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SUPREME COURT OF THE STATE OF WASHINGTON

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LAWRENCE JAMETSKY,

Plaintiff-Petitioner,

v.

RODNEY A. and JANE DOE OLSEN,  
and MATHEW and DANE DOE FLYNN,

Defendants-Respondents.

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BRIEF OF AMICUS CURIAE  
ATTORNEY GENERAL OF WASHINGTON

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ROBERT W. FERGUSON  
Attorney General

SHANNON E. SMITH, WSBA #19077  
Sr. Assistant Attorney General  
800 5th Avenue, Suite 2000  
Seattle, WA 98109  
(206) 389-3996

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## I. INTEREST OF AMICUS

*Amicus Curiae* is the Attorney General of Washington. The Attorney General's constitutional and statutory powers include the submission of *amicus curiae* briefs on matters affecting the public interest.<sup>1</sup> This case presents the issue of what constitutes a "distressed home" under Washington's Distressed Property Conveyances Act (DCPA), RCW 61.34. The issue is of great concern to the Attorney General because the provision of the DCPA at issue in this appeal was part of legislation proposed by the Attorney General in 2008 to reduce foreclosure rescue scams and protect consumers.<sup>2</sup> In addition, violations of the DCPA are per se violations of the Consumer Protection Act, RCW 19.86. The Attorney General enforces the CPA on behalf of the public,<sup>3</sup> and has an interest in the development of CPA case law.<sup>4</sup>

## II. INTRODUCTION

This appeal presents an issue of statutory construction. In its decision, the Court of Appeals applied an erroneous standard for defining "distressed home." The Court held that Mr. Jametsky's home was not a "distressed home" under the DCPA because the county treasurer was still

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<sup>1</sup> See *Young Americans for Freedom v. Gorton*, 91 Wn.2d 204, 212, 588 P.2d 195 (1978).

<sup>2</sup> Laws of 2008, ch. 278 (HB 2791).

<sup>3</sup> RCW 19.86.080.

<sup>4</sup> RCW 19.86.095.

several months away from issuing a certificate of delinquency pursuant to RCW 84.64.050. *Jametsky v. Olsen*, 2012 WL 5292830 (Wash. App. Div. II 2012), at \*4. The Court of Appeals improperly relied on an unrelated statute to determine the meaning of “risk of loss due to nonpayment of taxes” within the DCPA. In doing so, the Court ignored the rules of statutory construction established by this Court and defeated the legislature’s intent to protect homeowners from abusive practices.

Therefore, this Court should overturn the Court of Appeals’ decision.

### III. ARGUMENT

#### A. The DCPA Is Designed to Protect Homeowners

In passing the DCPA the legislature intended to protect homeowners from foreclosure rescue scams, including those targeting homeowners who are behind on paying their property taxes. RCW 61.34.020(2)(a). The DCPA is an important consumer protection law steeped in the public interest. RCW 61.34.040 (“the legislature finds the practices covered by this chapter are matters vitally affecting the public interest”).

It is plain from the provisions of the DCPA that it protects homeowners who are under financial duress, including those who are not sophisticated in property transactions. Nothing in the legislative history or the statute indicates that the legislature was concerned with county

treasurers foreclosing on unsuspecting homeowners. Quite to the contrary, the legislature made clear that the DCPA was squarely aimed at protecting Washington homeowners against fraudulent, unfair, and coercive practices in the marketplace. RCW 61.34.010. For example, the DCPA affords consumers certain rights when they engage in “distressed home conveyances,” which are home sales in which:

- (a) A distressed homeowner transfers an interest in a distressed home to a distressed home purchaser;
- (b) The distressed home purchaser allows the distressed homeowner to occupy the distressed home; and
- (c) The distressed home purchaser or a person acting in participation with the distressed home purchaser conveys or promises to convey the distressed home to the distressed homeowner, provides the distressed homeowner with an option to purchase the distressed home at a later date, or promises the distressed homeowner an interest in, or portion of, the proceeds of any resale of the distressed home.

RCW 61.34.020(5). The DCPA gives distressed homeowners a five-day right to cancel a distressed home contract, RCW 61.34.100, and prohibits distressed home purchasers from taking unfair advantage of distressed homeowners. RCW 61.34.120. In addition, the DCPA requires distressed home consulting transactions: (1) to be in writing and in at least 12-point font; (2) fully disclose the exact nature of the distress home conveyance; and (3) include a notice in bold face type and in at least 14-point type

warning the distressed homeowner that the transaction could result in loss of the home. RCW 61.34.050.

**B. The Court of Appeals Erroneously Construed “Distressed Homeowner” in the DCPA By Disregarding the Rules of Statutory Construction and the Legislature’s Intent**

The DCPA’s protections are afforded to owners of “distressed homes.” The DCPA defines a “distressed home” as either:

(a) A dwelling that is in danger of foreclosure or at risk of loss due to nonpayment of taxes; or

(b) A dwelling that is in danger of foreclosure or that is in the process of being foreclosed due to a default under the terms of a mortgage.

RCW 61.34.020(2). The legislature further defined “in danger of foreclosure,” RCW 61.34.020(11), but did not define “risk of loss due to nonpayment of taxes.” The issue in this case is the proper construction of “at risk of loss due to nonpayment of taxes” in RCW 61.34.020(2)(a).

**1. The Court of Appeals Did Not Properly Define “At Risk of Loss Due to Nonpayment of Taxes”**

“The fundamental objective of statutory construction is to ascertain and carry out the intent of the Legislature.” *Rozner v. City of Bellevue*, 116 Wn.2d 342, 347, 804 P.2d 24 (1991) (citing *Bellevue Fire Fighters Local 1604 v. Bellevue*, 100 Wn.2d 748, 751, 675 P.2d 592 (1984), *cert. denied*, 471 U.S. 1015, 105 S.Ct. 2017, 85 L. Ed. 2d 299 (1985)). In discerning legislative intent, courts look first to the statute’s plain

language. *Electric Lightwave Inc. v. Washington Utils. & Transp. Comm'n*, 123 Wn.2d. 530, 536, 869 P. 2d 1045 (1994). Where a statutory term is undefined, courts will give the words in the statute their ordinary meaning, and may look to a dictionary for such meaning. *State v. Gonzalez*, 168 Wn.2d 256, 263, 226 P.3d 131, *cert. denied*, 131 S.Ct 318 (2008).

Here, the legislature did not define “at risk of loss due to nonpayment of taxes” in the DCPA, and it is appropriate to consult a dictionary. “Risk” is defined as “the possibility of loss, injury, disadvantage, or destruction : CONTINGENCY, DANGER, PERIL, THREAT” Webster’ Third New International Dictionary, 1961 (1986). Under the ordinary meaning of “risk,” a home is at risk of loss due to nonpayment of taxes when there is a *possibility* of loss due to nonpayment of taxes. The possibility that a home will be lost due to nonpayment of taxes does not come into existence only when the county treasurer issues a certificate of delinquency. As argued below, a homeowner can be at risk of loss before the county begins its statutory foreclosure procedure.

Contrary to Respondents’ argument, attributing the ordinary meaning to “risk” would not “improperly add words to the statute.” *See* Respondents’ Supp. Br. at 4-5. Rather, Amicus contends that giving the

words their ordinary meaning is a proper exercise of statutory construction. *See State v. Gonzalez*, 168 Wn.2d at 263-64.

Words in a statute also take their meaning from the context in which they are used. Here, the phrase “at risk of loss due to nonpayment of taxes” is used within a statute that is intended to protect homeowners from abusive practices that may result in loss of their homes or the equity in their homes. Had the legislature intended that a risk of loss due to nonpayment of taxes arises only when the county treasurer issues a certificate of delinquency for the property, it would have said so. The Court should construe the phrase in light of the broad remedial purpose served by the DPCA.

Rather than apply the common meaning of “at risk of loss due to nonpayment of taxes,” the Court of Appeals resorted to an entirely separate title and chapter of the RCW, RCW 84.64, and decided that home is not “at risk of loss due to nonpayment of taxes” under the DCPA when the county treasurer has not issued a certificate of delinquency on the property pursuant to RCW 84.64.050. *Jametsky*, 2012 WL 5292830, at \*4. This is contrary to the rules of statutory construction.

## 2. Courts Should Not Construe Unrelated Statutes Together

To determine the legislature's intent in one statute, courts may look to language the legislature used in related statutes. *See State v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 11-12, 43 P.2d 4 (2002) (looking to a related, supplemental statute on the same subject matter to determine legislative intent). However, it is not proper to look to the language used in unrelated statutes. *See Washington Utils. & Transp. Comm'n v. United Cartage, Inc.*, 28 Wn. App. 90, 96-97, 621 P.2d 217, *review denied*, 90 Wn.2d 1017 (1981); *Klassen v. Skamania County*, 66 Wn. App. 127, 131-32, 831 P.2d 763 (1992); *Sherman v. Kissinger*, 146 Wn. App. 855, 868-69, 195 P.3d 539 (2008).

In *United Cartage*, the Court construed the meaning of "contiguous" for purposes of reviewing a decision by the Washington Utility and Transportation Commission (WUTC) that denied United Cartage's petition for automatic extension of its cartage permits to include a newly created commercial zone. 28 Wn. App. at 93-94. The WUTC denied the automatic extension of the permit because United Cartage had not provided cartage to contiguous cities. *Id.* (construing former WAC 480-12-080, 990). Despite the fact that the WUTC had consistently determined that Seattle and Bellevue were not contiguous cities, United

Cartage argued that Seattle and Bellevue were contiguous cities under RCW 35.21.060, which gives cities and towns abutting bodies of water jurisdiction of the area up to the middle of the body of water (thereby making Seattle and Bellevue contiguous). The court rejected that argument because RCW 35.21.160 has no impact on the WUTC's regulatory authority under Titles 80 and 81, but is intended to address cities' exercise of municipal powers. "Where two statutes concern wholly different subject matters, serve entirely separate purposes and operate independently of each other, they should not be construed together." *Id.* at 97 (citing *Public Util. Dist. No. 1 of Pend Orielle County v. Pend Orielle County*, 38 Wn.2d 221, 224-226; 228 P.2d 766 (1951)).

Similarly, the Court in *Sherman v. Kissinger* properly declined to construe two unrelated statutes together. At issue in that case was whether the medical malpractice act, RCW 7.70, applied to malpractice actions against veterinarians. 146 Wn. App. at 865. In attempting to extend the medical malpractice act to veterinarians, which would have barred many of the plaintiff's causes of actions, the defendant veterinarian argued that because the medical malpractice act applied to "health care providers," the court should look to RCW 18.120 and RCW 18.130, which regulate the health professions, to interpret the definition of "health care provider" set forth in RCW 7.70.020. According to the defendant, because RCW

18.120 and RCW 18.130 include veterinarians within their regulatory schemes, the term “health care provider” in the medical malpractice act also should include veterinarians. *Id.* at 868-89. In rejecting the argument, the court considered the purposes of RCW 18.120 and 18.130, which are to regulate health care professions in the public interest and provide for uniform discipline and licensing requirements on health care professionals, and held that these purposes were unrelated to the limitation of claims against health care providers in the medical malpractice act, RCW 7.70: “Neither of these unrelated regulatory statutes means that the limitation of claims against doctors in the medical malpractice act includes veterinarians.” *Sherman*, 146 Wn. App. at 869. The Court of Appeals properly did not consider unrelated statutes in interpreting RCW 7.70.020.

In *Klassen v. Skamania County*, the court construed the meaning of “forest land” for purposes of determining whether a land transaction was exempt from compensating taxes under RCW 84.33. The landowners had exchanged land in Skamania County with the United States Forest Service for land in Lewis County pursuant to the Columbia Gorge National Scenic Area Act (Scenic Act), 16 U.S.C. § 544. 66 Wn. App. at 128. The issue of whether the transaction was exempt from the compensating tax depended on whether the land met the definition of “forest land” in former RCW 84.33.100(1), which required that the land be at least 20 acres. In

contrast, the Scenic Act defined “forest land” as “lands used or suitable for the production of forest products. 16 U.S.C. § 544(b)(3). If the definition of “forest land” in the Scenic Act controlled, the landowners exchanged forest land, but if the definition in RCW 84.33.100(1) applied, they did not. *Klassen*, 66 Wn. App. at 131. The court ruled that the definition in former RCW 84.33.100(1) applied: “While these two statutes serve similar purposes, they concern different subject matters (i.e. land preservation v. taxation) and operate independently of each other. Thus the trial court properly concluded that the transaction made the Skamania property subject to compensating tax.” *Id.* at 131-32.

The same principle of statutory construction applies here. The legislature enacted the DCPA to protect innocent homeowners from losing their homes or equity in their homes because of the sharp practices of others. *See* RCW 61.34.010 (findings), .030 (criminalizing equity skimming), .040 (applying CPA and making defendant liable for increased damages of up to \$100,000 for acting in bad faith), .050 (setting forth specific notice requirements for a distressed home consulting transaction), .060 (making a distressed home consultant the fiduciary of the distressed homeowner), .100 (giving a distressed homeowner a right to cancel sale within five business days), .120 (prohibiting a distressed home purchaser from, among things, entering into an agreement with a distressed

homeowner without evaluating the distressed homeowner's financial situation).

In contrast, RCW 84.64 governs the procedures a county must follow to foreclose on a tax lien and protects the due process rights of property owners and those with recorded interests in the property by requiring adequate notice prior to the foreclosure sale. *See* RCW 84.64.050, .080. In passing RCW 84.64, the legislature did not intend to protect homeowners from sharp practices or deter unscrupulous conduct.

Rather than look to an unrelated statute to construe "at risk of loss due to nonpayment of taxes," the court should have considered it within the context of the DCPA. "Legislative definitions generally control in construing the statutes in which they appear, but when the same word or phrase is used elsewhere the meaning depends on common usage and the context in which it is used, unaffected by the other statutory definitions." *Childers v. Childers*, 89 Wn.2d 592, 598, 575 P.2d 201 (1978).

**3. "Risk of Loss Due to Nonpayment of Taxes" Should Be Construed Within the Context of the DPCA as a Whole**

Homeowners who are under financial duress or who are not sophisticated in property transactions and who are significantly behind on their property taxes may know that they could lose their home for nonpayment of taxes, but they may not know the specific process the

county must follow to foreclose. These homeowners could be at risk of losing their homes due to nonpayment of taxes and could fall prey to scams offering to save their homes before the county treasurer issues a certificate of delinquency under RCW 84.64.050. By concluding that a homeowner is not at risk of losing the home for nonpayment of taxes until the certificate of delinquency is issued, the Court of Appeals draws a bright line that ignores the homeowner's potential vulnerability to foreclosure rescue scams and elevates a county tax procedure statute over a vital consumer protection statute. For example, a homeowner who is nearly three years in arrears and unemployed may be vulnerable to promises to rescue the home from being lost to the county because the homeowner knows he or she ultimately will not be able to obtain the funds necessary to pay the taxes. To the contrary, a homeowner who receives a certificate of delinquency, but who has sufficient funds to pay the taxes may not be at risk of loss due to nonpayment of taxes. But the Court of Appeals opinion means that a homeowner who is two years and nine months behind on paying property taxes and has a good faith belief that he or she will not be able to pay the taxes is not protected by the statute.

Whether the county has issued a certificate of delinquency may be relevant in considering whether the homeowner is at risk of losing the home for failure to pay taxes, but it is not the only factor that may

demonstrate the homeowner is at risk. Certainly, a scammer may identify potential victims through certificates of delinquency, *see, e.g., State v. Kaiser*, 161 Wn. App. 705, 709, 254 P.3d 850 (2011) (foreclosure rescue scam targeted victims who had received a certificate of delinquency), but that is not the only means by which an unscrupulous person can target a homeowner who is behind on tax payments and attempt to “rescue” the homeowner.

The DCPA prohibits a distressed home purchaser from entering or attempting to enter into a transaction with a distressed homeowner unless the purchaser verifies the distressed homeowner’s financial situation. RCW 61.34.120. By ignoring the homeowner’s financial situation and other evidence and limiting the DCPA’s protections only to those situations where the county has issued a certificate of delinquency, the Court of Appeals has stripped homeowners of the DCPA’s protections.

The Court of Appeals decision also turns an important protection for financially strapped homeowners into an exculpatory clause for scammers. Under the Court of Appeals decision, a foreclosure rescue scammer can simply disregard an important provision of the DCPA with impunity for up to 36 months so long as the county has not issued a certificate of delinquency. Given the broad protections set forth in the DCPA, it is plain that the legislature did not intend this result.

The Court of Appeals failed to apply principles of statutory construction when it limited the phrase “at risk of loss due to nonpayment of taxes” only to those situations where the county treasurer has issued a certificate of delinquency under RCW 84.64.050. As a result, the Court of Appeals significantly limited the protections for distressed homeowners under the DCPA and frustrated the legislature’s intent to stop abusive and sharp business practices that harm consumers.

**IV. CONCLUSION**

For the foregoing reasons, this Court should reverse the Court of Appeals.

RESPECTFULLY SUBMITTED this 6th day of September, 2013.

ROBERT W. FERGUSON  
Attorney General



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SHANNON E. SMITH, WSBA #19077  
Senior Assistant Attorney General  
Attorneys for Amicus Curiae  
Attorney General of Washington

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Filed by:

Shannon E. Smith, WSBA #19077

[shannons@atg.wa.gov](mailto:shannons@atg.wa.gov)

(206)389-3996

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**MICHELLE FERAZZA** LEGAL ASSISTANT

 206-464-6491 |  206-587-5636 |  [michellef@atg.wa.gov](mailto:michellef@atg.wa.gov)

WA State Attorney General's Office, Consumer Protection Division

800 Fifth Avenue Suite 2000, Seattle, WA 98104-3188