

Supreme Court No. 89132-0

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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

WINNIE LYONS,
Plaintiff-Appellant,

v.

U.S. BANK NATIONAL ASSOCIATION, as Trustee for Stanwich
Mortgage Loan Trust Series 2012-3, by Carrington Mortgage Services,
LLC; CARRINGTON MORTGAGE SERVICES, LLC; WELLS FARGO
BANK, N.A., a chartered national bank; WELLS FARGO BANK, N.A., as
servicer; and NORTHWEST TRUSTEE SERVICES, INC., as Trustee,
Defendant-Respondent.

**AMICUS CURIAE BRIEF OF NORTHWEST CONSUMER LAW
CENTER, THE NORTHWEST JUSTICE PROJECT, AND
COLUMBIA LEGAL SERVICES**

Matthew Geyman, WSBA #17544
COLUMBIA LEGAL SERVICES
101 Yesler Way, Suite 300
Seattle, WA 98104
(206) 287-9661

Eulalia Sotelo, WSBA #41407
Lisa von Biela, WSBA #42142
Thomas McKay, WSBA #46501
NORTHWEST JUSTICE PROJECT
401 Second Ave. South, Suite 407
Seattle, WA 98104
(206) 464-1519

Sheila M. O'Sullivan, WSBA #28656
Audrey Udashen, WSBA #42868
NORTHWEST CONSUMER LAW CENTER
520 E. Denny Way
Seattle, WA 98122
(206) 805-0989

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Ronald R. Carpenter
Clerk

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II. INTEREST OF *AMICI*

Northwest Consumer Law Center (NWCLC), The Northwest Justice Project (NJP), and Columbia Legal Services (CLS) are statewide non-profit law firms that provide representation and counseling to low and moderate income homeowners in Washington. Collectively, we have counseled and represented thousands of Washington homeowners over the last five and a half years since the current foreclosure crisis began.¹

NJP, NWCLC, and CLS each receive funding from the National Mortgage Settlement, an historic state-federal settlement that was reached in February 2012 among Washington's Attorney General, the attorneys general of 48 other states, the U.S. Justice Department, and the country's five largest loan servicers. The settlement provided approximately \$44.5 million for the Washington Attorney General to distribute to non-profit corporations and government agencies in Washington for foreclosure-related work on behalf of Washington homeowners and others impacted by the foreclosure crisis in our state.

We and our homeowner clients have a substantial interest in this Court's statement and application of the legal standard governing the statutory duty of good faith that a trustee owes under the Washington

¹ NJP and CLS are acting as *amici* here on behalf of their homeowner client, Brian Longworth, whom they currently represent in *Longworth v. Northwest Trustee Services, et al.*, Thurston County Superior Court Case No. 13-2-01806-1.

Deeds of Trust Act (DTA), RCW 61.24.010(4). In this case, the Court will be applying that statutory duty of good faith for the first time since the statutory duty went into effect in 2009. This brief addresses the history, legal context and public policy surrounding the trustee's statutory duty of good faith, points that are not addressed in the parties' merits briefs.

III. ARGUMENT

A. This Court Has Not Yet Addressed the Meaning of the Current Statutory Duty of Good Faith.

In 2009, the DTA was revised to provide that “[t]he trustee or successor trustee has a *duty of good faith* to the borrower, beneficiary, and grantor.” Laws 2009, ch. 292, § 7 (eff. July 26, 2009) (emphasis added). This statutory duty of good faith owed by the trustee is codified in RCW 61.24.010(4). Since then, this Court has issued a number of important decisions interpreting and applying the DTA.² However, this is the first case that asks the Court to address what the trustee's statutory duty of “good faith” means or requires under RCW 61.24.010(4), and how it relates to the Court's prior decisions in this area.³

² See, e.g., *Klem v. Washington Mut. Bank*, 176 Wn.2d 771, 295 P.3d 1179 (2013); *Schroeder v. Excelstor Mgmt. Group, LLC*, 177 Wn.2d 94, 297 P.3d 677 (2013); *Bain v. Metro. Mortgage Group, Inc.*, 175 Wn.2d 83, 285 P.3d 34 (2012); *Albice v. Premier Mortgage Servs. of Washington, Inc.*, 174 Wn.2d 560, 276 P.3d 1277 (2012).

³ In *Klem*, the trustee's misconduct occurred before the 2009 amendments went into effect. *Klem*, 176 Wn.2d at 778 n.3 & 806 n.1. In *Bain*, the alleged trustee misconduct occurred after the statutory duty of good faith went into effect, but the allegations were beyond the scope of the certified questions. *Bain*, 175 Wn.2d at 90 n.3. In *Schroeder*

In this case, we ask the Court to hold that the statutory duty of good faith requires the trustee to ensure that the rights of both borrower and beneficiary are protected, and that this duty requires the trustee to take reasonable and appropriate steps to avoid sacrifice of the borrower's property and interest. This standard has been articulated in cases dealing with trustee's duties for 30 years, starting with the *Cox* case and continuing through more recent decision such as *Klem*, *Schroeder*, and *Albice*. See *Cox v. Helenius*, 103 Wn.2d 383, 388-89, 693 P.2d 683 (1985); *Klem*, 176 Wn.2d at 788-92; *Schroeder*, 177 Wn.2d at 111-12; *Albice*, 174 Wn.2d at 572. The standard articulated in these cases should be recognized as part of the duty of good faith instituted by the 2009 amendments to the DTA.

We also urge the Court to take the opportunity presented in this case to make clear that when circumstances are known to the trustee prior to the trustee's sale that raise doubts about whether the beneficiary has authority to foreclose, that the trustee's duty to take reasonable and appropriate steps to avoid sacrifice of the borrower's property includes a corollary duty to ensure that the beneficiary has authority to foreclose.

and *Albice*, while the Court mentioned the statutory duty of good faith in each case, it was not required to reach or apply the statutory duty given the facts of each case. See *Schroeder*, 177 Wn.2d at 101 n.3; *Albice*, 174 Wn.2d at 567-68.

This specific, corollary duty of statutory good faith owed by the trustee to the homeowner under RCW 61.24.010(4) was discussed and applied in two recent published decisions, *Walker v. Quality Loan Serv. Corp.*, 176 Wn. App. 294, 310, 308 P.3d 716 (2013), and *In re Meyer*, 506 B.R. 533, 540-41 & 547-48 (Bkrcty. W.D. Wash. 2014).⁴ We urge the Court to follow these decisions and confirm this principle as well.

B. Analysis of Trustee's Alleged Misconduct in this Case.

We incorporate here by reference Ms. Lyons' statement of facts. *See* Opening Brief of Petitioner at 4-18. Following are the key facts most relevant to NWTS's violations of its statutory duty of good faith under RCW 61.24.010(4).

First, the beneficiary declaration that Wells Fargo Bank, N.A. (Wells Fargo) executed on which NWTS relied as purported proof that Wells Fargo was the "owner" of the promissory note did not meet the requisites of the DTA.⁵ The declaration stated that:

⁴ *See also Bain*, 175 Wn.2d at 93-94 (discussing the trustee's duty owed to homeowner under prior law, stating that the duty includes a duty to "have proof that the beneficiary is the owner of any promissory note or other obligation secured by the deed of trust' . . . before foreclosing on an owner-occupied home") (quoting RCW 61.24.030(7)(a)).

⁵ *See Albice*, 174 Wn.2d at 566 (because the non-judicial foreclosure process under the DTA lacks the protections enjoyed by borrowers in judicial foreclosure, courts must "strictly construe the statute in the borrower's favor").

Wells Fargo, NA is the *actual holder* of the promissory note or other obligation evidencing the above-referenced loan *or* has the requisite authority under RCW 62A.3-301 to enforce said obligation.

CP 118 (emphasis added). This declaration failed to meet the requirement that “before the notice of trustee's sale is recorded, transmitted, or served, the trustee shall have proof that the beneficiary is the *owner* of any promissory note or other obligation secured by the deed of trust.” RCW 61.24.030(7)(a) (emphasis added).

RCW 61.24.030(7)(a) allows a trustee to rely on, as proof of ownership, a declaration from a lender stating that it is the “actual holder of the promissory note or other obligation secured by the deed of trust,” *id.*, but it does not permit a trustee to rely upon a lender’s representation that it is anything other than the “owner” or “actual holder” of the note. *Id.* The declaration in this case did not comply with the second sentence of RCW 61.24.030(7)(a) because it left open the possibility that Wells Fargo merely had “requisite authority under RCW 62A.3-301 to enforce the promissory note.” CP 118.⁶ This ambiguity in the beneficiary

⁶ RCW 62A.3-301’s definition of a “person entitled to enforce” a note includes a “nonholder in possession of the instrument who has the rights of a holder” and a “person not in possession of the instrument who is entitled to enforce the instrument pursuant to RCW 62A.3-309 or 62A.3-418(d).” Neither of these definitions satisfies the requisites of RCW 61.24.030(7). Thus, under the declaration from Wells Fargo that NWTS relied on in issuing the notice of trustee’s sale, Wells Fargo could have been a nonholder.

declaration raised significant questions regarding Wells Fargo's authority to foreclose.

Second, the Wells Fargo beneficiary declaration in this case was null and void, both facially and in fact. The declaration was stale on its face, given that it was executed in *June 2010*, yet the notice of trustee's sale was not recorded until *March 2012*. Compare CP 118 (June 30, 2010 beneficiary declaration) with CP 90-93 (notice of trustee's sale recorded on March 30, 2012). Because home loans are routinely sold,⁷ a two-year-old beneficiary declaration may specify an entity that no longer has a beneficial interest in the deed of trust. This extremely long gap between the signing of the beneficiary declaration and the recording of the notice of trustee's sale in this case was another circumstance that raised significant questions regarding Wells Fargo's authority to foreclose.

In fact, the ownership of Ms. Lyons' loan *had* changed prior the recording of the notice of trustee's sale. CP 110. By the time the notice of trustee's sale was recorded, the loan had been sold to Stanwich Mortgage, Loan Trust Series 2012-3, and Wells Fargo was no longer the beneficiary. Thus the facially stale beneficiary declaration executed by Wells Fargo was indeed null and void. If NWTS had made any inquiry at the time it

⁷ See, e.g., *GSO Drawn to Mortgage Servicing as Banks Retreating*, Bloomberg News (Sept. 17, 2013), <http://www.bloomberg.com/news/2013-09-17/gso-drawn-to-mortgage-servicing-as-banks-retreating.html>.

recorded the notice of trustee's sale, it would have discovered that Wells Fargo no longer owned the loan and had no authority to foreclose.

Third, and finally, when NWTS refused to discontinue or postpone the scheduled July 6, 2012 trustee's sale after being told that Ms. Lyons had been offered and accepted a loan modification and that the ownership and servicing of her loan had been transferred, CP 99-101, a reason it gave to Ms. Lyons' counsel was that the new loan servicer, Carrington, had instructed NWTS to go forward with the sale. CP 99. This fact is also highly relevant to NWTS's alleged failure to comply with its statutory duty of good faith, because as this Court held in *Klem*, a trustee must exercise independent judgment when considering a request for postponement of a trustee's sale, and may not simply follow the direction of the beneficiary.⁸

C. The Trustee's Statutory Duty of Good Faith Under RCW 61.24.010(4) Should Require the Trustee to Ensure that the Rights of Both Borrower and Beneficiary Are Protected.

Washington courts have long held that foreclosure trustees have a *duty to act impartially* between mortgagee and mortgagor. As this Court held in *Cox* almost 30 years ago, the trustee owes a duty to both the borrower and the beneficiary, and it "must act impartially between them." *Cox*, 103 Wn.2d at 388 (citing G. Osborne, G. Nelson & D. Whitman,

⁸ See *Klem*, 176 Wn.2d at 788-89.

Real Estate Finance Law § 7.21 (1979)). The Court described this duty in *Cox* as requiring the trustee to “attend equally to the interest of the debtor and creditor alike.” *Id.*

This duty of the trustee to act impartially between the parties has been stated by this Court many times since *Cox*, and is undisputed in this case. *See, e.g., Schroeder*, 177 Wn.2d at 101 n.3 (stating that the trustee “must be independent”); *Klem*, 176 Wn.2d at 790 (trustee has duty “to act impartially to fairly respect the interests of both the lender and debtor”); *see also* Respondent NWTs’s Brief at 20 & 29 (admitting that trustee must act impartially).

Washington courts have also long held that the foreclosure trustee owes a *duty of good faith* to both the borrower and the beneficiary. *See Cox*, 103 Wn.2d at 686 (holding that the trustee “is bound to use not only *good faith*, but also every requisite degree of diligence in conducting the sale and to attend equally to the interest of the creditor and debtor alike”) (emphasis added; quoting *Swindell v. Overton*, 314 S.E. 2d 512, 516 (N.C. 1984)). This duty of good faith requires the trustee “to treat the trustor [*i.e.*, the borrower] fairly and in accordance with a high punctilio of honor.” *Cox*, 103 Wn.2d at 686 (quoting *Blodgett v. Martsch*, 590 P.2d 298, 302 (Utah 1978)).

In *Cox*, the Court summarized the standard that a trustee must meet to protect the borrower's interests, and stated as follows: “[T]he trustee must ‘take reasonable and appropriate steps to avoid sacrifice of the debtor’s property and his interest.’” *Cox*, 103 Wn.2d at 389 (emphasis added; quoting *McHugh v. Church*, 583 P.2d 210, 213 (Alaska 1978)). This standard has been followed by Washington courts since *Cox*. See, e.g., *Albice v. Premier Mortgage Servs. of Washington, Inc.*, 157 Wn. App. 912, 934, 239 P.3d 1148 (2010), *aff’d*, 174 Wn.2d 560, 276 P.3d 1277 (2012) (quoting and applying this standard as articulated in *Cox*).

This Court’s use of the word “fiduciary” to describe a trustee’s duty to both borrower and beneficiary in the *Cox* and *Klem* opinions does not mean that the standards articulated in those opinions should not be incorporated as part of the trustee’s statutory duty of good faith under RCW 61.24.010(4), even though the 2008 amendments to the DTA state that the trustee or successor trustee shall have “no *fiduciary duty* or fiduciary obligation to the grantor or other persons having an interest in the property subject to the deed of trust.” RCW 61.24.010(3) (emphasis added). See, e.g., *Klem*, 176 Wn.2d at 790 (stating that trustee “owes a duty to act in good faith to exercise a *fiduciary* duty to act impartially to fairly respect the interests of both the lender and the debtor”) (emphasis added); *Cox*, 103 Wn.2d at 389 (stating that trustee “is a *fiduciary* for both

the mortgagee and mortgagor and must act neutrally between them”)
(emphasis added).

Reconciling this apparent discrepancy is simple. Outside of the foreclosure context, the fiduciary duty of a true trustee comprises two distinct types of duties: the duty of good faith, and the duty of undivided loyalty. *See, e.g., Esmieu v. Schrag*, 88 Wn.2d 490, 498, 563 P.2d 203 (1977) (trustee owes both duty of good faith and duty of undivided loyalty). The purpose of the 2008 amendment of the DTA stating that the trustee or successor trustee shall have no fiduciary duty was to clarify that the trustee does not owe an “undivided duty of loyalty” to both the borrower and the beneficiary because this would create an impossible conflict. This was simply a clarification because *Cox* had already stated that the trustee “must act impartially between” the borrower and the beneficiary. *Cox*, 103 Wn.2d at 388. This is also made clear in the bill report that accompanied the legislation, SSB 5378, when it passed the House.⁹

Thus, the 2008 legislation was a clarification of *Cox*, not a legislative overruling of that case, and it did not vitiate the long-

⁹ *See* House Bill Report on SSB 5378 (March 6, 2008) at 4 (explaining that the bill addressed “ambiguity created in the *Cox* case by *clarifying* that a trustee does not have a fiduciary duty, but rather a duty of fairness [*i.e.*, the duty of good faith] and impartiality”) (emphasis added).

established standard defining the duty of the trustee under the DTA as enunciated by this Court in that leading case. *See also Johnson v. Morris*, 87 Wn.2d 922, 926, 557 P.2d 1299 (1976) (under the separation of powers doctrine, the legislature cannot “clarify” the meaning of a statute if it would overrule a prior decision by this Court interpreting the statute, and a legislative amendment must thus either be consistent with this Court’s interpretation or expressly overrule this Court’s prior decision).

Because *Cox* expressly recognized the duty of neutrality owed by the trustee to both the borrower and the beneficiary, *Cox*, 103 Wn.2d at 389, and because the legislature made it clear that it was *not* overruling *Cox*, but merely clarifying that decision, the 2008 amendment adding the current provision in RCW 61.24.010(3) stating that the trustee does not owe a fiduciary duty to any party in the foreclosure process had no effect on the continued vitality of the *Cox* standard as set forth above.

Finally, the legislature’s amendment of the DTA again in 2009, to add the current statutory duty of good faith under RCW 61.24.010(4), was again merely a clarification of longstanding Washington law, and should be treated as such. The legislative history of that amendment is silent regarding the intended meaning of the term “good faith” as used in what is now RCW 61.24.010(4). There is nothing, however, stating or suggesting that the legislature intended to overrule *Cox* or to lessen in any way the

strict duty of good faith owed by trustees when carrying out their duties under the DTA as established under prior Washington case law. As such, this Court should interpret the statutory duty of good faith under the current RCW 61.24.010(4) as imposing the same strict standard of good faith first articulated in *Cox*.

D. When Circumstances Are Known to the Trustee Prior to the Trustee's Sale Raising Doubts About a Beneficiary's Authority to Foreclose, the Trustee's Duty Includes a Duty to Ensure that the Beneficiary Is Authorized to Foreclose.

In *Walker v. Quality Loan Serv. Corp.*, Division One recently held that, in order to adhere to its duty of good faith in the prosecution of a non-judicial foreclosure, a foreclosure trustee must “adequately inform” itself regarding the purported beneficiary’s right to foreclose. *Walker*, 176 Wn. App. at 306. This duty includes the performance of, at a minimum, a “cursory investigation” into the ostensible beneficiary’s right to foreclose.

The *Walker* court held that a trustee could violate its duty of good faith under facts where a trustee initiated a non-judicial foreclosure at the behest of a lender that obtained its purported beneficial interest in a promissory note by assignment from an entity that was not a lawful beneficiary under Washington law, such as the Mortgage Electronic Recording System (MERS). *Walker*, 176 Wn. App. at 309. The *Walker* court reasoned that a “cursory investigation” by the trustee into the

lender's authority to foreclose would have revealed that lender was not a proper beneficiary under the DTA. *Id.* The *Walker* court found that the trustee's failure to perform this investigation violated its statutory duty of good faith. *Id.*

Similarly, in *In re Meyer*, the Bankruptcy Court for the Western District of Washington recently held that a trustee's duty of good faith encompasses a duty to "exercise independent judgment" to confirm the authority of any entity requesting the performance of a non-judicial foreclosure. *In re Meyer*, 506 B.R. at 547-48 & 552. In other words, under Washington law, a foreclosure trustee "must be capable of assembling enough information about the lender, servicer, and others involved in the lending chain to be able to objectively satisfy the homeowner that the correct party is initiating the action to take their home." *Id.* at 550. The *Meyer* court found that NWTS violated its duty of good faith by exclusively relying upon representations by Wells Fargo and U.S. Bank that they had the requisite authority to commence a non-judicial foreclosure of the Meyers' home without any independent verification. *Id.* at 547-48.

Trustees, under a constitutional non-judicial foreclosure process, must be something other than mere functionaries. Their role requires a high duty of diligence and neutrality as well as taking reasonable and

appropriate steps to avoid sacrifice of the borrower's property and interest.

They are the referee.¹⁰

E. These Proposed Standards Governing the Trustee's Statutory Duty of Good Faith Under RCW 61.24.010(4) Are Supported by Sound Policy Considerations and the Goals of the DTA.

It is vital that the Court articulate a strong, clear, yet flexible standard given the panoply of scenarios that can occur in a non-judicial foreclosure, as well as recent changes in the mortgage marketplace that have a direct effect on the logistics of non-judicial foreclosure.

1. Home Ownership Is an Interest of Paramount Importance on Many Levels and Requires Protection.

Loss of the home in foreclosure has serious negative effects for the individual/family. Such loss often coincides with the financial difficulties that led to the foreclosure, exacerbating the situation.¹¹ Foreclosure may result in long-term unstable housing because of financial vulnerability and negative impacts to credit scores and the ability to rent or buy.¹² These impacts are even greater to those at opposite ends of the age spectrum: the elderly may experience health, emotional, and financial impacts from

¹⁰ See also David A. Leen, *Wrongful Foreclosures in Washington*, 49 Gonz. L. Rev. 331, 336-38 (2014) (discussing trustee's role in Washington's non-judicial foreclosure process).

¹¹ Kingsley, Smith, & Price, "The Impacts of Foreclosures on Families and Communities," THE URBAN INSTITUTE, 6-12 (May 2009).
http://www.urban.org/UploadedPDF/411909_impact_of_foreclosures.pdf.

¹² *Id.*

which they may never recover,¹³ and school age children may perform poorly in school due to multiple school changes.¹⁴ The high degree of stress for those in the process of foreclosure may negatively affect health in general, chronic conditions in particular, and may also escalate into mental issues, spousal and child abuse.¹⁵ And of course, the loss of the home has a substantial negative effect on net worth.¹⁶

With such consequences at stake, it is crucial that when a foreclosure is conducted, it is conducted with proper authority and justification and in strict compliance with the DTA.

2. Non-Judicial Foreclosure Under the Deed of Trust Act Grants the Trustee Tremendous Power and Requires Utmost Care by the Trustee to Achieve DTA Goals.

Without the benefit of judicial oversight, a lynchpin of the non-judicial foreclosure process is the trustee's central—and powerful—role.

a. Overarching Goals of the Deed of Trust Act.

The three overarching goals of the DTA are (1) to create an efficient and

¹³ Cagney, Browning, Iveniuk & English, *"The Onset of Depression During the Great Recession: Foreclosure and Older Adult Mental Health,"* AM. J. PUB. HEALTH, Vol. 104, No. 3, 498 & 501-04 (March 2014) ("Increases in neighborhood-level foreclosure represent an important risk factor for depression in older adults.").

¹⁴ Kingsley, Smith, & Price, *supra* note 10. *See also* Isaacs, Julia B., *"The Ongoing Impact of Foreclosures on Children,"* THE BROOKINGS INSTITUTION, 4-6 (April 2012) (88,000 Washington children (6%) were affected by foreclosures of owner-occupied homes from 2004-2008. Children who change schools suffer losses in math and reading achievement equivalent to the loss of about one month of school.).

¹⁵ Kingsley, Smith, & Price, *supra* note 10.

¹⁶ *Id.*

inexpensive process, (2) to promote stability of land titles, and (3) to prevent wrongful foreclosures. *See Albice*, 174 Wn.2d at 567; *Cox*, 103 Wn.2d at 387 (citing Comment, *Court Actions Contesting the Nonjudicial Foreclosure of Deeds of Trust in Washington*, 59 WASH. L. REV. 323, 330 (1984)). Holding the trustee accountable to a high standard in terms of its statutory duty of good faith upholds each of these three key goals of the DTA.

When the trustee operates with the utmost good faith, the non-judicial foreclosure process is efficient and inexpensive, free of defects, as well as the need for “do-overs,” litigation, and other expensive processes to ensure that the homeowner is not improperly divested of his largest single investment. Land titles are stabilized because a fair and accurate process eliminates the need to rescind trustee’s sales. “[E]ncouraging statutory compliance encourages...procedurally sound sales...thereby promoting stable land titles overall.” *Albice*, 174 Wn.2d at 572. And of course, if trustees conduct the non-judicial foreclosure process with proper authority and accuracy, then wrongful foreclosures would be prevented entirely.

b. The Non-Judicial Foreclosure Process Places Tremendous Responsibility on the Trustee.

In a non-judicial foreclosure under the DTA, the trustee is in a

position of tremendous power and responsibility. In contrast to a judicial foreclosure, in which there is court oversight, non-judicial foreclosure relies on the trustee to ensure there is proper authority for the foreclosure and that the process proceeds according to the statutory requirements. *See Klem*, 176 Wn.2d at 789 (stating that the trustee's "power to sell another person's home, often the family home itself, is a tremendous power to vest in anyone's hands" and discussing the "lack of judicial oversight in conducting nonjudicial foreclosure sales" as reasons for requiring that the DTA be strictly construed in favor of borrowers).

The imbalance of power in a non-judicial foreclosure is substantial. The trustee is paid by the servicer or beneficiary to perform these services, and conducts many such foreclosures each year. The homeowner, on the other hand, is by definition in dire financial straits, and may well have never experienced foreclosure before.

In addition, financially distressed homeowners are not likely to be able to afford a private attorney to protect their rights and free legal services are limited. Moreover, homeowners may also be fighting the clock because they were given the mistaken impression by their lender/servicer that the foreclosure would not go forward because they were in the process of applying for a loan modification or another loss mitigation option. These realities makes it all the more vital that the

trustee act with an elevated level of good faith in a non-judicial foreclosure.

3. New Trends in the Mortgage Marketplace Amplify the Need for a Heightened Duty of Good Faith for the Trustee.

Recent developments in the mortgage marketplace create an even greater reliance on the trustee to investigate and verify authority to foreclose. A key development is the sale of servicing rights from the main servicer players to new players, such as hedge funds, REITs, and private-equity firms.¹⁷

This is happening at an accelerating rate.¹⁸ Servicing rights on at least \$1 trillion of mortgages will trade in the next two years.¹⁹ With such a sea change, a Notice of Default or Beneficiary Declaration could quite easily cite the wrong servicer by the time the trustee issues the Notice of Sale. Therefore, without additional diligence and double-checking, an unauthorized sale may result.

F. Application of Standards Governing the Trustee's Statutory Duty of Good Faith.

Based on the foregoing, the standard for assessing a trustee's compliance with its statutory duty of good faith under RCW 61.24.010(4)

¹⁷ *GSO Drawn to Mortgage Servicing as Banks Retreating*, *supra* note 7.

¹⁸ *Id.*

¹⁹ *Id.*

that we propose is the original *Cox* standard, namely, that a trustee owes a heightened duty of diligence and neutrality and must take reasonable and appropriate steps to avoid sacrifice of the borrower's property and interest. When this general standard is applied to a trustee's actions such as those documented on the record here, violations of the statutory duty of good faith are apparent.

First, when a beneficiary declaration does not unequivocally state that the foreclosing beneficiary is the "owner" or "actual holder" of the note, a question arises as to the authority of that entity to foreclose. A trustee would violate its statutory duty of good faith in relying on such a beneficiary declaration as representing the requisite authority to foreclose because such a declaration does not meet the requirements of the DTA and ensure authority to foreclose.

Second, reliance on a significantly aged beneficiary declaration would potentially give rise to a violation of the trustee's statutory duty of good faith. Given the commonplace sale and resale of mortgage loans and transfers of loan servicing rights, the facial staleness of a beneficiary declaration should create doubts about whether it is still accurate when the notice of trustee's sale is recorded long after the declaration was made. Under this proposed standard, a trustee's duty to take reasonable and appropriate steps to avoid sacrifice of the borrower's property would

require it to check whether a very old declaration was still valid before recording the Notice of Sale.

Third, a trustee would violate its statutory duty of good faith by allowing a servicer to instruct it to go forward with the sale, despite its duty to independently investigate the situation and exercise independent judgment. Such relinquishment of its independent duty would violate the standard proposed above, and would specifically violate the trustee's duty to remain neutral rather than "deferring to the lender on whether to postpone a foreclosure sale and thereby failing to exercise its independent discretion." *Klem*, 176 Wn.2d at 792.

IV. CONCLUSION

For the foregoing reasons, we respectfully request that the Court adopt these proposed standards governing the trustee's statutory duty of good faith under RCW 61.24.010(4).

DATED this 25th day of April, 2014.

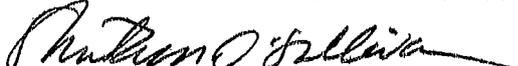
COLUMBIA LEGAL SERVICES


Matthew Geyman, WSBA #11544

NORTHWEST JUSTICE PROJECT


Eulalia Sotelo, WSBA #41407
Lisa von Biela, WSBA #42142
Thomas McKay, WSBA #46501

NORTHWEST CONSUMER LAW CENTER


Sheila M. O'Sullivan, WSBA #28656
Audrey Udashen, WSBA #42868

DECLARATION OF SERVICE

I, Annabell Joya, a legal assistant at Columbia Legal Services, certify under penalty of perjury under the laws of the State of Washington that on this day I caused a copy of the foregoing to be served by first-class mail, postage prepaid, upon the following counsel of record:

Mary C. Anderson
Guidance to Justice Law Firm
2320 130th Avenue N.E., Bldg. E, Suite 250
Bellevue, WA 98005

Melissa A. Huelsman
Law Offices of Melissa A. Huelsman, P.S.
705 Second Ave., Suite 601
Seattle, WA 98104

Joshua S. Schaer
RCO Legal, P.S.
13555 S.E, 36th St., Suite 300
Bellevue, WA 98006

DATED at Seattle, Washington, this 25th day of April, 2014.



Annabell Joya

OFFICE RECEPTIONIST, CLERK

From: OFFICE RECEPTIONIST, CLERK
Sent: Friday, April 25, 2014 4:41 PM
To: 'Annabell Joya'
Cc: Matt Geyman
Subject: RE: Lyons v U.S. Bank National Association, et al., Case No. 89132-0

Rec'd 4-25-14

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Annabell Joya [mailto:Annabell.Joya@ColumbiaLegal.org]
Sent: Friday, April 25, 2014 4:39 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Matt Geyman
Subject: Lyons v U.S. Bank National Association, et al., Case No. 89132-0

Dear Clerk,

Attached are the following documents for filing with the Court:

- Motion of Northwest Consumer Law Center, The Northwest Justice Project, and Columbia Legal Services for Leave to File *Amicus Curiae Brief*; and
- *Amicus Curiae* Brief of Northwest Consumer Law Center, The Northwest Justice Project, and Columbia Legal Services

These have been served today upon all counsel of record by first-class mail, postage prepaid.

The case name, case number, and name, phone number, bar number and email address of the attorney filing these documents are, respectively:

Lyons v U.S. Bank National Association, et al., Case No. 89132-0, filed by Matthew Geyman, WSBA #17544, (206) 287-9661, matt.geyman@columbialegal.org.

Thank you.

Annabell Joya
Legal Assistant to Matthew Geyman
Columbia Legal Services
101 Yesler Way, Suite 300
Seattle, WA 98104
Phone: 206-287-9664
FAX: 206-382-3386
Email: Annabell.Joya@ColumbiaLegal.org