be a go-between.¹⁶⁴

In any case, Defendant ROBERT H. WAGNER engaged in conversations with third parties to sell to him OLLA'S two real properties¹⁶⁵ and in fact admitted that he demanded both of OLLA'S properties for the absurd sum of \$50,000.00 (Fifty Thousand Dollars)¹⁶⁶ having just days before led OLLA to believe OLLA would be getting money and keeping the Washington real property in the newly adopted plan by said defendant which said Defendant admitted to in testimony.¹⁶⁷ And said Defendant claimed in testimony that he had too many personal issues to accord OLLA his full rights as the borrower in effect¹⁶⁸ and still the WAGNER Defendants wanted OLLA to sign the proffered subject agreement that they had drafted without OLLA request for such.

Privitera also stated for the record that he never negotiated anything for OLLA.¹⁶⁹ Freedman states similarly that he was not appointed by OLLA to

¹⁶⁴ RP page 143, lines 12 through 18.

¹⁶⁵ RPs page 326.

¹⁶⁶ RP page 327 line 22 through 24.

¹⁶⁷ See RP p. 339 lines 13 through 17.

¹⁶⁸ RP p. 336 lines 7 through 10.

¹⁶⁹ RPs page 91 lines 22 through 25.

negotiate.¹⁷⁰ Freedman also stated that it was Defendant ROBERT H. WAGNER who looked to Freedman as a go-between to ensure the offer of a deed in lieu of foreclosure settlement as presented by said Defendant was looked at by OLLA.¹⁷¹ Later still Freedman states in the record that there was no official sanctioning of him as a negotiator and that given that the WAGNER Defendants were speaking with Privitera, OLLA would not have two people negotiating and rather "there were people surrounding (OLLA) who were trying to help him who were not explicitly told to negotiate¹⁷² because of what the WAGNER Defendants admit to having told Freedman¹⁷³ that OLLA could go homeless were he not to sign the subject agreement the WAGNER Defendants were offering to OLLA. And, in any case, the WAGNER Defendants did not even choose to email OLLA, the borrower, the first draft of the Real Estate Purchase and Sale Agreement, instead emailing it to Freedman and themselves.¹⁷⁴

¹⁷⁰ RPs page 117 at lines 18 through 24.

¹⁷¹ RPs p. 128 lines 17 through 23.

¹⁷² RP p 156 lines 10 through 12.

¹⁷³ RP p. 346 lines 3 through 12.

¹⁷⁴ RPs page 360 lines 7 through 11.

The trial court had no factual basis on which to conclude that both parties "specifically negotiated the terms at arm's length¹⁷⁵ and in fact failed to note that the only negotiating that took place was in regard to payment after OLLA had been induced into signing the document on October 14, 2008 after weeks of unwillingness to sign and in fact failed to note that no terms of the subject were negotiable. It was a case of "sign with these terms and if you do not I will file the notice of default" and OLLA was expected to sign no later than the weekend of October 17, 2008.¹⁷⁶

Finally as stated by Defense Counsel,¹⁷⁷ there were multiple documents requiring signature of OLLA for each of three subject loans. Neither the Court or counsel sought to explain why the loan disclosures for the first loan were not in fact signed by OLLA when every other document was. Neither the loan disclosure or the loan disclosure statement as

¹⁷⁵ RPs page 45 at lines 6 through 8.

¹⁷⁶ RPs page 371 at lines 20 through 25.

¹⁷⁷ RP page 41 lines 23-25 and page 42 lines 1-4.

submitted by the WAGNER Defendants¹⁷⁸ in both the California court and the Washington court for the first loan bears OLLA'S signature and such has not and cannot be produced because OLLA never signed such.¹⁷⁹

Assignment of Error No. 6: PURSUANT TO RAP 2.5

(a) (2):

THE TRIAL COURT FAILED TO ESTABLISH FACTS SUFFICIENT TO SUPPORT CONCLUSIONS OF LAW IN WHOLE OR IN PART IN FAVOR OF THE WAGNER DEFENDANTS.

Had the trial court properly applied the laws of Washington been properly to the issues and subject matter over which it did have proper subject matter jurisdiction, the decision as reached on December 11, 2009 could not have obtained. Thus the trial court largely erroneous findings reveal that it had not sufficient facts on which to base findings in favor of the WAGNER Defendants. The WAGNER Defendants admitted they would have filed a notice of default had OLLA not signed the proffered subject Real Estate Purchase and Sale Agreement with its non-negotiable terms.¹⁸⁰ Defendant ROBERT H. WAGNER testified at trial the WAGNER Defendants were not calling OLLA'S

¹⁷⁸ WAGNER Defendants admitted awareness of Stated required disclosures, RP page 496 of lines 18-21.

¹⁷⁹ RP page 236 lines 1 through 25.

¹⁸⁰ RP page 372 lines 7 through 10

loan due, nor principal balance¹⁸¹ contra to defense counsels opening statement¹⁸² and Trial Exhibit 28 and 33 make very clear the said Defendant led OLLA to believe the loans were continuing.

Further said Defendant stated¹⁸³ that a balloon payment was not due at the point he sought for OLLA to sign deeds in lieu of foreclosure and then on the same page at line 22 says it was due. Had said Defendant properly followed Rev. Code of Washington § 61.24.031 he would have had to have given OLLA the opportunity to cure the default by certified letter and an initial appointment. Such not being the case, only the WAGNER Defendants knew what was going on and they exploited disproportionate bargaining power to push for deeds in lieu of foreclosure. In fact, Defendant ROBERT H. WAGNER admitted that he and OLLA "never talked about foreclosure",¹⁸⁴ as alleged by OLLA'S Complaint¹⁸⁵ and again in their Brief for Trial, the WAGNER Defendants made no mention of the prospect of filing a notice of default or initiating foreclosure against OLLA or even

¹⁸¹ RP p. 219 lines 13 and 14.

¹⁸² RP p. 44 at lines 12 and 13.

¹⁸³ RP p. 220 lines 18 and 19

¹⁸⁴ RP p. 233 lines 12 through 15.

¹⁸⁵ Pages 34 and 37.

that OLLA was in default, as late as their conversation on September 18, 2008 a mere four days before summarily demanding both of OLLA'S two real properties for the sum of \$50,000.00 (Fifty Thousand Dollars) to Privitera on September 22, 2008.¹⁸⁶

The trial court completely disregarded the fact, established by OLLA'S numerous to Defendant ROBERT H. WAGNER over the period from September 18 through September 22, 2008, that said defendant refused contact with borrower OLLA, choosing not to answer OLLA'S emails, which the trial court had notice of^{187,188} In addition Freedman has stated that not once did Defendant ROBERT H. WAGNER mention or offer how to do a loan workout or how OLLA could avoid foreclosure, all procedural omissions further afield from a semblance of comport with requirements of Revised Code of Washington § 61.24.031 of an initial meeting on how to avoid foreclosure. Revised Code of Washington § 61.24.031 (see Appendix No.1) provides in pertinent part:

¹⁸⁶ See OLLA'S email September 22.

¹⁸⁷ See RP page 29 lines 17 through 22.

¹⁸⁸ See RP page 29 lines 17 through 22.

"(a) A trustee, beneficiary or authorized agent may not issue a notice of default under RCW 61.24.030(8) until thirty days after initial contact with the borrower is made as required under (b) of this subsection or thirty days after satisfying the due diligence requirements as described subsection (5) of this section.

(b) A beneficiary or authorized agent shall contact the borrower by letter and by telephone in order to assess the borrower's financial ability to pay the debt secured by the deed of trust and explore options for the borrower to avoid foreclosure. The letter required under this subsection must be mailed in accordance with subsection (5) (a) and (e) (i) through (v) of this section. (c) During the initial contact, the beneficiary or authorized agent shall advise the borrower that he or she has a right to request a subsequent meeting....At the initial contact the borrower must be provided the toll-free telephone number made available by the department to find a department-certified housing counseling agency and the toll-free numbers for the department of financial institutions and the statewide civil legal aid hotline for possible assistance and referrals."

The WAGNER Defendants did not even know if OLLA knew his rights as a borrower in such context or that he knew of any alternatives¹⁸⁹ may have apprised OLLA that the threat of filing a notice of default could not just be filed immediately as WAGNER Defendants so misled OLLA and Freedman into thinking and was not an immediate initiation of foreclosure because WAGNER Defendants admit that they did tell "clearly" if thing

¹⁸⁹ RP 390 lines 5 through 8.

(subject agreement) were not signed then notice of default would be filed immediately.¹⁹⁰

Instead the WAGNER Defendants basically decided arbitrarily that OLLA had no way to pay the WAMU first mortgage¹⁹¹ to legitimize their actions in omission of what was required by law, that they did not need OLLA'S permission to negotiate with third parties and unilaterally "figured it would be better for everybody" if they offered a settlement.¹⁹²

The trial court thus did not properly apply the Revised Code of Washington § 61.24.031 to the facts that the WAGNER Defendants threatened to file a notice of default if OLLA did not sign by the weekend of October 17.¹⁹³ Freedman points out that Defendant ROBERT H. WAGNER told him that if OLLA did not sign the agreement presented to him that said Defendant would file a notice of default.¹⁹⁴ Such failure of fact finding is in direct contravention to findings that OLLA signed any agreement as containing a clause

¹⁹⁰ RP p. 575 lines 10 through 12.

¹⁹¹ RP p. 395 lines 13 and 14.

¹⁹² RP p. 537 lines 23 and 24. See also RP page 327 lines 7 through 13.

¹⁹³ See RP p. 36 at lines 12 and 13.

¹⁹⁴ RP page 133 lines 14 through 16

in release of the WAGNER Defendants from liability which release was neither knowing or intelligent. The WAGNER Defendants had no concern if OLLA even knew his rights as a borrower.¹⁹⁵

The trial court failed to accept evidence of newly discovered material fact the truth of which had OLLA known OLLA could not have been reasonably expected to sign the Real Estate Purchase and Sale Agreement by granting deeds in lieu of foreclosure in transference in the manner the WAGNER Defendants intended¹⁹⁶ to avoid foreclosure which agreement would actually potentially place OLLA in foreclosure.

The WAGNER Defendants admitted at trial that neither they nor their pension plan¹⁹⁷ was not licensed within the state of Washington to make loans secured by a deed of trust on real property located within the state of Washington which was a requirement to Revised Code of Washington § 19.146.200 (1) (Appendix 17) and he therefore could not have brought suit against OLLA for fees (RCW 19.146.200 (2) (Appendix 17) falling

¹⁹⁵ RP p. 390 lines 5 through 8.

¹⁹⁶ RP 391 lines 15 through 19.

¹⁹⁷ RP page 486 lines 7-10 also RP p. 201 lines 12-13, November 19, 2009; also RP page 485 lines 14-17, November 30, 2009

under no exemption to such statutes as under RCW 19.146.020 (Appendix 16) the WAGNER Defendants being a real estate broker who was not exempt because he accepted a loan application (as claimed by him at trial to be OLLA'S May 23, 2007 Washington Mutual first mortgage loan application and the September 18, 2007 Agreement to Hold Funds¹⁹⁸ (Plaintiff's Trial Evidence Exhibit No. 6 and provided the disclosure required by RCW § 19.146.030 (Appendix 18)) as admitted to at trial.¹⁹⁹

As such the WAGNER Defendants violated RCW § 19.146.100 (Appendix 25) which RCW 19.86.020 (Appendix 15) declares such acts to be unlawful acts.

The trial court had no choice further but to accept this evidence offered pre-judgment and apply Washington law to it because it raised unlawful acts which even rise to the level of criminal culpability on the part of WAGNER Defendants which would have been noted had the law been properly applied in the interest of substantial justice and notice of such comment of trial court at trial to OLLA assuring that

¹⁹⁸ EXLST No. 1 which did not disclose lenders WAGNER Defendants source of the funds was a pension plan.

¹⁹⁹ RP p. 226 lines 17 through 20.

it would. The Revised Code of Washington § 9A.60.030

(1) specifically states in pertinent part

"...that a person is guilty of obtaining a signature by deception if by deceptionand with intent to defraud...he causes another person to sign or execute a written instrument."

This same statute goes on to classify:

"(2) Obtaining a signature by deception or duress is a class C felony." or deprive he causes another person to sign or execute a written instrument."

V. CONCLUSION

It is abundantly clear from the record that the trial court took the path of least resistance and, as defense counsel delighted in, siding with Defendants, no doubt stemming from judicial lassitude and an obvious unwillingness to strive to conscientiously and comprehensively fact find as over the matters within its subject matter jurisdiction, taking care not to overstep its bounds in derogation of OLLA'S contractually bargained-for choice of law and rights as a borrower resident domiciliary of the state of Washington as of the time of the demands by the WAGNER Defendants in late September 2008, in this highly complex case of first impression in the state of Washington because OLLA'S entire life was ruined in

the process stemming from the WAGNER Defendants frenzied greed, bad faith and recklessness who trampled on OLLA'S rights as a borrower and in effect pilfered his Malibu real property in every direction to come out whole with regard.²⁰⁰ The trial court did not conscientiously reach any full and fair determination, lacking subject matter jurisdiction, outrageously allowed the WAGNER Defendants to infallibly arbitrarily and without substantiation of their claims of valuation at the time illegitimately decide whatever they wanted regarding OLLA'S properties and summarily demand the properties as an alternate to their filing a notice of default²⁰¹ and purposely misrepresented OLLA'S rights as a borrower under Revised Code of Washington § 61,24,031 and concealing material terms, the truth of which had OLLA known would reasonably have been grounds for OLLA to have avoided the subject real estate purchase and sale agreement.

Further and more troubling in so doing the trial has created a ominously dangerous specter of precedent

²⁰⁰ RP page 341 lines 14 through 16.

²⁰¹ RP page 377 lines 15 through 19.

whereby the courts in the state of Washington have the power to decide cases with insufficient contacts to satisfy claim of subject matter jurisdiction, give no heed to choice of law as a term of contract between parties, ignore overwhelming evidence of unlawful transfer and misrepresentation of material fact on the part of a defendant, and thereby deprive OLLA of a full and fair determination of facts within its subject matter jurisdiction and no more, all simply due to the fact that a case presents complexities and issues which it could neither fully nor competently dispose of the merits on.

For the reasons explained above, Appellant MARK OLLA seeks that this Court either entirely reverse the judgment and order as entered on January 15, 2010 from oral decision as given on December 11, 2009 order that Respondents compensate Appellant for the damages associated with the sale of his Washington real property proximate and equitable damages, expenses incurred during institution of the suit and restitution for the monies realized by the sale of the subject Washington real property together with his costs of suit and for damages for fraud for which an

award for unlawful, unfair and fraudulent actions for inducing OLLA to transfer his property in the manner as took place, of suit of punitive and exemplary damages justified, and as further allowed for under RCW 18.85.230(26), which should be offset by the \$165,000 received by OLLA, or, in the alternative, to remand the case back to the trial Court so that Washington law be applied only to the matters within its jurisdictional powers to decide and for such other relief that the Court deems proper and just, leaving matters squarely within the jurisdiction of the prior commenced and earlier filed California action to the California Court and not indulge the WAGNER Defendants intention that the Washington action be a vehicle by which to settle claims within the purview of such other forums law.²⁰²

Respectfully submitted on this 29th day of July 2010.


MARK OLLA
Appellant-Plaintiff Pro Se

²⁰² RP page 630, lines 5-10.

40367-6-II

APPENDIX to opening app brief

1. Court of Appeals July 8, 2010 order granting Appellant OLLA's motion to file over-length Appellant Brief.
2. Washington Mutual Bank First Mortgage Adjustable Rate Note, executed May 23, 2007. See exhibit 1 of Plaintiff OLLA'S OPPOSITION TO ORDERS, JAN. 13, 2010
3. Washington Mutal Bank First Mortgage Deed of Trust, executed May 23, 2007. See exhibit 2 of Plaintiff OLLA'S OPPOSITION TO ORDERS, JAN. 13, 2010
4. California Civil Code Section 1542
5. California Civil Code Section 1667
6. California Civil Code Section 1668
7. California Civil Code Section 2889
8. California Civil Code Section 2923.5
- * 9. RCW Section 19.85.030 — listed erroneously
10. RCW Section 19.86.030
11. RCW Section 61.24.031
12. RCW Section 61.34.040
13. RCW Section 61.24.030
14. RCW Section 18.85.230
15. RCW Section 19.86.020
16. RCW Section 19.146.020
17. RCW Section 19.146.200
18. RCW Section 19.146.030
19. RCW Section 19.146.0201
20. RCW Section 19.146.085 good faith
21. RCW Section 19.146.095

22. RCW Section 9A.060.030
23. Regulation Z (12 C.F.R. Section 226.23, et seq.)
24. Federal Truth in Lending Act (15 U.S.C. Section 1601 (a))
25. RCW Section 19.145.100
26. RCW 19.146.010

Appendix 1



Washington State Court of Appeals
Division Two

950 Broadway, Suite 300, Tacoma, Washington 98402-4454

David Ponzoha, Clerk/Administrator (253) 593-2970 (253) 593-2806 (Fax)

General Orders, Calendar Dates, Issue Summaries, and General Information at <http://www.courts.wa.gov/courts>

July 8, 2010

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Mark Olla
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Florence, OR 97439

CASE #: 40367-6-II
Mark Olla, Appellant v Robert Wagner, et al, Respondent

Mr. Olla & Counsel:

On the above date, this court entered the following notation ruling:

A RULING SIGNED BY COMMISSIONER SCHMIDT:

Appellant's motion to file overlength brief is granted. Appellant is granted permission to file a brief not to exceed 75 pages. That brief must include references to the record in the statement of the case, RAP 10.4(f), and is due 07/30/10,

Very truly yours,

A handwritten signature in black ink, appearing to read "David Ponzoha", with a large, stylized flourish at the end.

David C. Ponzoha
Court Clerk

Appendix 2



ADJUSTABLE RATE NOTE (12-MTA Index - Payment and Rate Caps)

3017737382

THIS NOTE CONTAINS PROVISIONS ALLOWING FOR CHANGES IN MY INTEREST RATE AND MY MONTHLY PAYMENT. MY MONTHLY PAYMENT INCREASES WILL HAVE LIMITS WHICH COULD RESULT IN THE PRINCIPAL AMOUNT I MUST REPAY BEING LARGER THAN THE AMOUNT I ORIGINALLY BORROWED, BUT NOT MORE THAN 115% OF THE ORIGINAL AMOUNT (OR \$ 2,875,000.00). MY INTEREST RATE CAN NEVER EXCEED THE LIMIT STATED IN THIS NOTE OR ANY RIDER TO THIS NOTE. A BALLOON PAYMENT MAY BE DUE AT MATURITY.

MAY 23, 2007 SANTA MONICA CALIFORNIA
CITY STATE

6388 SEASTAR DRIVE MALIBU, CA 90269
PROPERTY ADDRESS

1. BORROWER'S PROMISE TO PAY

In return for the loan that I have received, I promise to pay U.S. \$ 2,500,000.00 plus any amounts added in accordance with Section 4 (G) below, (this amount is called "Principal"), plus interest, to the order of the Lender. The Lender is WASHINGTON MUTUAL BANK, PA. I will make all payments under this Note in form of cash, check or money order. I understand that the Lender may transfer this Note. The Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the "Note Holder".

2. INTEREST

Interest will be charged on unpaid Principal until the full amount has been paid. Up until the first day of the calendar month that immediately precedes the first payment due date set forth in Section 3 of this Note, I will pay interest at a yearly rate of 8.804%. Thereafter until the first Change Date (as defined in Section 4 of this Note) I will pay interest at a yearly rate of 3.625%. The interest rate required by this Section 2 and Section 4 of this Note is the Rate I will pay both before and after any default described in Section 7(B) of this Note.

3. PAYMENTS

(A) Time and Place of Payments

I will pay Principal and interest by making payments every month. In this Note, "payments" refer to Principal and interest payments only, although other charges such as taxes, insurance and/or late charges may also be payable with the monthly payment.

I will make my monthly payments on 1ST day of each month beginning on JULY, 2007. I will make these payments every month until I have paid all of the principal and interest and any other charges described below that I may owe under this Note. Each monthly payment will be applied to interest before Principal. If, on JUNE 01, 2047, I still owe amounts under this Note, I will pay those amounts in full on that date, which is called the "Maturity Date".

I will make my monthly payments at P.O. BOX 78148 PHOENIX, AZ 85082-8148, or at a different place if required by the Note Holder.

(B) Amount of My Initial Monthly Payments

Each of my monthly payments until the first Payment Change Date will be in the amount of U.S. \$ 9,722.30, unless adjusted at an earlier time under Section 4(H) of this Note.

EXCEPT AS SHOWN OTHERWISE, THIS IS A TRUE AND CORRECT COPY OF THE ORIGINAL

(C) Payment Changes

My monthly payment will be recomputed, according to Sections 4(E)(F)(G)(H) and (I) of this Note, to reflect changes in the Principal balance and interest rate that I must pay. The Note Holder will determine my new interest rate and the changed amount of my monthly payment in accordance with Section 4 of this Note.

4. INTEREST RATE AND MONTHLY PAYMENT CHANGES

(A) Change Dates

The interest rate I will pay may further change on the 1ST day of JULY, 2007, and on that day every month thereafter. Each such day is called a "Change Date".

(B) The Index

On each Change Date, my interest rate will be based on an Index. The "Index" is the Twelve-Month Average, determined as set forth below, of the annual yields on actively traded United States Treasury Securities adjusted to a constant maturity of one year as published by the Federal Reserve Board in the Federal Reserve Statistical Release entitled "Selected Interest Rates (H.15)" (the "Monthly Yields"). The Twelve-Month Average is determined by adding together the Monthly Yields for the most recently available twelve months and dividing by 12.

The most recent Index figure available as of 15 days before each interest rate Change Date is called the "Current Index". If the Index is no longer available, the Note Holder will choose a new index which is based upon comparable information. The Note Holder will give me notice of this choice.

(C) Calculation of Changes

Before each Change Date, the Note Holder will calculate my new interest rate by adding THREE AND 77/100 percentage points 3.77% ("Margin") to the Current Index. The Note Holder will then round the result of this addition to the nearest one-thousandth of one percentage point (0.001%). Subject to the limits stated in Section 4(D) below, this rounded amount will be my new interest rate until the next Change Date. In the event a new Index is selected, pursuant to paragraph 4(B), a new Margin will be determined. The new Margin will be the difference between the average of the old Index for the most recent three year period which ends on the last date the Index was available plus the Margin on the last date the old Index was available and the average of the new Index for the most recent three year period which ends on that date (or if not available for such three year period, for such time as it is available). This difference will be rounded to the next higher 1/100 of 1%.

(D) Interest Rate Limit

My interest rate will never be greater than TEN AND 35/100 percentage points 10.35% ("Cap"), except that following any sale or transfer of the property which secures repayment of this Note after the first interest rate Change Date, the maximum interest rate will be the higher of the Cap or 5 percentage points greater than the interest rate in effect at the time of such sale or transfer.

(E) Payment Change Dates

Effective every year commencing JULY 01, 2008, and on the same date each twelfth month thereafter ("Payment Change Date"), the Note Holder will determine the amount of the monthly payment that would be sufficient to repay the projected principal balance I am expected to owe as of the Payment Change Date in full on the Maturity Date at the interest rate in effect 45 days prior to the Payment Change Date in substantially equal payments. The result of this calculation is the new amount of my monthly payment, subject to Section 4(F) below, and I will make payments in the new amount until the next Payment Change Date unless my payments are changed earlier under Section 4(H) of this Note.

(F) Monthly Payment Limitations

Unless Section 4(H) and 4(I) below apply, the amount of my new monthly payment, beginning with a Payment Change Date, will be limited to 7 1/2% more or less than the amount I have been paying. This payment cap applies only to the principal payment and does not apply to any escrow payments Lender may require under the Security Instrument.

RECEIVED
AT THE TRUE AND ORIGINAL

(G) Changes in My Unpaid Principal Due to Negative Amortization or Accelerated Amortization

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

(H) Limit on My Unpaid Principal; Increased Monthly Payment

My unpaid principal can never exceed a maximum amount equal to 115% of the principal amount originally borrowed. In the event my unpaid Principal would otherwise exceed that 115% limitation, I will begin paying a new monthly payment until the next Payment Change Date notwithstanding the 7 1/2% annual payment increase limitation. The new monthly payment will be an amount which would be sufficient to repay my then unpaid Principal in full on the maturity date at my interest rate in effect the month prior to the payment due date in substantially equal payments.

(I) Required Full Monthly Payment

On the FIFTH anniversary of the due date of the first monthly payment, and on that same day every FIFTH year thereafter, the monthly payment will be adjusted without regard to the payment cap limitation in Section 4(F).

(J) Notice of Changes

The Note Holder will deliver or mail to me a notice of any changes in the amount of my monthly payment before the effective date of any change. The notice will include information required by law to be given me and also the title and telephone number of a person who will answer any question I may have regarding the notice.

(K) Failure to Make Adjustments

If for any reason Note Holder fails to make an adjustment to the interest rate or payment amount as described in this Note, regardless of any notice requirement, I agree that Note Holder may, upon discovery of such failure, then make the adjustment as if they had been made on time. I also agree not to hold Note Holder responsible for any damages to me which may result from Note Holder's failure to make the adjustment and to let the Note Holder, at its option, apply any excess monies which I may have paid to partial prepayment of unpaid Principal.

5. BORROWER'S RIGHT TO PREPAY

I have the right to make payments of Principal at any time before they are due. A payment of Principal only is known as a "Prepayment". When I make a Prepayment, I will tell the Note Holder in writing that I am doing so. I may not designate a payment as a Prepayment if I have not made all the monthly payments due under the Note.

I may make a full prepayment or partial prepayments without paying any prepayment charge. The Note Holder will apply all of my prepayments to reduce the amount of principal that I owe under this Note. However, the Note Holder may apply my Prepayment to the accrued and unpaid interest on the Prepayment amount, before applying my Prepayment to reduce the principal amount of the Note. If I make a partial prepayment, there will be no changes in the due dates of my monthly payments unless the Note Holder agrees in writing to those changes. My partial prepayment may have the effect of reducing the amount of my monthly payments, but only after the first Payment Change Date following my partial Prepayment. However, any reduction due to my partial Prepayment may be offset by an interest rate increase.

THIS IS A TRUE AND ORIGINAL COPY OF THE ORIGINAL

6. LOAN CHARGES

If a law, which applies to this loan and which sets maximum loan charges, is finally interpreted so that the interest or other loan charges collected or to be collected in connection with this loan exceed the permitted limits, then: (a) any such loan charge shall be reduced by the amount necessary to reduce the charge to the permitted limit; and (b) any sums already collected from me which exceeded permitted limits will be refunded to me. The Note Holder may choose to make this refund by reducing the Principal I owe under this Note or by making a direct payment to me. If a refund reduces Principal, the reduction will be treated as a partial Prepayment.

Miscellaneous Fees: I understand that the Note Holder will also charge a return item charge in the event a payment that I make in connection with repayment of this loan is not honored by the financial institution on which it is drawn. The current fee is \$ 15.00. Lender reserves the right to change the fee from time to time without notice except as may be required by law.

7. BORROWER'S FAILURE TO PAY AS REQUIRED

(A) Late Charges for Overdue Payments

If the Note Holder has not received the full amount of any monthly payment by the end of FIFTEEN calendar days after the date it is due, I will pay a late charge to the Note Holder. The amount of the charge will be 5.000 % of my overdue payment of Principal and interest. I will pay this late charge promptly but only once of each late payment.

(B) Default

If I do not pay the full amount of each monthly payment on the date it is due, I will be in default.

(C) Notice of Default

If I am in default, the Note Holder may send me a written notice telling me that if I do not pay the overdue amount by a certain date, the Note Holder may require me to pay immediately the full amount of Principal which has not been paid and all the interest that I owe on that amount. That date must be at least 10 days after the date on which the notice is delivered or mailed to me (or, if the Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation buys all or part of Lender's rights under the Security Instrument, in which case the notice will specify a date, not less than 30 days from the date the notice is given the Borrower).

(D) No Waiver By Note Holder

Even if, at a time when I am in default, the Note Holder does not require me to pay immediately in full as described above, the Note Holder will still have the right to do so if I am in default at a later time.

(E) Payment of Note Holder's Costs and Expenses

If the Note Holder has required me to pay immediately in full as described above, the Note Holder will have the right to be paid back by me for all of its costs and expenses in enforcing this Note, whether or not a lawsuit is brought, to the extent not prohibited by Applicable Law. Those expenses include, for example, reasonable attorneys' fees.

8. GIVING OF NOTICES

Unless Applicable Law requires a different method, any notice that must be given to me under this Note will be given by delivering it or by mailing it by first class mail to me at the Property Address above or at a different address if I give the Note Holder a notice of my different address.

Any notice that must be given to the Note Holder under this Note will be given by mailing it by first class mail to the Note Holder at the address stated in Section 3(A) above or at a different address if I am given a notice of that different address.

9. OBLIGATIONS OF PERSONS UNDER THIS NOTE

If more than one person signs this Note, each person is fully and personally obligated to keep all of the promises made in this Note, including the promise to pay the full amount owed. Any person who is a guarantor, surety, or endorser of this Note is also obligated to do these things. Any person who takes over these obligations, including the obligations of a guarantor, surety, or endorser of this Note, is also obligated to keep all of the promises made in this Note. The Note Holder may enforce its rights under this Note against each person individually or against all of us together. This means that any one of us may be required to pay all of the amounts owed under this Note.

EX-100
TRUE AND ORIGINAL

★ means read this!

★
SO17737382

10. WAIVERS

I and any other person who has obligations under this Note waive the rights of presentment and notice of dishonor. "Presentment" means the right to require the Note Holder to demand payment of amounts due. "Notice of Dishonor" means the right to require the Note Holder to give notice to other persons that amounts due have not been paid.

11. UNIFORM SECURED NOTE

This Note is a uniform instrument with limited variations in some jurisdictions. In addition to the protections given to the Note Holder under this Note, a Mortgage, Deed of Trust or Security Deed (the "Security Instrument"), dated the same date as this Note, protects the Note Holder from possible losses which might result if I do not keep the promises which I make in this Note. That Security Instrument describes how and under what conditions I may be required to make immediate payment in full of all amounts I owe under this Note. Some of those conditions are described as follows:

Transfer of the Property or a Beneficial Interest in Borrower.

If all or any part of the Property or any interest in the Property is sold or transferred (or if a beneficial interest in Borrower is sold or transferred and Borrower is not a natural person) without Lender's prior written consent, Lender may require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by Lender if such exercise is prohibited by Applicable Law. Lender also shall not exercise this option if: (a) the request to assume is made after one year following recordation of the Deed of Trust, (b) Borrower causes to be submitted to Lender information required by Lender to evaluate the intended transferee as if a new loan were being made to the transferee; and (c) Lender reasonably determines that Lender's security will not be impaired by the loan assumption and that the risk of a breach of any covenant or agreement in this Security Instrument or other obligations related to the Note or other loan document is acceptable to Lender, (d) Assuming party executes Assumption Agreement acceptable to Lender at its sole choice and discretion, which Agreement may include an increase to Cap as set forth below and (e) payment of Assumption Fee if requested by Lender.

To the extent permitted by Applicable Law, Lender may charge a reasonable fee as a condition to Lender's consent to the loan assumption and Lender may increase the maximum rate limit to the higher of the Cap or 5 percentage points greater than the interest rate in effect at the time of the transfer. Lender may also require the transferee to sign an assumption agreement that is acceptable to Lender and that obligates the transferee to keep all the promises and agreements made in the Note and in this Security Instrument. Borrower will continue to be obligated under the Note and this Security Instrument unless Lender has entered into a written Assumption Agreement with transferee and formally releases Borrower.

If Lender exercises this option, Lender shall give Borrower notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is given in accordance with Section 1 within which Borrower must pay all sums secured by this Security Instrument. If Borrower fails to pay these sums prior to the expiration of this period, Lender may invoke any remedies permitted by this Security Instrument without further notice or demand on Borrower.

12. MISCELLANEOUS PROVISIONS

In the event the Note Holder at any time discovers that this Note or the Security Instrument or any other document related to this loan, called collectively the "Loan Documents," contains an error which was caused by a clerical or ministerial mistake, calculation error, computer error, printing error or similar error (collectively "Errors"), I agree, upon notice from the Note Holder, to reexecute any Loan Documents that are necessary to correct any such Errors and I also agree that I will not hold the Note Holder responsible for any damage to me which may result from any such Errors.

If any of the Loan Documents are lost, stolen, mutilated or destroyed and the Note Holder delivers to me an indemnification in my favor, signed by the Note Holder, then I will sign and deliver to the Note Holder a Loan Document identical in form and content which will have the effect of the original for all purposes.

★
A TRUE AND
CORRECT COPY OF THE ORIGINAL

★
8/5/8

★
10:541997115

★
JUN-07-2010 16:00:00

0017737382

WITNESS THE HAND (S) AND SEAL (S) OF THE UNDERSIGNED.

Mark Olla

MARK OLLA

32859 (11-01)

Page 8 of 8

CERTIFIED TO BE A TRUE AND EXACT COPY OF THE ORIGINAL

[Signature]

LNT&U (VERSION 1.0)

WP 1V
M39

Prepayment Fee Note Addendum

30 7737382-077

This Note Addendum is made this 23RD day of MAY, 2007 and is incorporated into and shall be deemed to amend and supplement the Note made by the undersigned (the "Borrower") in favor of WASHINGTON MUTUAL BANK, FA (the "Lender") and dated as of even date herewith (the "Note").

This Note Addendum amends the provision in the Note regarding the Borrower's right to prepay as follows:

BORROWER'S RIGHT TO PREPAY

I have the right to make payments of principal before they are due. Any payment of principal, before it is due, is known as a "prepayment." A prepayment of only part of the unpaid principal is known as a "partial prepayment." A prepayment of the full amount of the unpaid principal is known as a "full prepayment."

If I make a full prepayment, I may be charged a fee as follows:

If Noteholder receives a prepayment on or before the first anniversary of the date of the Note, the Prepayment Fee shall be equal to TWO percent (2.00 %) of the original loan amount. Thereafter, prepayment of the Note shall be permitted without any Prepayment Fee.

The Prepayment Fee shall be payable upon a full prepayment, voluntary or involuntary, including but not limited to a prepayment resulting from Noteholder's permitted acceleration of the balance due on the Note. Notwithstanding the foregoing, nothing herein shall restrict my right to prepay at any time without penalty accrued but unpaid interest that has been added to principal.

When I make a full or partial prepayment I will notify the Noteholder in writing that I am doing so. Any partial prepayment of principal shall be applied to interest accrued on the amount prepaid and then to the principal balance of the Note which shall not reduce the amount of monthly installments of principal and interest (until reamortized as set forth in the Note at the next Payment Change Date) nor relieve me of the obligation to make the installments each and every month until the Note is paid in full. Partial prepayments shall have no effect upon the due dates or the amounts of my monthly payments unless the Noteholder agrees in writing to such changes.

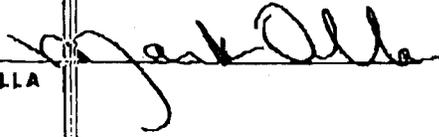
CERTIFIED TO BE A TRUE AND EXACT COPY OF THE ORIGINAL
[Signature]
LRI38UGA

NOTICE TO THE BORROWER

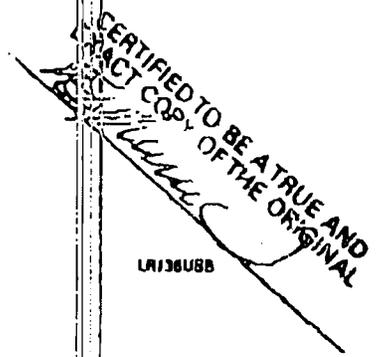
Do not sign this Note Addendum before you read it. This Note Addendum provides for the payment of a Prepayment Fee if you wish to repay the loan prior to the date provided for repayment in the Note.

By signing below, Borrower accepts and agrees to the terms and covenants contained in this Note Addendum.

MARK OLLA



CERTIFIED TO BE A TRUE AND EXACT COPY OF THE ORIGINAL



WP 1Y
M30

Prepayment Fee Note Addendum

30 7737382-077

This Note Addendum is made this 23RD day of MAY, 2007 and is incorporated into and shall be deemed to amend and supplement the Note made by the undersigned (the "Borrower") in favor of WASHINGTON MUTUAL BANK, FA (the "Lender") and dated as of even date herewith (the "Note").

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BORROWER'S RIGHT TO PREPAY

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If I make a full prepayment, I may be charged a fee as follows:

If Noteholder receives a prepayment on or before the first anniversary of the date of the Note, the Prepayment Fee shall be equal to TWO percent (2.00 %) of the original loan amount. Thereafter, prepayment of the Note shall be permitted without any Prepayment Fee.

The Prepayment Fee shall be payable upon a full prepayment, voluntary or involuntary, including but not limited to a prepayment resulting from Noteholder's permitted acceleration of the balance due on the Note. Notwithstanding the foregoing, nothing herein shall restrict my right to prepay at any time without penalty accrued but unpaid interest that has been added to principal.

When I make a full or partial prepayment I will notify the Noteholder in writing that I am doing so. Any partial prepayment of principal shall be applied to interest accrued on the amount prepaid and then to the principal balance of the Note which shall not reduce the amount of monthly installments of principal and interest (until reamortized as set forth in the Note at the next Payment Change Date) nor relieve me of the obligation to make the installments each and every month until the Note is paid in full. Partial prepayments shall have no effect upon the due dates or the amounts of my monthly payments unless the Noteholder agrees in writing to such changes.

CERTIFIED TO BE A TRUE AND EXACT COPY OF THE ORIGINAL

UNIBUS

NOTICE TO THE BORROWER

Do not sign this Note Addendum before you read it. This Note Addendum provides for the payment of a Prepayment Fee if you wish to repay the loan prior to the date provided for repayment in the Note.

By signing below, Borrower accepts and agrees to the terms and covenants contained in this Note Addendum.



MARK OLLA

CERTIFIED TO BE A TRUE AND EXACT COPY OF THE ORIGINAL
[Signature]

Appendix 3

Recording Requested By:
WASHINGTON MUTUAL BANK

Return To:
WASHINGTON MUTUAL BANK
2210 ENTERPRISE DRIVE
FLORENCE, SC 29501
DOC OPS M/S FSCE 440

Prepared By:
ALEXIS CAZARES

[Space Above This Line For Recording Data]

ZCA1
M39

DEED OF TRUST

3017737382-077

DEFINITIONS

Words used in multiple sections of this document are defined below and other words are defined in Sections 3, 11, 13, 18, 20 and 21. Certain rules regarding the usage of words used in this document are also provided in Section 16.

(A) "Security Instrument" means this document, which is dated **MAY 23, 2007**, together with all Riders to this document.

(B) "Borrower" is **MARK OLLA, A SINGLE MAN**

Borrower's address is **5368 SEASTAR DR, MALIBU, CA 90265**. Borrower is the trustor under this Security Instrument.

(C) "Lender" is **WASHINGTON MUTUAL BANK, FA**

Lender is a **FEDERAL SAVINGS BANK** organized and existing under the laws of **THE UNITED STATES OF AMERICA**

CALIFORNIA - Single Family - Fannie Mae/Freddie Mac UNIFORM INSTRUMENT

Form 3005 1/01

 -6(CA) (0207)

Page 1 of 15

Initials: _____

VMP MORTGAGE FORMS - (800)521-7291



take this refund by reducing the principal owed under the Note or by making a direct payment to Borrower. If a refund reduces principal, the reduction will be treated as a partial prepayment without any prepayment charge (whether or not a prepayment charge is provided for under the Note). Borrower's acceptance of any such refund made by direct payment to Borrower will constitute a waiver of any right of action Borrower might have arising out of such overcharge.

15. Notices. All notices given by Borrower or Lender in connection with this Security Instrument must be in writing. Any notice to Borrower in connection with this Security Instrument shall be deemed to have been given to Borrower when mailed by first class mail or when actually delivered to Borrower's notice address if sent by other means. Notice to any one Borrower shall constitute notice to all Borrowers unless Applicable Law expressly requires otherwise. The notice address shall be the Property Address unless Borrower has designated a substitute notice address by notice to Lender. Borrower shall promptly notify Lender of Borrower's change of address. If Lender specifies a procedure for reporting Borrower's change of address, then Borrower shall only report a change of address through that specified procedure. There may be only one designated notice address under this Security Instrument at any one time. Any notice to Lender shall be given by delivering it or by mailing it by first class mail to Lender's address stated herein unless Lender has designated another address by notice to Borrower. Any notice in connection with this Security Instrument shall not be deemed to have been given to Lender until actually received by Lender. If any notice required by this Security Instrument is also required under Applicable Law, the Applicable Law requirement will satisfy the corresponding requirement under this Security Instrument.

16. Governing Law; Severability; Rules of Construction. This Security Instrument shall be governed by federal law and the law of the jurisdiction in which the Property is located. All rights and obligations contained in this Security Instrument are subject to any requirements and limitations of Applicable Law. Applicable Law might explicitly or implicitly allow the parties to agree by contract or it might be silent, but such silence shall not be construed as a prohibition against agreement by contract. In the event that any provision or clause of this Security Instrument or the Note conflicts with Applicable Law, such conflict shall not affect other provisions of this Security Instrument or the Note which can be given effect without the conflicting provision.

As used in this Security Instrument: (a) words of the masculine gender shall mean and include corresponding neuter words or words of the feminine gender; (b) words in the singular shall mean and include the plural and vice versa; and (c) the word "may" gives sole discretion without any obligation to take any action.

17. Borrower's Copy. Borrower shall be given one copy of the Note and of this Security Instrument.

18. Transfer of the Property or a Beneficial Interest in Borrower. As used in this Section 18, "Interest in the Property" means any legal or beneficial interest in the Property, including, but not limited to, those beneficial interests transferred in a bond for deed, contract for deed, installment sales contract or escrow agreement, the intent of which is the transfer of title by Borrower at a future date to a purchaser.

If all or any part of the Property or any Interest in the Property is sold or transferred (or if Borrower is not a natural person and a beneficial interest in Borrower is sold or transferred) without Lender's prior written consent, Lender may require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by Lender if such exercise is prohibited by Applicable Law.

If Lender exercises this option, Lender shall give Borrower notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is given in accordance with Section 15 within which Borrower must pay all sums secured by this Security Instrument. If Borrower fails to pay these sums prior to the expiration of this period, Lender may invoke any remedies permitted by this Security Instrument without further notice or demand on Borrower.

19. Borrower's Right to Reinstate After Acceleration. If Borrower meets certain conditions, Borrower shall have the right to have enforcement of this Security Instrument discontinued at any time prior to the earliest of: (a) five days before sale of the Property pursuant to any power of sale contained in this Security Instrument; (b) such other period as Applicable Law might specify for the termination of Borrower's right to reinstate; or (c) entry of a judgment enforcing this Security Instrument. Those conditions are that Borrower: (a) pays Lender all sums which then would be due under this Security Instrument and the Note as if no acceleration had occurred; (b) cures any default of any other covenants or agreements; (c) pays all expenses incurred

Initials: MFO

my
2001

Appendix 4

Ads by Google

Law Attorney

Civil Code

Civil Laws

Labor Laws

onecle**COURT OPINIONS**

US Supreme Court

US Tax Court

Board of Patent Appeals

STATE LAWS

Alabama

Arizona

California

Florida

Georgia

Illinois

Indiana

Massachusetts

Michigan

Nevada

New Jersey

New York

North Carolina

Oregon

Pennsylvania

Texas

Virginia

Washington

US CODE

Copyrights

Crimes

Labor

Patents

Shipping

US CONSTITUTION

Preamble

California Civil Code Section 1542[Legal Research Home](#) > [California Lawyer](#) > [Civil Code](#) > California Civil Code Section 1542**Sponsored Links**

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[Law.JustAnswer.com](#)

Restraining Order?
Domestic Violence Attorney in L.A.
Only \$100/hour!
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Learn more about
Panasonic's enhanced
solutions for networking
and communications.

Panasonic

A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor.

Section: [Previous](#) [1541](#) [1542](#) [1542.1](#) [1543](#) [Next](#)*Last modified: March 8, 2010*

Learn more about
Panasonic's enhanced
solutions for networking &
communications.

Panasonic

Appendix 5

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That is not lawful which is:

1. Contrary to an express provision of law;
2. Contrary to the policy of express law, though not expressly prohibited; or,
3. Otherwise contrary to good morals.

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 CONTRACTS
 [1667. - 1670.7.]

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All contracts which have for their object, directly or indirectly, to exempt any one from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law.

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All contracts for the forfeiture of property subject to a lien, in satisfaction of the obligation secured thereby, and all contracts in restraint of the right of redemption from a lien, are void.

Section: [Previous](#) [2888](#) [2889](#) [2890](#) [2891](#) [2892](#) [Next](#)*Last modified: March 8, 2010*

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Art. III - Judicial

Art. IV - States' Relations

Art. V - Mode of Amendment

Art. VI - Prior Debts

Art VII - Ratification

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(a) (1) A mortgagee, trustee, beneficiary, or authorized agent may not file a notice of default pursuant to Section 2924 until 30 days after initial contact is made as required by paragraph (2) or 30 days after satisfying the due diligence requirements as described in subdivision (g).

(2) A mortgagee, beneficiary, or authorized agent shall contact the borrower in person or by telephone in order to assess the borrower's financial situation and explore options for the borrower to avoid foreclosure. During the initial contact, the mortgagee, beneficiary, or authorized agent shall advise the borrower that he or she has the right to request a subsequent meeting and, if requested, the mortgagee, beneficiary, or authorized agent shall schedule the meeting to occur within 14 days. The assessment of the borrower's financial situation and discussion of options may occur during the first contact, or at the subsequent meeting scheduled for that purpose. In either case, the borrower shall be provided the toll-free telephone number made available by the United States Department of Housing and Urban Development (HUD) to find a HUD-certified housing counseling agency. Any meeting may occur telephonically.

(b) A notice of default filed pursuant to Section 2924 shall include a declaration that the mortgagee, beneficiary, or authorized agent has contacted the borrower, has tried with due diligence to contact the borrower as required by this section, or that no contact was required pursuant to subdivision (h).

(c) If a mortgagee, trustee, beneficiary, or authorized agent had already filed the notice of default prior to the enactment of this section and did not subsequently file a notice of rescission, then the mortgagee, trustee, beneficiary, or authorized agent shall, as part of the notice of sale filed pursuant to Section 2924f, include a declaration that either:

(1) States that the borrower was contacted to assess the borrower's financial situation and to explore options for the borrower to avoid foreclosure.

(2) Lists the efforts made, if any, to contact the borrower in the event no contact was made.

(d) A mortgagee's, beneficiary's, or authorized agent's loss mitigation personnel may participate by telephone during any contact required by this section.

(e) For purposes of this section, a "borrower" shall include a mortgagor or trustor.

(f) A borrower may designate, with consent given in writing, a HUD-certified housing counseling agency, attorney, or other advisor to discuss with the mortgagee, beneficiary, or authorized agent, on the borrower's behalf, the borrower's financial situation and options for the borrower to avoid foreclosure. That contact made at the direction of the borrower shall satisfy the contact requirements of paragraph (2) of subdivision (a). Any loan modification or workout plan offered at the meeting by the mortgagee, beneficiary, or authorized agent is subject to approval by the borrower.

(g) A notice of default may be filed pursuant to Section 2924 when a mortgagee, beneficiary, or authorized agent has not contacted a borrower as required by paragraph (2) of subdivision (a) provided that the failure to contact the borrower occurred despite the due diligence of the mortgagee, beneficiary, or authorized agent. For purposes of this section, "due diligence" shall require and mean all of the following:

(1) A mortgagee, beneficiary, or authorized agent shall first attempt to contact a borrower by sending a first-class letter that

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- Art. I - Legislative includes the toll-free telephone number made available by HUD to find a HUD-certified housing counseling agency.
- Art. II - Executive (2) (A) After the letter has been sent, the mortgagee, beneficiary, or authorized agent shall attempt to contact the borrower by telephone at least three times at different hours and on different days. Telephone calls shall be made to the primary telephone number on file.
- Art. III - Judicial (B) A mortgagee, beneficiary, or authorized agent may attempt to contact a borrower using an automated system to dial borrowers, provided that, if the telephone call is answered, the call is connected to a live representative of the mortgagee, beneficiary, or authorized agent.
- Art. IV - States' Relations (C) A mortgagee, beneficiary, or authorized agent satisfies the telephone contact requirements of this paragraph if it determines, after attempting contact pursuant to this paragraph, that the borrower's primary telephone number and secondary telephone number or numbers on file, if any, have been disconnected.
- Art. V - Mode of Amendment (3) If the borrower does not respond within two weeks after the telephone call requirements of paragraph (2) have been satisfied, the mortgagee, beneficiary, or authorized agent shall then send a certified letter, with return receipt requested.
- Art. VI - Prior Debts (4) The mortgagee, beneficiary, or authorized agent shall provide a means for the borrower to contact it in a timely manner, including a toll-free telephone number that will provide access to a live representative during business hours.
- Art. VII - Ratification (5) The mortgagee, beneficiary, or authorized agent has posted a prominent link on the homepage of its Internet Web site, if any, to the following information:
- (A) Options that may be available to borrowers who are unable to afford their mortgage payments and who wish to avoid foreclosure, and instructions to borrowers advising them on steps to take to explore those options.
- (B) A list of financial documents borrowers should collect and be prepared to present to the mortgagee, beneficiary, or authorized agent when discussing options for avoiding foreclosure.
- (C) A toll-free telephone number for borrowers who wish to discuss options for avoiding foreclosure with their mortgagee, beneficiary, or authorized agent.
- (D) The toll-free telephone number made available by HUD to find a HUD-certified housing counseling agency.
- (h) Subdivisions (a), (c), and (g) shall not apply if any of the following occurs:
- (1) The borrower has surrendered the property as evidenced by either a letter confirming the surrender or delivery of the keys to the property to the mortgagee, trustee, beneficiary, or authorized agent.
- (2) The borrower has contracted with an organization, person, or entity whose primary business is advising people who have decided to leave their homes on how to extend the foreclosure process and avoid their contractual obligations to mortgagees or beneficiaries.
- (3) A case has been filed by the borrower under Chapter 7, 11, 12, or 13 of Title 11 of the United States Code and the bankruptcy court has not entered an order closing or dismissing the bankruptcy case, or granting relief from a stay of foreclosure.
- (i) This section shall apply only to mortgages or deeds of trust recorded from January 1, 2003, to December 31, 2007, inclusive, that are secured by owner-occupied residential real property containing no more than four dwelling units. For purposes of this subdivision, "owner-occupied" means that the residence is the principal residence of the borrower as indicated to the lender in loan documents.
- (j) This section shall remain in effect only until January 1, 2013, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2013, deletes or extends that date.

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[19.86.023](#) << 19.86.030 >> [19.86.040](#)

RCW 19.86.030

Contracts, combinations, conspiracies in restraint of trade declared unlawful.

Every contract, combination, in the form of trust or otherwise, or conspiracy in restraint of trade or commerce is hereby declared unlawful.

[1961 c 216 § 3.]

Notes:

Monopolies and trusts prohibited: State Constitution Art. 12 § 22.



Appendix 11

RCW 61.24.031

Notice of default under RCW 61.24.030(8) — Beneficiary's duties — Borrower's options. (Expires December 31, 2012.)

(1)(a) A trustee, beneficiary, or authorized agent may not issue a notice of default under RCW 61.24.030(8) until thirty days after initial contact with the borrower is made as required under (b) of this subsection or thirty days after satisfying the due diligence requirements as described in subsection (5) of this section.

(b) A beneficiary or authorized agent shall contact the borrower by letter and by telephone in order to assess the borrower's financial ability to pay the debt secured by the deed of trust and explore options for the borrower to avoid foreclosure. The letter required under this subsection must be mailed in accordance with subsection (5)(a) of this section and must include the information described in subsection (5)(a) and (e)(i) through (iv) of this section.

(c) During the initial contact, the beneficiary or authorized agent shall advise the borrower that he or she has the right to request a subsequent meeting and, if requested, the beneficiary or authorized agent shall schedule the meeting to occur within fourteen days of the request. The assessment of the borrower's financial ability to repay the debt and a discussion of options may occur during the initial contact or at a subsequent meeting scheduled for that purpose. At the initial contact, the borrower must be provided the toll-free telephone number made available by the department to find a department-certified housing counseling agency and the toll-free numbers for the department of financial institutions and the statewide civil legal aid hotline for possible assistance and referrals.

(d) Any meeting under this section may occur telephonically.

(2) A notice of default issued under RCW 61.24.030(8) must include a declaration, as provided in subsection (9) of this section, from the beneficiary or authorized agent that it has contacted the borrower as provided in subsection (1)(b) of this section, it has tried with due diligence to contact the borrower under subsection (5) of this section, or the borrower has surrendered the property to the trustee, beneficiary, or authorized agent. Unless the trustee has violated his or her duty under RCW 61.24.010(4), the trustee is entitled to rely on the declaration as evidence that the requirements of this section have been satisfied, and the trustee is not liable for the beneficiary's or its authorized agent's failure to comply with the requirements of this section.

(3) A beneficiary's or authorized agent's loss mitigation personnel may participate by telephone during any contact required under this section.

(4) Within fourteen days after the initial contact under subsection (1) of this section, if a borrower has designated a department-certified housing counseling agency, attorney, or other advisor to discuss with the beneficiary or authorized agent, on the borrower's behalf, options for the borrower to avoid foreclosure, the borrower shall inform the beneficiary or authorized agent and provide the contact information. The beneficiary or authorized agent shall contact the designated representative for the borrower for the discussion within fourteen days after the representative is designated by the borrower. Any deed of trust modification or workout plan offered at the meeting with the borrower's designated representative by the beneficiary or authorized agent is subject to approval by the borrower.

(5) A notice of default may be issued under RCW 61.24.030(8) if a beneficiary or authorized agent has not contacted a borrower as required under subsection (1)(b) of this section and the failure to contact the borrower occurred despite the due diligence of the

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beneficiary or authorized agent. Due diligence requires the following:

(a) A beneficiary or authorized agent shall first attempt to contact a borrower by sending a first-class letter to the address in the beneficiary's records for sending account statements to the borrower and to the address of the property encumbered by the deed of trust. The letter must include the toll-free telephone number made available by the department to find a department-certified housing counseling agency, and the following information:

"You may contact the Department of Financial Institutions, the Washington State Bar Association, or the statewide civil legal aid hotline for possible assistance or referrals."

(b)(i) After the letter has been sent, the beneficiary or authorized agent shall attempt to contact the borrower by telephone at least three times at different hours and on different days. Telephone calls must be made to the primary and secondary telephone numbers on file with the beneficiary or authorized agent.

(ii) A beneficiary or authorized agent may attempt to contact a borrower using an automated system to dial borrowers if the telephone call, when answered, is connected to a live representative of the beneficiary or authorized agent.

(iii) A beneficiary or authorized agent satisfies the telephone contact requirements of this subsection (5)(b) if the beneficiary or authorized agent determines, after attempting contact under this subsection (5)(b), that the borrower's primary telephone number and secondary telephone number or numbers on file, if any, have been disconnected or are not good contact numbers for the borrower.

(c) If the borrower does not respond within fourteen days after the telephone call requirements of (b) of this subsection have been satisfied, the beneficiary or authorized agent shall send a certified letter, with return receipt requested, to the borrower at the address in the beneficiary's records for sending account statements to the borrower and to the address of the property encumbered by the deed of trust. The letter must include the information described in (e)(i) through (iv) of this subsection.

(d) The beneficiary or authorized agent shall provide a means for the borrower to contact the beneficiary or authorized agent in a timely manner, including a toll-free telephone number or charge-free equivalent that will provide access to a live representative during business hours.

(e) The beneficiary or authorized agent shall post a link on the home page of the beneficiary's or authorized agent's internet web site, if any, to the following information:

(i) Options that may be available to borrowers who are unable to afford their mortgage payments and who wish to avoid foreclosure, and instructions to borrowers advising them on steps to take to explore those options;

(ii) A list of financial documents borrowers should collect and be prepared to present to the beneficiary or authorized agent when discussing options for avoiding foreclosure;

(iii) A toll-free telephone number or charge-free equivalent for borrowers who wish to discuss options for avoiding foreclosure with their beneficiary or authorized agent; and

(iv) The toll-free telephone number or charge-free equivalent made available by the department to find a department-certified housing counseling agency.

(6) Subsections (1) and (5) of this section do not apply if any of the following occurs:

(a) The borrower has surrendered the property as evidenced by either a letter confirming the surrender or delivery of the keys to the property to the trustee, beneficiary, or authorized agent; or

(b) The borrower has filed for bankruptcy, and the bankruptcy stay remains in place, or the borrower has filed for bankruptcy and the bankruptcy court has granted relief from the bankruptcy stay allowing enforcement of the deed of trust.

(7)(a) This section applies only to deeds of trust made from January 1, 2003, to December 31, 2007, inclusive, that are recorded against owner-occupied residential real property. This section does not apply to deeds of trust: (i) Securing a commercial loan; (ii) securing obligations of a grantor who is not the borrower or a guarantor; or (iii) securing a purchaser's

obligations under a seller-financed sale.

(b) This section does not apply to association beneficiaries subject to chapter 64.32, 64.34, or 64.38 RCW.

(8) As used in this section:

(a) "Department" means the United States department of housing and urban development.

(b) "Seller-financed sale" means a residential real property transaction where the seller finances all or part of the purchase price, and that financed amount is secured by a deed of trust against the subject residential real property.

(9) The form of declaration to be provided by the beneficiary or authorized agent as required under subsection (2) of this section must be in substantially the following form:

"FORECLOSURE LOSS MITIGATION FORM

Please select applicable option(s) below.

The undersigned beneficiary or authorized agent for the beneficiary hereby represents and declares under the penalty of perjury that [check the applicable box and fill in any blanks so that the trustee can insert, on the beneficiary's behalf, the applicable declaration in the notice of default required under chapter 61.24 RCW]:

(1) The beneficiary or beneficiary's authorized agent has contacted the borrower under, and has complied with, RCW 61.24.031 (contact provision to "assess the borrower's financial ability to pay the debt secured by the deed of trust and explore options for the borrower to avoid foreclosure").

(2) The beneficiary or beneficiary's authorized agent has exercised due diligence to contact the borrower as required in RCW 61.24.031(5) and, after waiting fourteen days after the requirements in RCW 61.24.031 were satisfied, the beneficiary or the beneficiary's authorized agent sent to the borrower(s), by certified mail, return receipt requested, the letter required under RCW 61.24.031.

(3) The borrower has surrendered the secured property as evidenced by either a letter confirming the surrender or by delivery of the keys to the secured property to the beneficiary, the beneficiary's authorized agent or to the trustee.

(4) Under RCW 61.24.031, the beneficiary or the beneficiary's authorized agent has verified information that, on or before the date of this declaration, the borrower(s) has filed for bankruptcy, and the bankruptcy stay remains in place, or the borrower has filed for bankruptcy and the bankruptcy court has granted relief from the bankruptcy stay allowing the enforcement of the deed of trust."

[2009 c 292 § 2.]

Notes:

Expiration date – 2009 c 292 § 2: "Section 2 of this act expires December 31, 2012." [2009 c 292 § 13.]

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RCW 61.34.040

Application of consumer protection act — Remedies are cumulative.

(1) In addition to the criminal penalties provided in RCW [61.34.030](#), the legislature finds that the practices covered by this chapter are matters vitally affecting the public interest for the purpose of applying chapter [19.86](#) RCW. A violation of this chapter is not reasonable in relation to the development and preservation of business and is an unfair method of competition for the purpose of applying chapter [19.86](#) RCW.

(2) In a private right of action under chapter [19.86](#) RCW for a violation of this chapter, the court may double or triple the award of damages pursuant to RCW [19.86.090](#), subject to the statutory limit. If, however, the court determines that the defendant acted in bad faith, the limit for doubling or tripling the award of damages may be increased, but shall not exceed one hundred thousand dollars. Any claim for damages brought under this chapter must be commenced within four years after the date of the alleged violation.

(3) The remedies provided in this chapter are cumulative and do not restrict any remedy that is otherwise available. The provisions of this chapter are not exclusive and are in addition to any other requirements, rights, remedies, and penalties provided by law. An action under this chapter shall not affect the rights in the distressed home held by a distressed home purchaser for value under this chapter or other applicable law.

[2008 c 278 § 11; 1988 c 33 § 3.]

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RCWs > Title 61 > Chapter 61.24 > Section 61.24.030

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RCW 61.24.030 Requisites to trustee's sale.

It shall be requisite to a trustee's sale:

- (1) That the deed of trust contains a power of sale;
- (2) That the deed of trust contains a statement that the real property conveyed is not used principally for agricultural purposes; provided, if the statement is false on the date the deed of trust was granted or amended to include that statement, and false on the date of the trustee's sale, then the deed of trust must be foreclosed judicially. Real property is used for agricultural purposes if it is used in an operation that produces crops, livestock, or aquatic goods;
- (3) That a default has occurred in the obligation secured or a covenant of the grantor, which by the terms of the deed of trust makes operative the power to sell;
- (4) That no action commenced by the beneficiary of the deed of trust is now pending to seek satisfaction of an obligation secured by the deed of trust in any court by reason of the grantor's default on the obligation secured: PROVIDED, That (a) the seeking of the appointment of a receiver shall not constitute an action for purposes of this chapter; and (b) if a receiver is appointed, the grantor shall be entitled to any rents or profits derived from property subject to a homestead as defined in RCW 6.13.010. If the deed of trust was granted to secure a commercial loan, this subsection shall not apply to actions brought to enforce any other lien or security interest granted to secure the obligation secured by the deed of trust being foreclosed;
- (5) That the deed of trust has been recorded in each county in which the land or some part thereof is situated;
- (6) 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;
- (7)(a) That, for residential real property, before the notice of trustee's sale is recorded, transmitted, or served, the trustee shall have proof that the beneficiary is the owner of any promissory note or other obligation secured by the deed of trust. A declaration by the beneficiary made under the penalty of perjury stating that the beneficiary is the actual holder of the promissory note or other obligation secured by the deed of trust shall be sufficient proof as required under this subsection.
- (b) Unless the trustee has violated his or her duty under RCW 61.24.010(4), the trustee is entitled to rely on the beneficiary's declaration as evidence of proof required under this subsection.
- (c) This subsection (7) does not apply to association beneficiaries subject to chapter 64.32, 64.34, or 64.38 RCW; and
- (8) That at least thirty days before notice of sale shall be recorded, transmitted or served, written notice of default shall be transmitted by the beneficiary or trustee to the borrower and grantor at their last known addresses by both first-class and either registered or certified mail, return receipt requested, and the beneficiary or trustee shall cause to be posted in a conspicuous place on the premises, a copy of the notice, or personally served on the borrower and grantor. This notice shall contain the following information:

- (a) A description of the property which is then subject to the deed of trust;
- (b) A statement identifying each county in which the deed of trust is recorded and the document number given to the deed of trust upon recording by each county auditor or recording officer;
- (c) A statement that the beneficiary has declared the borrower or grantor to be in default, and a concise statement of the default alleged;
- (d) An itemized account of the amount or amounts in arrears if the default alleged is failure to make payments;
- (e) An itemized account of all other specific charges, costs, or fees that the borrower, grantor, or any guarantor is or may be obliged to pay to reinstate the deed of trust before the recording of the notice of sale;
- (f) A statement showing the total of (d) and (e) of this subsection, designated clearly and conspicuously as the amount necessary to reinstate the note and deed of trust before the recording of the notice of sale;
- (g) A statement that failure to cure the alleged default within thirty days of the date of mailing of the notice, or if personally served, within thirty days of the date of personal service thereof, may lead to recordation, transmittal, and publication of a notice of sale, and that the property described in (a) of this subsection may be sold at public auction at a date no less than one hundred twenty days in the future;
- (h) A statement that the effect of the recordation, transmittal, and publication of a notice of sale will be to (i) increase the costs and fees and (ii) publicize the default and advertise the grantor's property for sale;
- (i) A statement that the effect of the sale of the grantor's property by the trustee will be to deprive the grantor of all their interest in the property described in (a) of this subsection;
- (j) A statement that the borrower, grantor, and any guarantor has recourse to the courts pursuant to RCW 61.24.130 to contest the alleged default on any proper ground;
- (k) In the event the property secured by the deed of trust is owner-occupied residential real property, a statement, prominently set out at the beginning of the notice, which shall state as follows:

"You should take care to protect your interest in your home. This notice of default (your failure to pay) is the first step in a process that could result in you losing your home. You should carefully review your options. For example:

Can you pay and stop the foreclosure process?

Do you dispute the failure to pay?

Can you sell your property to preserve your equity?

Are you able to refinance this loan or obligation with a new loan or obligation from another lender with payments, terms, and fees that are more affordable?

Do you qualify for any government or private homeowner assistance programs?

Do you know if filing for bankruptcy is an option? What are the pros and cons of doing so?

Do not ignore this notice; because if you do nothing, you could lose your home at a foreclosure sale. (No foreclosure sale can be held any sooner than ninety days after a notice of sale is issued and a notice of sale cannot be issued until thirty days after this notice.) Also, if you do nothing to pay what you owe, be careful of people who claim they can help you. There are many individuals and businesses that watch for the notices of sale in order to unfairly profit as a result of borrowers' distress.

You may feel you need help understanding what to do. There are a number of professional resources available, including home loan counselors and attorneys, who may assist you. Many legal services are lower-cost or even free, depending on your ability to pay. If you desire legal help in understanding your options or handling this default, you may obtain

a referral (at no charge) by contacting the county bar association in the county where your home is located. These legal referral services also provide information about lower-cost or free legal services for those who qualify. You may contact the Department of Financial Institutions or the statewide civil legal aid hotline for possible assistance or referrals; and

(i) In the event the property secured by the deed of trust is residential real property, the name and address of the owner of any promissory notes or other obligations secured by the deed of trust and the name, address, and telephone number of a party acting as a servicer of the obligations secured by the deed of trust."

[2009 c 292 § 8. Prior: 2008 c 153 § 2; 2008 c 108 § 22; 1998 c 295 § 4; 1990 c 111 § 1; 1987 c 352 § 2; 1985 c 193 § 3; 1975 1st ex.s. c 129 § 3; 1965 c 74 § 3.]

Notes:

Findings – 2008 c 108: See RCW 19.144.005.

Application – 1985 c 193: See note following RCW 61.24.020.



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[RCWs](#) > [Title 18](#) > [Chapter 18.85](#) > [Section 18.85.230](#)

[18.85.227](#) << [18.85.230](#) >> [18.85.231](#)

RCW 18.85.230

Disciplinary action — Grounds. (*Effective until July 1, 2010.*)

In addition to the unprofessional conduct described in RCW [18.235.130](#), the director may take disciplinary action against any person engaged in the business or acting in the capacity of a real estate broker, associate real estate broker, or real estate salesperson, regardless of whether the transaction was for his or her own account or in his or her capacity as broker, associate real estate broker, or real estate salesperson, and may impose any of the sanctions specified in RCW [18.235.110](#) for any holder or applicant who is guilty of:

(1) Violating any of the provisions of this chapter or any lawful rules or regulations made by the director pursuant thereto or violating a provision of chapter [64.36](#), [19.105](#), or [58.19](#) RCW or RCW [18.86.030](#) or the rules adopted under those chapters or section;

(2) Making, printing, publishing, distributing, or causing, authorizing, or knowingly permitting the making, printing, publication or distribution of false statements, descriptions or promises of such character as to reasonably induce any person to act thereon, if the statements, descriptions, or promises purport to be made or to be performed by either the licensee or his or her principal and the licensee then knew or, by the exercise of reasonable care and inquiry, could have known, of the falsity of the statements, descriptions or promises;

(3) Knowingly committing, or being a party to, any material fraud, misrepresentation, concealment, conspiracy, collusion, trick, scheme, or device whereby any other person lawfully relies upon the word, representation or conduct of the licensee;

(4) Accepting the services of, or continuing in a representative capacity, any associate broker or salesperson who has not been granted a license, or after his or her license has been revoked or during a suspension thereof;

(5) Conversion of any money, contract, deed, note, mortgage, or abstract or other evidence of title, to his or her own use or to the use of his or her principal or of any other person, when delivered to him or her in trust or on condition, in violation of the trust or before the happening of the condition; and failure to return any money or contract, deed, note, mortgage, abstract, or other evidence of title within thirty days after the owner thereof is entitled thereto, and makes demand therefor, shall be prima facie evidence of such conversion;

(6) Failing, upon demand, to disclose any information within his or her knowledge to, or to produce any document, book or record in his or her possession for inspection of the director or his or her authorized representatives acting by authority of law;

(7) Continuing to sell any real estate, or operating according to a plan of selling, whereby the interests of the public are endangered, after the director has, by order in writing, stated objections thereto;

(8) Advertising in any manner without affixing the broker's name as licensed, and in the case of a salesperson or associate broker, without affixing the name of the broker as licensed for whom or under whom the salesperson or associate broker operates, to the advertisement; except, that a real estate broker, associate real estate broker, or real estate salesperson advertising their personally owned real property must only disclose that they hold a real estate license;

(9) Accepting other than cash or its equivalent as earnest money unless that fact is communicated to the owner prior to his or her acceptance of the offer to purchase, and such

fact is shown in the earnest money receipt;

(10) Charging or accepting compensation from more than one party in any one transaction without first making full disclosure in writing of all the facts to all the parties interested in the transaction;

(11) Accepting, taking, or charging any undisclosed commission, rebate, or direct profit on expenditures made for the principal;

(12) Accepting employment or compensation for appraisal of real property contingent upon reporting a predetermined value;

(13) Issuing an appraisal report on any real property in which the broker, associate broker, or salesperson has an interest unless his or her interest is clearly stated in the appraisal report;

(14) Misrepresentation of his or her membership in any state or national real estate association;

(15) Discrimination against any person in hiring or in sales activity, on the basis of any of the provisions of any state or federal antidiscrimination law;

(16) Failing to keep an escrow or trustee account of funds deposited with him or her relating to a real estate transaction, for a period of three years, showing to whom paid, and such other pertinent information as the director may require, such records to be available to the director, or his or her representatives, on demand, or upon written notice given to the bank;

(17) Failing to preserve for three years following its consummation records relating to any real estate transaction;

(18) Failing to furnish a copy of any listing, sale, lease or other contract relevant to a real estate transaction to all signatories thereof at the time of execution;

(19) Acceptance by a branch manager, associate broker, or salesperson of a commission or any valuable consideration for the performance of any acts specified in this chapter, from any person, except the licensed real estate broker with whom he or she is licensed;

(20) To direct any transaction involving his or her principal, to any lending institution for financing or to any escrow company, in expectation of receiving a kickback or rebate therefrom, without first disclosing such expectation to his or her principal;

(21) Buying, selling, or leasing directly, or through a third party, any interest in real property without disclosing in writing that he or she holds a real estate license;

(22) In the case of a broker licensee, failing to exercise adequate supervision over the activities of his or her licensed associate brokers and salespersons within the scope of this chapter;

(23) Any conduct in a real estate transaction which demonstrates bad faith, dishonesty, untrustworthiness, or incompetency;

(24) Acting as a vehicle dealer, as defined in RCW 46.70.011, without having a license to do so; or

(25) Failing to ensure that the title is transferred under chapter 46.12 RCW when engaging in a transaction involving a mobile home as a broker, associate broker, or salesperson.

[2002 c 86 § 230; 1999 c 46 § 1; 1997 c 322 § 17; 1996 c 179 § 18; 1990 c 85 § 1; 1988 c 205 § 5. Prior: 1987 c 370 § 15; 1987 c 332 § 9; 1979 c 25 § 4; prior: 1977 ex.s. c 261 § 1; 1977 ex.s. c 204 § 1; 1972 ex.s. c 139 § 19; 1967 c 22 § 3; 1953 c 235 § 12; 1951 c 222 § 16; 1947 c 203 § 5; 1945 c 111 § 8; 1943 c 118 § 5; 1941 c 252 § 19; Rem. Supp. 1947 § 8340-42; prior: 1925 ex.s. c 129 § 13.]

Notes:

Effective dates -- 2002 c 86: See note following RCW 18.08.340.

Part headings not law -- Severability -- 2002 c 86: See RCW 18.235.902 and 18.235.903.

Effective date -- 1996 c 179: See RCW 18.86.902.

False advertising: Chapter 9.04 RCW.

Obstructing justice: Chapter 9A.72 RCW.



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[19.86.010](#) << [19.86.020](#) >> [19.86.023](#)

RCW 19.86.020

Unfair competition, practices, declared unlawful.

Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

[1961 c 216 § 2.]

Notes:

Hearing instrument dispensing, advertising, etc. -- Application: RCW [18.35.180](#).



Appendix 16



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[19.146.010](#) << [19.146.020](#) >> [19.146.0201](#)

RCW 19.146.020

Exemptions from chapter.

(1) The following are exempt from all provisions of this chapter:

(a) Any person doing business under the laws of the state of Washington or the United States, and any federally insured depository institution doing business under the laws of any other state, relating to commercial banks, bank holding companies, savings banks, trust companies, savings and loan associations, credit unions, insurance companies, or real estate investment trusts as defined in 26 U.S.C. Sec. 856 and the affiliates, subsidiaries, and service corporations thereof;

(b) Any person doing business under the consumer loan act is exempt from this chapter only for that business conducted under the authority and coverage of the consumer loan act;

(c) An attorney licensed to practice law in this state who is not principally engaged in the business of negotiating residential mortgage loans when such attorney renders services in the course of his or her practice as an attorney;

(d) Any person doing any act under order of any court, except for a person subject to an injunction to comply with any provision of this chapter or any order of the director issued under this chapter;

(e) A real estate broker or salesperson licensed by the state who obtains financing for a real estate transaction involving a bona fide sale of real estate in the performance of his or her duties as a real estate broker and who receives only the customary real estate broker's or salesperson's commission in connection with the transaction;

(f) The United States of America, the state of Washington, any other state, and any Washington city, county, or other political subdivision, and any agency, division, or corporate instrumentality of any of the entities in this subsection (1)(f);

(g) A real estate broker who provides only information regarding rates, terms, and lenders in connection with a CLI system, who receives a fee for providing such information, who conforms to all rules of the director with respect to the providing of such service, and who discloses on a form approved by the director that to obtain a loan the borrower must deal directly with a mortgage broker or lender. However, a real estate broker shall not be exempt if he or she does any of the following:

(i) Holds himself or herself out as able to obtain a loan from a lender;

(ii) Accepts a loan application, or submits a loan application to a lender;

(iii) Accepts any deposit for third-party services or any loan fees from a borrower, whether such fees are paid before, upon, or after the closing of the loan;

(iv) Negotiates rates or terms with a lender on behalf of a borrower; or

(v) Provides the disclosure required by RCW [19.146.030\(1\)](#);

(h) Registered mortgage loan originators, or any individual required to be registered; and

(i) A manufactured or modular home retailer employee who performs purely administrative or clerical tasks and who receives only the customary salary or commission from the employer in connection with the transaction.

(2) Any person otherwise exempted from the licensing provisions of this chapter may voluntarily submit an application to the director for a mortgage broker's license. The director shall review such application and may grant or deny licenses to such applicants upon the same grounds and with the same fees as may be applicable to persons required to be licensed under this chapter.

(a) Upon receipt of a license under this subsection, the licensee is required to continue to maintain a valid license, is subject to all provisions of this chapter, and has no further right to claim exemption from the provisions of this chapter except as provided in (b) of this subsection.

(b) Any licensee under this subsection who would otherwise be exempted from the requirements of licensing by this section may apply to the director for exemption from licensing. The director shall adopt rules for reviewing such applications and shall grant exemptions from licensing to applications which are consistent with those rules and consistent with the other provisions of this chapter.

[2009 c 528 § 2; 2006 c 19 § 3; 1997 c 106 § 2; 1994 c 33 § 5; 1994 c 33 § 4; 1993 c 468 § 3; 1987 c 391 § 4.]

Notes:

Effective date -- License requirement -- Implementation -- 2009 c 528:
See notes following RCW [19.146.010](#).

Severability -- 1997 c 106: See note following RCW [19.146.010](#).

Adoption of rules -- Severability -- 1993 c 468: See notes following RCW [19.146.0201](#).

Effective dates -- 1993 c 468: See note following RCW [19.146.200](#).

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[19.146.110](#) << [19.146.200](#) >> [19.146.205](#)

RCW 19.146.200

Mortgage broker or loan originator — License required — Suit or action for collection of compensation — Display of license — Designated broker required.

(1) A person, unless specifically exempted from this chapter under RCW [19.146.020](#), may not engage in the business of a mortgage broker or loan originator without first obtaining and maintaining a license under this chapter.

(2) A person may not bring a suit or action for the collection of compensation in connection with a residential mortgage loan unless the plaintiff alleges and proves that he or she was a duly licensed mortgage broker, or exempt from the license requirement of this chapter, at the time of offering to perform or performing any such an act or service regulated by this chapter.

(3) A mortgage broker license must be prominently displayed in the mortgage broker's place of business.

(4) Every licensed mortgage broker must at all times have a designated broker responsible for all activities of the mortgage broker in conducting the business of a mortgage broker. A designated broker, principal, or owner who has supervisory authority over a mortgage broker is responsible for a licensee's, employee's, or independent contractor's violations of this chapter and its rules if:

(a) The designated broker, principal, or owner directs or instructs the conduct or, with knowledge of the specific conduct, approves or allows the conduct; or

(b) The designated broker, principal, or owner who has supervisory authority over the licensed mortgage broker knows or by the exercise of reasonable care and inquiry should have known of the conduct, at a time when its consequences can be avoided or mitigated and fails to take reasonable remedial action.

[2006 c 19 § 9; 1997 c 106 § 8; 1994 c 33 § 7; 1993 c 468 § 5.]

Notes:

Severability -- 1997 c 106: See note following RCW [19.146.010](#).

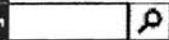
Effective dates -- 1993 c 468: "(1) Sections 2 through 4, 9, 13, and 21 through 23 of this act are necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and shall take effect immediately [May 17, 1993].

(2) Sections 6 through 8, 10, 18, and 19 of this act shall take effect September 1, 1993.

(3) Sections 1, 5, 11, 12, 14 through 17, and 20 of this act shall take effect October 31, 1993. However, the effective date of section 5 of this act may be delayed thirty days upon an order of the director of licensing under section 7(3) of this act." [1993 c 468 § 26.] The director of licensing did not delay the effective date.

Adoption of rules -- Severability -- 1993 c 468: See notes following RCW [19.146.0201](#).

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[19.146.0201](#) << [19.146.030](#) >> [19.146.040](#)

RCW 19.146.030

Written disclosure of fees and costs — Rules — Contents — Lock-in agreement terms — Excess fees limited.

(1) Within three business days following receipt of a loan application or any moneys from a borrower, a mortgage broker or loan originator on behalf of the mortgage broker shall provide to each borrower a full written disclosure containing an itemization and explanation of all fees and costs that the borrower is required to pay in connection with obtaining a residential mortgage loan, and specifying the fee or fees which inure to the benefit of the mortgage broker and other such disclosures as may be required by rule. A good faith estimate of a fee or cost shall be provided if the exact amount of the fee or cost is not determinable. This subsection shall not be construed to require disclosure of the distribution or breakdown of loan fees, discount, or points between the mortgage broker and any lender or investor.

(2) The written disclosure shall contain the following information:

(a) The annual percentage rate, finance charge, amount financed, total amount of all payments, number of payments, amount of each payment, amount of points or prepaid interest and the conditions and terms under which any loan terms may change between the time of disclosure and closing of the loan; and if a variable rate, the circumstances under which the rate may increase, any limitation on the increase, the effect of an increase, and an example of the payment terms resulting from an increase. Disclosure in compliance with the requirements of the truth-in-lending act, 15 U.S.C. Sec. 1601 and Regulation Z, 12 C.F.R. Sec. 226, as now or hereafter amended, shall be deemed to comply with the disclosure requirements of this subsection;

(b) The itemized costs of any credit report, appraisal, title report, title insurance policy, mortgage insurance, escrow fee, property tax, insurance, structural or pest inspection, and any other third-party provider's costs associated with the residential mortgage loan. Disclosure through good faith estimates of settlement services and special information booklets in compliance with the requirements of the real estate settlement procedures act, 12 U.S.C. Sec. 2601, and Regulation X, 24 C.F.R. Sec. 3500, as now or hereafter amended, shall be deemed to comply with the disclosure requirements of this subsection;

(c) If applicable, the cost, terms, duration, and conditions of a lock-in agreement and whether a lock-in agreement has been entered, and whether the lock-in agreement is guaranteed by the mortgage broker or lender, and if a lock-in agreement has not been entered, disclosure in a form acceptable to the director that the disclosed interest rate and terms are subject to change;

(d) A statement that if the borrower is unable to obtain a loan for any reason, the mortgage broker must, within five days of a written request by the borrower, give copies of any appraisal, title report, or credit report paid for by the borrower to the borrower, and transmit the appraisal, title report, or credit report to any other mortgage broker or lender to whom the borrower directs the documents to be sent;

(e) Whether and under what conditions any lock-in fees are refundable to the borrower; and

(f) A statement providing that moneys paid by the borrower to the mortgage broker for third-party provider services are held in a trust account and any moneys remaining after payment to third-party providers will be refunded.

(3) If subsequent to the written disclosure being provided under this section, a mortgage broker or loan originator enters into a lock-in agreement with a borrower or represents to the borrower that the borrower has entered into a lock-in agreement, then no less than three business days thereafter including Saturdays, the mortgage broker or loan originator shall deliver or send by first-class mail to the borrower a written confirmation of the terms of the lock-in agreement, which shall include a copy of the disclosure made under subsection (2)(c) of this section.

(4) A mortgage broker or loan originator on behalf of a mortgage broker shall not charge any fee that inures to the benefit of the mortgage broker if it exceeds the fee disclosed on the written disclosure pursuant to this section, unless (a) the need to charge the fee was not reasonably foreseeable at the time the written disclosure was provided and (b) the mortgage broker or loan originator on behalf of a mortgage broker has provided to the borrower, no less than three business days prior to the signing of the loan closing documents, a clear written explanation of the fee and the reason for charging a fee exceeding that which was previously disclosed. However, if the borrower's closing costs on the final settlement statement, excluding prepaid escrowed costs of ownership as defined by rule, does not exceed the total closing costs in the most recent good faith estimate, excluding prepaid escrowed costs of ownership as defined by rule, no other disclosures shall be required by this subsection.

[2006 c 19 § 5; 1997 c 106 § 4; 1994 c 33 § 18; 1993 c 468 § 12; 1987 c 391 § 5.]

Notes:

Severability -- 1997 c 106: See note following RCW [19.146.010](#).

Adoption of rules -- Severability -- 1993 c 468: See notes following RCW [19.146.0201](#).

Effective dates -- 1993 c 468: See note following RCW [19.146.200](#).

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[19.146.020](#) << [19.146.0201](#) >> [19.146.030](#)

RCW 19.146.0201

Loan originator, mortgage broker — Prohibitions — Requirements.

It is a violation of this chapter for a loan originator or mortgage broker required to be licensed under this chapter to:

- (1) Directly or indirectly employ any scheme, device, or artifice to defraud or mislead borrowers or lenders or to defraud any person;
- (2) Engage in any unfair or deceptive practice toward any person;
- (3) Obtain property by fraud or misrepresentation;
- (4) Solicit or enter into a contract with a borrower that provides in substance that the mortgage broker may earn a fee or commission through the mortgage broker's "best efforts" to obtain a loan even though no loan is actually obtained for the borrower;
- (5) Solicit, advertise, or enter into a contract for specific interest rates, points, or other financing terms unless the terms are actually available at the time of soliciting, advertising, or contracting from a person exempt from licensing under RCW [19.146.020\(1\)\(f\)](#) or a lender with whom the mortgage broker maintains a written correspondent or loan broker agreement under RCW [19.146.040](#);
- (6) Fail to make disclosures to loan applicants and noninstitutional investors as required by RCW [19.146.030](#) and any other applicable state or federal law;
- (7) Make, in any manner, any false or deceptive statement or representation with regard to the rates, points, or other financing terms or conditions for a residential mortgage loan or engage in bait and switch advertising;
- (8) Negligently make any false statement or knowingly and willfully make any omission of material fact in connection with any reports filed by a mortgage broker or in connection with any investigation conducted by the department;
- (9) Make any payment, directly or indirectly, to any appraiser of a property, for the purposes of influencing the independent judgment of the appraiser with respect to the value of the property;
- (10) Advertise any rate of interest without conspicuously disclosing the annual percentage rate implied by such rate of interest;
- (11) Fail to comply with any requirement of the truth-in-lending act, 15 U.S.C. Sec. 1601 and Regulation Z, 12 C.F.R. Sec. 226; the real estate settlement procedures act, 12 U.S.C. Sec. 2601 and Regulation X, 24 C.F.R. Sec. 3500; the equal credit opportunity act, 15 U.S.C. Sec. 1691 and Regulation B, Sec. 202.9, 202.11, and 202.12; Title V, Subtitle A of the financial modernization act of 1999 (known as the "Gramm-Leach-Bliley act"), 12 U.S.C. Secs. 6801-6809; the federal trade commission's privacy rules, 16 C.F.R. Parts 313-314, mandated by the Gramm-Leach-Bliley act; the home mortgage disclosure act, 12 U.S.C. Sec. 2801 et seq. and Regulation C, home mortgage disclosure; the federal trade commission act, 12 C.F.R. Part 203, 15 U.S.C. Sec. 45(a); the telemarketing and consumer fraud and abuse act, 15 U.S.C. Secs. 6101 to 6108; and the federal trade commission telephone sales rule, 16 C.F.R. Part 310, as these acts existed on January 1, 2007, or such subsequent date as may be provided by the department by rule, in any advertising of residential mortgage loans, or any other applicable mortgage broker or loan originator activities covered by the acts. The

department may adopt by rule requirements that mortgage brokers and loan originators comply with other applicable federal statutes and regulations in any advertising of residential mortgage loans, or any other mortgage broker or loan originator activity;

(12) Fail to pay third-party providers no later than thirty days after the recording of the loan closing documents or ninety days after completion of the third-party service, whichever comes first, unless otherwise agreed or unless the third-party service provider has been notified in writing that a bona fide dispute exists regarding the performance or quality of the third-party service;

(13) Collect, charge, attempt to collect or charge or use or propose any agreement purporting to collect or charge any fee prohibited by RCW 19.146.030 or 19.146.070;

(14)(a) Except when complying with (b) and (c) of this subsection, act as a loan originator in any transaction (i) in which the loan originator acts or has acted as a real estate broker or salesperson or (ii) in which another person doing business under the same licensed real estate broker acts or has acted as a real estate broker or salesperson;

(b) Prior to providing mortgage services to the borrower, a loan originator, in addition to other disclosures required by this chapter and other laws, shall provide to the borrower the following written disclosure:

THIS IS TO GIVE YOU NOTICE THAT I OR ONE OF MY ASSOCIATES HAVE/HAS ACTED AS A REAL ESTATE BROKER OR SALESPERSON REPRESENTING THE BUYER/SELLER IN THE SALE OF THIS PROPERTY TO YOU. I AM ALSO A LOAN ORIGINATOR, AND WOULD LIKE TO PROVIDE MORTGAGE SERVICES TO YOU IN CONNECTION WITH YOUR LOAN TO PURCHASE THE PROPERTY.

YOU ARE NOT REQUIRED TO USE ME AS A LOAN ORIGINATOR IN CONNECTION WITH THIS TRANSACTION. YOU ARE FREE TO COMPARISON SHOP WITH OTHER MORTGAGE BROKERS AND LENDERS, AND TO SELECT ANY MORTGAGE BROKER OR LENDER OF YOUR CHOOSING; and

(c) A real estate broker or salesperson licensed under chapter 18.85 RCW who also acts as a mortgage broker shall carry on such mortgage broker business activities and shall maintain such person's mortgage broker business records separate and apart from the real estate broker activities conducted pursuant to chapter 18.85 RCW. Such activities shall be deemed separate and apart even if they are conducted at an office location with a common entrance and mailing address, so long as each business is clearly identified by a sign visible to the public, each business is physically separated within the office facility, and no deception of the public as to the separate identities of the broker business firms results. This subsection (14)(c) shall not require a real estate broker or salesperson licensed under chapter 18.85 RCW who also acts as a mortgage broker to maintain a physical separation within the office facility for the conduct of its real estate and mortgage broker activities where the director determines that maintaining such physical separation would constitute an undue financial hardship upon the mortgage broker and is unnecessary for the protection of the public; or

(15) Fail to comply with any provision of RCW 19.146.030 through 19.146.080 or any rule adopted under those sections.

[2009 c 528 § 3; 2006 c 19 § 4; 1997 c 106 § 3; 1994 c 33 § 6; 1993 c 468 § 4.]

Notes:

Effective date -- License requirement -- Implementation -- 2009 c 528:
See notes following RCW 19.146.010.

Severability -- 1997 c 106: See note following RCW 19.146.010.

Adoption of rules -- 1993 c 468: "The director shall take steps and adopt rules necessary to implement the sections of this act by their effective dates." [1993 c 468 § 22.]

Severability -- 1993 c 468: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1993 c 468 § 23.]

Effective dates -- 1993 c 468: See note following RCW [19.146.200](#).

Appendix 20



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[19.146.080](#) << [19.146.085](#) >> [19.146.095](#)

RCW 19.146.085
Duties — Generally.

The activities of a mortgage broker affect the public interest, and require that all actions of mortgage brokers, designated brokers, loan originators, and other persons subject to this chapter be actuated by good faith, abstain from deception, and practice honesty and equity in all matters related to their profession. The duty of preserving the integrity of the mortgage broker business rests upon the mortgage broker, designated broker, loan originator, and other persons subject to this chapter.

[2008 c 108 § 20.]

Notes:

Findings -- 2008 c 108: See RCW [19.144.005](#).



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[19.146.085](#) << [19.146.095](#) >> [19.146.100](#)

RCW 19.146.095

Fiduciary duties.

(1) A mortgage broker has a fiduciary relationship with the borrower. For the purposes of this section, the fiduciary duty means that the mortgage broker has the following duties:

(a) A mortgage broker must act in the borrower's best interest and in the utmost good faith toward the borrower, and shall disclose any and all interests to the borrower including, but not limited to, interests that may lie with the lender that are used to facilitate a borrower's request. A mortgage broker shall not accept, provide, or charge any undisclosed compensation or realize any undisclosed remuneration that inures to the benefit of the mortgage broker on an expenditure made for the borrower;

(b) A mortgage broker must carry out all lawful instructions provided by the borrower;

(c) A mortgage broker must disclose to the borrower all material facts of which the mortgage broker has knowledge that might reasonably affect the borrower's rights, interests, or ability to receive the borrower's intended benefit from the residential mortgage loan;

(d) A mortgage broker must use reasonable care in performing duties; and

(e) A mortgage broker must provide an accounting to the borrower for all money and property received from the borrower.

(2) A mortgage broker may contract for or collect a fee for services rendered if the fee is disclosed to the borrower in advance of the provision of those services.

(3) The fiduciary duty in this section does not require a mortgage broker to offer or obtain access to loan products and services other than those that are available to the mortgage broker at the time of the transaction.

(4) The director must adopt rules to implement this section.

[2008 c 109 § 1.]

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[9A.60.020](#) << [9A.60.030](#) >> [9A.60.040](#)

RCW 9A.60.030

Obtaining a signature by deception or duress.

(1) A person is guilty of obtaining a signature by deception or duress if by deception or duress and with intent to defraud or deprive he causes another person to sign or execute a written instrument.

(2) Obtaining a signature by deception or duress is a class C felony.

[1975-'76 2nd ex.s. c 38 § 14; 1975 1st ex.s. c 260 § [9A.60.030](#).]

Notes:

Effective date -- Severability -- 1975-'76 2nd ex.s. c 38: See notes following RCW [9A.08.020](#).



Appendix 2

[Code of Federal Regulations]
 [Title 12, Volume 3, Parts 220 to 299]
 [Revised as of January 1, 2001]
 From the U.S. Government Printing Office via GPO Access
 [CITE: 12CFR226.23]

[Page 248-251]

TITLE 12--BANKS AND BANKING

CHAPTER II--FEDERAL RESERVE SYSTEM

PART 226--TRUTH IN LENDING (REGULATION Z)--Table of Contents

Subpart C--Closed-End Credit

Sec. 226.23 Right of rescission.

(a) Consumer's right to rescind. (1) In a credit transaction in which a security interest is or will be retained or acquired in a consumer's principal dwelling, each consumer whose ownership interest is or will be subject to the security interest shall have the right to rescind the transaction, except for transactions described in paragraph (f) of this section.\47\

\47\ For purposes of this section, the addition to an existing obligation of a security interest in a consumer's principal dwelling is a transaction. The right of rescission applies only to the addition of the security interest and not the existing obligation. The creditor shall deliver the notice required by paragraph (b) of this section but need not deliver new material disclosures. Delivery of the required notice shall begin the rescission period.

(2) To exercise the right to rescind, the consumer shall notify the creditor of the rescission by mail, telegram or other means of written communication. Notice is considered given when mailed, when filed for telegraphic transmission or, if sent by other means, when delivered to the creditor's designated place of business.

(3) The consumer may exercise the right to rescind until midnight of the third business day following consummation, delivery of the notice required by paragraph (b) of this section, or delivery of all material disclosures,\48\ whichever occurs last. If the required notice or material disclosures

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are not delivered, the right to rescind shall expire 3 years after

consummation, upon transfer of all of the consumer's interest in the property, or upon sale of the property, whichever occurs first. In the case of certain administrative proceedings, the rescission period shall be extended in accordance with section 125(f) of the Act.

\48\ The term ``material disclosures'' means the required disclosures of the annual percentage rate, the finance charge, the amount financed, the total payments, the payment schedule, and the disclosures and limitations referred to in Sec. 226.32 (c) and (d).

(4) When more than one consumer in a transaction has the right to rescind, the exercise of the right by one consumer shall be effective as to all consumers.

(b)(1) Notice of right to rescind. In a transaction subject to rescission, a creditor shall deliver 2 copies of the notice of the right to rescind to each consumer entitled to rescind. The notice shall be on a separate document that identifies the transaction and shall clearly and conspicuously disclose the following:

(i) The retention or acquisition of a security interest in the consumer's principal dwelling.

(ii) The consumer's right to rescind the transaction.

(iii) How to exercise the right to rescind, with a form for that purpose, designating the address of the creditor's place of business.

(iv) The effects of rescission, as described in paragraph (d) of this section.

(v) The date the rescission period expires.

(2) Proper form of notice. To satisfy the disclosure requirements of

paragraph (b)(1) of this section, the creditor shall provide the appropriate model form in Appendix H of this part or a substantially similar notice.

(c) Delay of creditor's performance. Unless a consumer waives the right of rescission under paragraph (e) of this section, no money shall

be disbursed other than in escrow, no services shall be performed and no

materials delivered until the rescission period has expired and the creditor is reasonably satisfied that the consumer has not rescinded.

(d) Effects of rescission. (1) When a consumer rescinds a transaction, the security interest giving rise to the right of rescission becomes void and the consumer shall not be liable for any amount, including any finance charge.

(2) Within 20 calendar days after receipt of a notice of rescission, the creditor shall return any money or property that has been given to

anyone in connection with the transaction and shall take any action necessary to reflect the termination of the security interest.

(3) If the creditor has delivered any money or property, the consumer may retain possession until the creditor has met its

obligation under paragraph (d)(2) of this section. When the creditor has complied with that paragraph, the consumer shall tender the money or property to the creditor or, where the latter would be impracticable or inequitable, tender its reasonable value. At the consumer's option, tender of property may be made at the location of the property or at the consumer's residence. Tender of money must be made at the creditor's designated place of business. If the creditor does not take possession

of the money or property within 20 calendar days after the consumer's tender, the consumer may keep it without further obligation.

(4) The procedures outlined in paragraphs (d) (2) and (3) of this section may be modified by court order.

(e) Consumer's waiver of right to rescind. (1) The consumer may modify or waive the right to rescind if the consumer determines that the extension of credit is needed to meet a bona fide personal financial emergency. To modify or waive the right, the consumer shall give the

creditor a dated written statement that describes the emergency, specifically modifies or waives the right to rescind, and bears the signature of all the consumers entitled to rescind. Printed forms for this purpose are prohibited, except as provided in paragraph (e)(2) of

this section.

(2) The need of the consumer to obtain funds immediately shall be regarded as a bona fide personal financial emergency provided that the dwelling securing the extension of credit is located in an area declared during June through September 1993, pursuant to 42 U.S.C. 5170, to be a major disaster area because of severe storms and flooding in the

Midwest.\48a\ In this instance,

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creditors may use printed forms for the consumer to waive the right to rescind. This exemption to paragraph (e)(1) of this section shall expire one year from the date an area was declared a major disaster.

 \48a\ A list of the affected areas will be maintained by the Board.

(3) The consumer's need to obtain funds immediately shall be regarded as a bona fide personal financial emergency provided that the dwelling securing the extension of credit is located in an area

declared during June through September 1994 to be a major disaster area, pursuant to 42 U.S.C. 5170, because of severe storms and flooding in the South.\48b\ In this instance, creditors may use printed forms for the consumer to waive the right to rescind. This exemption to paragraph (e)(1) of this section shall expire one year from the date an area was declared a major disaster.

\48b\ A list of the affected areas will be maintained and published by the Board. Such areas now include parts of Alabama, Florida, and Georgia.

(4) The consumer's need to obtain funds immediately shall be regarded as a bona fide personal financial emergency provided that the dwelling securing the extension of credit is located in an area declared during October 1994 to be a major disaster area, pursuant to 42 U.S.C. 5170, because of severe storms and flooding in Texas.\48c\ In this instance, creditors may use printed forms for the consumer to waive the right to rescind. This exemption to paragraph (e)(1) of this section shall expire one year from the date an area was declared a major disaster.

\48c\ A list of the affected areas will be maintained and published by the Board. Such areas now include the following counties in Texas:

Angelina, Austin, Bastrop, Brazos, Brazoria, Burleson, Chambers, Fayette, Fort Bend, Galveston, Grimes, Hardin, Harris, Houston, Jackson, Jasper, Jefferson, Lee, Liberty, Madison, Matagorda, Montgomery, Nacagdoches, Orange, Polk, San Augustine, San Jacinto, Shelby, Trinity, Victoria, Washington, Waller, Walker, and Wharton.

(f) Exempt transactions. The right to rescind does not apply to the following:

- (1) A residential mortgage transaction.
- (2) A refinancing or consolidation by the same creditor of an extension of credit already secured by the consumer's principal dwelling. The right of rescission shall apply, however, to the extent the new amount financed exceeds the unpaid principal balance, any earned unpaid finance charge on the existing debt, and amounts attributed solely to the costs of the refinancing or consolidation.
- (3) A transaction in which a state agency is a creditor.
- (4) An advance, other than an initial advance, in a series of advances or in a series of single-payment obligations that is treated as a single transaction under Sec. 226.17(c)(6), if the notice required by

paragraph (b) of this section and all material disclosures have been given to the consumer.

(5) A renewal of optional insurance premiums that is not considered a refinancing under Sec. 226.20(a)(5).

(g) Tolerances for accuracy--(1) One-half of 1 percent tolerance. Except as provided in paragraphs (g)(2) and (h)(2) of this section, the finance charge and other disclosures affected by the finance charge (such as the amount financed and the annual percentage rate) shall be considered accurate for purposes of this section if the disclosed finance charge:

(i) is understated by no more than $\frac{1}{2}$ of 1 percent of the face amount of the note or \$100, whichever is greater; or

(ii) is greater than the amount required to be disclosed.

(2) One percent tolerance. In a refinancing of a residential mortgage transaction with a new creditor (other than a transaction covered by Sec. 226.32), if there is no new advance and no consolidation of existing loans, the finance charge and other disclosures affected by the finance charge (such as the amount financed and the annual percentage rate) shall be considered accurate for purposes of this section if the disclosed finance charge:

(i) is understated by no more than 1 percent of the face amount of

the note or \$100, whichever is greater; or

(ii) is greater than the amount required to be disclosed.

(h) Special rules for foreclosures--(1) Right to rescind. After the initiation of foreclosure on the consumer's principal dwelling that secures the credit obligation, the consumer shall have the right to rescind the transaction if:

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(i) A mortgage broker fee that should have been included in the finance charge was not included; or

(ii) The creditor did not provide the properly completed appropriate model form in Appendix H of this part, or a substantially similar notice of rescission.

(2) Tolerance for disclosures. After the initiation of foreclosure on the consumer's principal dwelling that secures the credit obligation, the finance charge and other disclosures affected by the finance charge (such as the amount financed and the annual percentage rate) shall be considered accurate for purposes of this section if the disclosed finance charge:

(i) is understated by no more than \$35; or

(ii) is greater than the amount required to be disclosed.

[Reg. Z, 46 FR 20892, Apr. 7, 1981, as amended at 51 FR 45299, Dec. 18, 1986; 58 FR 40583, July 29, 1993; 59 FR 40204, Aug. 5, 1994; 59 FR 63715, Dec. 9, 1994; 60 FR 15471, Mar. 24, 1995; 61

FR 49247, Sept. 19, 1996]

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Appendix 21

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§ 1601. — Congressional findings and declaration of purpose.

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[CITE: 15USC1601]

TITLE 15--COMMERCE AND TRADE

CHAPTER 41--CONSUMER CREDIT PROTECTION

SUBCHAPTER I--CONSUMER CREDIT COST DISCLOSURE

Part A--General Provisions

Sec. 1601. Congressional findings and declaration of purpose

(a) Informed use of credit

The Congress finds that economic stabilization would be enhanced and the competition among the various financial institutions and other firms engaged in the extension of consumer credit would be strengthened by the informed use of credit. The informed use of credit results from an

awareness of the cost thereof by consumers. It is the purpose of this subchapter to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices.

(b) Terms of personal property leases

The Congress also finds that there has been a recent trend toward leasing automobiles and other durable goods for consumer use as an alternative to installment credit sales and that these leases have been offered without adequate cost disclosures. It is the purpose of this subchapter to assure a meaningful disclosure of the terms of leases of personal property for personal, family, or household purposes so as to enable the lessee to compare more readily the various lease terms available to him, limit balloon payments in consumer leasing, enable comparison of lease terms with credit terms where appropriate, and to assure meaningful and accurate disclosures of lease terms in advertisements.

(Pub. L. 90-321, title I, Sec. 102, May 29, 1968, 82 Stat. 146; Pub. L. 93-495, title III, Sec. 302, Oct. 28, 1974, 88 Stat. 1511; Pub. L. 94-240, Sec. 2, Mar. 23, 1976, 90 Stat. 257.)

Amendments

1976--Pub. L. 94-240 designated existing provisions as subsec. (a) and added subsec. (b).

1974--Pub. L. 93-495 inserted provisions expanding purposes of subchapter to include protection of consumer against inaccurate and unfair credit billing and credit card practices.

Effective Date of 1976 Amendment

Amendment by Pub. L. 94-240 effective on expiration of one year after Mar. 23, 1976, see section 6 of Pub. L. 94-240, set out as an Effective Date note under section 1667 of this title.

Effective Date of 1974 Amendment

For effective date of amendment by Pub. L. 93-495, see section 308 of Pub. L. 93-495, set out as an Effective Date note under section 1666 of this title.

Effective Date

Section 504(a) of Pub. L. 90-321 provided that this part is effective May 29, 1968.

Short Title of 1999 Amendment

Pub. L. 106-102, title VII, Sec. 701, Nov. 12, 1999, 113 Stat. 1463, provided that: ``This subtitle [subtitle A (Secs. 701-705) of title VII of Pub. L. 106-102, amending sections 1693b, 1693c, and 1693h of this

title] may be cited as the `ATM Fee Reform Act of 1999'.'

Short Title of 1998 Amendment

Pub. L. 105-347, Sec. 1, Nov. 2, 1998, 112 Stat. 3208, provided that: ``This Act [amending sections 1681a to 1681c, 1681g, 1681i, 1681k, and 1681s of this title and enacting provisions set out as a note under section 1681a of this title] may be cited as the `Consumer Reporting Employment Clarification Act of 1998'.'

Short Title of 1996 Amendment

Pub. L. 104-208, div. A, title II, Sec. 2401, Sept. 30, 1996, 110 Stat. 3009-426, provided that: ``This chapter [chapter 1 (Secs. 2401-2422) of subtitle D of title II of div. A of Pub. L. 104-208, enacting section 1681s-2 of this title, amending sections 1681a to 1681e, 1681g to 1681j, 1681m to 1681o, 1681q to 1681s, and 1681t of this title, and enacting provisions set out as notes under sections 1681a, 1681b, and 1681g of this title] may be cited as the `Consumer Credit Reporting Reform Act of 1996'.'

Short Title of 1995 Amendments

Pub. L. 104-29, Sec. 1, Sept. 30, 1995, 109 Stat. 271, provided that: ``This Act [enacting section 1649 of this title, amending sections 1605, 1631, 1635, 1640, and 1641 of this title, and enacting provisions set out as notes under section 1605 of this title] may be cited as the `Truth in Lending Act Amendments of 1995'.'

Pub. L. 104-12, Sec. 1, May 18, 1995, 109 Stat. 161, provided that: ``This Act [amending section 1640 of this title] may be cited as the `Truth in Lending Class Action Relief Act of 1995'.'

Short Title of 1994 Amendment

Pub. L. 103-325, title I, Sec. 151, Sept. 23, 1994, 108 Stat. 2190, provided that: ``This subtitle [subtitle B (Secs. 151-158) of title I of Pub. L. 103-325, enacting sections 1639 and 1648 of this title, amending sections 1602, 1604, 1610, 1640, 1641, and 1647 of this title, and enacting provisions set out as notes under this section and section 1602 of this title] may be cited as the `Home Ownership and Equity Protection Act of 1994'.'

Short Title of 1992 Amendment

Pub. L. 102-537, Sec. 1, Oct. 27, 1992, 106 Stat. 3531, provided that: ``This Act [enacting section 1681s-1 of this title, amending section 1681a of this title, and enacting provisions set out as a note under section 1681a of this title] may be cited as the `Ted Weiss Child Support Enforcement Act of 1992'.'

Short Title of 1988 Amendments

Pub. L. 100-709, Sec. 1, Nov. 23, 1988, 102 Stat. 4725, provided that: ``This Act [enacting sections 1637a, 1647, and 1665b of this

title, amending sections 1632 and 1637 of this title, and enacting provisions set out as notes under section 1637a of this title] may be cited as the `Home Equity Loan Consumer Protection Act of 1988'.'

Pub. L. 100-583, Sec. 1, Nov. 3, 1988, 102 Stat. 2960, provided that: ``This Act [amending sections 1610, 1632, 1637, 1640, and 1646 of this title and enacting provisions set out as a note under section 1637 of this title] may be cited as the `Fair Credit and Charge Card Disclosure Act of 1988'.'

Short Title of 1981 Amendment

Pub. L. 97-25, Sec. 1, July 27, 1981, 95 Stat. 144, provided: ``That this Act [amending sections 1602 and 1666f of this title, section 29 of Title 12, Banks and Banking, and sections 205 and 212 of Title 42, The Public Health and Welfare; enacting provisions set out as notes under this section and sections 1602 and 1666f of this title; and amending provisions set out as notes under sections 1602 and 1666f of this title] may be cited as the `Cash Discount Act'.'

Short Title of 1980 Amendment

Pub. L. 96-221, title VI, Sec. 601, Mar. 31, 1980, 94 Stat. 168, provided that: ``This title [enacting section 1646 of this title, amending sections 57a, 1602 to 1607, 1610, 1612, 1613, 1631, 1632, 1635, 1637, 1638, 1640, 1641, 1643, 1663, 1664, 1665a, 1666, 1666d, 1667d, and 1691f of this title, repealing sections 1614, 1636, and 1639 of this title, and enacting provisions set out as notes under sections 1602 and 1607 of this title] may be cited as the `Truth in Lending Simplification and Reform Act'.'

Short Title of 1976 Amendments

Section 1 of Pub. L. 94-240 provided that: ``This Act [enacting sections 1667 to 1667e of this title, amending this section and section 1640 of this title, and enacting provisions set out as a note under section 1667 of this title] may be cited as the `Consumer Leasing Act of 1976'.'

Pub. L. 94-239, Sec. 1(a), Mar. 23, 1976, 90 Stat. 251, provided that: ``This Act [enacting section 1691f of this title, amending this section and sections 1691b, 1691c, 1691d, 1691e of this title, repealing section 1609 of this title, enacting provisions set out as notes under this section, and repealing provision set out as a note under this section] may be cited as the `Equal Credit Opportunity Act Amendments of 1976'.'

Section 1(c) of Pub. L. 94-239 repealed section 501 of Pub. L. 93-495, title V, Oct. 28, 1974, 88 Stat. 1521, which provided that subchapter IV of this chapter and notes set out under section 1691 were to be cited as the `Equal Credit Opportunity Act'.

Short Title of 1974 Amendment

Section 301 of title III of Pub. L. 93-495 provided that: ``This title [enacting sections 1666 to 1666j of this title, amending this section and sections 1602, 1610, 1631, 1632, and 1637 of this title, and enacting provision set out as a note under section 1666 of this title] may be cited as the `Fair Credit Billing Act'.'

Short Title

Section 1 of Pub. L. 90-321 provided that: ``This Act [enacting this chapter, sections 891 to 896 of Title 18, Crimes and Criminal Procedure, and provisions set out as notes under this section, sections 1631 and 1671 of this title, and section 891 of Title 18] may be cited as the `Consumer Credit Protection Act'.''

Section 101 of title I of Pub. L. 90-321 provided that: ``This title [enacting this subchapter] may be cited as the `Truth in Lending Act'.''

Section 401 of title IV of Pub. L. 90-321, as added by Pub. L. 104-208, div. A, title II, Sec. 2451, Sept. 30, 1996, 110 Stat. 3009-454, provided that: ``This title [enacting subchapter II-A of this chapter] may be cited as the `Credit Repair Organizations Act'.''

Section 601 of title VI of Pub. L. 90-321, as added by Pub. L. 91-508, title VI, Sec. 601, Oct. 26, 1970, 84 Stat. 1128, provided that: ``This title [enacting subchapter III of this chapter] may be cited as the `Fair Credit Reporting Act'.''

Section 709 of title VII of Pub. L. 90-321, as added by section 1(b) of Pub. L. 94-239, Mar. 23, 1976, 90 Stat. 251, provided that: ``This title [enacting subchapter IV of this chapter and notes set out under section 1691 of this title] may be cited as the `Equal Credit Opportunity Act'.''

Section 801 of title VIII of Pub. L. 90-321, as added by Pub. L. 95-109, Sept. 20, 1977, 91 Stat. 874, provided that: ``This title [enacting subchapter V of this chapter] may be cited as the `Fair Debt Collection Practices Act'.''

Section 901 of title IX of Pub. L. 90-321, as added Pub. L. 95-630, title XX, Sec. 2001, Nov. 10, 1978, 92 Stat. 3728, provided that: ``This title [enacting subchapter VI of this chapter] may be cited as the `Electronic Fund Transfer Act'.''

Severability

Section 501 of Pub. L. 90-321 provided that: ``If a provision enacted by this Act [see Short Title note above], is held invalid, all valid provisions that are severable from the invalid provision remain in effect. If a provision enacted by this Act is held invalid in one or more of its applications, the provision remains in effect in all valid applications that are severable from the invalid application or applications.''

Federal Reserve Study of Home Equity Lending and Appropriate Interest Rate Index

Pub. L. 103-325, title I, Sec. 157, Sept. 23, 1994, 108 Stat. 2197, provided that: ``During the period beginning 180 days after the date of enactment of this Act [Sept. 23, 1994] and ending 2 years after that date of enactment, the Board of Governors of the Federal Reserve System shall conduct a study and submit to the Congress a report, including recommendations for any appropriate legislation, regarding--

``(1) whether a consumer engaging in an open end credit transaction (as defined in section 103 of the Truth in Lending Act [15 U.S.C. 1602]) secured by the consumer's principal dwelling is provided adequate protections under Federal law, including section 127A of the Truth in Lending Act [15 U.S.C. 1637a]; and

``(2) whether a more appropriate interest rate index exists for

purposes of subparagraph (A) of section 103(aa)(1) of the Truth in Lending Act (as added by section 152(a) of this Act [15 U.S.C. 1602(aa)(1)(A)]) than the yield on Treasury securities referred to in that subparagraph.''

Hearings on Home Equity Lending

Pub. L. 103-325, title I, Sec. 158, Sept. 23, 1994, 108 Stat. 2197, provided that:

``(a) Hearings.--Not less than once during the 3-year period beginning on the date of enactment of this Act [Sept. 23, 1994], and regularly thereafter, the Board of Governors of the Federal Reserve System, in consultation with the Consumer Advisory Council of the Board, shall conduct a public hearing to examine the home equity loan market and the adequacy of existing regulatory and legislative provisions and the provisions of this subtitle [see Short Title of 1994 Amendment note above] in protecting the interests of consumers, and low-income consumers in particular.

``(b) Participation.--In conducting hearings required by subsection (a), the Board of Governors of the Federal Reserve System shall solicit participation from consumers, representatives of consumers, lenders, and other interested parties.''

Study by Federal Reserve Board of Governors Covering Effect of Charge Card Transactions Upon Card Issuers, Merchants, and Consumers

Pub. L. 97-25, title II, Sec. 202, July 27, 1981, 95 Stat. 145, directed Board of Governors of Federal Reserve System, not later than 2 years after July 27, 1981, to prepare a study and submit its findings to Congress on the effect of charge card transactions upon card issuers, merchants, and consumers.

Inference of Legislative Intent in Section Captions and Catchlines

Section 502 of Pub. L. 90-321 provided that: ``Captions and catchlines are intended solely as aids to convenient reference, and no inference as to the legislative intent with respect to any provision enacted by this Act [enacting this chapter, section 891 to 896 of Title 18, Crimes and Criminal Procedure, and provisions set out as notes under this section, sections 1631 and 1671 of this title, and section 891 of Title 18] may be drawn from them.''

Grammatical Usages

Section 503 of Pub. L. 90-321 provided that: ``In this Act [enacting this chapter, sections 891 to 896 of Title 18, Crimes and Criminal Procedure, and provisions set out as notes under sections 1601, 1631 and 1671 of this title, and section 891 of Title 18]:

``(1) The word `may' is used to indicate that an action either is authorized or is permitted.

``(2) The word `shall' is used to indicate that an action is both authorized and required.

``(3) The phrase `may not' is used to indicate that an action is both unauthorized and forbidden.

``(4) Rules of law are stated in the indicative mood.''

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§ 1602. — Definitions and rules of construction.

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TITLE 15--COMMERCE AND TRADE

CHAPTER 41--CONSUMER CREDIT PROTECTION

SUBCHAPTER I--CONSUMER CREDIT COST DISCLOSURE

Part A--General Provisions

Sec. 1602. Definitions and rules of construction

(a) The definitions and rules of construction set forth in this section are applicable for the purposes of this subchapter.

(b) The term ``Board'' refers to the Board of Governors of the Federal Reserve System.

(c) The term ``organization'' means a corporation, government or governmental subdivision or agency, trust, estate, partnership, cooperative, or association.

(d) The term ``person'' means a natural person or an organization.

(e) The term ``credit'' means the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment.

(f) The term ``creditor'' refers only to a person who both (1) regularly extends, whether in connection with loans, sales of property or services, or otherwise, consumer credit which is payable by agreement in more than four installments or for which the payment of a finance charge is or may be required, and (2) is the person to whom the debt arising from the consumer credit transaction is initially payable on the face of the evidence of indebtedness or, if there is no such evidence of indebtedness, by agreement. Notwithstanding the preceding sentence, in the case of an open-end credit plan involving a credit card, the card issuer and any person who honors the credit card and offers a discount which is a finance charge are creditors. For the purpose of the requirements imposed under part D of this subchapter and sections 1637(a)(5), 1637(a)(6), 1637(a)(7), 1637(b)(1), 1637(b)(2), 1637(b)(3), 1637(b)(8), and 1637(b)(10) of this title, the term ``creditor'' shall also include card issuers whether or not the amount due is payable by agreement in more than four installments or the payment of a finance charge is or may be required, and the Board shall, by regulation, apply these requirements to such card issuers, to the extent appropriate, even though the requirements are by their terms applicable only to creditors offering open-end credit plans. Any person who originates 2 or more mortgages referred to in subsection (aa) of this section in any 12-month period or any person who originates 1 or more such mortgages through a mortgage broker shall be considered to be a creditor for purposes of this subchapter.

(g) The term ``credit sale'' refers to any sale in which the seller is a creditor. The term includes any contract in the form of a bailment or lease if the bailee or lessee contracts to pay as compensation for use a sum substantially equivalent to or in excess of the aggregate value of the property and services involved and it is agreed that the bailee or lessee will become, or for no other or a nominal consideration has the option to become, the owner of the property upon full compliance with his obligations under the contract.

(h) The adjective ``consumer'', used with reference to a credit transaction, characterizes the transaction as one in which the party to whom credit is offered or extended is a natural person, and the money, property, or services which are the subject of the transaction are primarily for personal, family, or household purposes.

(i) The term ``open end credit plan'' means a plan under which the creditor reasonably contemplates repeated transactions, which prescribes the terms of such transactions, and which provides for a finance charge which may be computed from time to time on the outstanding unpaid balance. A credit plan which is an open end credit plan within the meaning of the preceding sentence is an open end credit plan even if credit information is verified from time to time.

(j) The term ``adequate notice,'' as used in section 1643 of this title, means a printed notice to a cardholder which sets forth the pertinent facts clearly and conspicuously so that a person against whom it is to operate could reasonably be expected to have noticed it and understood its meaning. Such notice may be given to a cardholder by printing the notice on any credit card, or on each periodic statement of account, issued to the cardholder, or by any other means reasonably assuring the receipt thereof by the cardholder.

(k) The term ``credit card'' means any card, plate, coupon book or other credit device existing for the purpose of obtaining money, property, labor, or services on credit.

(l) The term ``accepted credit card'' means any credit card which the cardholder has requested and received or has signed or has used, or authorized another to use, for the purpose of obtaining money, property, labor, or services on credit.

(m) The term ``cardholder'' means any person to whom a credit card

is issued or any person who has agreed with the card issuer to pay obligations arising from the issuance of a credit card to another person.

(n) The term ``card issuer'' means any person who issues a credit card, or the agent of such person with respect to such card.

(o) The term ``unauthorized use,'' as used in section 1643 of this title, means a use of a credit card by a person other than the cardholder who does not have actual, implied, or apparent authority for such use and from which the cardholder receives no benefit.

(p) The term ``discount'' as used in section 1666f of this title means a reduction made from the regular price. The term ``discount'' as used in section 1666f of this title shall not mean a surcharge.

(q) The term ``surcharge'' as used in this section and section 1666f of this title means any means of increasing the regular price to a cardholder which is not imposed upon customers paying by cash, check, or similar means.'

(r) The term ``State'' refers to any State, the Commonwealth of Puerto Rico, the District of Columbia, and any territory or possession of the United States.

(s) The term ``agricultural purposes'' includes the production, harvest, exhibition, marketing, transportation, processing, or manufacture of agricultural products by a natural person who cultivates, plants, propagates, or nurtures those agricultural products, including but not limited to the acquisition of farmland, real property with a farm residence, and personal property and services used primarily in farming.

(t) The term ``agricultural products'' includes agricultural, horticultural, viticultural, and dairy products, livestock, wildlife, poultry, bees, forest products, fish and shellfish, and any products thereof, including processed and manufactured products, and any and all products raised or produced on farms and any processed or manufactured products thereof.

(u) The term ``material disclosures'' means the disclosure, as required by this subchapter, of the annual percentage rate, the method of determining the finance charge and the balance upon which a finance charge will be imposed, the amount of the finance charge, the amount to be financed, the total of payments, the number and amount of payments, the due dates or periods of payments scheduled to repay the indebtedness, and the disclosures required by section 1639(a) of this title.

(v) The term ``dwelling'' means a residential structure or mobile home which contains one to four family housing units, or individual units of condominiums or cooperatives.

(w) The term ``residential mortgage transaction'' means a transaction in which a mortgage, deed of trust, purchase money security interest arising under an installment sales contract, or equivalent consensual security interest is created or retained against the consumer's dwelling to finance the acquisition or initial construction of such dwelling.

(x) As used in this section and section 1666f of this title, the term ``regular price'' means the tag or posted price charged for the property or service if a single price is tagged or posted, or the price charged for the property or service when payment is made by use of an open-end credit plan or a credit card if either (1) no price is tagged or posted, or (2) two prices are tagged or posted, one of which is charged when payment is made by use of an open-end credit plan or a credit card and the other when payment is made by use of cash, check, or similar means. For purposes of this definition, payment by check, draft, or other negotiable instrument which may result in the debiting of an open-end credit plan or a credit cardholder's open-end account shall not

be considered payment made by use of the plan or the account.

(y) Any reference to any requirement imposed under this subchapter or any provision thereof includes reference to the regulations of the Board under this subchapter or the provision thereof in question.

(z) The disclosure of an amount or percentage which is greater than the amount or percentage required to be disclosed under this subchapter does not in itself constitute a violation of this subchapter.

(aa)(1) A mortgage referred to in this subsection means a consumer credit transaction that is secured by the consumer's principal dwelling, other than a residential mortgage transaction, a reverse mortgage transaction, or a transaction under an open end credit plan, if--

(A) the annual percentage rate at consummation of the transaction will exceed by more than 10 percentage points the yield on Treasury securities having comparable periods of maturity on the fifteenth day of the month immediately preceding the month in which the application for the extension of credit is received by the creditor; or

(B) the total points and fees payable by the consumer at or before closing will exceed the greater of--

- (i) 8 percent of the total loan amount; or
- (ii) \$400.

(2)(A) After the 2-year period beginning on the effective date of the regulations promulgated under section 155 of the Riegle Community Development and Regulatory Improvement Act of 1994, and no more frequently than biennially after the first increase or decrease under this subparagraph, the Board may by regulation increase or decrease the number of percentage points specified in paragraph (1)(A), if the Board determines that the increase or decrease is--

(i) consistent with the consumer protections against abusive lending provided by the amendments made by subtitle B of title I of the Riegle Community Development and Regulatory Improvement Act of 1994; and

(ii) warranted by the need for credit.

(B) An increase or decrease under subparagraph (A) may not result in the number of percentage points referred to in subparagraph (A) being--

- (i) less than 8 percentage points; or
- (ii) greater than 12 percentage points.

(C) In determining whether to increase or decrease the number of percentage points referred to in subparagraph (A), the Board shall consult with representatives of consumers, including low-income consumers, and lenders.

(3) The amount specified in paragraph (1)(B)(ii) shall be adjusted annually on January 1 by the annual percentage change in the Consumer Price Index, as reported on June 1 of the year preceding such adjustment.

(4) For purposes of paragraph (1)(B), points and fees shall include--

(A) all items included in the finance charge, except interest or the time-price differential;

(B) all compensation paid to mortgage brokers;

(C) each of the charges listed in section 1605(e) of this title (except an escrow for future payment of taxes), unless--

- (i) the charge is reasonable;
- (ii) the creditor receives no direct or indirect compensation; and
- (iii) the charge is paid to a third party unaffiliated with the creditor; and

(D) such other charges as the Board determines to be appropriate.

(5) This subsection shall not be construed to limit the rate of interest or the finance charge that a person may charge a consumer for any extension of credit.

(bb) The term "reverse mortgage transaction" means a nonrecourse transaction in which a mortgage, deed of trust, or equivalent consensual security interest is created against the consumer's principal dwelling--

(1) securing one or more advances; and

(2) with respect to which the payment of any principal, interest, and shared appreciation or equity is due and payable (other than in the case of default) only after--

(A) the transfer of the dwelling;

(B) the consumer ceases to occupy the dwelling as a principal dwelling; or

(C) the death of the consumer.

(Pub. L. 90-321, title I, Sec. 103, May 29, 1968, 82 Stat. 147; Pub. L. 91-508, title V, Sec. 501, Oct. 26, 1970, 84 Stat. 1126; Pub. L. 93-495, title III, Sec. 303, Oct. 28, 1974, 88 Stat. 1511; Pub. L. 94-222, Sec. 3(a), Feb. 27, 1976, 90 Stat. 197; Pub. L. 96-221, title VI, Secs. 602, 603(a), (b), 604, 612(a)(2), (b), Mar. 31, 1980, 94 Stat. 168, 169, 175, 176; Pub. L. 97-25, title I, Sec. 102, July 27, 1981, 95 Stat. 144; Pub. L. 97-320, title VII, Sec. 702(a), Oct. 15, 1982, 96 Stat. 1538; Pub. L. 103-325, title I, Secs. 152(a)-(c), 154(a), Sept. 23, 1994, 108 Stat. 2190, 2191, 2196.)

References in Text

The Riegle Community Development and Regulatory Improvement Act of 1994, referred to in subsec. (aa)(2)(A)(i), is Pub. L. 103-325, Sept. 23, 1994, 108 Stat. 2160. Section 155 of the Act is set out below. For classification of subtitle B of title I of the Act, known as the "Home Ownership and Equity Protection Act of 1994", see Short Title of 1994 Amendment note set out under section 1601 of this title. For complete classification of this Act to the Code, see Short Title note set out under section 4701 of Title 12, Banks and Banking, and Tables.

Amendments

1994--Subsec. (f). Pub. L. 103-325, Sec. 152(c), inserted at end "Any person who originates 2 or more mortgages referred to in subsection (aa) of this section in any 12-month period or any person who originates 1 or more such mortgages through a mortgage broker shall be considered to be a creditor for purposes of this subchapter."

Subsec. (u). Pub. L. 103-325, Sec. 152(b), substituted "the due dates" for "and the due dates" and inserted before period at end "", and the disclosures required by section 1639(a) of this title".

Subsec. (aa). Pub. L. 103-325, Sec. 152(a), added subsec. (aa).

Subsec. (bb). Pub. L. 103-325, Sec. 154(a), added subsec. (bb).

1982--Subsec. (f). Pub. L. 97-320 struck out provision that a person who regularly arranged for the extension of consumer credit payable in more than four installments or for which the payment of a finance charge was or might have been required from persons not creditors was a creditor, and provision that this subchapter applied to any creditor, irrespective of his or its status as a natural person or any type of organization, who was a card issuer.

1981--Subsecs. (x) to (z). Pub. L. 97-25 added subsec. (z) and, effective Apr. 10, 1982, redesignated subsecs. (x), (y), and (z) as (y), (z), and (x), respectively.

1980--Subsec. (f). Pub. L. 96-221, Sec. 602(a), substituted provisions defining term ``creditor'' as referring only to a person who both regularly extends consumer credit, subject to specified conditions, and is the person to whom the debt arising is initially payable on the face of the indebtedness or by agreement, and notwithstanding such provisions, also refers to a person regularly arranging for the extension of consumer credit, and a card issuer and any person honoring the credit card, subject to specified conditions, for provisions defining term ``creditor'' as referring only to creditors who regularly extend, or arrange for the extension of credit payable in more than four installments or where a finance charge is or may be required, and substituted ``(a)(5)'' for ``(a)(6)'', ``(a)(6)'' for ``(a)(7)'', ``(a)(7)'' for ``(a)(8)'', ``(b)(8)'' for ``(b)(9)'', and ``(b)(10)'' for ``(b)(11)''.

Subsec. (g). Pub. L. 96-221, Sec. 602(b), substituted ``in which the seller is a creditor'' for ``with respect to which credit is extended or arranged by the seller''.

Subsec. (h). Pub. L. 96-221, Sec. 603(a), struck out applicability to agricultural purposes.

Subsec. (i). Pub. L. 96-221, Sec. 604, inserted provisions respecting the reasonable contemplations of the creditor, and verification of credit information from time to time.

Subsecs. (s), (t). Pub. L. 96-221, Sec. 603(b), added subsecs. (s) and (t). Former subsecs. (s) and (t) redesignated (x) and (y), respectively.

Subsec. (u). Pub. L. 96-221, Sec. 612(a)(2), added subsec. (u).

Subsecs. (v), (w). Pub. L. 96-221, Sec. 612(b), added subsecs. (v) and (w).

Subsecs. (x), (y). Pub. L. 96-221, Sec. 603(b), redesignated former subsecs. (s) and (t) as (x) and (y), respectively.

1976--Subsecs. (p) to (t). Pub. L. 94-222 added subsecs. (p) and (q) and redesignated former subsecs. (p) to (r) as (r) to (t), respectively.

1974--Subsec. (f). Pub. L. 93-495 inserted provision requiring the credit to be payable by agreement in more than four installments and defining term ``creditor'' for the purposes of the requirements imposed under the enumerated sections of this chapter.

1970--Subsecs. (j) to (r). Pub. L. 91-508 added subsecs. (j) to (o) and redesignated former subsecs. (j) to (l) as (p) to (r), respectively.

Effective Date of 1982 Amendment

Section 702(b) of Pub. L. 97-320 provided that: ``The amendment made by subsection (a) [amending this section] shall take effect on the effective date of title VI of the Depository Institutions Deregulation and Monetary Control Act of 1980 [two years and six months after Mar. 31, 1980, see Effective Date of 1980 Amendment note below].''

Effective Date of 1981 Amendment

Section 102(b) of Pub. L. 97-25 provided that the amendment made by that section is effective Apr. 10, 1982.

Effective Date of 1980 Amendment

Section 625 of title VI of Pub. L. 96-221, as amended by Pub. L. 97-25, title III, Sec. 301, July 27, 1981, 95 Stat. 145; Pub. L. 97-110, title III, Sec. 301, Dec. 26, 1981, 95 Stat. 1515, provided that:

“(a) Except as provided in section 608(b) [set out as an Effective Date of 1980 Amendment note under section 1607 of this title], the amendments made by this title [enacting section 1646 of this title, amending sections 57a, 1602 to 1606, 1610, 1612, 1613, 1631, 1632, 1635, 1637, 1638, 1640, 1641, 1643, 1663, 1664, 1665a, 1666, 1666d, 1667d, and 1691f of this title, repealing sections 1614, 1636, and 1639 of this title, and enacting provisions set out as a note under section 1601 of this title] shall take effect upon the expiration of two years and six months after the date of enactment of this title [Mar. 31, 1980].

“(b) All regulations, forms, and clauses required to be prescribed under the amendments made by this title shall be promulgated at least one year prior to such effective date.

“(c) Notwithstanding subsections (a) and (b), any creditor may comply with the amendments made by this title, in accordance with the regulations, forms, and clauses prescribed by the Board, prior to such effective date. Any creditor who elects to comply with such amendments and any assignee of such a creditor shall be subject to the provisions of sections 130 and 131 of the Truth in Lending Act, as amended by sections 615 and 616, respectively, of this title [sections 1640 and 1641 of this title].”

Effective Date of 1974 Amendment

For effective date of amendment by Pub. L. 93-495, see section 308 of Pub. L. 93-495, set out as an Effective Date note under section 1666 of this title.

Regulations

Section 155 of title I of Pub. L. 103-325 provided that: “Not later than 180 days after the date of enactment of this Act [Sept. 23, 1994], the Board of Governors of the Federal Reserve System shall issue such regulations as may be necessary to carry out this subtitle [subtitle B (Secs. 151-158) of title I of Pub. L. 103-325, see Short Title of 1994 Amendment note set out under section 1601 of this title], and such regulations shall become effective on the date on which disclosure regulations are required to become effective under section 105(d) of the Truth in Lending Act [15 U.S.C. Sec. 1604(d)].”

Applicability of 1994 Amendments and Regulations to Subsection (aa) Mortgages

Section 156 of title I of Pub. L. 103-325 provided that: “This subtitle [subtitle B (Secs. 151-158) of title I of Pub. L. 103-325, see Short Title of 1994 Amendment note set out under section 1601 of this title], and the amendments made by this subtitle, shall apply to every mortgage referred to in section 103(aa) of the Truth in Lending Act [15 U.S.C. 1602(aa)] (as added by section 152(a) of this Act) consummated on or after the date on which regulations issued under section 155 [set out above] become effective.”

Section Referred to in Other Sections

This section is referred to in sections 78m, 1604, 1605, 1610, 1615,

1631, 1635, 1638, 1639, 1641, 1667, 1679a, 1693a, 1693g of this title;
title 12 sections 1735f-5, 1735f-7a, 1834b, 2602, 3401; title 18 section
1030; title 26 section 6311; title 42 section 5511.

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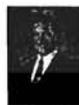
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RCW 19.146.100

Violations of chapter — Application of consumer protection act.

The legislature finds that the practices governed by this chapter are matters vitally affecting the public interest for the purpose of applying the consumer protection act, chapter [19.86](#) RCW. Any violation of this chapter is not reasonable in relation to the development and preservation of business and is an unfair or deceptive act or practice and unfair method of competition in the conduct of trade or commerce in violation of RCW [19.86.020](#). Remedies provided by chapter [19.86](#) RCW are cumulative and not exclusive.

[1994 c 33 § 25; 1987 c 391 § 12.]



Appendix 26



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RCW 19.146.010

Definitions.

*** CHANGE IN 2010 *** (SEE [2608.SL](#)) ***

Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

(1) "Affiliate" means any person who directly or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with another person.

(2) "Application" means the same as in Regulation X, Real Estate Settlement Procedures, 24 C.F.R. Sec. 3500.

(3) "Borrower" means any person who consults with or retains a mortgage broker or loan originator in an effort to obtain or seek advice or information on obtaining or applying to obtain a residential mortgage loan for himself, herself, or persons including himself or herself, regardless of whether the person actually obtains such a loan.

(4) "Computer loan information systems" or "CLI system" means a real estate mortgage financing information system that facilitates the provision of information to consumers by a mortgage broker, loan originator, lender, real estate agent, or other person regarding interest rates and other loan terms available from different lenders.

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

(6) "Designated broker" means a natural person designated as the person responsible for activities of the licensed mortgage broker in conducting the business of a mortgage broker under this chapter and who meets the experience and examination requirements set forth in RCW [19.146.210\(1\)\(e\)](#).

(7) "Director" means the director of financial institutions.

(8) "Employee" means an individual who has an employment relationship with a mortgage broker, and the individual is treated as an employee by the mortgage broker for purposes of compliance with federal income tax laws.

(9) "Federal banking agencies" means the board of governors of the federal reserve system, comptroller of the currency, director of the office of thrift supervision, national credit union administration, and federal deposit insurance corporation.

(10) "Independent contractor" or "person who independently contracts" means any person that expressly or impliedly contracts to perform mortgage brokering services for another and that with respect to its manner or means of performing the services is not subject to the other's right of control, and that is not treated as an employee by the other for purposes of compliance with federal income tax laws.

(11)(a) "Loan originator" means a natural person who for direct or indirect compensation or gain, or in the expectation of direct or indirect compensation or gain (i) takes a residential mortgage loan application for a mortgage broker, or (ii) offers or negotiates terms of a mortgage loan. "Loan originator" also includes a person who holds themselves out to the public as able to perform any of these activities. "Loan originator" does not mean persons performing purely administrative or clerical tasks for a mortgage broker. For the purposes of this subsection, "administrative or clerical tasks" means the receipt, collection, and

distribution of information common for the processing of a loan in the mortgage industry and communication with a borrower to obtain information necessary for the processing of a loan. A person who holds himself or herself out to the public as able to obtain a loan is not performing administrative or clerical tasks.

(b) "Loan originator" does not include a person or entity that only performs real estate brokerage activities and is licensed or registered in accordance with applicable state law, unless the person or entity is compensated by a lender, a mortgage broker, or other mortgage loan originator or by any agent of such a lender, mortgage broker, or other mortgage loan originator. For purposes of this chapter, the term "real estate brokerage activity" means any activity that involves offering or providing real estate brokerage services to the public, including:

(i) Acting as a real estate agent or real estate broker for a buyer, seller, lessor, or lessee of real property;

(ii) Bringing together parties interested in the sale, purchase, lease, rental, or exchange of real property;

(iii) Negotiating, on behalf of any party, any portion of a contract relating to the sale, purchase, lease, rental, or exchange of real property, other than in connection with providing financing with respect to such a transaction;

(iv) Engaging in any activity for which a person engaged in the activity is required to be registered or licensed as a real estate agent or real estate broker under any applicable law; and

(v) Offering to engage in any activity, or act in any capacity, described in (b)(i) through (iv) of this subsection.

(c) "Loan originator" does not include a person or entity solely involved in extensions of credit relating to timeshare plans, as that term is defined in section 101(53D) of Title 11, United States Code.

(12) "Loan processor" means an individual who performs clerical or support duties as an employee at the direction of and subject to the supervision and instruction of a person licensed, or exempt from licensing, under chapter 19.146 RCW.

(13) "Lock-in agreement" means an agreement with a borrower made by a mortgage broker or loan originator, in which the mortgage broker or loan originator agrees that, for a period of time, a specific interest rate or other financing terms will be the rate or terms at which it will make a loan available to that borrower.

(14) "Mortgage broker" means any person who for compensation or gain, or in the expectation of compensation or gain (a) assists a person in obtaining or applying to obtain a residential mortgage loan or (b) holds himself or herself out as being able to assist a person in obtaining or applying to obtain a residential mortgage loan.

(15) "Mortgage loan originator" has the same meaning as "loan originator."

(16) "Nationwide mortgage licensing system and registry" means a mortgage licensing system developed and maintained by the conference of state bank supervisors and the American association of residential mortgage regulators for the licensing and registration of mortgage loan originators.

(17) "Person" means a natural person, corporation, company, limited liability corporation, partnership, or association.

(18) "Principal" means any person who controls, directly or indirectly through one or more intermediaries, or alone or in concert with others, a ten percent or greater interest in a partnership, company, association, or corporation, and the owner of a sole proprietorship.

(19) "Residential mortgage loan" means any loan primarily for personal, family, or household use secured by a mortgage or deed of trust on residential real estate upon which is constructed or intended to be constructed a single family dwelling or multiple family dwelling of four or less units.

(20) "S.A.F.E. act" means the secure and fair enforcement for mortgage licensing act of

2008, or Title V of the housing and economic recovery act of 2008 ("HERA"), P.L. 110-289, effective July 30, 2008.

(21) "Third-party provider" means any person other than a mortgage broker or lender who provides goods or services to the mortgage broker in connection with the preparation of the borrower's loan and includes, but is not limited to, credit reporting agencies, title companies, appraisers, structural and pest inspectors, or escrow companies.

(22) "Unique identifier" means a number or other identifier assigned by protocols established by the nationwide mortgage licensing system and registry.

[2009 c 528 § 1; 2008 c 78 § 3; 2006 c 19 § 2; 1997 c 106 § 1; 1994 c 33 § 3; 1993 c 468 § 2; 1987 c 391 § 3.]

Notes:

Effective date -- License requirement -- 2009 c 528: "(1) In order to facilitate an orderly transition to licensing and minimize disruption in the mortgage marketplace, sections 4, 6 through 9, 11, 12, 14, and 17 [of this act] are effective January 1, 2010.

(2) In order to facilitate an orderly transition to licensing and minimize disruption in the mortgage marketplace, mortgage loan originators who were previously exempt as exclusive agents under RCW 19.146.020(1)(a)(ii) must obtain a mortgage loan originator license under this chapter before July 1, 2010." [2009 c 528 § 19.]

Implementation -- 2009 c 528: "The director of financial institutions or the director's designee may take the actions necessary to ensure this act is implemented on July 1, 2010." [2009 c 528 § 20.]

Severability -- 2008 c 78: See note following RCW 31.04.025.

Severability -- 1997 c 106: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1997 c 106 § 22.]

Adoption of rules -- Severability -- 1993 c 468: See notes following RCW 19.146.0201.

Effective dates -- 1993 c 468: See note following RCW 19.146.200.

DECLARATION OF SERVICE

FILED
COURT OF APPEALS

10 AM -3 AM 12:14

STATE OF WASHINGTON

Mark Olla states as follows:

I am a citizen of the United States of America and a resident of the State of OR
OREGON

Oregon, I am over the age of 21 years, I am ~~not~~ a party to this action, and I am competent to be a witness herein.

On this 30th day of July, 2010, I caused copies of the foregoing ~~APPELLANT'S BRIEF~~ **APPELLANT'S BRIEF APPENDIX** and **and Corrected Declaration of Service 7/29/2010** ~~and APPELLANT'S MOTION TO FILE OVER-LENGTH APPEAL BRIEF~~ to be served on the

following parties as indicated below:

Attorney for Defendants/Respondents **Certified US Mail**
Law Office of Isaac A. Anderson
19717 Front Street
Poulsbo, WA 98370
Phone: 360-779-4292

Court of Appeals: Division II **Certified US Mail**
State of Washington
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I declare under penalty of perjury under the laws of the State of Oregon that the foregoing is true and correct.

Executed at Medford, Oregon this 30th day of July, 2010.

Mark Olla
Mark Olla

Mark Olla

original