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Supreme Court Cause No. 852600  
Court of Appeal Cause No. 39265-8-11

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

**SUPPLEMENTAL BRIEF OF  
RESPONDENTS ALBICE AND TECCA**

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STATE OF WASHINGTON  
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## **I. Introduction**

The non-judicial deed of trust foreclosure in this case is void because the sale took place more than 120 days after the date originally set for sale, cure was tendered more than eleven days before the sale, and the trustee did not have an officer residing in the state at the time of the foreclosure sale. Mr. Dickinson does not dispute that the sale took place more than 120 days after the original sale date or that cure was tendered more than eleven days prior to the sale. Instead, he argues that he is a bona fide purchaser for value and therefore these defects are irrelevant. But Mr. Dickinson knew or should have known of these defects, and Mr. Dickinson only paid about 13% of the fair market value of the property at the foreclosure sale. Thus, the Court of Appeals properly found the sale void and concluded that Mr. Dickinson was not a bona fide purchaser for value.

Since the events in this case, the Legislature enacted legislation relating to the Deed of Trust Act that underscores not only the legislative intent to allow post-sale relief for void and substantially defective foreclosures, but also underscores that the Court of Appeals' decision in this is case was correct. Rather than re-briefing the details of the sale defects, Ms. Albice and the Teccas rely upon previous briefing and the Court of Appeals' decision, since these issues were discussed at length in those materials. The focus of this supplemental brief is primarily on the legislation enacted since this case began, the policies

behind the Deed of Trust Act, and the implications the legislation and policies have on this case.

## II. Statement of the Case

Many of the factual issues in this case were not disputed. The foreclosure sale in this place took place more than 120 days after the original sale date. CP 303, 444, 455, 772, 783-829. Ms. Albice and the Teccas tendered funds to cure their default more than eleven days before the sale, and had more than \$5,300 in unapplied funds on deposit with the beneficiary at the time of the sale. CP 268-271, 298-299, 454, 474, 823-825. The sale was conducted by Premier Mortgage Services which did not have an officer residing in the state at the time of the sale. CP 170-173, 243-244, 321-324; RP 36-37; Exs. 34, 35. The first two issues were not disputed by Mr. Dickinson and were therefore decided on summary judgment. CP 17-33. The third issue proceeded to trial. CP 35-44. A more detailed statement of facts is set forth in the Response to Petition for Review, and the Court of Appeals' decision, so will not be repeated here.

## III. Argument

1. **Legislation enacted since this case began demonstrates the Legislature's intent to protect landowners from wrongful foreclosures by expanding the circumstances under which land owners can bring post-sale claims for wrongful foreclosure.**

In *Cox v. Helenius* this Court confirmed that under certain circumstances, a non-judicial deed of trust foreclosure may result in a

void sale, even if the aggrieved party fails to restrain the sale. *Cox v. Helenius*, 103 Wn.2d 383, 388, 693 P.2d 683 (1985), citing *Lovejoy v. Americus*, 111 Wn. 571, 574, 191 P. 790 (1920) and *Miebach v. Colasurdo*, 102 Wn.2d 170, 685 P.2d 1074 (1984). Commenting on the Coxes' failure to restrain the sale, this Court observed,

Even if the statutory requisites to foreclose had been satisfied and the Coxes had failed to properly restrain the sale, this trustee's actions, along with the grossly inadequate purchase price, would result in a void sale.

*Cox*, 103 Wn.2d at 388.

Courts recognize a distinction between post-sale challenges to foreclosure sales based upon substantive defects (usually challenges to the underlying debt), and procedural defects in the sale process. Often post-sale substantive challenges are deemed waived or barred if the sale is not restrained, while post-sale challenges to procedural defects affecting the legal authority of the trustee are not waived. *Plein v. Lackey* 149 Wn.2d 214, 57 P.3d 1061 (2003); *Moon v. GMAC Mortgage Corporation*, 2009 WL 3185596 (W.D. Wash. 2009) (Appendix A); *Brown v. Household Realty Corp.*, 146 Wn. App. 157, 189 P.3d 233 (2008); *CHD v. Boyles*, 138 Wn. App. 131, 139, 157 P.3d 415 (2007). If the procedural defects in the sale are such that the trustee lacks authority to conduct the sale, or the sale is void, the sale can be set aside. *Cox v. Helenius*, 103 Wn.2d 383 (1985); See also *Udall v. T.D. Escrow Services, Inc.*, 159 Wn.2d 903, 911, 154 P.3d 882 (2007).

In 2008, Division I of the Court of Appeals applied this waiver rule to homeowners' claims against the lender and trustee for damages based upon several theories including tort. *Brown v. Household Realty Corp.*, 146 Wn. App. 157, 189 P.3d 233 (2008). The *Brown* court observed that allowing a substantive challenge to the underlying debt post-sale would undermine the spirit and intent of the Deed of Trust Act. *Brown*, 146 Wn. App. at 170. With regard to legislative intent, the court observed, "We interpret the legislature's inaction as acquiescence in the courts' interpretation of the waiver doctrine." *Brown*, 146 Wn. App. at 170.

In its next session following the *Brown* decision, the Legislature reversed *Brown* by passing RCW 61.24.127. 18 Wash. Prac., Real Estate § 20.17 (2d ed.); *See also* April 9, 2009, WA S.B. Rep., 2009 Reg. Sess. SB 5810 (witness testimony that, "The Brown court case fix is important") (attached as Appendix B); April 9, 2009, WA H.R.B. Rep., 2009 Reg. Sess. SB 5810 (witness testimony that, "The Brown court case fix is important") (attached as Appendix C); March 23, 2009, WA H.R.B. An., 2009 Reg. Sess. SB 5810 (explaining non-waiver of claims) (attached as Appendix D).

RCW 61.24.127 permits post-sale claims for damages arising from common law fraud or misrepresentation, violation of the Consumer Protection Act, and failure of the trustee to comply with the Deed of Trust Act. RCW 61.24.127. In 2011, the Legislature expanded RCW 61.24.127 even further by adding a cause of action against a

lender who fails to respond to a homeowner's tender of a short sale offer. 2011 Wash. Leg. Serv. Ch. 364 (S.S.B. 5590) (attached as Appendix E).

The Legislature is presumed to be aware of existing Washington case law on the subjects about which it is legislating. *Woodson v. State*, 95 Wn.2d 257, 623 P.2d 683 (1980). As discussed above, the Legislature was aware of the *Brown* decision when it adopted RCW 61.24.127, and the Legislature reversed that decision as it relates to certain claims. At the same time, the Legislature is presumed to be aware of *Cox v. Helenius* and the other cases holding that procedural defects affecting the trustee's authority to conduct a foreclosure sale make such sales void. *Woodson v. State*, 95 Wn.2d 257 (1980). Yet the Legislature has not reversed those decisions.

In fact, during the most recent legislative session, the Legislature adopted further protections against wrongful foreclosures, including the Foreclosure Fairness Act establishing a mediation program and requiring additional pre-sale notices prior to a foreclosure. 2011 Wash. Leg. Serv. Ch. 58 (S.S.H.B. 1362) (attached as Appendix F). All three legislative changes to the Deed of Trust Act since *Brown* demonstrate both the Legislature's acquiescence in the court's rejection of the waiver doctrine in void sale cases, as well as the Legislature's rejection of the waiver doctrine in certain post-foreclosure damage cases.

Because the present case involves procedural defects affecting the trustee's authority that make the sale void, because equitable

considerations support the conclusion the sale is void, and because Ms. Albice and the Teccas were not aware of the defects in the sale until after the sale took place, they did not waive their right to seek post-sale remedies. This outcome is consistent with the policies stated in *Cox v. Helenius*, as well as the Legislature's decisions not only to allow post-sale challenges where the sale is void, but to extend the types of claims that may be asserted post-sale.

2. **The sale in this case was void because it took place more than 120 days after the date originally set for sale, cure was tendered more than eleven days before the sale, and the trustee did not have an officer residing in the state at the time of the sale.**

The Court of Appeals' decision was correct based upon the facts of this case and the plain language of the Deed of Trust Act. A contrary result would make much of the Deed of Trust Act superfluous. In interpreting a statute, courts should not assume parts of the statute are inoperative or superfluous. *Cox v. Helenius*, 103 Wn.2d at 388, quoting 2A C. Sands, *Statutory Construction* § 46.06, at 63 (4th ed. 1973). Courts construe statutes to, "effect their purpose and avoid unlikely or absurd results." *Thompson v. Hanson*, 167 Wn.2d 414, 426, 219 P.3d 659, as amended (Mar. 26, 2010), reconsideration denied (Mar. 29, 2010), republished as modified at 168 Wn.2d 738, 239 P.3d 537 (2009). If the meaning of a statute is plain, "then the court must give effect to that plain meaning as an expression of legislative intent." *Udall v. T.D. Escrow Services, Inc.*, 159 Wn.2d at 909 (citations omitted). If the words

of a statute are plain and unambiguous, the statute must be applied as written. *Amresco Independence Funding, Inc. v. SPS Properties, LLC*, 129 Wn. App. 532, 536, 119 P.3d 884 (2005).

In the present case, three substantial violations of the Deed of Trust Act render the sale void. First, the foreclosure sale took place more than 120 days after the date originally set for sale. CP 303, 444, 455, 772, 783-829; RCW 61.24.040(6). Second, Ms. Tecca tendered funds to cure the default more than eleven days before the sale. CP 454, 474; RCW 61.24.090. Third, the trustee did not have an officer residing in the state of Washington at the time of the foreclosure sale. CP 170-173, 243-244, 321-324; RP 36-37; Exs. 34, 35; RCW 61.24.010(1)(a). **The first two defects in the sale are not disputed by Mr. Dickinson.** The third defect was disputed by Mr. Dickinson, but he did not submit substantial evidence to support his assertion that Premier had an officer residing in Washington at the time of the sale. CP 170-173, 243-244, 321-324; RP 36-37; Exs. 34, 35.

If there are procedural irregularities in a foreclosure sale that defeat the trustee's authority to sell the property, the sale is void. *Udall v. T.D. Escrow Services, Inc.*, 159 Wn.2d at 911 (2007); *Cox*, 103 Wn.2d 383 (1985). The three substantial irregularities in the present case each relate to the trustee's authority to conduct a foreclosure sale.

RCW 61.24.040(6) provides the trustee can continue the foreclosure sale for a period of time not exceeding 120 days. RCW 61.24.040(6). If the sale is continued more than 120 days, the trustee

lacks statutory authority to conduct the sale without reissuing the notices provided in the Deed of Trust Act. *Felton v. Citizens Federal Savings and Loan Association of Seattle*, 101 Wn.2d 416, 424-425, 679 P.2d 928 (1984); *Bingham v. Lechner*, 111 Wn. App. 118, 131, 45 P.3d 562 (2002).

Similarly, if funds to cure the default are tendered more than eleven days before the sale, the trustee is legally obligated to discontinue the sale. RCW 61.24.090(1). By using the word “shall,” the Legislature made it clear that discontinuing the sale is mandatory, not discretionary. *See also Udall v. T.D. Escrow Services, Inc.*, 159 Wn.2d at 909-911 (holding that the word “shall” in RCW 61.24.040(4) and (7) mandated the trustee’s issuance of a deed following a foreclosure sale absent procedural irregularities voiding the sale).

Finally, if Premier Mortgage Services did not have an officer residing in the state of Washington at the time of the sale, Premier Mortgage Services was not a trustee authorized to conduct a foreclosure sale. RCW 61.24.010(1)(a). If the trustee did not have authority to act as a trustee in the state of Washington at the time of the sale, then no interest passed to Mr. Dickinson by virtue of the trustee’s deed. RCW 61.24.050.

With regard to each of the three substantial defects in the sale, a contrary result – upholding the sale to Mr. Dickinson – would make those parts of the Deed of Trust Act meaningless. Relying on RCW 61.24.040(7), Mr. Dickinson argues that even assuming the three

substantial sale defects exist, the defects should not make the foreclosure sale void because he is a bona fide purchaser for value. Brief of Respondents [Dickinson] dated December 23, 2009, p. 44; Petition for Review; *See also* CP 17-20, 143-146. Because Mr. Dickinson is not a bona fide purchaser for value, the Court does not necessarily need to address his argument that a bona fide purchaser status overcomes substantial procedural defects in a foreclosure sale.

However, even if Mr. Dickinson's argument were to be considered, it should not be adopted by the Court because it makes the rest of the Deed of Trust Act inoperative and superfluous. This interpretation of the statute would mean that trustees cannot continue sales beyond 120 days, must accept a tender of cure, and must have an officer residing in the state, unless the trustee happens to sell the property to a bona fide purchaser for value, in which case the trustee does not need to comply with these statutes. This interpretation would also mean that the language in RCW 61.24.050 about the grantor of a trustee's deed only conveying that which he, she or it has the power to convey is inoperative or superfluous. Mr. Dickinson's interpretation of RCW 61.24.040(7) means a grantor would have authority to convey more right, title and interest in real property than he, she or it has, if the conveyance is to a bona fide purchaser for value. *Compare* RCW 61.24.050.

Finally, adopting Mr. Dickinson's argument that a void sale is not void if made to a bona fide purchaser for value completely

disregards one of the primary goals of the Deed of Trust Act. The Deed of Trust Act is designed to “promot[e] efficient, inexpensive, and procedurally sound foreclosures and the stability of land titles.” *Udall v. T.D. Escrow Services, Inc.*, 159 Wn.2d at 916 (2007); *See also Cox v. Helenius*, 103 Wn.2d at 387 (1985). Mr. Dickinson’s argument promotes the interest of quick, cheap and unchallengeable foreclosure sales, while completely discounting any concerns about whether the sale was procedurally sound.

The Court of Appeals’ decision in the present case is consistent with ensuring procedurally sound foreclosures, the stability of land titles, and efficient, inexpensive foreclosures. So long as the procedures of the Deed of Trust Act are followed, there is no reason a foreclosure sale cannot be quick and efficient. Also, encouraging trustees to take steps to ensure a procedurally sound foreclosure advances the interest of ensuring purchasers at foreclosure sales receive a stable land title. A contrary result under the facts of this case would encourage trustees to push through procedurally defective foreclosures knowing that all defects will be cured as long as the purchaser at the foreclosure sale is a bona fide purchaser for value.

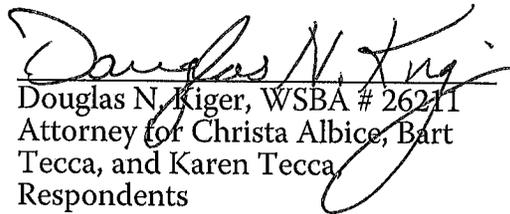
#### **IV. Conclusion**

The Deed of Trust Act aims to make the foreclosure process inexpensive and efficient, to prevent wrongful foreclosures, and to promote the stability of land titles. *Cox v. Helenius*, 103 Wn.2d at 387 (1985). Consistent with these goals, the Legislature has enacted

legislation to help prevent wrongful foreclosures, and avoid foreclosures when possible. *See* 2011 Wash. Leg. Serv. Ch. 58 § 1 (S.S.H.B. 1362) (attached as Appendix F). In the present case Mr. Dickinson does not dispute the sale took place more than 120 days after the date originally set for sale, or that cure was tendered more than eleven days prior to the sale. Further, Mr. Dickinson did not submit sufficient evidence to show the trustee was authorized to conduct the sale. All three of these defects are significant and relate directly to the trustee's authority to conduct a valid foreclosure. These three defects caused the sale to be procedurally unsound and the resulting title to be unstable. Because the sale was void, the Court of Appeals' decision in this matter should be affirmed.

Respectfully submitted this 3rd day of June, 2011.

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

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

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on the 3<sup>rd</sup> day of June, 2011, I placed with ABC Legal Messengers, Inc. an original Supplemental Brief of Respondents Albice and Tecca 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:

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DATED this 3<sup>rd</sup> day of June, 2011, at Tacoma, Washington.

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# Appendix A

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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. Co8-969Z. Oct. 2, 2009.

West KeySummary

**1 Damages** Mental Suffering and Emotional Distress

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.

**Attorneys and Law Firms**

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**Opinion**

**ORDER**

THOMAS S. ZILLY, District Judge.

\*1 THIS MATTER comes before the Court on cross-motions for summary judgment. Having reviewed 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 it is therefore presented in chronological rather than narrative form.

September 7, 2007 Plaintiff sends a letter to GMAC requesting "complete copies of all our loan documents," complaining that she "tried to contact someone at ditech.com several times to inform you that my husband passed away unexpectedly last month, but have not received any return call or correspondence," and advising that she had retained an attorney who was authorized to speak with GMAC on her behalf. Exh. C to Stines Decl. (docket no. 77).

November 2007 Plaintiff is laid off.

January 1, 2008 Plaintiff's attorney sends a letter to GMAC requesting "complete copies of all the loan documents." Exh. 6 to Davis Decl. (docket no. 86).

January 24, 2008 Plaintiff's attorney sends a letter to GMAC requesting "complete copies of all the loan documents." Exh. 7 to Davis Decl. (docket no. 86).

March 3, 2008 Homecomings Financial, LLC, a GMAC company, sends plaintiff's attorney "the requested documentation." Exh. 8 to Davis Decl. (docket no. 86).

March 17, 2008 GMAC sends plaintiff (and her deceased husband) a letter offering to accept \$11,122.39 as full payment on the second (\$45,000) mortgage. Exh. H to Zeitz Decl. (docket no. 78).

\*2 May 23, 2008 Plaintiff files suit in Snohomish County Superior Court against GMAC, as well as Mortgage Electronic Registration System, Inc. ("MERS"), Transnation Title Co., and FATIC.<sup>1</sup> Exh. A to Notice of Removal (docket no. 1).

May 27, 2008 Snohomish County Superior Court issues a temporary restraining order enjoining the Trustee's sale scheduled for May 30, 2008. Exh. C to Khan Decl. (docket no. 88).

May 30, 2008 Plaintiff's attorney Zeshan Khan drives to Snohomish County Superior Court and sees that plaintiff's property is still listed for sale at auction. Khan Decl. at ¶¶ 5-6 (docket no. 88).

June 20, 2008 Plaintiff's Snohomish County Superior Court case is removed to this Court. Notice of Removal (docket no. 1).

June 27, 2008 Plaintiff names ETS<sup>2</sup> as an additional defendant. Amended Complaint (docket no. 3).

October 24, 2008 Injunction against foreclosure is dissolved due to plaintiff's failure to make monthly payments into the Court's Registry. Order (docket no. 46).

May 15, 2009 Trustee sells the property for \$207,435.29. Exh. 16 to Davis Decl. (docket no. 86).

June 11, 2009 Trustee's Deed is recorded with Snohomish County. *Id.*

### Discussion

Plaintiff makes three types of claims: (1) federal statutory claims, (2) state statutory claims, and (3) state tort claims. Defendants move for summary judgment as to all of plaintiff's claims. Plaintiff moves for partial summary judgment as to liability in three separate motions, one aimed at GMAC, one concerning FATIC, and one regarding ETS.

#### A. Summary Judgment Standard

The Court should grant summary judgment if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). A fact is material if it might affect the outcome of the suit under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). When a properly supported motion for summary judgment has been presented, the adverse party "may not rely merely on allegations or denials in its own pleading." Fed.R.Civ.P. 56(e). Rather, the non-moving party must set forth "specific facts" demonstrating the existence of a genuine issue for trial. *Id.*; *Anderson*, 477 U.S. at 256. All "justifiable inferences" are to be drawn in favor of the non-moving party. *Anderson*, 477 U.S. at 255. When the record, however, taken as a whole, could not lead a rational trier of fact to find for the non-moving party, summary judgment is warranted. *See Miller v. Glenn Miller Prod., Inc.*, 454 F.3d 975, 988 (9th Cir.2006).

#### B. Federal Statutory Claims

##### 1. Violation of Truth in Lending Act ("TILA") (Third Cause of Action)

Plaintiff alleges that she did not receive from GMAC the documents and/or disclosures required by TILA. Amended Complaint at ¶ 6.2 (docket no. 3). Defendants have moved for summary judgment on this claim on the ground that it is barred by a one-year statute of limitations. Plaintiff has not provided much response to this argument, but she did assert in her Amended Complaint that the statute of limitations does not apply because the “TILA violations are defensive in nature to enjoin foreclosure.” *Id.* at ¶ 6.3.

\*3 The provision of TILA at issue provides in relevant part:

Any action under this section may be brought in any United States district court ... within one year from the date of the occurrence of the violation. This subsection does not bar a person from asserting a violation of this subchapter in an action to collect the debt which was brought more than one year from the date of the occurrence of the violation as a matter of defense by recoupment or set-off in such action, except as otherwise provided by State law.

15 U.S.C. § 1640(e). Thus, the statute differentiates between affirmative claims, which must be brought within one year, and defensive assertions of TILA violations, which carry no time limit. *See Roach v. Option One Mortgage Corp.*, 598 F.Supp.2d 741, 757 (E.D.Va.2009) (“ § 1640(e) recognizes the fundamental difference between a borrower's initiation of a lawsuit by filing of a claim, which must occur within one year, and the defensive assertion of a TILA violation in an action brought by a TILA creditor, which a borrower may make at any time in *response* to the creditor seeking payment of the debt” (emphasis in original)).

The closing of the loans at issue occurred in April 2006. Plaintiff did not file suit until over two years later, in May 2008. Plaintiff offers no argument that the TILA violations took place any later than April 2006, or that she could not have discovered the violations until a time within one year before she filed suit. Thus, the one-year statute of limitations bars plaintiff's affirmative claim. It does not, however, preclude plaintiff from asserting any TILA violation as a defense to defendants' counterclaim. Defendants' motion for summary judgment is GRANTED IN PART and plaintiff's Third Cause of Action is DISMISSED.<sup>3</sup>

## 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 belief 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 noncompliance 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 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 Thoriam*, 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 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)

\*7 To establish a violation of the CPA, plaintiff must prove (i) defendants engaged in an unfair or deceptive act or practice; (ii) such act or practice occurred within a trade or business; (iii) such act or practice affected the public interest; (iv) plaintiff suffered an injury to her business or property; and (v) a causal relationship exists between defendants’ act or practice and plaintiff’s injury. See *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wash.2d 778, 785-93, 719 P.2d 531 (1986). In her Amended Complaint, plaintiff pleaded her CPA claim in conclusory fashion, merely reciting the elements of a CPA claim, and failing to identify with particularity any unfair or deceptive trade practice in which defendants have allegedly engaged. See Amended Complaint at ¶¶ 9.2-9.6 (docket no. 3). Based

on the deficiency of plaintiff's pleading, defendants have moved for summary judgment.

In response, plaintiff contends that GMAC's unfair or deceptive practices consisted of violations of RESPA's disclosure and QWR requirements. *See Brazier v. Sec. Pac. Mortgage Inc.*, 245 F.Supp.2d 1136, 1142 (W.D.Wash.2003) (holding that failure to make timely disclosures as required by federal statutes such as TILA and RESPA constitutes an unfair or deceptive act or practice for purposes of Washington's CPA). Plaintiff alleges that GMAC failed to provide a HUD-1 settlement statement at closing as required by RESPA. Plaintiff, however, did not plead in her Amended Complaint any RESPA or CPA claim predicated on nondisclosure of a HUD-1. Indeed, plaintiff acknowledges that she has no private right of action or remedy for such RESPA violation, and that she seeks to use this RESPA violation only as evidence of an unfair practice in connection with her CPA claim. Plaintiff cannot do so, though, because she waited too long to give notice of the HUD-1 claim. Discovery closed a month before defendants filed the pending motion for summary judgment, and defendants would be prejudiced if plaintiff were now allowed to proceed on the previously undisclosed theory that GMAC violated the CPA by not complying with RESPA's HUD-1 provisions.

In contrast, plaintiff did plead a RESPA claim based on violation of the QWR response requirements, and plaintiff explicitly incorporated the allegations of that cause of action into her CPA claim. *See* Amended Complaint at ¶ 9.1 (docket no. 3). In their briefing on the pending motions, however, the parties did not fully address whether failures to acknowledge or respond to QWRs constitute either per se unfair or deceptive trade practices or trade practices that are unfair or deceptive because they have the "capacity to deceive a substantial portion of the public." *See Hangman Ridge*, 105 Wash.2d at 785-86, 719 P.2d 531 (1986); *see also Panag v. Farmers Ins. Co.*, 166 Wash.2d 27, 37 n. 3, 204 P.3d 885 (2009). The parties are directed to discuss this issue, as well as the other elements of a CPA claim, in their trial briefs, which are currently due on November 23, 2009.

\*8 As to her CPA claim against FATIC and ETS, plaintiff alleges that FATIC's and ETS's unfair or deceptive practices consisted of making misrepresentations concerning their authority (or lack thereof) to stop or postpone the trustee's sale. Plaintiff, however, has failed to explain how such representations were unfair or deceptive, how they affected the public interest, or how they caused any injury to plaintiff's property. Thus, plaintiff has not presented sufficient evidence

or analysis to demonstrate the existence of an issue for trial concerning her CPA claim against FATIC and ETS. Defendants' motion for summary judgment is GRANTED IN PART, and plaintiff's Sixth Cause of Action against FATIC and ETS is DISMISSED with prejudice. Plaintiff may proceed to trial on her Sixth Cause of Action against GMAC, but her claim is limited to any violations of the QWR provisions of RESPA, and it may not be predicated on the alleged failure to provide a HUD-1 statement.

#### D. State Tort Claims

Defendants raise three types of defenses to plaintiff's tort claims. First, defendants contend that 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.<sup>4</sup> *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.

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.<sup>5</sup>

\*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 outside 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. *Alejandro 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 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 auctioneer'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 subsequently 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.

#### Footnotes

- 1 MERS is the beneficiary of the deeds of trusts executed by plaintiff and her husband in connection with the loans from GMAC. Exhs. C & D to Zeitz Decl. (docket no. 78). Transnation Title Co. was the trustee named in the deeds of trust, but it was removed as

trustee in January 2008, and plaintiff's claims against Transnation Title Co. were dismissed in May 2009 pursuant to a stipulation of the parties. Stip. & Order (docket no. 60). FATIC is Transnation Title Co.'s successor as trustee for the deeds of trust at issue. Exh. A to De La Torre Decl. (docket no. 80).

- 2 ETS acted as FATIC's agent for purposes of foreclosure proceedings. De La Torre Decl. at ¶ 3 (docket no. 80).
- 3 By Minute Order dated August 24, 2009, docket no. 126, the Court denied plaintiff's motion to quash defendants' counterclaim, but gave plaintiff ten days to file an answer. Plaintiff's answer was filed on September 3, 2009, and asserted that "the amount of liability owed to Defendants 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.
- 4 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.
- 5 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.").

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# Appendix B

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# SENATE BILL REPORT

## ESB 5810

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As Amended by House, April 9, 2009

**Title:** An act relating to foreclosures on deeds of trust.

**Brief Description:** Concerning foreclosures on deeds of trust.

**Sponsors:** Senators Kauffman, Berkey, Shin, Franklin, Keiser, Tom and Kohl-Welles; by request of Governor Gregoire.

**Brief History:**

**Committee Activity:** Financial Institutions, Housing & Insurance: 2/18/09, 2/24/09 [DPS].

Passed Senate: 3/12/09, 33-16.

Passed House: 4/09/09, 98-0.

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### SENATE COMMITTEE ON FINANCIAL INSTITUTIONS, HOUSING & INSURANCE

**Majority Report:** That Substitute Senate Bill No. 5810 be substituted therefor, and the substitute bill do pass.

Signed by Senators Berkey, Chair; Hobbs, Vice Chair; Franklin, McDermott, Parlette and Schoesler.

**Staff:** Diane Smith (786-7410)

**Background:** A deed of trust is a type of security interest in real property. A deed of trust is essentially a three-party mortgage. The borrower (grantor) grants a deed creating a lien on the real property to a third party (the trustee) who holds the deed in trust as security for an obligation due to the lender (the beneficiary).

The major difference between a deed of trust and a mortgage is that the deed of trust may be nonjudicially foreclosed, whereas a mortgage may only be foreclosed judicially. If the grantor defaults on the loan obligation, the trustee may foreclose on the real property as long as certain procedural and notice requirements are met.

The trustee of a deed of trust may be a domestic corporation, a title insurance company, an attorney, a professional corporation whose shareholders are licensed attorneys, an agency of the United States government, or a bank or savings and loan association. A trustee must resign at the request of a beneficiary, and the beneficiary may designate a successor trustee.

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

In order for a deed of trust to be nonjudicially foreclosed, the following requirements must be met: (1) the deed contains a power of sale and provides that the real property is not used principally for agricultural purposes; (2) a default has occurred which makes the power of sale operative; (3) the deed has been recorded; (4) a notice of default is sent at least 30 days before a notice of sale is recorded; and (5) no other action is pending to seek satisfaction of an obligation secured by the deed of trust.

To initiate foreclosure procedures the trustee must (1) file a notice of trustee's sale 90 days before the sale; (2) send notice of the sale to the grantor, beneficiary, and any other person with a recorded interest in the land; (3) post the notice on the property or personally serve any occupants; and (4) publish the notice of sale in a newspaper at specified dates.

The sale may not take place less than 190 days from the date of default. Any person other than the trustee may bid at the sale. After sale of the property there is no right of redemption and no right to a deficiency judgment.

The proceeds of the foreclosure sale are distributed first to the expenses of sale and the obligation secured by the deed of trust, and the surplus is deposited with the clerk of the court. Any interests or liens on the real property that are eliminated by the sale attached to the surplus proceeds.

Notice of trustee's sale must be given to occupants of property consisting of a single-family residence, condominium, cooperative, and dwelling with less than five units; the notice must identify personal property that may be sold and any other action that is pending to foreclose on another security; the notice must specify the potential effects of foreclosure on the occupants of the property; and there are two eight-day time periods during which the trustee must publish the notice of sale in a legal newspaper.

**Summary of Engrossed Bill:** For deeds of trust made from January 1, 2003, to December 31, 2007, for owner-occupied, residential property, a 30-day extension is made to the current timeline for foreclosure. Thirty days must pass before the notice of default can be filed. The 30 days are measured from the time the lender contacts the borrower, or satisfies due diligence requirements to contact the borrower, to work out a way to avoid foreclosure.

Obligations of the lender to the borrower are to advise the borrower of his or her right to request a subsequent meeting; to schedule that meeting to occur within 14 days; and to give the borrower a toll-free telephone number for contacting a HUD-certified counselor.

The notice of default must include a declaration from the lender that it contacted the borrower or used due diligence in attempting to do so. Actions by the lender to contact the borrower and the times at which these actions are to be taken are specified in detail.

Under certain circumstances the 30-day delay in filing the notice of default and the due diligence requirements need not be met.

Tenants in non-owner-occupied one- to four-unit residences must be notified of the impending foreclosure sale, the potential consequences to them, and their option to contact a lawyer, legal aid, or a housing counselor about their rights. Tenants living in foreclosed

property must be given 60 days' written notice before they are removed from the property by an unlawful detainer action.

The trustee has a duty of good faith to the beneficiary, grantor, and others with an interest in the property. This requirement has no expiration date.

Certain claims, such as the trustee's failure materially to comply with the deed of trust law, are not waived by the borrower's failure to bring a lawsuit to enjoin a foreclosure sale of an owner-occupied one- to four-unit residence, but these claims must be asserted within two years of the foreclosure sale. This requirement has no expiration date.

There must be proof that the beneficiary is the actual holder of the obligation secured by the deed of trust.

Existing law is conformed to the specific requirements of this bill.

Other than as mentioned above, this bill expires January 1, 2013.

**Appropriation:** None.

**Fiscal Note:** Not requested.

**Committee/Commission/Task Force Created:** No.

**Effective Date:** Ninety days after adjournment of session in which bill is passed.

**Staff Summary of Public Testimony:** PRO: The numbers of foreclosures are increasing and are expected to continue to increase for some period. This bill will complement very well the Obama plan that came out today. Our Senate provided a wonderful package of counseling for homeowners last year. The landscape continues to change. We continue to work with the banks and the bar association. While the legal language is complicated, we need to make sure it protects both the financial institutions and the consumers. This bill is part of the Governor's stimulus package. A lot of work has been done to prevent foreclosures in the future. This bill helps people who are struggling now. Loan modifications are just not happening. This bill will not be enough. Lenders are not acting correctly. The third party trained mediation could be the solution to this crisis in a lot of ways. We need a loan modification plan with teeth. The Brown court case fix is important. If done right, this could be the single most important piece of consumer protection legislation we see in our careers. There were more January foreclosures than sales in King County. Few homeowners know who has the authority to negotiate with them due to loan repackaging. The entity owning the loan should have to present the paper to prove they have authority to foreclose.

CON: It is important to maintain the trustee's impartiality by not adding duties that undermine that neutrality. The unconstitutionality arises from casting too large a net.

OTHER: We are concerned that we get this legislation right for consumers and for the health of our financial institutions. We need to amend the bill so that nonjudicial foreclosure works for both parties. This bill is important in preventing foreclosures. When people get

depressed, they get difficult to reach. Some language in the bill is not applicable to our Deed of Trust Act and some is unconstitutional. It is important to strike the balance between judicial and nonjudicial foreclosure. Trustees do not want to be caught in the middle of terms that are not well defined.

**Persons Testifying:** PRO: Kari Burrell, Governor's Policy Office; Melissa Huelsman, private consumer attorney; Bruce Neas, Columbia Legal Service; Nick Federici, Washington Low Income Housing Alliance; Georgene T. Monday, ACORN; Michelle Thomas, Tenants Union of Washington.

CON: Stu Halsan, Washington Land Title; Aleana Harris, Real Property Realtors, Trust Section of the Washington State Bar Association.

OTHER: Denny Eliason, Washington Bankers Association; Joe Sakay, Washington Mortgage Lenders Association.

**House Amendment(s):** Requires the beneficiary's initial contact to be by phone and letter. The contact requirement does not apply when the beneficiary is a homeowner or condominium association. Language stating the contact requirements do not apply if the borrower contracts with a distressed home consultant is removed.

The provision allowing the claim to be raised in an unlawful detainer action is removed. An action for breach of contract is removed from the types of claims that are not waived. A violation of Title 19 RCW (regulations of businesses, including the Consumer Protection Act) is added to the list of nonwaived claims. That the nonwaived claims must be brought within two years of the foreclosure sale or within the applicable statute of limitation for the claim, whichever is earlier, is clarified.

The trustee's proof of the beneficiary's ownership of the promissory note may be in the form of the beneficiary's declaration and the language regarding the trustee having possession of the original note is removed. The trustee may rely on the declaration, unless the trustee violated its duty of good faith.

Beneficiaries that are homeowner or condominium associations are exempt from the bill. The notice of default must contain the name and address of the owner of the promissory note and servicer of any obligation secured by the deed of trust. That the requirements apply only to residential real property, is clarified.

Language stating the purchaser may offer a tenant payment in exchange for the tenant vacating the property before the 60 days expires is removed.

"Residential real property" is defined as property consisting solely of a single family residence, a residential condominium unit, or a residential cooperative unit.

"Tenant-occupied" property is defined as property consisting solely of residential real property that is the principal residence of a tenant or that is another building with four or fewer residential units that is the principal residence of a tenant.

The expiration date that applied to the sections on notice to tenants is removed.

Language imposing on a trustee a duty of good faith to persons other than the borrower, beneficiary, and grantor, is removed.

Makes other changes for clarification.

# Appendix C

**Blado | Kiger | Bolan, P.S.**

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# HOUSE BILL REPORT

## ESB 5810

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**As Passed House - Amended:**

April 9, 2009

**Title:** An act relating to foreclosures on deeds of trust.

**Brief Description:** Concerning foreclosures on deeds of trust.

**Sponsors:** Senators Kauffman, Berkey, Shin, Franklin, Keiser, Tom and Kohl-Welles; by request of Governor Gregoire.

**Brief History:**

**Committee Activity:**

Judiciary: 3/23/09, 3/26/09 [DPA].

**Floor Activity**

Passed House - Amended: 4/9/09, 98-0.

**Brief Summary of Engrossed Bill  
(As Amended by House)**

- Requires a beneficiary, before issuing a notice of default, to contact the borrower and explore options for the borrower to avoid foreclosure.
- Provides that a tenant of property that has been sold in foreclosure receive 60 days written notice before the tenant can be removed.
- Provides that a borrower's failure to enjoin a foreclosure does not constitute a waiver of certain claims.
- Requires that before a notice of sale may be recorded, the trustee must have proof that the beneficiary is the actual holder of the promissory note secured by the deed of trust.

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### HOUSE COMMITTEE ON JUDICIARY

**Majority Report:** Do pass as amended. Signed by 11 members: Representatives Pedersen, Chair; Goodman, Vice Chair; Rodne, Ranking Minority Member; Shea, Assistant Ranking Minority Member; Flannigan, Kelley, Kirby, Ormsby, Roberts, Ross and Warnick.

**Staff:** Trudes Tango (786-7384)

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

**Background:**

Unlike mortgages, which require judicial foreclosure, deeds of trust may be nonjudicially foreclosed if the borrower defaults on the loan obligation. The deeds of trust statutes establish procedures that must be followed by beneficiaries, trustees, and borrowers. The trustee must act impartially between the borrower, grantor, and beneficiary.

A foreclosure sale cannot occur until at least 190 days from the date of default on the loan. Within that time, the trustee or beneficiary must comply with specific notice provisions. The beneficiary or trustee must send a notice of default to the grantor. After 30 days from the date the notice of default is sent, the trustee may record a notice of the foreclosure sale. The foreclosure sale may not occur until after 90 days from the time the notice of foreclosure sale is recorded, mailed, and served. Within certain time frames, the borrower may cure the default and discontinue the sale. The trustee's sale is automatically stayed if the borrower files for bankruptcy.

The borrower may file an action in court to enjoin the sale on any proper ground, such as an assertion that the borrower is not in default on the loan or that the borrower did not receive the required notices.

Once the property is sold, the purchaser has the right to possession of the property on the twentieth day following the sale.

In *Brown v. Household Realty Corp.* (2008), the Washington Court of Appeals held that a party waives the right to post-foreclosure sale remedies where the party failed to bring an action to enjoin the sale. The court stated that applying the waiver doctrine furthers the three goals of the Deeds of Trust Act: (1) that the nonjudicial foreclosure process should be efficient and inexpensive; (2) that the process should result in interested parties having an adequate opportunity to prevent wrongful foreclosure; and (3) that the process should promote stability of land titles.

**Summary of Amended Bill:**

Changes are made to the procedures governing foreclosures on deeds of trust securing residential real property. These changes affect beneficiaries, trustees, purchasers, and tenants of property subject to a trustee sale. The trustee has a duty of good faith to the borrower, beneficiary, and grantor.

**Requirement to Contact the Borrower.**

A notice of default may not be issued to the borrower until 30 days after the beneficiary contacts, or exercises due diligence to contact, the borrower by phone and by mail to explore options for the borrower to avoid foreclosure. During the initial contact, the beneficiary must advise the borrower that he or she has the right to request a subsequent meeting, which if requested, the beneficiary must schedule within 14 days of the request. The borrower must be provided with contact information for a HUD-certified counseling agency, for the Department of Financial Institutions, and the for statewide legal aid hotline.

A notice of default must include a declaration by the beneficiary that it has contacted, or tried with due diligence to contact, the borrower. A trustee is not liable for the beneficiary's failure to satisfy the contact requirements, absent a violation of the trustee's duty of good faith.

Due diligence includes mailing the borrower a letter, calling the borrower at various times, providing the beneficiary's toll-free number for the borrower to call, and if the beneficiary has a website, posting a link on the website with information specifically for borrowers in default.

The contact requirement does not apply in specified circumstances, such as if the borrower has surrendered the property. The contact requirement does not apply to deeds of trust securing commercial loans, obligations of a grantor who is not the borrower or a guarantor, seller-financed sales, and when the beneficiary is a homeowners' or condominium association. The contact requirement applies to deeds of trust for owner-occupied residential real property made from January 1, 2003, to December 31, 2007.

The contact requirement expires on December 31, 2012.

#### Tenants in Possession of Property Sold at Foreclosure.

Upon posting a notice of trustee sale, the trustee must also post on nonowner-occupied residential real property a notice stating that the property may be sold at foreclosure and the tenant may enter a new lease with the new owner or may be given a 60-day notice to vacate. The trustee or beneficiary must also mail the notice to the address of the property subject to foreclosure.

If the property is sold, the purchaser of tenant-occupied property must give the tenant 60 days written notice before the tenant may be removed. The new owner may negotiate a new lease with the tenant or offer to pay the tenant to vacate sooner.

"Tenant-occupied property" means property consisting solely of residential real property that is the principal residence of a tenant or other building with four or fewer residential units that is the principal residence of a tenant.

#### Nonwaiver of Claims.

The failure of a borrower or grantor to enjoin a foreclosure sale does not constitute a waiver of claims for: common law fraud or misrepresentation; a violation of Title 19 RCW (business regulations, including the Consumer Protection Act); and failure of the trustee to materially comply with the provisions of the deeds of trust statutes.

The nonwaived claims must be asserted within two years from the date of the foreclosure sale, or within the applicable statute of limitations for the claim, whichever expires earlier. If the borrower or grantor brings in the same civil action a Consumer Protection Act claim arising out of the same alleged facts, relief is limited to actual damages, treble damages as allowed under the CPA, and a reasonable attorney's fee. The claim may not otherwise affect the validity or finality of the foreclosure sale.

This provision regarding claims applies only to foreclosures of owner-occupied residential real property and does not apply to foreclosures of deeds of trust used to secure commercial loans.

Requirement Before Notice of Sale is Recorded.

Before the notice of sale can be recorded, transmitted, or served, the trustee must have proof that the beneficiary is the actual holder of the promissory note secured by the deed of trust. Proof that the beneficiary is the actual holder of the note may be made by a declaration signed by the beneficiary. The trustee may rely on the beneficiary's declaration as evidence of proof, absent a violation of the trustee's duty of good faith. This requirement does not apply to beneficiaries that are homeowners' or condominium associations.

The notice of default that must be sent at least 30 days prior to recording the notice of sale must contain contact information for the Department of Financial Institutions and the statewide civil legal aid hotline. The notice of default on deeds of trust for residential real property must also contain the name and address of the owner of any promissory notes or other obligations and the name, address, and telephone number of a servicer of the obligation secured by the deed of trust.

**Appropriation:** None.

**Fiscal Note:** Available.

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

**Staff Summary of Public Testimony:**

(In support) This bill has been worked on very carefully after many meetings with representatives from the community banks, consumers, and mortgage lenders. This is a compromise bill. It has been amended significantly from the original version. This is a consumer protection bill that will help homeowners who are trying to avoid foreclosure. It will require lenders to try to work out plans with borrowers to avoid foreclosure. It also provides tenants with sufficient notice so tenants who are living in houses subject to foreclosure are not surprised when the property is eventually sold. The bill provides protection to homeowners who are victims of fraud. They will be able to take their fraud claims to court. Claims brought under the bill will not put a cloud on the title of the property. Many foreclosure sales occur even when nobody can prove who owns the promissory note secured by the property; this bill will help to ensure that does not happen. This bill could be stronger for homeowners and could have more teeth, but it is a good first step towards helping homeowners. It is important that something be done to help homeowners during this economic crisis.

(Opposed) None.

**Persons Testifying:** Senator Kauffman, prime sponsor; Kari Burrell, Washington Office of the Governor; Marc Gaspard, United Financial Lobby; Marsha Osborn, Association of Community Organizations for Reform Now (ACORN); Bruce Neas, Columbia Legal Services; Kim Herman, Housing Finance Commission; and Holly Chisa, United Trustees Association.

**Persons Signed In To Testify But Not Testifying:** None.

# Appendix D

**Blado | Kiger | Bolan, P.S.**

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## Judiciary Committee

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### ESB 5810

**Title:** An act relating to foreclosures on deeds of trust.

**Brief Description:** Concerning foreclosures on deeds of trust.

**Sponsors:** Senators Kauffman, Berkey, Shin, Franklin, Keiser, Tom and Kohl-Welles; by request of Governor Gregoire.

#### Brief Summary of Engrossed Bill

- Requires a beneficiary, before issuing a notice of default, to contact the borrower and explore options for the borrower to avoid foreclosure.
- Provides that a tenant of property that has been sold in foreclosure receive 60 days written notice before the tenant can be removed.
- Provides that a borrower's failure to enjoin a foreclosure does not constitute a waiver of certain claims.
- Requires that before a notice of sale may be recorded, the trustee must have proof that the beneficiary is the actual holder of the promissory note secured by the deed of trust.

**Hearing Date:** 3/23/09

**Staff:** Trudes Tango (786-7384)

#### **Background:**

Unlike mortgages, which require judicial foreclosure, deeds of trust may be nonjudicially foreclosed if the borrower defaults on the loan obligation. The deeds of trust statutes establish procedures that must be followed by beneficiaries, trustees, and borrowers. The trustee must act impartially between the borrower, grantor, and beneficiary.

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

A foreclosure sale cannot occur until at least 190 days from the date of default on the loan. Within that time, the trustee or beneficiary must comply with specific notice provisions. The beneficiary or trustee must send a notice of default to the grantor. After 30 days from the date the notice of default is sent, the trustee may record a notice of the foreclosure sale. The foreclosure sale may not occur until after 90 days from the time the notice of foreclosure sale is recorded, mailed, and served. Within certain time frames, the borrower may cure the default and discontinue the sale. The trustee's sale is automatically stayed if the borrower files for bankruptcy.

The borrower may file an action in court to enjoin the sale on any proper ground, such as an assertion that the borrower is not in default on the loan or that the borrower did not receive the required notices. The action to enjoin the sale can be filed anytime before the scheduled trustee sale, but five days notice of the action must be given to the trustee and the beneficiary.

In *Brown v. Household Realty Corp.* (2008), the Washington Court of Appeals held that a party waives the right to post-foreclosure sale remedies where the party failed to bring an action to enjoin the sale. The court stated that applying the waiver doctrine furthers the three goals of the Deeds of Trust Act: (1) that the nonjudicial foreclosure process should be efficient and inexpensive; (2) that the process should result in interested parties having an adequate opportunity to prevent wrongful foreclosure; and (3) that the process should promote stability of land titles.

Once the property is sold, the purchaser has the right to possession of the property on the 20th day following the sale.

### **Summary of Bill:**

Changes are made to the procedures for foreclosure on deeds of trust. The trustee has a duty of good faith to the borrower, beneficiary, grantor, and other persons with an interest in the property.

#### Requirement to contact the borrower

A notice of default may not be issued to the borrower until 30 days after the beneficiary contacts, or exercises due diligence to contact, the borrower to explore options to avoid foreclosure. During the initial contact, the beneficiary must advise the borrower that he or she has the right to request a subsequent meeting, which if requested, the beneficiary must schedule within 14 days. The borrower must be provided with contact information for a HUD-certified counseling agency.

A notice of default must include a declaration by the beneficiary that it has contacted, or tried with due diligence to contact, the borrower. A trustee is not liable for the beneficiary's failure to satisfy the contact requirements.

Due diligence includes mailing the borrower a letter, calling the borrower at various times, providing the beneficiary's toll-free number for the borrower to call, and if the beneficiary has a website, posting a link on the website with information specifically for borrowers in default.

The contact requirement does not apply in specified circumstances, such as if the borrower has surrendered the property. The contact requirement does not apply to: deeds of trust securing a debt incurred primarily for commercial purposes; securing a guarantor's obligations under a guaranty; or seller-financed sales.

The contact requirement applies to deeds of trust for owner-occupied residential real property made from January 1, 2003, to December 31, 2007. The contact requirement expires on December 31, 2012.

#### Tenants in possession of property sold at foreclosure

Upon posting a notice of trustee sale, the trustee must also post on nonowner-occupied residential real property a notice that states: the property may be sold at foreclosure; and the tenant may enter a new lease with the new owner or may be given a 60-day notice to vacate. The trustee or beneficiary must also mail the notice to the address of the property subject to foreclosure.

If the property is sold, the new owner must give the tenant 60 days written notice before the tenant may be removed. The new owner may negotiate a new lease with the tenant or offer to pay the tenant to vacate sooner.

The 60-day notice provisions for tenants expire on December 31, 2007.

#### Nonwaiver of claims

The failure of a borrower or grantor to enjoin a foreclosure sale does not constitute a waiver of the following claims: common law fraud, misrepresentation or breach of contract; unlawful lending under the mortgage lending laws; and failure of the trustee to materially comply with the provisions of the deeds of trust statutes.

A nonwaived claim may be brought in an unlawful detainer action if the borrower or grantor asserting the claim is a defendant in an unlawful detainer action brought by the lender. A borrower or grantor may assert a nonwaived claim independently against a lender or trustee regardless of whether a third party was a successful bidder at the foreclosure sale.

The nonwaived claims must be asserted within two years from the date of the foreclosure sale. The claim may not seek any remedy other than money damages unless the property is owned by the beneficiary at the time the action is filed. If the borrower or grantor brings in the same civil action a Consumer Protection Act (CPA) claim arising out of the same alleged facts, relief is limited to actual damages, treble damages as allowed under the CPA, and a reasonable attorney's fee.

The claim may not otherwise affect the validity or finality of the foreclosure sale to a bona fide purchaser.

#### Requirement before notice of sale is recorded

Before the notice of sale can be recorded, transmitted, or served, the trustee must either: have proof that the beneficiary is the actual holder of the promissory note secured by the deed of trust; or possess the original note showing that the entity initiating the foreclosure sale has the authority to enforce the note. Proof that the beneficiary is the actual holder of the note must be made by affidavit by a person with personal knowledge of the physical location of the note. If the original note is lost, the beneficiary may provide a copy of the notice and a notarized statement asserting that the original note has been lost.

**Appropriation:** None.

**Fiscal Note:** Available.

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

# Appendix E

**Blado | Kiger | Bolan, P.S.**

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CERTIFICATION OF ENROLLMENT

**SUBSTITUTE SENATE BILL 5590**

Chapter 364, Laws of 2011

62nd Legislature  
2011 Regular Session

FORECLOSURES--LIENHOLDER REQUIREMENTS--SELLER'S OFFER

EFFECTIVE DATE: 07/22/11

Passed by the Senate April 19, 2011  
YEAS 46 NAYS 0

BRAD OWEN

**President of the Senate**

Passed by the House April 5, 2011  
YEAS 96 NAYS 0

FRANK CHOPP

**Speaker of the House of Representatives**

Approved May 16, 2011, 2:52 p.m.

CHRISTINE GREGOIRE

**Governor of the State of Washington**

CERTIFICATE

I, Thomas Hoemann, Secretary of the Senate of the State of Washington, do hereby certify that the attached is **SUBSTITUTE SENATE BILL 5590** as passed by the Senate and the House of Representatives on the dates hereon set forth.

THOMAS HOEMANN

**Secretary**

FILED

May 17, 2011

**Secretary of State  
State of Washington**

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**SUBSTITUTE SENATE BILL 5590**

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AS AMENDED BY THE HOUSE

Passed Legislature - 2011 Regular Session

**State of Washington**

**62nd Legislature**

**2011 Regular Session**

**By** Senate Financial Institutions, Housing & Insurance (originally sponsored by Senator Benton)

READ FIRST TIME 02/17/11.

1 AN ACT Relating to lien holder requirements for certain foreclosure  
2 sales; amending RCW 61.24.127; reenacting and amending RCW 61.24.005;  
3 and adding a new section to chapter 61.24 RCW.

4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

5 NEW SECTION. **Sec. 1.** A new section is added to chapter 61.24 RCW  
6 to read as follows:

7 (1) Whenever (a) consummation of a written agreement for the  
8 purchase and sale of owner-occupied residential real property would  
9 result in contractual sale proceeds that are insufficient to pay in  
10 full the obligation owed to a senior beneficiary of a deed of trust  
11 encumbering the residential real property; and (b) the seller makes a  
12 written offer to the senior beneficiary to accept the entire net  
13 proceeds of the sale in order to facilitate closing of the purchase and  
14 sale; then the senior beneficiary must, within one hundred twenty days  
15 after the receipt of the written offer, deliver to the seller, in  
16 writing, an acceptance, rejection, or counter-offer of the seller's  
17 written offer. The senior beneficiary may determine, in its sole  
18 discretion, whether to accept, reject, or counter-offer the seller's  
19 written offer.

1 (2) This section applies only when the written offer to the senior  
2 beneficiary is received by the senior beneficiary prior to the issuance  
3 of a notice of default. The offer must include a copy of the purchase  
4 and sale agreement. The offer must be sent to the address of the  
5 senior beneficiary or the address of a party acting as a servicer of  
6 the obligation secured by the deed of trust.

7 (3) A seller has a right of action for actual monetary damages  
8 incurred as a result of the senior beneficiary's failure to comply with  
9 the requirements of subsection (1) of this section.

10 (4) A senior beneficiary is not liable for the actions or inactions  
11 of any other lien holder.

12 (5)(a) This section does not apply to deeds of trust: (i) Securing  
13 a commercial loan; (ii) securing obligations of a grantor who is not  
14 the borrower or a guarantor; or (iii) securing a purchaser's  
15 obligations under a seller-financed sale.

16 (b) This section does not apply to beneficiaries that are exempt  
17 from RCW 61.24.--- (section 7, chapter 58, Laws of 2011), if enacted,  
18 or if not enacted, to beneficiaries that conduct fewer than two hundred  
19 fifty trustee sales per year.

20 (6) This section does not alter a beneficiary's right to issue a  
21 notice of default and does not lengthen or shorten any time period  
22 imposed or required under this chapter.

23 **Sec. 2.** RCW 61.24.127 and 2009 c 292 s 6 are each amended to read  
24 as follows:

25 (1) The failure of the borrower or grantor to bring a civil action  
26 to enjoin a foreclosure sale under this chapter may not be deemed a  
27 waiver of a claim for damages asserting:

28 (a) Common law fraud or misrepresentation;

29 (b) A violation of Title 19 RCW; (~~or~~)

30 (c) Failure of the trustee to materially comply with the provisions  
31 of this chapter; or

32 (d) A violation of section 1 of this act.

33 (2) The nonwaived claims listed under subsection (1) of this  
34 section are subject to the following limitations:

35 (a) The claim must be asserted or brought within two years from the  
36 date of the foreclosure sale or within the applicable statute of  
37 limitations for such claim, whichever expires earlier;

1 (b) The claim may not seek any remedy at law or in equity other  
2 than monetary damages;

3 (c) The claim may not affect in any way the validity or finality of  
4 the foreclosure sale or a subsequent transfer of the property;

5 (d) A borrower or grantor who files such a claim is prohibited from  
6 recording a lis pendens or any other document purporting to create a  
7 similar effect, related to the real property foreclosed upon;

8 (e) The claim may not operate in any way to encumber or cloud the  
9 title to the property that was subject to the foreclosure sale, except  
10 to the extent that a judgment on the claim in favor of the borrower or  
11 grantor may, consistent with RCW 4.56.190, become a judgment lien on  
12 real property then owned by the judgment debtor; and

13 (f) The relief that may be granted for judgment upon the claim is  
14 limited to actual damages. However, if the borrower or grantor brings  
15 in the same civil action a claim for violation of chapter 19.86 RCW,  
16 arising out of the same alleged facts, relief under chapter 19.86 RCW  
17 is limited to actual damages, treble damages as provided for in RCW  
18 19.86.090, and the costs of suit, including a reasonable attorney's  
19 fee.

20 (~~(4)~~ ~~[(3)]~~) (3) This section applies only to foreclosures of  
21 owner-occupied residential real property.

22 (~~(5)~~ ~~[(4)]~~) (4) This section does not apply to the foreclosure of  
23 a deed of trust used to secure a commercial loan.

24 **Sec. 3.** RCW 61.24.005 and 2009 c 292 s 1 are each reenacted and  
25 amended to read as follows:

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

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

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

33 (3) "Borrower" means a person or a general partner in a  
34 partnership, including a joint venture, that is liable for all or part  
35 of the obligations secured by the deed of trust under the instrument or  
36 other document that is the principal evidence of such obligations, or

1 the person's successors if they are liable for those obligations under  
2 a written agreement with the beneficiary.

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

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

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

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

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

24 (9) "Person" means any natural person, or legal or governmental  
25 entity.

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

28 (11) "Residential real property" means property consisting solely  
29 of a single-family residence, a residential condominium unit, or a  
30 residential cooperative unit.

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

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

1           (~~(13)~~) (14) "Trustee" means the person designated as the trustee  
2 in the deed of trust or appointed under RCW 61.24.010(2).

3           (~~(14)~~) (15) "Trustee's sale" means a nonjudicial sale under a  
4 deed of trust undertaken pursuant to this chapter.

Passed by the Senate April 19, 2011.

Passed by the House April 5, 2011.

Approved by the Governor May 16, 2011.

Filed in Office of Secretary of State May 17, 2011.

# Appendix F

**Blado | Kiger | Bolan, P.S.**

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CERTIFICATION OF ENROLLMENT

**SECOND SUBSTITUTE HOUSE BILL 1362**

Chapter 58, Laws of 2011

62nd Legislature  
2011 Regular Session

FORECLOSURES--HOMEOWNER ASSISTANCE AND PROTECTION

EFFECTIVE DATE: 07/22/11 - Except sections 11, 12, and 16, which become effective 04/14/11.

Passed by the House April 1, 2011  
Yeas 78 Nays 15

FRANK CHOPP

**Speaker of the House of Representatives**

Passed by the Senate March 29, 2011  
Yeas 36 Nays 11

BRAD OWEN

**President of the Senate**

Approved April 14, 2011, 10:08 a.m.

CHRISTINE GREGOIRE

**Governor of the State of Washington**

CERTIFICATE

I, Barbara Baker, Chief Clerk of the House of Representatives of the State of Washington, do hereby certify that the attached is **SECOND SUBSTITUTE HOUSE BILL 1362** as passed by the House of Representatives and the Senate on the dates hereon set forth.

BARBARA BAKER

**Chief Clerk**

FILED

April 14, 2011

**Secretary of State  
State of Washington**

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**SECOND SUBSTITUTE HOUSE BILL 1362**

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AS AMENDED BY THE SENATE

Passed Legislature - 2011 Regular Session

**State of Washington**

**62nd Legislature**

**2011 Regular Session**

**By** House Ways & Means (originally sponsored by Representatives Orwall, Hope, Rolfes, Moeller, Lillas, Probst, Green, Darneille, Frockt, Kirby, Miloscia, Roberts, Hunt, Dickerson, Upthegrove, Fitzgibbon, Kagi, Eddy, Hasegawa, Pettigrew, Ormsby, Sells, Kenney, Cody, Hudgins, Lytton, Moscoso, Ryu, Appleton, Reykdal, Van De Wege, Carlyle, Dunshee, Santos, McCoy, Tharinger, Haigh, Goodman, Jinkins, Jacks, Takko, Sullivan, Blake, Seaquist, Billig, Stanford, Ladenburg, Finn, and Pedersen)

READ FIRST TIME 02/25/11.

1 AN ACT Relating to protecting and assisting homeowners from  
2 unnecessary foreclosures; amending RCW 61.24.030, 61.24.031, 61.24.135,  
3 and 82.45.030; reenacting and amending RCW 61.24.005; adding new  
4 sections to chapter 61.24 RCW; creating new sections; repealing 2009 c  
5 292 s 13 (uncodified); and declaring an emergency.

6 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

7 NEW SECTION. **Sec. 1.** (1) The legislature finds and declares that:

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

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

15 (c) In recent years, the legislature has enacted procedures to help  
16 encourage and strengthen the communication between homeowners and  
17 lenders and to assist homeowners in navigating through the foreclosure  
18 process; however, Washington's nonjudicial foreclosure process does not

1 have a mechanism for homeowners to readily access a neutral third party  
2 to assist them in a fair and timely way; and

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

7 (2) Therefore, the legislature intends to:

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

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

14 (c) Provide a process for foreclosure mediation when a housing  
15 counselor or attorney determines that mediation is appropriate. For  
16 mediation to be effective, the parties should attend the mediation (in  
17 person, telephonically, through an agent, or otherwise), provide the  
18 necessary documentation in a timely manner, willingly share  
19 information, actively present, discuss, and explore options to avoid  
20 foreclosure, negotiate willingly and cooperatively, maintain a  
21 professional and cooperative demeanor, cooperate with the mediator, and  
22 keep any agreements made in mediation.

23 NEW SECTION. **Sec. 2.** This act may be known and cited as the  
24 foreclosure fairness act.

25 **Sec. 3.** RCW 61.24.005 and 2009 c 292 s 1 are each reenacted and  
26 amended to read as follows:

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

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

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

34 (3) "Borrower" means a person or a general partner in a  
35 partnership, including a joint venture, that is liable for all or part  
36 of the obligations secured by the deed of trust under the instrument or

1 other document that is the principal evidence of such obligations, or  
2 the person's successors if they are liable for those obligations under  
3 a written agreement with the beneficiary.

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

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

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

18 (~~(6)~~) (7) "Grantor" means a person, or its successors, who  
19 executes a deed of trust to encumber the person's interest in property  
20 as security for the performance of all or part of the borrower's  
21 obligations.

22 (~~(7)~~) (8) "Guarantor" means any person and its successors who is  
23 not a borrower and who guarantees any of the obligations secured by a  
24 deed of trust in any written agreement other than the deed of trust.

25 (~~(8)~~) (9) "Housing counselor" means a housing counselor that has  
26 been approved by the United States department of housing and urban  
27 development or approved by the Washington state housing finance  
28 commission.

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

31 (~~(9)~~) (11) "Person" means any natural person, or legal or  
32 governmental entity.

33 (~~(10)~~) (12) "Record" and "recorded" includes the appropriate  
34 registration proceedings, in the instance of registered land.

35 (~~(11)~~) (13) "Residential real property" means property consisting  
36 solely of a single-family residence, a residential condominium unit, or  
37 a residential cooperative unit.

1        ~~((12))~~ (14) "Tenant-occupied property" means property consisting  
2 solely of residential real property that is the principal residence of  
3 a tenant subject to chapter 59.18 RCW or other building with four or  
4 fewer residential units that is the principal residence of a tenant  
5 subject to chapter 59.18 RCW.

6        ~~((13))~~ (15) "Trustee" means the person designated as the trustee  
7 in the deed of trust or appointed under RCW 61.24.010(2).

8        ~~((14))~~ (16) "Trustee's sale" means a nonjudicial sale under a  
9 deed of trust undertaken pursuant to this chapter.

10        **Sec. 4.** RCW 61.24.030 and 2009 c 292 s 8 are each amended to read  
11 as follows:

12        It shall be requisite to a trustee's sale:

13        (1) That the deed of trust contains a power of sale;

14        (2) That the deed of trust contains a statement that the real  
15 property conveyed is not used principally for agricultural purposes;  
16 provided, if the statement is false on the date the deed of trust was  
17 granted or amended to include that statement, and false on the date of  
18 the trustee's sale, then the deed of trust must be foreclosed  
19 judicially. Real property is used for agricultural purposes if it is  
20 used in an operation that produces crops, livestock, or aquatic goods;

21        (3) That a default has occurred in the obligation secured or a  
22 covenant of the grantor, which by the terms of the deed of trust makes  
23 operative the power to sell;

24        (4) That no action commenced by the beneficiary of the deed of  
25 trust is now pending to seek satisfaction of an obligation secured by  
26 the deed of trust in any court by reason of the grantor's default on  
27 the obligation secured: PROVIDED, That (a) the seeking of the  
28 appointment of a receiver shall not constitute an action for purposes  
29 of this chapter; and (b) if a receiver is appointed, the grantor shall  
30 be entitled to any rents or profits derived from property subject to a  
31 homestead as defined in RCW 6.13.010. If the deed of trust was granted  
32 to secure a commercial loan, this subsection shall not apply to actions  
33 brought to enforce any other lien or security interest granted to  
34 secure the obligation secured by the deed of trust being foreclosed;

35        (5) That the deed of trust has been recorded in each county in  
36 which the land or some part thereof is situated;

1 (6) That prior to the date of the notice of trustee's sale and  
2 continuing thereafter through the date of the trustee's sale, the  
3 trustee must maintain a street address in this state where personal  
4 service of process may be made, and the trustee must maintain a  
5 physical presence and have telephone service at such address;

6 (7)(a) That, for residential real property, before the notice of  
7 trustee's sale is recorded, transmitted, or served, the trustee shall  
8 have proof that the beneficiary is the owner of any promissory note or  
9 other obligation secured by the deed of trust. A declaration by the  
10 beneficiary made under the penalty of perjury stating that the  
11 beneficiary is the actual holder of the promissory note or other  
12 obligation secured by the deed of trust shall be sufficient proof as  
13 required under this subsection.

14 (b) Unless the trustee has violated his or her duty under RCW  
15 61.24.010(4), the trustee is entitled to rely on the beneficiary's  
16 declaration as evidence of proof required under this subsection.

17 (c) This subsection (7) does not apply to association beneficiaries  
18 subject to chapter 64.32, 64.34, or 64.38 RCW; ((and))

19 (8) That at least thirty days before notice of sale shall be  
20 recorded, transmitted or served, written notice of default shall be  
21 transmitted by the beneficiary or trustee to the borrower and grantor  
22 at their last known addresses by both first-class and either registered  
23 or certified mail, return receipt requested, and the beneficiary or  
24 trustee shall cause to be posted in a conspicuous place on the  
25 premises, a copy of the notice, or personally served on the borrower  
26 and grantor. This notice shall contain the following information:

27 (a) A description of the property which is then subject to the deed  
28 of trust;

29 (b) A statement identifying each county in which the deed of trust  
30 is recorded and the document number given to the deed of trust upon  
31 recording by each county auditor or recording officer;

32 (c) A statement that the beneficiary has declared the borrower or  
33 grantor to be in default, and a concise statement of the default  
34 alleged;

35 (d) An itemized account of the amount or amounts in arrears if the  
36 default alleged is failure to make payments;

37 (e) An itemized account of all other specific charges, costs, or

1 fees that the borrower, grantor, or any guarantor is or may be obliged  
2 to pay to reinstate the deed of trust before the recording of the  
3 notice of sale;

4 (f) A statement showing the total of (d) and (e) of this  
5 subsection, designated clearly and conspicuously as the amount  
6 necessary to reinstate the note and deed of trust before the recording  
7 of the notice of sale;

8 (g) A statement that failure to cure the alleged default within  
9 thirty days of the date of mailing of the notice, or if personally  
10 served, within thirty days of the date of personal service thereof, may  
11 lead to recordation, transmittal, and publication of a notice of sale,  
12 and that the property described in (a) of this subsection may be sold  
13 at public auction at a date no less than one hundred twenty days in the  
14 future;

15 (h) A statement that the effect of the recordation, transmittal,  
16 and publication of a notice of sale will be to (i) increase the costs  
17 and fees and (ii) publicize the default and advertise the grantor's  
18 property for sale;

19 (i) A statement that the effect of the sale of the grantor's  
20 property by the trustee will be to deprive the grantor of all their  
21 interest in the property described in (a) of this subsection;

22 (j) A statement that the borrower, grantor, and any guarantor has  
23 recourse to the courts pursuant to RCW 61.24.130 to contest the alleged  
24 default on any proper ground;

25 (k) In the event the property secured by the deed of trust is  
26 owner-occupied residential real property, a statement, prominently set  
27 out at the beginning of the notice, which shall state as follows:

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

32 Can you pay and stop the foreclosure process?

33 Do you dispute the failure to pay?

34 Can you sell your property to preserve your equity?

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

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

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

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

13 You may feel you need help understanding what to do. There are a  
14 number of professional resources available, including home loan  
15 counselors and attorneys, who may assist you. Many legal services are  
16 lower-cost or even free, depending on your ability to pay. If you  
17 desire legal help in understanding your options or handling this  
18 default, you may obtain a referral (at no charge) by contacting the  
19 county bar association in the county where your home is located. These  
20 legal referral services also provide information about lower-cost or  
21 free legal services for those who qualify. You may contact the  
22 Department of Financial Institutions or the statewide civil legal aid  
23 hotline for possible assistance or referrals"; and

24 (1) In the event the property secured by the deed of trust is  
25 residential real property, the name and address of the owner of any  
26 promissory notes or other obligations secured by the deed of trust and  
27 the name, address, and telephone number of a party acting as a servicer  
28 of the obligations secured by the deed of trust(~~(-"~~); and

29 (9) That, for owner-occupied residential real property, before the  
30 notice of the trustee's sale is recorded, transmitted, or served, the  
31 beneficiary has complied with RCW 61.24.031 and, if applicable, section  
32 7 of this act.

33 **Sec. 5.** RCW 61.24.031 and 2009 c 292 s 2 are each amended to read  
34 as follows:

35 (1)(a) A trustee, beneficiary, or authorized agent may not issue a  
36 notice of default under RCW 61.24.030(8) until: (i) Thirty days after  
37 initial contact with the borrower (~~(is made)~~) was initiated as required

1 under (b) of this subsection or thirty days after satisfying the due  
2 diligence requirements as described in subsection (5) of this section  
3 and the borrower has not responded; or (ii) if the borrower responds to  
4 the initial contact, ninety days after the initial contact with the  
5 borrower was initiated.

6 (b) A beneficiary or authorized agent shall make initial contact  
7 with the borrower by letter to provide the borrower with information  
8 required under (c) of this subsection and by telephone (~~in order to~~  
9 ~~assess the borrower's financial ability to pay the debt secured by the~~  
10 ~~deed of trust and explore options for the borrower to avoid~~  
11 ~~foreclosure)) as required under subsection (5) of this section. The  
12 letter required under this subsection must be mailed in accordance with  
13 subsection (5)(a) of this section and must include the information  
14 described in (c) of this subsection and subsection (5) (~~(a) and~~) (e)  
15 (i) through (iv) of this section.~~

16 (c) (~~During the initial contact, the beneficiary or authorized~~  
17 ~~agent shall advise the borrower that he or she has the right to request~~  
18 ~~a subsequent meeting and, if requested, the beneficiary or authorized~~  
19 ~~agent shall schedule the meeting to occur within fourteen days of the~~  
20 ~~request. The)) The letter required under this subsection, developed by  
21 the department pursuant to section 16 of this act, at a minimum shall  
22 include:~~

23 (i) A paragraph printed in no less than twelve point font and  
24 bolded that reads:

25 "You must respond within thirty days of the date of this letter.  
26 IF YOU DO NOT RESPOND within thirty days, a notice of default may be  
27 issued and you may lose your home in foreclosure.

28 IF YOU DO RESPOND within thirty days of the date of this letter,  
29 you will have an additional sixty days to meet with your lender before  
30 a notice of default may be issued.

31 You should contact a housing counselor or attorney as soon as  
32 possible. Failure to contact a housing counselor or attorney may  
33 result in your losing certain opportunities, such as meeting with your  
34 lender or participating in mediation in front of a neutral third party.  
35 A housing counselor or attorney can help you work with your lender to  
36 avoid foreclosure.";

37 (ii) The toll-free telephone number from the United States  
38 department of housing and urban development to find a department-

1 approved housing counseling agency, the toll-free numbers for the  
2 statewide foreclosure hotline recommended by the housing finance  
3 commission, and the statewide civil legal aid hotline for assistance  
4 and referrals to other housing counselors and attorneys;

5 (iii) A paragraph stating that a housing counselor may be available  
6 at little or no cost to the borrower and that whether or not the  
7 borrower contacts a housing counselor or attorney, the borrower has the  
8 right to request a meeting with the beneficiary; and

9 (iv) A paragraph explaining how the borrower may respond to the  
10 letter and stating that after responding the borrower will have an  
11 opportunity to meet with his or her beneficiary in an attempt to  
12 resolve and try to work out an alternative to the foreclosure and that,  
13 after ninety days from the date of the letter, a notice of default may  
14 be issued, which starts the foreclosure process.

15 (d) If the beneficiary has exercised due diligence as required  
16 under subsection (5) of this section and the borrower does not respond  
17 by contacting the beneficiary within thirty days of the initial  
18 contact, the notice of default may be issued. "Initial contact" with  
19 the borrower is considered made three days after the date the letter  
20 required in (b) of this subsection is sent.

21 (e) If a meeting is requested by the borrower or the borrower's  
22 housing counselor or attorney, the beneficiary or authorized agent  
23 shall schedule the meeting to occur before the notice of default is  
24 issued. An assessment of the borrower's financial ability to ((repay  
25 the debt)) modify or restructure the loan obligation and a discussion  
26 of options ((may)) must occur during the ((initial contact or at a  
27 subsequent)) meeting scheduled for that purpose. ((At the initial  
28 contact, the borrower must be provided the toll-free telephone number  
29 made available by the department to find a department-certified housing  
30 counseling agency and the toll-free numbers for the department of  
31 financial institutions and the statewide civil legal aid hotline for  
32 possible assistance and referrals.

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

34 (f) The meeting scheduled to assess the borrower's financial  
35 ability to modify or restructure the loan obligation and discuss  
36 options to avoid foreclosure must be in person, unless the requirement  
37 to meet in person is waived in writing by the borrower or the  
38 borrower's representative. A person who is authorized to modify the

1 loan obligation or reach an alternative resolution to foreclosure on  
2 behalf of the beneficiary may participate by telephone or video  
3 conference, so long as a representative of the beneficiary is at the  
4 meeting in person.

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

17 ~~((A beneficiary's or authorized agent's loss mitigation~~  
18 ~~personnel may participate by telephone during any contact required~~  
19 ~~under this section.~~

20 ~~(4) Within fourteen days))~~ If, after the initial contact under  
21 subsection (1) of this section, ~~((if))~~ a borrower has designated a  
22 ~~((department certified))~~ housing counseling agency, housing counselor,  
23 or attorney ~~(, or other advisor)~~ to discuss with the beneficiary or  
24 authorized agent, on the borrower's behalf, options for the borrower to  
25 avoid foreclosure, the borrower shall inform the beneficiary or  
26 authorized agent and provide the contact information to the beneficiary  
27 or authorized agent. The beneficiary or authorized agent shall contact  
28 the designated representative for the borrower ~~((for the discussion~~  
29 ~~within fourteen days after the representative is designated by the~~  
30 ~~borrower))~~ to meet.

31 (4) The beneficiary or authorized agent and the borrower or the  
32 borrower's representative shall attempt to reach a resolution for the  
33 borrower within the ninety days from the time the initial contact is  
34 sent and the notice of default is issued. A resolution may include,  
35 but is not limited to, a loan modification, an agreement to conduct a  
36 short sale, or a deed in lieu of foreclosure transaction, or some other  
37 workout plan. Any ~~((deed-of-trust))~~ modification or workout plan

1 offered at the meeting with the borrower's designated representative by  
2 the beneficiary or authorized agent is subject to approval by the  
3 borrower.

4 (5) A notice of default may be issued under RCW 61.24.030(8) if a  
5 beneficiary or authorized agent has ~~((not contacted-a))~~ initiated  
6 contact with the borrower as required under subsection (1)(b) of this  
7 section and the failure to ~~((contact))~~ meet with the borrower occurred  
8 despite the due diligence of the beneficiary or authorized agent. Due  
9 diligence requires the following:

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

17 ~~"You may contact the Department of Financial Institutions, the~~  
18 ~~Washington State Bar Association, or the statewide civil legal aid~~  
19 ~~hotline for possible assistance or referrals.")~~ be the letter  
20 described in subsection (1)(c) of this section.

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

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

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

36 (c) If the borrower does not respond within fourteen days after the  
37 telephone call requirements of (b) of this subsection have been  
38 satisfied, the beneficiary or authorized agent shall send a certified

1 letter; with return receipt requested, to the borrower at the address  
2 in the beneficiary's records for sending account statements to the  
3 borrower and to the address of the property encumbered by the deed of  
4 trust. The letter must include the information described in (e)(i)  
5 through (iv) of this subsection. The letter must also include a  
6 paragraph stating: "Your failure to contact a housing counselor or  
7 attorney may result in your losing certain opportunities, such as  
8 meeting with your lender or participating in mediation in front of a  
9 neutral third party."

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

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

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

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

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

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

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

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

36 (b) The borrower has filed for bankruptcy, and the bankruptcy stay  
37 remains in place, or the borrower has filed for bankruptcy and the

1 bankruptcy court has granted relief from the bankruptcy stay allowing  
2 enforcement of the deed of trust.

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

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

12 (8) As used in this section:

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

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

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

22 **"FORECLOSURE LOSS MITIGATION FORM**

23 **Please select applicable option(s) below.**

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

29 (1) [ ] The beneficiary or beneficiary's authorized agent has  
30 contacted the borrower under, and has complied with, RCW 61.24.031  
31 (contact provision to "assess the borrower's financial ability to pay  
32 the debt secured by the deed of trust and explore options for the  
33 borrower to avoid foreclosure") and the borrower did not request a  
34 meeting.

35 (2) [ ] The beneficiary or beneficiary's authorized agent has  
36 contacted the borrower as required under RCW 61.24.031 and the borrower

1 ~~or the borrower's designated representative requested a meeting. A~~  
2 ~~meeting was held in compliance with RCW 61.24.031.~~

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

9 ~~((+3))~~ (4) [ ] The borrower has surrendered the secured property  
10 as evidenced by either a letter confirming the surrender or by delivery  
11 of the keys to the secured property to the beneficiary, the  
12 beneficiary's authorized agent or to the trustee.

13 ~~((+4))~~ (5) [ ] Under RCW 61.24.031, the beneficiary or the  
14 beneficiary's authorized agent has verified information that, on or  
15 before the date of this declaration, the borrower(s) has filed for  
16 bankruptcy, and the bankruptcy stay remains in place, or the borrower  
17 has filed for bankruptcy and the bankruptcy court has granted relief  
18 from the bankruptcy stay allowing the enforcement of the deed of  
19 trust."

20 NEW SECTION. **Sec. 6.** A new section is added to chapter 61.24 RCW  
21 to read as follows:

22 (1)(a) A housing counselor who is contacted by a borrower under RCW  
23 61.24.031 has a duty to act in good faith to attempt to reach a  
24 resolution with the beneficiary on behalf of the borrower within the  
25 ninety days provided from the date the beneficiary initiates contact  
26 with the borrower and the date the notice of default is issued. A  
27 resolution may include, but is not limited to, modification of the  
28 loan, an agreement to conduct a short sale, a deed in lieu of  
29 foreclosure transaction, or some other workout plan.

30 (b) Nothing in RCW 61.24.031 or this section precludes a meeting or  
31 negotiations between the housing counselor, borrower, and beneficiary  
32 at any time, including after the issuance of the notice of default.

33 (c) A borrower who is contacted under RCW 61.24.031 may seek the  
34 assistance of a housing counselor or attorney at any time.

35 (2) Housing counselors have a duty to act in good faith to assist  
36 borrowers by:

37 (a) Preparing the borrower for meetings with the beneficiary;

1 (b) Advising the borrower about what documents the borrower must  
2 have to seek a loan modification or other resolution;

3 (c) Informing the borrower about the alternatives to foreclosure,  
4 including loan modifications or other possible resolutions; and

5 (d) Providing other guidance, advice, and education as the housing  
6 counselor considers necessary.

7 (3) A housing counselor or attorney assisting a borrower may refer  
8 the borrower to a mediation program, pursuant to section 7 of this act,  
9 if:

10 (a) The housing counselor or attorney determines that mediation is  
11 appropriate based on the individual circumstances; and

12 (b) A notice of sale on the deed of trust has not been recorded.

13 (4) A referral to mediation by a housing counselor or attorney does  
14 not preclude a trustee issuing a notice of default if the requirements  
15 of RCW 61.24.031 have been met.

16 (5) Housing counselors providing assistance to borrowers under RCW  
17 61.24.031 are not liable for civil damages resulting from any acts or  
18 omissions in providing assistance, unless the acts or omissions  
19 constitute gross negligence or willful or wanton misconduct.

20 (6) Housing counselors shall provide information to the department  
21 to assist the department in its annual report to the legislature as  
22 required under section 7(15) of this act. The information provided to  
23 the department by the housing counselors should include outcomes of  
24 foreclosures and be similar to the information requested in the  
25 national foreclosure mortgage counseling client level foreclosure  
26 outcomes report form.

27 NEW SECTION. **Sec. 7.** A new section is added to chapter 61.24 RCW  
28 to read as follows:

29 (1) The foreclosure mediation program established in this section  
30 applies only to borrowers who have been referred to mediation by a  
31 housing counselor or attorney. The mediation program under this  
32 section is not governed by chapter 7.07 RCW and does not preclude  
33 mediation required by a court or other provision of law.

34 (2) A housing counselor or attorney referring a borrower to  
35 mediation shall send a notice to the borrower and the department,  
36 stating that mediation is appropriate.

37 (3) Within ten days of receiving the notice, the department shall:

1 (a) Send a notice to the beneficiary, the borrower, the housing  
2 counselor or attorney who referred the borrower, and the trustee  
3 stating that the parties have been referred to mediation. The notice  
4 must include the statements and list of documents and information  
5 described in subsection (5)(b)(i) through (iv) of this section; and

6 (b) Select a mediator and notify the parties of the selection.

7 (4)(a) Within forty-five days of receiving the referral from the  
8 department, the mediator shall convene a mediation session in the  
9 county where the borrower resides, unless the parties agree on another  
10 location. The parties may agree in writing to extend the time in which  
11 to schedule the mediation session. If the parties agree to extend the  
12 time, the beneficiary shall notify the trustee of the extension and the  
13 date the mediator is expected to issue the mediator's certification.

14 (b) Prior to scheduling a mediation session, the mediator shall  
15 require that both parties sign a waiver stating that neither party may  
16 call the mediator as a live witness in any litigation pertaining to a  
17 foreclosure action between the parties. However, the mediator's  
18 certification may be deemed admissible evidence, subject to court  
19 rules, in any litigation pertaining to a foreclosure action between the  
20 parties.

21 (5)(a) The mediator may schedule phone conferences, consultations  
22 with the parties individually, and other communications to ensure that  
23 the parties have all the necessary information to engage in a  
24 productive mediation.

25 (b) The mediator must send written notice of the time, date, and  
26 location of the mediation session to the borrower, the beneficiary, and  
27 the department at least fifteen days prior to the mediation session.  
28 At a minimum, the notice must contain:

29 (i) A statement that the borrower may be represented in the  
30 mediation session by an attorney or other advocate;

31 (ii) A statement that a person with authority to agree to a  
32 resolution, including a proposed settlement, loan modification, or  
33 dismissal or continuation of the foreclosure proceeding, must be  
34 present either in person or on the telephone or video conference during  
35 the mediation session;

36 (iii) A complete list of documents and information required by this  
37 section that the parties must provide to the mediator and the deadlines  
38 for providing the documents and information; and

1 (iv) A statement that the parties have a duty to mediate in good  
2 faith and that failure to mediate in good faith may impair the  
3 beneficiary's ability to foreclose on the property or the borrower's  
4 ability to modify the loan or take advantage of other alternatives to  
5 foreclosure.

6 (6) The borrower, the beneficiary or authorized agent, and the  
7 mediator must meet in person for the mediation session. However, a  
8 person with authority to agree to a resolution on behalf of the  
9 beneficiary may be present over the telephone or video conference  
10 during the mediation session.

11 (7) The participants in mediation must address the issues of  
12 foreclosure that may enable the borrower and the beneficiary to reach  
13 a resolution, including but not limited to reinstatement, modification  
14 of the loan, restructuring of the debt, or some other workout plan. To  
15 assist the parties in addressing issues of foreclosure, the mediator  
16 must require the participants to consider the following:

17 (a) The borrower's current and future economic circumstances,  
18 including the borrower's current and future income, debts, and  
19 obligations for the previous sixty days or greater time period as  
20 determined by the mediator;

21 (b) The net present value of receiving payments pursuant to a  
22 modified mortgage loan as compared to the anticipated net recovery  
23 following foreclosure;

24 (c) Any affordable loan modification calculation and net present  
25 value calculation when required under any federal mortgage relief  
26 program, including the home affordable modification program (HAMP) as  
27 applicable to government-sponsored enterprise and nongovernment-  
28 sponsored enterprise loans and any HAMP-related modification program  
29 applicable to loans insured by the federal housing administration, the  
30 veterans administration, and the rural housing service. If such a  
31 calculation is not required, then the beneficiary must use the current  
32 calculations, assumptions, and forms that are established by the  
33 federal deposit insurance corporation and published in the federal  
34 deposit insurance corporation loan modification program guide; and

35 (d) Any other loss mitigation guidelines to loans insured by the  
36 federal housing administration, the veterans administration, and the  
37 rural housing service, if applicable.

1 (8) A violation of the duty to mediate in good faith as required  
2 under this section may include:

3 (a) Failure to timely participate in mediation without good cause;

4 (b) Failure of the beneficiary to provide the following  
5 documentation to the borrower and mediator at least ten days before the  
6 mediation or pursuant to the mediator's instructions:

7 (i) An accurate statement containing the balance of the loan as of  
8 the first day of the month in which the mediation occurs;

9 (ii) Copies of the note and deed of trust;

10 (iii) Proof that the entity claiming to be the beneficiary is the  
11 owner of any promissory note or obligation secured by the deed of  
12 trust. Sufficient proof may be a copy of the declaration described in  
13 RCW 61.24.030(7)(a);

14 (iv) The best estimate of any arrearage and an itemized statement  
15 of the arrearages;

16 (v) An itemized list of the best estimate of fees and charges  
17 outstanding;

18 (vi) The payment history and schedule for the preceding twelve  
19 months, or since default, whichever is longer, including a breakdown of  
20 all fees and charges claimed;

21 (vii) All borrower-related and mortgage-related input data used in  
22 any net present value analysis;

23 (viii) An explanation regarding any denial for a loan modification,  
24 forbearance, or other alternative to foreclosure in sufficient detail  
25 for a reasonable person to understand why the decision was made;

26 (ix) The most recently available appraisal or other broker price  
27 opinion most recently relied upon by the beneficiary; and

28 (x) The portion or excerpt of the pooling and servicing agreement  
29 that prohibits the beneficiary from implementing a modification, if the  
30 beneficiary claims it cannot implement a modification due solely to  
31 limitations in a pooling and servicing agreement, and documentation or  
32 a statement detailing the efforts of the beneficiary to obtain a waiver  
33 of the pooling and servicing agreement provisions;

34 (c) Failure of the borrower to provide documentation to the  
35 beneficiary and mediator, at least ten days before the mediation or  
36 pursuant to the mediator's instruction, showing the borrower's current  
37 and future income, debts and obligations, and tax returns for the past  
38 two years;

1 (d) Failure of either party to pay the respective portion of the  
2 mediation fee in advance of the mediation as required under this  
3 section;

4 (e) Failure of a party to designate representatives with adequate  
5 authority to fully settle, compromise, or otherwise reach resolution  
6 with the borrower in mediation; and

7 (f) A request by a beneficiary that the borrower waive future  
8 claims he or she may have in connection with the deed of trust, as a  
9 condition of agreeing to a modification, except for rescission claims  
10 under the federal truth in lending act. Nothing in this section  
11 precludes a beneficiary from requesting that a borrower dismiss with  
12 prejudice any pending claims against the beneficiary, its agents, loan  
13 servicer, or trustee, arising from the underlying deed of trust, as a  
14 condition of modification.

15 (9) Within seven business days after the conclusion of the  
16 mediation session, the mediator must send a written certification to  
17 the department and the trustee and send copies to the parties of:

18 (a) The date, time, and location of the mediation session;

19 (b) The names of all persons attending in person and by telephone  
20 or video conference, at the mediation session;

21 (c) Whether a resolution was reached by the parties, including  
22 whether the default was cured by reinstatement, modification, or  
23 restructuring of the debt, or some other alternative to foreclosure was  
24 agreed upon by the parties;

25 (d) Whether the parties participated in the mediation in good  
26 faith; and

27 (e) A description of the net present value test used, along with a  
28 copy of the inputs, including the result of the net present value test  
29 expressed in a dollar amount.

30 (10) If the parties are unable to reach any agreement and the  
31 mediator certifies that the parties acted in good faith, the  
32 beneficiary may proceed with the foreclosure.

33 (11)(a) The mediator's certification that the beneficiary failed to  
34 act in good faith in mediation constitutes a defense to the nonjudicial  
35 foreclosure action that was the basis for initiating the mediation. In  
36 any action to enjoin the foreclosure, the beneficiary shall be entitled  
37 to rebut the allegation that it failed to act in good faith.

1 (b) The mediator's certification that the beneficiary failed to act  
2 in good faith during mediation does not constitute a defense to a  
3 judicial foreclosure or a future nonjudicial foreclosure action if a  
4 modification of the loan is agreed upon and the borrower subsequently  
5 defaults.

6 (c) If an agreement was not reached and the mediator's  
7 certification shows that the net present value of the modified loan  
8 exceeds the anticipated net recovery at foreclosure, that showing in  
9 the certification shall constitute a basis for the borrower to enjoin  
10 the foreclosure.

11 (12) The mediator's certification that the borrower failed to act  
12 in good faith in mediation authorizes the beneficiary to proceed with  
13 the foreclosure.

14 (13)(a) A trustee may not record the notice of sale until the  
15 trustee receives the mediator's certification stating that the  
16 mediation has been completed.

17 (b) If the trustee does not receive the mediator's certification,  
18 the trustee may record the notice of sale after ten days from the date  
19 the certification to the trustee was due. If the notice of sale is  
20 recorded under this subsection (13)(b) and the mediator subsequently  
21 issues a certification alleging the beneficiary violated the duty of  
22 good faith, the trustee may not proceed with the sale.

23 (14) A mediator may charge reasonable fees as authorized by this  
24 subsection and by the department. Unless the fee is waived or the  
25 parties agree otherwise, a foreclosure mediator's fee may not exceed  
26 four hundred dollars for a mediation session lasting between one hour  
27 and three hours. For a mediation session exceeding three hours, the  
28 foreclosure mediator may charge a reasonable fee, as authorized by the  
29 department. The mediator must provide an estimated fee before the  
30 mediation, and payment of the mediator's fee must be divided equally  
31 between the beneficiary and the borrower. The beneficiary and the  
32 borrower must tender the loan mediator's fee seven calendar days before  
33 the commencement of the mediation or pursuant to the mediator's  
34 instructions.

35 (15) Beginning December 1, 2012, and every year thereafter, the  
36 department shall report annually to the legislature on:

37 (a) The performance of the program, including the numbers of

1 borrowers who are referred to mediation by a housing counselor or  
2 attorney;

3 (b) The results of the mediation program, including the number of  
4 mediations requested by housing counselors and attorneys, the number of  
5 certifications of good faith issued, the number of borrowers and  
6 beneficiaries who failed to mediate in good faith, and the reasons for  
7 the failure to mediate in good faith, if known, the numbers of loans  
8 restructured or modified, the change in the borrower's monthly payment  
9 for principal and interest and the number of principal write-downs and  
10 interest rate reductions, and, to the extent practical, the number of  
11 borrowers who report a default within a year of restructuring or  
12 modification;

13 (c) The information received by housing counselors regarding  
14 outcomes of foreclosures; and

15 (d) Any recommendations for changes to the statutes regarding the  
16 mediation program.

17 NEW SECTION. **Sec. 8.** A new section is added to chapter 61.24 RCW  
18 to read as follows:

19 (1) Section 7 of this act applies only to deeds of trust that are  
20 recorded against owner-occupied residential real property. The  
21 property must have been owner-occupied as of the date of the initial  
22 contact under RCW 61.24.031 was made.

23 (2) A borrower under a deed of trust on owner-occupied residential  
24 real property who has received a notice of default on or before the  
25 effective date this section may be referred to mediation under section  
26 7 of this act by a housing counselor or attorney.

27 (3) Section 7 of this act does not apply to deeds of trust:

28 (a) Securing a commercial loan;

29 (b) Securing obligations of a grantor who is not the borrower or a  
30 guarantor; or

31 (c) Securing a purchaser's obligations under a seller-financed  
32 sale.

33 (4) Section 7 of this act does not apply to association  
34 beneficiaries subject to chapter 64.32, 64.34, or 64.38 RCW.

35 NEW SECTION. **Sec. 9.** A new section is added to chapter 61.24 RCW  
36 to read as follows:

1 The provisions of section 7 of this act do not apply to any  
2 federally insured depository institution, as defined in 12 U.S.C. Sec.  
3 461(b)(1)(A), that certifies to the department under penalty of perjury  
4 that it was not a beneficiary of deeds of trust in more than two  
5 hundred fifty trustee sales of owner-occupied residential real property  
6 that occurred in this state during the preceding calendar year. A  
7 federally insured depository institution certifying that section 7 of  
8 this act does not apply must do so annually, beginning no later than  
9 thirty days after the effective date of this section, and no later than  
10 January 31st of each year thereafter.

11 NEW SECTION. **Sec. 10.** A new section is added to chapter 61.24 RCW  
12 to read as follows:

13 (1) For the purposes of section 7 of this act, the department must  
14 maintain a list of approved foreclosure mediators. The department may  
15 approve the following persons to serve as foreclosure mediators under  
16 this section:

17 (a) Attorneys who are active members of the Washington state bar  
18 association;

19 (b) Employees of United States department of housing and urban  
20 development-approved housing counseling agencies or approved by the  
21 Washington state housing finance commission;

22 (c) Employees or volunteers of dispute resolution centers under  
23 chapter 7.75 RCW; and

24 (d) Retired judges of Washington courts.

25 (2) The department may establish a required training program for  
26 foreclosure mediators and may require mediators to acquire training  
27 before being approved. The mediators must be familiar with relevant  
28 aspects of the law, have knowledge of community-based resources and  
29 mortgage assistance programs, and refer borrowers to these programs  
30 where appropriate.

31 (3) The department may remove any mediator from the approved list  
32 of mediators.

33 NEW SECTION. **Sec. 11.** A new section is added to chapter 61.24 RCW  
34 to read as follows:

35 The foreclosure fairness account is created in the custody of the  
36 state treasurer. All receipts received under section 12 of this act

1 must be deposited into the account. Only the director of the  
2 department of commerce or the director's designee may authorize  
3 expenditures from the account. The account is subject to allotment  
4 procedures under chapter 43.88 RCW, but an appropriation is not  
5 required for expenditures. Expenditures from the account must be used  
6 as follows: (1) No less than eighty percent must be used for the  
7 purposes of providing housing counselors for borrowers, except that  
8 this amount may be less than eighty percent only if necessary to meet  
9 the funding level specified for the office of the attorney general  
10 under subsection (2) of this section and the department under  
11 subsection (4) of this section; (2) up to six percent, or six hundred  
12 fifty-five thousand dollars per biennium, whichever amount is greater,  
13 to the office of the attorney general to be used by the consumer  
14 protection division to enforce this chapter; (3) up to two percent to  
15 the office of civil legal aid to be used for the purpose of contracting  
16 with qualified legal aid programs for legal representation of  
17 homeowners in matters relating to foreclosure. Funds provided under  
18 this subsection (3) must be used to supplement, not supplant, other  
19 federal, state, and local funds; (4) up to nine percent, or four  
20 hundred fifty-one thousand dollars per biennium, whichever amount is  
21 greater, to the department to be used for implementation and operation  
22 of the foreclosure fairness act; and (5) up to three percent to the  
23 department of financial institutions to conduct homeowner prepurchase  
24 and postpurchase outreach and education programs as defined in RCW  
25 43.320.150.

26 The department shall enter into interagency agreements to contract  
27 with the Washington state housing finance commission and other  
28 appropriate entities to implement the foreclosure fairness act.

29 NEW SECTION. **Sec. 12.** A new section is added to chapter 61.24 RCW  
30 to read as follows:

31 (1) Except as provided in subsection (4) of this section, beginning  
32 October 1, 2011, and every quarter thereafter, every beneficiary  
33 issuing notices of default, or directing that a trustee or authorized  
34 agent issue the notice of default, on owner-occupied residential real  
35 property under this chapter must:

36 (a) Report to the department the number of owner-occupied

1 residential real properties for which the beneficiary has issued a  
2 notice of default during the previous quarter; and

3 (b) Remit the amount required under subsection (2) of this section.

4 (2) For each owner-occupied residential real property for which a  
5 notice of default has been issued, the beneficiary issuing the notice  
6 of default, or directing that a trustee or authorized agent issue the  
7 notice of default, shall remit two hundred fifty dollars to the  
8 department to be deposited, as provided under section 11 of this act,  
9 into the foreclosure fairness account. The two hundred fifty dollar  
10 payment is required per property and not per notice of default. The  
11 beneficiary shall remit the total amount required in a lump sum each  
12 quarter.

13 (3) No later than thirty days after the effective date of this  
14 section, the beneficiaries required to report and remit to the  
15 department under this section shall determine the number of owner-  
16 occupied residential real properties for which notices of default were  
17 issued during the three months prior to the effective date of this  
18 section. The beneficiary shall remit to the department a one-time sum  
19 of two hundred fifty dollars multiplied by the number of properties.  
20 The department shall deposit the funds into the foreclosure fairness  
21 account as provided under section 11 of this act.

22 (4) This section does not apply to any beneficiary or loan servicer  
23 that is a federally insured depository institution, as defined in 12  
24 U.S.C. Sec. 461(b)(1)(A), and that certifies under penalty of perjury  
25 that it has issued, or has directed a trustee or authorized agent to  
26 issue, fewer than two hundred fifty notices of default in the preceding  
27 year.

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

30 NEW SECTION. **Sec. 13.** A new section is added to chapter 61.24 RCW  
31 to read as follows:

32 Any duty that servicers may have to maximize net present value  
33 under their pooling and servicing agreements is owed to all parties in  
34 a deed of trust pool, not to any particular parties, and a servicer  
35 acts in the best interests of all parties if it agrees to or implements  
36 a modification or workout plan when both of the following apply:

1 (1) The deed of trust is in payment default, or payment default is  
2 reasonably imminent; and

3 (2) Anticipated recovery under a modification or workout plan  
4 exceeds the anticipated recovery through foreclosure on a net present  
5 value basis.

6 **Sec. 14.** RCW 61.24.135 and 2008 c 153 s 6 are each amended to read  
7 as follows:

8 (1) It is an unfair or deceptive act or practice under the consumer  
9 protection act, chapter 19.86 RCW, for any person, acting alone or in  
10 concert with others, to offer, or offer to accept or accept from  
11 another, any consideration of any type not to bid, or to reduce a bid,  
12 at a sale of property conducted pursuant to a power of sale in a deed  
13 of trust. The trustee may decline to complete a sale or deliver the  
14 trustee's deed and refund the purchase price, if it appears that the  
15 bidding has been collusive or defective, or that the sale might have  
16 been void. However, it is not an unfair or deceptive act or practice  
17 for any person, including a trustee, to state that a property subject  
18 to a recorded notice of trustee's sale or subject to a sale conducted  
19 pursuant to this chapter is being sold in an "as-is" condition, or for  
20 the beneficiary to arrange to provide financing for a particular bidder  
21 or to reach any good faith agreement with the borrower, grantor, any  
22 guarantor, or any junior lienholder.

23 (2) It is an unfair or deceptive act in trade or commerce and an  
24 unfair method of competition in violation of the consumer protection  
25 act, chapter 19.86 RCW, for any person or entity to: (a) Violate the  
26 duty of good faith under section 7 of this act; (b) fail to comply with  
27 the requirements of section 12 of this act; or (c) fail to initiate  
28 contact with a borrower and exercise due diligence as required under  
29 RCW 61.24.031.

30 **Sec. 15.** RCW 82.45.030 and 1993 sp.s. c 25 s 503 are each amended  
31 to read as follows:

32 (1) As used in this chapter, the term "selling price" means the  
33 true and fair value of the property conveyed. If property has been  
34 conveyed in an arm's length transaction between unrelated persons for  
35 a valuable consideration, a rebuttable presumption exists that the

1 selling price is equal to the total consideration paid or contracted to  
2 be paid to the transferor, or to another for the transferor's benefit.

3 (2) If the sale is a transfer of a controlling interest in an  
4 entity with an interest in real property located in this state, the  
5 selling price shall be the true and fair value of the real property  
6 owned by the entity and located in this state. If the true and fair  
7 value of the real property located in this state cannot reasonably be  
8 determined, the selling price shall be determined according to  
9 subsection (4) of this section.

10 (3) As used in this section, "total consideration paid or  
11 contracted to be paid" includes money or anything of value, paid or  
12 delivered or contracted to be paid or delivered in return for the sale,  
13 and shall include the amount of any lien, mortgage, contract  
14 indebtedness, or other incumbrance, either given to secure the purchase  
15 price, or any part thereof, or remaining unpaid on such property at the  
16 time of sale.

17 Total consideration shall not include the amount of any outstanding  
18 lien or incumbrance in favor of the United States, the state, or a  
19 municipal corporation for taxes, special benefits, or improvements.

20 When a transfer or conveyance is made by deed in lieu of  
21 foreclosure to satisfy a deed of trust, total consideration shall not  
22 include the amount of any relocation assistance provided to the  
23 transferor.

24 (4) If the total consideration for the sale cannot be ascertained  
25 or the true and fair value of the property to be valued at the time of  
26 the sale cannot reasonably be determined, the market value assessment  
27 for the property maintained on the county property tax rolls at the  
28 time of the sale shall be used as the selling price.

29 **NEW SECTION. Sec. 16.** A new section is added to chapter 61.24 RCW  
30 to read as follows:

31 (1)(a) The department must develop model language for the initial  
32 contact letter to be used by beneficiaries as required under RCW  
33 61.24.031. The model language must explain how the borrower may  
34 respond to the letter. The department must develop the model language  
35 in both English and Spanish and both versions must be contained in the  
36 same letter.

1 (b) No later than thirty days after the effective date of this  
2 section, the department must create the following forms:

3 (i) The notice form to be used by housing counselors and attorneys  
4 to refer borrowers to mediation under section 7 of this act;

5 (ii) The notice form stating that the parties have been referred to  
6 mediation along with the required information under section 7(3)(a) of  
7 this act;

8 (iii) The waiver form as required in section 7(4)(b) of this act;

9 (iv) The scheduling form notice in section 7(5)(b) of this act; and

10 (v) The form for the mediator's written certification of mediation.

11 (2) The department may create rules to implement the mediation  
12 program under section 7 of this act and to administer the funds as  
13 required under section 11 of this act.

14 NEW SECTION. **Sec. 17.** 2009 c 292 s 13 (uncodified) is repealed.

15 NEW SECTION. **Sec. 18.** If any provision of this act or its  
16 application to any person or circumstance is held invalid, the  
17 remainder of the act or the application of the provision to other  
18 persons or circumstances is not affected.

19 NEW SECTION. **Sec. 19.** Sections 11, 12, and 16 of this act are  
20 necessary for the immediate preservation of the public peace, health,  
21 or safety, or support of the state government and its existing public  
22 institutions, and take effect immediately.

Passed by the House April 1, 2011.

Passed by the Senate March 29, 2011.

Approved by the Governor April 14, 2011.

Filed in Office of Secretary of State April 14, 2011.