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STATE OF WASHINGTON

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Supreme Court Cause No. 852600  
Court of Appeal Cause No. 39265-8-II

CLERK

IN THE SUPREME COURT OF  
THE STATE OF WASHINGTON

CHRISTA ALBICE, a married woman, and BART A. TECCA and  
KAREN L. TECCA, husband and wife,

Respondents.

vs.

PREMIER MORTGAGE SERVICES OF WASHINGTON, INC., a  
Washington Corporation; OPTION ONE MORTGAGE  
CORPORATION, a California Corporation; RON DICKINSON and  
"JANE DOE" DICKINSON, husband and wife,

Petitioners.

ON APPEAL FROM THE COURT OF APPEALS, DIVISION II

RESPONSE TO PETITION FOR REVIEW

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and Karen L. Tecca, Respondents.

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STATE OF WASHINGTON

ORIGINAL

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**A. Issues Presented for Review**

1. Should the Petition for Review be denied when Washington courts have previously recognized a borrower's right to bring post sale challenges to non-judicial deed of trust foreclosures based upon procedural irregularities in those sales?
2. Should the Petition for Review be denied where the record shows Ms. Albice and Mr. and Mrs. Tecca had no notice that a foreclosure sale was being held, and where they tendered funds to cure any defaults more than eleven days prior to the foreclosure sale?
3. Should the Petition for Review be denied where the only burden the Court of Appeals' decision in this case creates is to ensure that foreclosure sales are conducted properly?
4. If the Petition for Review is granted, should the Court also consider whether the foreclosure sale was proper where the trustee did not have an officer residing in Washington at the time of the foreclosure sale?

**B. Statement of the Case**

The factual and procedural history of the case is accurately set forth by the Court of Appeals at pages 2 through 4 of its opinion. Further, because the issues upon which the Court of Appeals based its decision were decided by the trial court on summary judgment, there were no material facts in dispute. *Hisle v. Todd Pacific Shipyards*, 151 Wn.2d 853, 93 P.3d 108 (2004). However, in light of the Dickinsons'

Statement of the Case, Ms. Albice and the Teccas ask this Court to consider the following additional facts.

In approximately June of 2006, after receiving the Notice of Foreclosure and Notice of Trustee's Sale, Ms. Tecca contacted Option One to cure her delinquent payments. CP 454; RP 14-15. The Notice of Foreclosure and Notice of Trustee's Sale stated that the foreclosure sale would take place on September 8, 2006. CP 303, 444. According to the Notice of Trustee's Sale, after applying credits and offsets, the Teccas were delinquent in the amount of \$1,228.03 as of June 2, 2006. CP 277, 444, 460. On July 19, 2006 (about a month and a half later), the Teccas entered into a Forbearance Agreement with Option One to cure their delinquency. CP 454, 465-472; RP 14. According to the Forbearance Agreement, the Teccas owed \$5,126.97 at that point in time. CP 471. This number did not include offsets for unapplied funds held by Option One for the benefit of the Teccas. CP 268-270, 298-299. Further, the \$5,126.97 figure included an estimate of \$1,733.79 for foreclosure fees and costs. CP 471. The actual foreclosure costs and fees at the time of the foreclosure sale several months later were only \$872.94. CP 298.

According to the terms of the Forbearance Agreement, the Teccas were required to make a down payment of \$3,000.00 upon executing the agreement, and five monthly payments of \$1,220.14. CP 454, 465-472. These monthly payments represented the amount in arrears, plus current monthly payments. *Id.* The Teccas paid the down payment of \$3,000.00 and five subsequent monthly payments of

\$1,220.14. CP 314-315, 454. The final payment was tendered by the Teccas on February 2, 2007. CP 454, 474. On February 10, 2007, Ms. Tecca was notified by Western Union that the final payment had been declined by Option One. CP 454, 474; RP 15. Ms. Tecca contacted Option One at that time and asked what amount must be tendered to bring the loan current. RP 16; CP 454; Ex. 27 (not admitted). She received no response. RP 16; CP 454. According to the terms of the Forbearance Agreement, the Teccas,

shall be considered in material breach of this Agreement and this Agreement shall automatically terminate, upon ten (10) days prior written notice... under any of the following circumstances:... fail[ure] to strictly comply with any of the terms of this Agreement....

CP 468. On February 16, 2007, Option One, through Western Union, refunded the Teccas' final payment under the Forbearance Agreement without any explanation or notice that they were in default or that the Forbearance Agreement had been terminated. CP 259, 454, 475; RP 15. The alleged letter of January 31, 2007, and proof of its delivery, which the Dickinsons claim notified the Teccas they were in breach of the agreement, was never produced or located. *See* CP 454-455, 511-512.

Ms. Albice and the Teccas later learned that Premier conducted a foreclosure sale of the property on February 16, 2007, 161 days after the sale date stated in the Notice of Foreclosure and Notice of Trustee's Sale. CP 303, 444, 455, 783-829, 772. No notices were provided to Ms. Albice or the Teccas of the new sale date, or of any continuances of the original sale date. CP 260-261, 352-359, 368, 380-383, 772. In addition

to the \$1,220.14 that was refunded on the day of foreclosure, Option One was also holding \$5,339.78 in unapplied funds paid by the Teccas under the Forbearance Agreement. CP 268-270, 298-299. This \$5,339.78 consisted of \$807.59 held in an escrow/impound account, \$3,623.17 in payments held as a credit toward foreclosure fees and costs, and \$909.02 held in a "suspense" account. CP 268-270, 298-299.

Mr. Dickinson is in the business of buying properties at foreclosure sales. CP 349-350, 369-370, 413-419, 424. He is familiar with foreclosure laws in the state of Washington. CP 428. In early 2007, Mr. Dickinson owned about thirteen properties in Thurston and Mason counties that he had purchased at foreclosure. CP 413-419. At trial, the Dickinsons themselves established Mr. Dickinson as an expert witness in the area of real estate. RP 65-73.

Finally, in their Statement of the Case, the Dickinsons represent (without providing a citation to the record) that there was a wide range of property values before the Court at the time of summary judgment. Petition for Review, page 8. But the evidence of the property's value submitted at summary judgment was an appraisal prepared by Mr. Preppernau as of November 17, 2007, showing the property was worth \$950,000.00. CP 386-410. Ms. Tecca had herself estimated that the property was worth at least \$750,000.00. CP 386-410, 1001. Her estimate was based in part upon Exhibit K to her declaration<sup>1</sup>, which

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<sup>1</sup> This declaration was submitted May 24, 2007, in response to a motion to dismiss the lender and trustee. CP 995-1067. This was several months prior to Mr. Preppernau's

was an appraisal as of April 11, 2003, prepared nearly four years prior to the foreclosure sale in this case. CP 1038-1049. There was no other evidence of value before the trial court at the time of summary judgment.

**C. Argument**

The Dickinsons' Petition for Review should be denied because this case does not raise an issue of substantial public interest. The Dickinsons argue this case involves an issue of substantial public interest because it permits and encourages post sale challenges to non-judicial deed of trust foreclosures in violation of RCW 61.24.130. Petition for Review, page 9. However, this is not the law in Washington as confirmed by this and other courts in several cases, not the least of which is *Cox v. Helenius*, 103 Wn.2d 383, 693 P.2d 683 (1985).

**1. *Post sale challenges to procedural irregularities in non-judicial deed of trust foreclosures are permitted in Washington.***

If pre-sale actions were the sole method to contest a foreclosure, then the case of *Cox v. Helenius* would not exist since it involved a post-sale contest to a foreclosure. *Cox v. Helenius*, 103 Wn.2d 383, 693 P.2d 683 (1985). Washington courts have made a distinction between challenges to procedural irregularities in a foreclosure, and challenges to the underlying obligation: the first type of challenge can be raised before or after sale, the second can only be raised before sale. *Moon v.*

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appraisal being available. Compare CP 298 to 995. It turned out Ms. Tecca's estimate of the property being worth at least \$750,000 was accurate. CP 386-410, 1001.

*GMAC Mortgage Corporation*, 2009 WL 3185596 (W.D. Wash. 2009) (copy attached), *CHD v. Boyles*, 138 Wn. App. 131, 157 P.3d 415 (2007), and *Cox v. Helenius*, 103 Wn. 2d 383, 693 P.2d 683 (1985).

The central issue on appeal is whether the claim of Ms. Albice and the Teccas to the property should prevail over that of the Dickinsons where the foreclosing trustee did not have statutory authority to conduct the foreclosure sale. *Cox v. Helenius*, 103 Wn.2d 383, 693 P.2d 683 (1985); *CHD v. Boyles*, 138 Wn. App. 131, 157 P.3d 415 (2007). Ms. Albice and the Teccas agree with the Dickinsons that in the context of post sale challenges to non-judicial deed of trust foreclosures the court must be mindful of ensuring the Deed of Trust Act's goals of, "promoting efficient, inexpensive, and procedurally sound foreclosures and the stability of land titles." *Udall v. T.D. Escrow Services, Inc.*, 159 Wn.2d 903, 916, 154 P.3d 882 (2007) (emphasis added); *See also Cox v. Helenius*, 103 Wn.2d 383, 693 P.2d 683 (1985). The Court of Appeals' decision in the present case was necessary to ensure a procedurally sound foreclosure. If anything, a contrary decision by the Court of Appeals would have encouraged procedurally unsound foreclosures because there would be no consequences for procedurally defective foreclosure sales.

The present case does not fall within the rule regarding pre-sale challenges to foreclosures stated in *Plein v. Lackey*, 149 Wn.2d 214, 67 P.3d 1061 (2003) or *In re the Marriage of Kaseburg*, 126 Wn. App. 546, 108 P.3d 1278 (2005), because Ms. Albice and the Teccas are contesting

the procedure of the sale, not the underlying obligation. *Compare Moon v. GMAC Mortgage Corporation*, 2009 WL 3185596 (W.D. Wash. 2009) (copy attached), *CHD v. Boyles*, 138 Wn. App. 131, 157 P.3d 415 (2007), and *Cox v. Helenius*, 103 Wn. 2d 383, 693 P.2d 683 (1985) to *Plein v. Lackey*, 149 Wn.2d 214, 67 P.3d 1061 (2003). Because the foreclosure in this case was not procedurally sound, and because Ms. Albice and the Teccas did not know that the sale was even taking place until after it happened, the Court of Appeals properly applied existing Washington law in setting aside the sale. *Id.*

2. ***Ms. Albice and the Teccas did not waive their right to challenge the procedural irregularities in the non-judicial deed of trust foreclosure sale because they had no knowledge that a sale was pending in violation of the statute.***

Given that the 120 day rule in RCW 61.24.040 is a statutorily created right, a waiver must be clear.

Statutory rights should ordinarily be waived only by clear affirmative words or actions, and at least one state requires a waiver of statutory rights must be express and explicit. In some states a flexible approach has been adopted regarding acceptable form of voluntary waivers when statutory rights, rather than constitutional rights, are at issue.

...

Further, a statutory right may not be waived or released if such waiver or release contravenes the purpose of the statute.

When a statute contains provisions that are founded on public policy, such provisions cannot be waived by a private party if such a waiver thwarts the legislative policy which the statute was designed to effectuate. The protection of statutes designed to protect the public as well as individuals cannot be waived by an individual.

28 Am. Jur. 2d Estoppel and Waiver § 214 (copy attached). As stated above, one of the policies of Washington's Deed of Trust Act is to ensure procedurally sound nonjudicial foreclosures. *Udall v. T.D. Escrow Services, Inc.*, 159 Wn.2d 903, 916, 154 P.3d 882 (2007); *See also Cox v. Helenius*, 103 Wn.2d 383, 693 P.2d 683 (1985). Similarly,

Since the statutes allowing for nonjudicial foreclosure dispense with many protections commonly enjoyed by borrowers, "lenders must strictly comply with the statutes, and courts must strictly construe the statutes in the borrower's favor."

*CHD, Inc. v. Boyles*, 138 Wn. App. 131, 137, 157 P.3d 415 (2007) quoting *Amresco Independence Funding, Inc. v. SPS Props., L.L.C.*, 129 Wn. App. 532, 537, 119 P.3d 884 (2005) (emphasis added). Finally, with regard to time limits, this Court has stated, "if a time limit is jurisdictional, instead of a normal statute of limitation, waiver, estoppel, and the doctrine of equitable tolling cannot be argued." *Hazel v. Van Beek*, 135 Wn.2d 45, 61, 954 P.2d 1301, 1308 (1998) citing *State v. Duvall*, 86 Wn. App. 871, 874, 940 P.2d 671(1997). It is the position of Ms. Albice and the Teccas that since the trustee's authority to conduct non-judicial deed of trust foreclosures arises solely from the statute, the 120 day rule is a jurisdictional rule since the trustee has no legal authority to conduct a sale after that time has expired. RCW 61.24.040(6).

The Dickinsons have argued several different waiver theories in the courts below. The Dickinsons' current waiver argument is based upon a claim that Ms. Albice and the Teccas ignored telephone calls from Premier or Option One. *See* Petition for Review, pages 5-6. In

support of this argument the Dickinsons rely upon a call log from Option One found at CP 309-312. But this waiver argument is not supported by the record and does not justify granting the Petition for Review for several reasons.

First, it is unclear who the alleged phone calls were made to or at what number. CP 309-312. The call log simply says, "called business" or "called home." *Id.* The call log demonstrates it was not the home or business of Ms. Albice or the Teccas because the last phone calls that were made – on February 13, 2007 – reflect that Premier and Option One had the wrong phone numbers. CP 311. This evidence is consistent with the testimony of Ms. Tecca that she received no communication from Premier or Option One in February of 2007 notifying her that a foreclosure sale was taking place. RP 16; CP 454.

The Dickinsons also argue that a letter was sent to Ms. Albice and the Teccas informing them that the foreclosure would be resumed. Petition for Review, page 5. However, Ms. Tecca says no such letter was ever received, nor was it ever produced throughout discovery in the case. *See* Court of Appeals Decision, page 3, footnote 3; RP 16; CP 454-455, 511-512. The "letter" referred to by the Dickinsons is nothing more than a computer entry. CP 1078. There is no evidence the letter was ever printed, mailed or otherwise delivered. There is an entry in the call logs that allegedly a letter was sent on February 5, 2007 (it is not clear whether that refers to the alleged January 31 letter), but whether a letter was sent on that date is irrelevant because Ms. Albice and the

Teccas tendered a cure of any defaults on February 2, 2007, more than eleven days prior to the sale. CP 309, 454, 474.

In light of the evidence, there was no clear waiver by Ms. Albice or the Teccas of their rights to challenge the procedural irregularities in the foreclosure. In fact, by tendering funds to cure any alleged defaults more than eleven days prior to the sale, Ms. Albice and the Teccas were actually attempting to exercise their rights under the statute. RCW 61.24.090(1). For these reasons the Court of Appeals correctly decided that there had been no waiver of either the 120 day rule contained in RCW 61.24.040(6), or the rule permitting them to cure more than eleven days prior to the sale contained in RCW 61.24.090(1).

**3. *The Court of Appeals' decision does not create any new burdens on buyers at foreclosure sales or lenders or trustees involved in such sales.***

The Court of Appeals' decision in this case merely applied the law to the facts of this case. The Court of Appeals' decision did not create any new burdens on purchasers, trustees, or lenders. The Dickinsons argue a parade of horrors in support of their request that this Court grant review. However, the consequences argued by the Dickinsons are not likely to occur, and some of the consequences argued by the Dickinsons are not actually negative.

First, any purchaser of property at a foreclosure sale purchases the property with some risk. After all, the purchaser receives a quitclaim deed, not a warranty deed. RCW 61.24.040(1)(f) (paragraph V of the Notice of Trustee's Sale). The Dickinsons argue that all parties

to a foreclosure sale must now conduct an inquiry into the factual basis for the allegations in the deed. Petition for Review, page 11. But all the Court of Appeals held was that the Dickinsons were not entitled to close their eyes to recitals in the deed that they knew to be false, such as the false recital that the original date set for sale was February 16, 2007. In the present case, Mr. Dickinson had a copy of the Notice of Trustee's Sale, which states the original date scheduled for sale was September 8, 2006. CP 444, 526.

The Dickinsons also argue that the Court of Appeals decision now requires purchasers at foreclosures to have a law degree. Petition for Review, page 11. This is like arguing someone cannot commit a crime unless they know the elements of the crime they commit. However, ignorance of the law, or a mistake as to the law, is not an excuse if the rights of third persons (in this case Ms. Albice and the Teccas) are at stake. *Harvey v. Charles R. McCormick Lumber Co. of Delaware*, 149 Wn. 368, 376, 271 P. 65 (1928).

Next, the Dickinsons argue that trustees will be required to substantially monitor the pre-sale conduct of lenders and borrowers to ensure a proper sale. Petition for Review, page 11. To a certain extent this is true, and they should.

Since the statutes allowing for nonjudicial foreclosure dispense with many protections commonly enjoyed by borrowers, "lenders must strictly comply with the statutes, and courts must strictly construe the statutes in the borrower's favor."

*CHD, Inc. v. Boyles*, 138 Wn. App. 131, 137, 157 P.3d 415 (2007) quoting *Amresco Independence Funding, Inc. v. SPS Props., L.L.C.*, 129 Wn. App. 532, 537, 119 P.3d 884 (2005). Whether or not complying with the statute is a heavy burden on lenders and trustees is irrelevant – it is their legal duty.

Finally, the Dickinsons argue that the Court of Appeals decision removed the bona fide purchaser protection from RCW 61.24.040. That is not the case. First, one needs to be a bona fide purchaser *for value* to obtain protection under the statute, not just a bona fide purchaser. RCW 61.24.040(7). Clearly the Dickinsons did not pay fair value for the property, and they knew that, showing up at the sale with four times as much money as they ultimately paid for the property. CP 373. Coupled with his extensive experience purchasing property at foreclosure sales, the irregularities in the foreclosure process, and the fact that he was tracking this foreclosure, Mr. Dickinson cannot claim the protections of a bona fide purchaser for value. The bona fide purchaser protection still exists in the statute. The Dickinsons simply fail to fall into that category.

4. ***If the Court accepts review of this matter, Ms. Albice and the Teccas ask that the Court also review the issues relating to Premier Mortgage's authority to conduct the foreclosure sale when it did not have an officer residing in the state at the time of the sale.***

Because this case was decided by the Court of Appeals on other grounds, it was not necessary for it to address Premier's legal authority to conduct the sale when it did not have a corporate officer residing in

the state at the time of the sale. Opinion, page 6, footnote 5; RCW 61.24.010(1)(a). If this Court decides to accept review of this matter, Ms. Albice and the Teccas request, pursuant to RAP 13.4(d), that the Court also address the issue of Premier's authority to conduct the sale under RCW 61.24.010(1)(a).

The foreclosure sale was conducted by Premier Mortgage Services of Washington. CP 240-241, 247, 697-711. Premier was a wholly owned subsidiary of Option One, a California corporation. CP 240-241, 697-711. All "employees" of Premier were actually employed by Option One. CP 240-241, 262; RP 33. According to its 2006 and 2007 annual reports filed with Washington's Secretary of State, none of Premier's corporate officers were residents of the state of Washington at the time of the foreclosure sale in this case. CP 170-173, 321-324; Exs. 34, 35. At a CR 30(b)(6) deposition, Premier designated an employee of Option One, Lisa Clary, to answer questions about the foreclosure in this case and the relationship between Option One and Premier. CP 240-242. Ms. Clary testified that she did not know who the corporate officers of Premier were, and did not know if any of them were residents of the state of Washington at the time of the foreclosure. CP 243-244. She also testified that although Premier was the trustee of the deed of trust in this case, she did not know what a trustee did. CP 247.

Teresa Harding, who had not been employed with Option One since 2007, later emerged as the purported officer of Premier residing in

Washington at the time of the foreclosure. CP 103-107, 130-134; RP 37. Like Ms. Clary, Ms. Harding received her paychecks from Option One or H&R Block. RP 33. The companies were “intertwined.” *Id.* As Vice President of Premier, Ms. Harding testified, “I do not participate in foreclosures.” RP 34. Ms. Harding had no job or duty description for her position as Vice President of Premier. RP 35-36. When asked if she had authority to govern the day-to-day operations of Premier, Ms. Harding testified that, as far as she knew, the company did not have day-to-day operations. RP 36. Ms. Harding testified that she was appointed or elected the resident officer of Premier in May 2004, although she was not a Washington resident until October 2004. *Id.*

At trial, the Dickinsons submitted a Consent by Directors dated May 2, 2005, showing Ms. Harding was retroactively appointed Vice President of the company from July 1, 2004, to May 2, 2005. Ex. 1; CP 106, 133. The Dickinsons also submitted a Consent by Directors dated May 31, 2005, showing Ms. Harding was appointed Vice President on that date, “to hold such office at the pleasure of this Board of Directors.” Ex. 2; CP 107. At trial Ms. Harding testified that she did not know if she was ever re-elected or re-appointed to the position. RP 37. She simply assumed that she was an officer of the company through the termination of her employment in 2007. RP 37. No one ever told her one way or the other. *Id.* According to Premier’s 2006 Annual Report, Ms. Harding was not elected or appointed as Vice President of the company in that year. Ex. 34; CP 170-171; 321-322; RP 37. Neither was

she elected or appointed as Vice President of Premier in 2007. Ex. 35; CP 172-173, 323-324.

**D. Conclusion**

This case does not involve an issue of substantial public interest that should be addressed by the Supreme Court. The legal issues raised by the Dickinson have already been addressed in *Felton v. Citizens Federal Savings and Loan Association of Seattle*, 101 Wn.2d 416, 679 P.2d 928(1984); *Cox v. Helenius*, 103, Wn.2d 383, 693 P.2d 683 (1985); *CHD v. Boyles*, 138 Wn. App. 131, 157 P.3d 415 (2007); and *Bingham v. Lechner*, 111 Wn. App. 118, 45 P.3d 562 (2002). This is not a close or difficult case factually either. Virtually none of the procedural requirements for a valid non-judicial deed of trust foreclosure were followed. The sale was conducted more than 120 days after the date first set for sale, the borrowers had over \$5,000.00 in applied funds on deposit with the lender at the time of the foreclosure, cure was tendered more than eleven days prior to the sale, and the sale was conducted by a trustee who was not qualified to act as a trustee in Washington. RCW 61.24.010, 61.24.040, and 61.24.090. Under the circumstances this may be a unique case given the near total failure of the trustee to comply with the procedural requirements for a non-judicial deed of trust foreclosure, but it is not a case of substantial public interest that should

\* \* \*

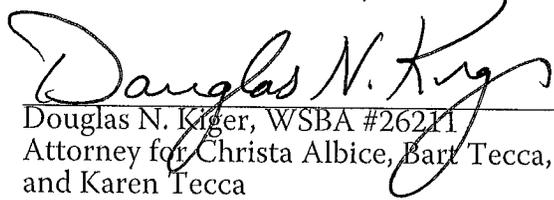
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\* \* \*

be addressed by this Court. Therefore, Ms. Albice and Mr. and Mrs. Tecca respectfully request that the Petition for Review be denied.

Respectfully submitted this 24 day of November 2010.

**BLADO KIGER BOLAN, P.S.**

  
Douglas N. Kiger, WSBA #26211  
Attorney for Christa Albice, Bart Tecca,  
and Karen Tecca

**DECLARATION OF SERVICE**

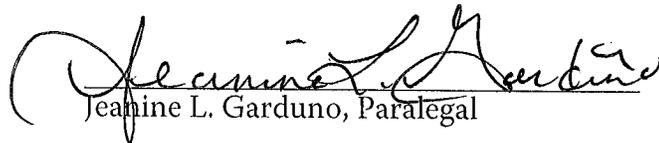
The undersigned declares under penalty of perjury under the laws of the State of Washington that on the 24<sup>th</sup> day of November, 2010, I placed with ABC Legal Messengers, Inc. an original Respondents' Response Brief for filing with the Supreme Court, and true and correct copies of the same for delivery to each of the following parties and their counsel of record:

Attorneys for Respondents, Ron Dickinson and Cheryl Dickinson:

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**DATED** this 24<sup>th</sup> day of November, 2010, at Tacoma, Washington.

**BLADO KIGER BOLAN, P.S.**

  
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# Appendix A

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Only the Westlaw citation is currently available.

United States District Court, W.D. Washington,  
 at Seattle.

Judith MOON, an individual, Plaintiff,

v.

GMAC MORTGAGE CORPORATION, d/b/a  
 Ditech.com, a Pennsylvania Corporation, et  
 al., Defendants.

No. C08-969Z.

Oct. 2, 2009.

West KeySummary

**Damages** → 208(6)

115k208(6) Most Cited Cases

A mortgagee was precluded from summary judgment as a mortgagor could show actual damages from a violation of the Real Estate Settlement Procedures Act (RESPA). Although two courts had concluded that RESPA did not permit recovery of emotional distress damages, other courts had consistently found that actual damages included emotional distress damages. Whether the mortgagor could adequately quantify her alleged emotional distress was an issue for the trier of fact. Real Estate Settlement Procedures Act of 1974, § 6(f)(1)(A), (B), 12 U.S.C.A. § 2605(f)(1)(A), (B); Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A. Shelly Crocker, Crocker Kuno/Resolve Legal, PLLC, Seattle, WA, for Plaintiff.

Antoinette Marie Davis, Taryn M. Darling Hill, Crocker Kuno/Resolve Legal, PLLC, Erin McDougal Stines, Bishop, White & Marshall, Seattle, WA, for Defendants.

**ORDER**

THOMAS S. ZILLY, District Judge.

\*1 THIS MATTER comes before the Court on cross-motions for summary judgment. Having re-

viewed all papers filed in support of and in opposition to each motion, the Court hereby ORDERS:

(1) Defendants' motion for summary judgment, docket no. 76, is GRANTED IN PART and DENIED IN PART;

(2) Plaintiff's motion for partial summary judgment against defendant GMAC Mortgage Corporation d/b/a ditech.com ("GMAC"), docket no. 83, is GRANTED IN PART and DENIED IN PART;

(3) Plaintiff's motion for partial summary judgment against defendant First American Title Insurance Company ("FATIC"), docket no. 84, is DENIED;

(4) Plaintiff's motion for partial summary judgment against defendant Executive Trustee Services, LLC ("ETS"), docket no. 85, is DENIED;

(5) With the exception of plaintiff's Fifth Cause of Action under the Real Estate Settlement Procedures Act and plaintiff's Sixth Cause of Action as against only GMAC, plaintiff's claims are DISMISSED with prejudice, but plaintiff will be permitted to assert any violations of the Truth in Lending Act as defenses to defendant GMAC's counterclaim; and

(6) Defendants Mortgage Electronic Registration Systems, Inc., First American Title Insurance Company, and Executive Trustee Services, LLC, are DISMISSED from this action with prejudice.

**Background**

This action involves two loans that Jimmy Moon and plaintiff Judith Moon obtained from GMAC in April 2006 to refinance their Snohomish residence. One of the loans was for 80% and the other loan was for 20% of the estimated value of the home. The "80/20" loans were for the following amounts, durations, and interest rates:

. \$180,000 for 30 years at 7% per annum

. \$45,000 for 25 years at 10.75% per annum.

On August 9, 2007, plaintiff's husband, Jimmy Moon, died. The sequence of the events that followed is the focus of many of plaintiff's claims, and





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ants should be offset ... by the damages to which Ms. Moon is entitled based upon the Court's findings regarding the claims addressed in her Complaint." Answer to Counterclaim, Affirmative Defenses at ¶ 5 (docket no. 135). The dismissal of plaintiff's Third Cause of Action is without prejudice to plaintiff's ability to maintain the same TILA claim as an affirmative defense.

## 2. Violation of Real Estate Settlement Procedures Act ("RESPA") (Fifth Cause of Action)

Plaintiff alleges that GMAC did not timely acknowledge or respond to her requests for copies of loan documents. Defendants assert that plaintiff's and her attorney's letters did not constitute "qualified written requests" and therefore did not trigger the statutory deadlines for acknowledgement or response. Defendants also argue that they timely responded to the attorney's letters sent in January 2008. Finally, defendants contend that plaintiff has not established a pattern of noncompliance.

The provisions of RESPA at issue provide in relevant part:

### (1) Notice of receipt of inquiry

#### (A) In general

If any servicer of a federally related mortgage loan receives a qualified written request from the borrower (or an agent of the borrower) for information relating to the servicing of such loan, the servicer shall provide a written response acknowledging receipt of the correspondence within 20 days ... unless the action requested is taken within such period.

#### (A) Qualified written request

For purposes of this subsection, a qualified written request shall be a written correspondence, other than notice on a payment coupon or other payment medium supplied by the servicer, that--

\*4 (i) includes, or otherwise enables the servicer to identify, the name and account of the borrower; and

(ii) includes a statement of the reasons for the be-

lief of the borrower, to the extent applicable, that the account is in error or provides sufficient detail to the servicer regarding other information sought by the borrower.

### (2) Action with respect to inquiry

Not later than 60 days ... after the receipt from any borrower of any qualified written request under paragraph (1) and, if applicable, before taking any action with respect to the inquiry of the borrower, the servicer shall--

....

(C) after conducting an investigation, provide the borrower with a written explanation or clarification that includes--

(i) information requested by the borrower or an explanation of why the information requested is unavailable or cannot be obtained by the servicer; and

(ii) the name and telephone number of an individual employed by, or the office or department of, the servicer who can provide assistance to the borrower.

12 U.S.C. § 2605(e)(1)(A), (e)(1)(B)(i) & (ii), & (e)(2)(C) (i) & (ii). An individual prevailing on a claim that the above-quoted provisions of RESPA were violated is entitled to:

(A) any actual damages to the borrower as a result of the failure; and

(B) any additional damages, as the court may allow, in the case of a pattern or practice of non-compliance with the requirements of this section, in an amount not to exceed \$1,000.

12 U.S.C. § 2605(f)(1)(A) & (B).

Defendants' contention that none of the three letters at issue constitute a qualified written request ("QWR") lacks merit. Defendants assert that plaintiff's letter dated September 7, 2007, is not a QWR because it is unsigned and does not state that the account is in error. Neither a signature nor an accusation of error, however, are requirements of a QWR. A QWR need only ask for information relating to servicing and provide the relevant names and account numbers. The September letter appears to do both. It requests copies of loan documents and

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contains the names of the borrowers and account numbers at issue. See Exh. C to Stines Decl. (docket no. 77-4 at 3). Thus, the September letter constitutes a QWR to which GMAC failed to timely respond. See *In re Thorian*, 387 B.R. 50, 70 (Bankr.D.Idaho 2008) (interpreting the terms "inquiry" and "request" as used in RESPA to mean "a request for information" and "the act or instance of asking for something," respectively, and concluding that a QWR must "allege an account error or seek some information from the loan servicer").

The two letters sent in January 2008 by plaintiff's attorney likewise qualify as QWRs. Defendants' assertion that the letters are not QWRs because they do not bear plaintiff's signature or are not accompanied by an authorization form containing plaintiff's and her husband's social security numbers runs contrary to the statutory definition of a QWR. RESPA specifically envisions that a QWR may be sent by a borrower's agent. See 12 U.S.C. § 2605(e)(1)(A). Both letters at issue indicate that the author, Shelly Crocker, had been retained by plaintiff to represent her. Both letters identify the borrowers and the account numbers. Both letters request copies of loan documents. See Exh. C to Stines Decl. (docket no. 77-4 at 4-6). Both letters are QWRs.

\*5 Defendants appear to concede that they never acknowledged receipt of the three letters at issue, which they were required to do within 20 days of receiving the correspondence. They assert, however, that they complied with the request for documents within 60 days of receiving the January letters from plaintiff's attorney. Defendants appear to be correct, the first letter being dated January 1, 2008, the documents having been produced on March 3, 2008, and all intervening holidays and weekends being excluded, pursuant to RESPA, from calculation of the 60-day period. See 12 U.S.C. § 2605(e)(2). Moreover, defendants' faxed response contains the requisite name and telephone number of an employee who could provide further assistance. See Exh. 8 to Davis Decl. (docket no.

86).

Thus, GMAC's RESPA violations consist of: (1) failing to acknowledge receipt of three QWRs within the applicable 20-day (effectively 4 work-week) period; and (2) failing to timely respond to plaintiff's September request for documents. Defendants contend that, despite such violations, plaintiff's RESPA claim should be dismissed because she has failed to establish actual damages or a pattern of noncompliance. These arguments, however, do not warrant judgment as a matter of law.

In response to defendants' assertion that plaintiff has not shown actual damages, plaintiff contends that "most courts" have held that actual damages under RESPA include emotional distress. Response at 15 (docket no. 103). Defendants have offered no reply on this issue, and plaintiff appears to be correct. Although two courts have concluded that RESPA does not permit recovery of emotional distress damages, other courts that "have examined § 2605(f) have consistently found that 'actual damages' includes emotional distress damages." *Carter v. Countrywide Home Loans, Inc.*, 2009 WL 1010851 at \*3 (E.D.Va.) (disagreeing with *Katz v. Dime Sav. Bank*, 992 F.Supp. 250 (W.D.N.Y.1997), and *In re Tomasevic*, 273 B.R. 682 (Bankr.M.D.Fla.2002)); *Ploog v. Homeside Lending, Inc.*, 209 F.Supp.2d 863, 870 (N.D.Ill.2002) (holding that "RESPA is a consumer protection statute and RESPA's actual damages provision includes recovery for emotional distress"). The *Carter* and *Ploog* decisions are well-reasoned and the Court likewise HOLDS that RESPA permits recovery of emotional distress damages. Whether plaintiff can adequately quantify her alleged emotional distress, however, is an issue for the trier of fact, and not an appropriate subject for summary judgment. See *Carter*, 2009 WL 1010851 at \*5 ("such evidence as that concerning emotional distress is, by its very nature, not necessarily susceptible to precise quantification and, therefore, the Court declines to preclude, as a matter of law, the

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ultimate fact finder's consideration of such evidence at trial").

As to defendants' denial of a pattern or practice of noncompliance with RESPA, plaintiff has established a genuine issue of material fact precluding summary judgment. The Court concludes that three successive failures to timely acknowledge receipt and a failure to timely respond to a request for loan documents might well constitute a pattern or practice of noncompliance, but defendants' explanation for such conduct might weigh against such finding, and the Court cannot decide this issue as a matter of law. The Court declines to address whether, if such pattern or practice were established, it would exercise its discretion to permit statutory damages in any amount, either equal to or below the limit of \$1,000.

\*6 In sum, defendants' motion for summary judgment as to plaintiff's Fifth Cause of Action is DENIED, and plaintiff's motion for partial summary judgment as to GMAC's violation of RESPA is GRANTED IN PART. The three letters sent by plaintiff or her attorney constitute QWRs, and GMAC failed to timely acknowledge receipt of the letters. GMAC also failed to timely respond to plaintiff's letter dated September 7, 2007. Actual damages for purposes of RESPA encompass emotional distress, but whether plaintiff can adequately quantify any emotional distress damages and whether plaintiff would receive any statutory damages based on any pattern or practice of noncompliance are issues reserved for trial.

### C. State Statutory Claims

#### 1. Violation of Deeds of Trust Act (Fourth Cause of Action)

The contours of plaintiff's claim under the Deeds of Trust Act are unclear. In her Amended Complaint, plaintiff alleged that MERS "cannot demonstrate that it is the beneficiary [of the deeds of trust] as defined by statute," that FATIC "is not authorized to act on behalf of the lender or any entity that was

a party to the subject Deed of Trust," and that ETS "is not authorized to act on behalf of the lender or any entity that was a party to the subject Deed of Trust." Amended Complaint at ¶¶ 7.2-7.4 (docket no. 3). Defendants, however, have provided copies of the Deeds of Trust, naming MERS as the beneficiary, and a copy of an Appointment of Successor Trustee, which was recorded in Snohomish County, indicating that FATIC had been appointed trustee by MERS, as successor to Transnation Title Co. Exhs. C & D to Zeitz Decl. (docket nos. 78-4 & 78-5); Exh. A to De La Torre Decl. (docket no. 80-2).

In response to defendants' motion, plaintiff has not offered any evidence disputing MERS's status as beneficiary or FATIC's status as trustee, and has not cited any authority undermining ETS's status or authority to act as FATIC's agent for purposes of foreclosure proceedings. *See Buse v. First Am. Title Ins. Co.*, 2009 WL 1543994 (W.D.Wash.) (holding that, although the Deeds of Trust Act limits who may serve as a trustee of a deed of trust, it does not restrict who may act as a trustee's agent, and that the Deeds of Trust Act explicitly allows trustees to use agents). Instead, in response to defendant's motion, plaintiff has attempted to alter the nature of her Deeds of Trust Act claim, and now contends that FATIC and ETS violated the statute and/or their fiduciary duties by representing to plaintiff that they could not stop or postpone the trustee's sale. Plaintiff, however, cannot in her briefing change the fundamental character of her pleadings. Moreover, plaintiff points to no specific provision of the Deeds of Trust Act that she alleges FATIC and/or ETS violated, and the current rendition of her statutory claim appears duplicative of her separately pleaded claim against FATIC and ETS for breach of fiduciary duty, as well as of her claim against FATIC for misrepresentation. Thus, defendants' motion for summary judgment is GRANTED IN PART and plaintiff's Fourth Cause of Action is DISMISSED with prejudice.

#### 2. Violation of Consumer Protection Act ("CPA") (Sixth Cause of Action)



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plaintiff's failure to pay amounts due into the Court's Registry, as a result of which the Court dissolved the preliminary injunction and permitted foreclosure, constituted a waiver of all of plaintiff's claims. Second, defendants assert that the economic loss rule bars plaintiff's infliction of emotional distress and unconscionability claims. Third, defendants challenge whether plaintiff has put forward sufficient proof of her claims. These arguments will be addressed seriatim.

### 1. Waiver

Washington courts have held that a borrower or grantor of a deed of trust who fails to employ the procedures of the Deeds of Trust Act to enjoin a foreclosure or trustee's sale waives the right to contest the underlying obligations on the foreclosed property. [FN4] *Plein v. Lackey*, 149 Wash.2d 214, 67 P.3d 1061 (2003); *Brown v. Household Realty Corp.*, 146 Wash.App. 157, 189 P.3d 233 (2008); *CHD, Inc. v. Boyles*, 138 Wash.App. 131, 157 P.3d 415 (2007). These decisions are based on the following three goals of the Deeds of Trust Act: (i) to promote an efficient and inexpensive nonjudicial foreclosure process; (ii) to ensure an adequate opportunity for interested parties to prevent wrongful foreclosure; and (iii) to secure the stability of land titles. *Brown*, 146 Wash.App. at 169, 189 P.3d 233. Although the waiver doctrine bars claims that contest the underlying debt or obligation, it does not preclude a borrower or grantor from challenging, in a post-sale action, the procedures of the foreclosure or trustee's sale. *CHD*, 138 Wash.App. at 139, 157 P.3d 415. Thus, the task before the Court is to determine the nature of plaintiff's claims, which will indicate whether they have been waived.

FN4. The legislature recently modified the waiver doctrine to exempt claims of fraud, misrepresentation, CPA violations, and failure to comply with the Deeds of Trust Act, thereby permitting such claims to be brought within the earlier of two years after a foreclosure sale or the applicable

statute of limitations even when the borrower or grantor failed to seek an injunction of the foreclosure sale. *See* 2009 Wash. Legis. Serv. Ch. 292, § 6 (S.B. No. 5810) (codified at RCW 61.24.180). The effective date of this amendment was July 26, 2009, which was after the foreclosure sale at issue in this case and after the Trustee's Deed was recorded. The new statute contains no indication that it has any retroactive effect. Moreover, the amendment does not appear to apply; it governs only "foreclosures of owner-occupied residential real property," RCW 61.24.180(3), and at the time the property at issue was foreclosed, plaintiff no longer resided in it, but rather had moved to Idaho.

As pleaded, plaintiff's claims against GMAC for breach of fiduciary duty, intentional and negligent infliction of emotional distress, and unconscionability involve the underlying obligation, not the foreclosure procedures. In the First Cause of Action, plaintiff asserts that GMAC breached a fiduciary duty by "talking the Moons into an '80/20' loan" and failing to aid or cooperate with plaintiff after her husband died. Amended Complaint at ¶ 4.4 (docket no. 3). In the Seventh and Eighth Causes of Action, plaintiff alleges that GMAC Mortgage Corp.'s callous attitude and unwillingness to work with her following her husband's death caused her emotional distress. *Id.* at ¶¶ 10.2 & 11.2. In the last, unnumbered claim, which the Court will denominate the Tenth Cause of Action, plaintiff contends that the second mortgage was unconscionable due to *inter alia* its "significantly higher" rate. *Id.* at ¶¶ 13.3-13.4. All of these claims seek relief from the underlying obligation, and plaintiff is deemed to have waived them by failing to take the steps necessary to maintain the injunction against foreclosure. [FN5]

FN5. Plaintiff asserts that waiver does not apply because she obtained an injunction,

which was later dissolved, citing for support a comment written by a law student in 1984, which opined that "a party who unsuccessfully attempted to enjoin the sale should not be held to have waived the right to contest the completed sale." Joseph L. Hoffmann, Comment, *Court Actions Contesting the Nonjudicial Foreclosure of Deeds of Trust in Washington*, 59 Wash. L.Rev. 323, 336 (1984). No Washington court has yet adopted this student's view, but even were it a valid proposition, lack of success in initially obtaining an injunction differs substantially from the situation here, where plaintiff "fail[ed] to show that she made a good faith effort to comply with the conditions of the injunction" and failed to "explain why she has not or cannot make partial monthly payments." Order at 7 (docket no. 46). In essence, plaintiff allowed the injunction to lapse, and waiver of her claims challenging the underlying obligation is the corollary to such behavior. See *Brown*, 146 Wash.App. at 169, 189 P.3d 233 ("To except tort or other claims for money damages from the waiver provision would frustrate the purposes of the Act because lenders understandably may not be willing to utilize a non-judicial foreclosure procedure in which the trustee's sale bars any deficiency judgment but leaves the lender subject to potential liability arising out of the underlying obligation even after the property securing the deed of trust has been sold.").

\*9 In contrast, plaintiff's claims against FATIC and ETS for breach of fiduciary duty, infliction of emotional distress, and misrepresentation predominately relate to the foreclosure process. In essence, plaintiff alleges that FATIC and/or ETS made misrepresentations concerning their authority to postpone the foreclosure and failed to adequately comply with the Snohomish County Superior Court's order enjoining foreclosure. These claims fall out-

side the scope of the waiver doctrine. Defendants' motion for summary judgment on the basis of waiver is therefore GRANTED IN PART as to GMAC and DENIED IN PART as to FATIC and ETS. Plaintiff's First, Seventh, Eighth, and Tenth Causes of Action against GMAC are deemed waived and are DISMISSED with prejudice.

## 2. Economic Loss Rule

Defendants assert that the economic loss rule precludes plaintiff's claims against FATIC and ETS for intentional and negligent infliction of emotional distress. The economic loss rule limits parties to their contractual remedies when a loss potentially implicates both tort and contract relief. *Alejandre v. Bull*, 159 Wash.2d 674, 682, 153 P.3d 864 (2007). The rule bars recovery for alleged breach of tort duties when a contractual relationship between the parties exists and the losses at issue are purely economic. *Id.* at 683, 153 P.3d 864. Plaintiff, however, did not have a contractual relationship with either FATIC or ETS, and defendants' motion for summary judgment based on the economic loss rule as to the Seventh and Eighth Causes of Action against FATIC and ETS is DENIED.

## 3. Sufficiency

As to the four remaining claims against FATIC and ETS, namely breach of fiduciary duty, intentional and negligent infliction of emotional distress, and misrepresentation, the Court must assess whether plaintiff has presented sufficient evidence to demonstrate an issue for trial. All four claims involve the same factual allegations, namely that FATIC and/or ETS told plaintiff's attorney they had no authority to postpone the foreclosure sale and that FATIC and/or ETS did not take the actions necessary to postpone the sale after the Snohomish County Superior Court issued an injunction. The parties appear to agree that a trustee of a deed of trust owes fiduciary duties to both the mortgagee/beneficiary and the mortgagor/grantor. *Cox v. Helenius*, 103 Wash.2d 383, 389, 693 P.2d 683 (1985). The parties dispute, however, whether FATIC or

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ETS breached any duties, made any misrepresentations, or did anything improper that caused plaintiff emotional distress.

In support of her claims, plaintiff offers ETS's file notes indicating that Myron Ravelo, a Default Team Lead with ETS, spoke with plaintiff's attorney, Shelly Crocker, on May 22, 2008, and advised her that ETS "do[es] not have the authority to make any payment arrangements nor postpone the sale without the consent of the lender GMAC." Exh. 10 to Davis Decl. (docket no. 86); *see also* Ravelo Decl. at ¶¶ 1 & 6 (docket no. 79). Plaintiff also submits a declaration of her former attorney, Zeshan Khan, who indicates that, on May 27, 2008, he obtained an order restraining the trustee's sale, which he served on Transnation Title Insurance Co. (which was no longer the trustee on the date in question), and that, on May 30, 2008, he drove to the Snohomish County Courthouse and saw plaintiff's property still listed for auction. Khan Decl. at ¶¶ 4 and 5 (docket no. 88). Mr. Khan further states that he presented the restraining order to the auctioneer and "stopped the sale from taking place." *Id.* at ¶ 6.

\*10 Defendants contend that the listing of plaintiff's property on the auctioneer's sheet is not evidence of FATIC's or ETS's failure to comply with the restraining order, but rather is consistent with one of the provisions of the Deeds of Trust Act, which states:

The trustee has no obligation to, but may, for any cause the trustee deems advantageous, *continue the sale* for a period or periods not exceeding a total of one hundred twenty days *by (a) a public proclamation at the time and place fixed for sale in the notice of sale* and if the continuance is beyond the date of sale, by giving notice of the new time and place of the sale by both first class and either certified or registered mail, return receipt requested, to the persons specified in subsection (1)(b)(i) and (ii) of this section ....

RCW 61.24.040(6) (emphasis added). Defendants assert that plaintiff's property remained on the auc-

tioneer's sheet because the trustee was required to publicly announce at the time stated in the notice of sale that the sale was being continued. Plaintiff provides no authority or evidence to the contrary, and defendants' position appears consistent with the Deeds of Trust Act, to the extent the trustee (FATIC via its agent ETS) chose to continue the sale in the manner set forth in RCW 61.24.040(6). *See* RCW 61.24.130(6) ("The issuance of a restraining order or injunction shall not prohibit the trustee from continuing the sale as provided in RCW 61.24.040(6)."). Thus, plaintiff has not put forward sufficient evidence to demonstrate that the listing of plaintiff's property on the auctioneer's sheet constituted a breach of FATIC's and/or ETS's fiduciary duties, and plaintiff's infliction of emotional distress claims relating to this allegation are likewise lacking in merit.

As to the statements by Mr. Ravelo indicating to plaintiff's attorney that FATIC and/or ETS had no authority to "make any payment arrangements nor postpone the sale without the consent of the lender GMAC," plaintiff fails to explain how such representation was inaccurate, misleading, or a breach of fiduciary duty. The only case cited by plaintiff is *Cox v. Helenius*, 103 Wash.2d 383, 693 P.2d 683 (1985), which is distinguishable. In *Cox*, the plaintiffs, a husband and wife, purchased a swimming pool for their home in Seattle. To secure payment for the pool, they executed a deed of trust for their home, naming the attorney for the pool contractor as trustee. Shortly after the work was completed, the pipes installed by the pool contractor collapsed, causing sewage to back up into the home. The pool contractor failed to repair the work and the plaintiffs spent additional funds to fix the problem. The plaintiffs' attorney sent a letter to the pool contractor demanding that it reconvey the deed of trust and pay for the damage resulting from its defective work. The plaintiffs withheld payments on the note secured by the deed of trust. The trustee sent the plaintiffs notice of default. The plaintiffs then filed suit. The trustee appeared in the action as attorney of record for the pool contractor. He sub-

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sequently gave notice of and conducted a foreclosure sale, at which his secretary bid \$11,783 on behalf of the pool contractor, and the winning bidder, a then-disbarred attorney, paid one dollar more. At the time of the sale, the home was worth between \$200,000 and \$300,000.

\*11 In *Cox*, the Supreme Court held that the trustee had violated his fiduciary duty to the plaintiffs by failing to either (i) inform them that their lawsuit did not itself operate to restrain the trustee's sale or (ii) delay the foreclosure until the plaintiff's action against the pool contractor was resolved. *Id.* at 390, 693 P.2d 683. Moreover, the trustee should not have also acted as the pool contractor's attorney. *Id.* Although the trustee in *Cox* was admonished by the Supreme Court for not delaying the foreclosure sale, the conclusion does not follow that all trustees of all deeds of trust have authority to postpone a foreclosure sale without the consent of the beneficiary. The key fact distinguishing *Cox* from this case, as well as from the garden-variety foreclosure situation, is the trustee's position as both the trustee of the deed of trust and the attorney of record for the beneficiary in an action in which the obligation secured by the deed of trust was being challenged. Because the trustee was also the attorney for the beneficiary, he presumably had authority to delay the foreclosure sale, not in his capacity as trustee, but as the representative of the beneficiary. *Cox* simply does not support plaintiff's contention that FATIC or ETS breached any fiduciary duty or made any misrepresentation when Mr. Ravelo informed plaintiff's attorney that, without GMAC's consent, neither FATIC nor ETS could cancel the sale and, as a result, her claims for breach of fiduciary duty, intentional or negligent infliction of emotional distress, and misrepresentation fail. Defendants' motion for summary judgment is GRANTED IN PART, and plaintiff's Second, Seventh, Eighth, and Ninth Causes of Action against FATIC and/or ETS are DISMISSED with prejudice.

### **Conclusion**

For the foregoing reasons, defendants' motion for

summary judgment, docket no. 76, is GRANTED IN PART and DENIED IN PART, plaintiff's motion for summary judgment against GMAC, docket no. 83, is GRANTED IN PART and DENIED IN PART, and plaintiff's motions for summary judgment against the remaining defendants, docket nos. 84 and 85, are DENIED.

IT IS SO ORDERED.

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# Appendix B

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Estoppel and Waiver

Francis C. Amendola, J.D.; Kimberly Castelaz, J.D., Beth Bates Holliday, J.D., Lucas Martin, J.D., and Eric Surette, J.D.

Part  
Two. Waiver

VIII. Kinds of Rights and Privileges Subject to Waiver

Topic SummaryCorrelation TableReferences**§ 214. Statutory rights or benefits**

Parties can waive statutory rights and protections,[98] and both substantive and procedural statutory rights may be waived.[99] Statutory rights should ordinarily be waived only by clear affirmative words or actions,[1] and at least one state requires a waiver of statutory rights must be express and explicit.[2] In some states a flexible approach has been adopted regarding acceptable form of voluntary waivers when statutory rights, rather than constitutional rights, are at issue.[3]

Where there is a statutory duty to be performed by those charged with administering that statute, such a law established for a public reason cannot be waived or circumvented by private act or agreements.[4] Further, a statutory right may not be waived or released if such waiver or release contravenes the purpose of the statute.[5]

When a statute contains provisions that are founded upon public policy, such provisions cannot be waived by a private party if such a waiver thwarts the legislative policy which the statute was designed to effectuate.[6] The protection of statutes designed to protect the public as well as individuals cannot be waived by an individual.[7]

Where a legislature permits a particular, limited waiver of right upon satisfaction of set of conditions, it intends that no other related waivers be permitted.[8]

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[FN98] Ellis v. General Motors Acceptance Corp., 160 F.3d 703 (11th Cir. 1998); Ramsey v. City of Sand Point, 936 P.2d 126 (Alaska 1997).

Absent an affirmative indication in a statute of Congress' intent to preclude waiver, a court presumes that statutory provisions are subject to waiver by voluntary agreement of the parties. U.S. v. Mezzanatto, 513 U.S. 196, 115 S. Ct. 797, 130 L. Ed. 2d 697, 40 Fed. R. Evid. Serv. (LCP) 1220 (1995), on remand to, 54 F.3d 613 (9th Cir. 1995) and (distinguished by, U.S. v. Burch, 156 F.3d 1315 (D.C. Cir. 1998)) and (distinguished by, U.S. v. Young, 1999 WL 1005001 (N.D. Iowa 1999)).

**Forms**

Statutory right waived. 8 Am. Jur. Legal Forms 2d, Estoppel and Waiver § 102:20.

[FN99]First Interstate Bank of Denver, N.A. v. Central Bank & Trust Co. of Denver, 937 P.2d 855 (Colo. Ct. App. 1996), reh'g denied, (Oct. 10, 1996) and cert. denied, (May 19, 1997).

[FN1]Matter of Appraisal of Ford Holdings, Inc. Preferred Stock, 698 A.2d 973 (Del. Ch. 1997).

[FN2]In re Jack/Wade Drilling, Inc., 213 B.R. 493, 139 O.G.R. 505 (Bankr. W.D. La. 1997).

[FN3]People v. Leonor, 245 A.D.2d 22, 665 N.Y.S.2d 76 (1st Dep't 1997), appeal denied, 92 N.Y.2d 855, 677 N.Y.S.2d 85, 699 N.E.2d 445 (1998).

[FN4]Soares v. Max Services, Inc., 42 Conn. App. 147, 679 A.2d 37 (1996), certification denied, 239 Conn. 915, 682 A.2d 1005 (1996).

As to the limitation on waiver of rights in violation of public policy or affecting the rights of others, see § 210.

[FN5]ABC, Inc. v. PrimeTime 24, Joint Venture, 17 F. Supp. 2d 478 (M.D.N.C. 1998), aff'd in part, vacated on other grounds in part, 184 F.3d 348, 51 U.S.P.Q.2d (BNA) 1451 (4th Cir. 1999), on remand to, 52 U.S.P.Q.2d (BNA) 1352, 1999 WL 781611 (M.D.N.C. 1999).

[FN6]In re Tulsa Energy, Inc., 111 F.3d 88 (10th Cir. 1997).

[FN7]Asbury Arms Development Corp., v. Florida Dept. of Business Regulations, Div. of Florida Land Sales and Condominiums, 456 So. 2d 1291 (Fla. Dist. Ct. App. 2d Dist. 1984).

[FN8]In re Marriage of Fell, 55 Cal. App. 4th 1058, 64 Cal. Rptr. 2d 522 (2d Dist. 1997), reh'g denied, (July 11, 1997) and review denied, (Sept. 3, 1997) and (distinguished by, In re Marriage of Jones, 60 Cal. App. 4th 685, 70 Cal. Rptr. 2d 542 (5th Dist. 1998).

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