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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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FLORENCE R. FRIAS,

Plaintiff,

v.

ASSET FORECLOSURE SERVICES, INC., et al.,

Defendants.

DEFENDANTS' MORTGAGE ELECTRONIC REGISTRATION
SYSTEMS, INC., AND U.S. BANK N.A.'S RESPONSE TO AMICUS
BRIEF OF THE NORTHWEST JUSTICE PROJECT, NORTHWEST
CONSUMER LAW CENTER, AND COLUMBIA LEGAL SERVICES

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I. INTRODUCTION

The amicus brief filed by the Northwest Justice Project, the Northwest Consumer Law Center, and Columbia Legal Services (“amici”) does not cite or discuss this Court’s test for determining whether to imply a statutory tort. *See Bennett v. Hardy*, 113 Wn.2d 912, 920 (1990). In fact, amici offer no reason for the Court to conclude the legislature intended, when it enacted the Deed of Trust Act (DTA), to imply a presale damages remedy for violations of the Act. Instead, they cobble together a catalog of cases *allowing* borrower recovery under *different* statutes and common law claims for the most improper conduct possible during a foreclosure, apparently unaware that each case shows existing remedies already protect against that conduct. The availability of these remedies shows why the legislature chose to provide the remedies specified in the DTA.

The Court should reject amici’s argument in favor of a generalized presale damages remedy under the DTA for the following reasons:

First, amici argue this Court should imply a presale damages remedy under the DTA, but offer no basis for this Court to find the legislature intended to afford that remedy. Although amici present a variety of misleading information about nonjudicial foreclosures, nothing suggests the legislature considered that information in enacting or amending the DTA—or that the legislature believed the circumstances required a presale damages remedy to redress amici’s parade of horrors.

Second, amici ignore the many existing remedies in the DTA and common law that address their concerns. The adequacy of these remedies shows why the legislature did not intend to create a generalized presale damages remedy in the DTA.

Third, amici's brief ultimately does no more than ask this Court to make new policy by judicial fiat. But "public policy is to be declared by the Legislature, not the courts." *Bird-Johnson Corp. v. Dana Corp.*, 119 Wn.2d 423, 428 (1992). *See also Cazzanigi v. Gen. Elec. Credit Corp.*, 132 Wn.2d 433, 449 (1997) ("[P]olicy arguments should be addressed to the Legislature."). The Court should decline to create a damages remedy the legislature has chosen not to enact.

II. ARGUMENT

A. Amici Present No Legislative Intent to Imply a Generalized Presale Damages Remedy from the DTA.

This Court "will not imply a private cause of action when the drafter of a statute evidenced a contrary intent." *Bird-Johnson Corp.*, 119 Wn.2d at 428. The Court applies a three-part test to determine if it should imply such a remedy, asking: "first, whether the plaintiff is within the class for whose 'especial' benefit the statute was enacted; second, whether the legislative intent, explicitly or implicitly, supports creating or denying a remedy; and third, whether implying a remedy is consistent with the underlying purpose of the legislation." *Bennett*, 113 Wn.2d at 920.

Although amici urge the Court to imply a presale damages remedy in the DTA, amici ignore this long-settled three-part test. Their silence is

easy to explain: the *Bennett* test turns largely on legislative intent and purpose, and amici have no evidence the legislature intended a generalized presale damages remedy in the DTA. *See Cazzanigi*, 132 Wn.2d at 448 (*Bennett* test often turns on legislative intent).

In any event, contrary to amici's suggestion, the DTA "is *not* a rights-or-privileges-creating statute." *Schroeder v. Excelsior Mgmt. Grp., LLC*, 177 Wn.2d 94, 106 (2013) (emphasis added). Rather, in the DTA the legislature created a complex scheme to achieve three goals: (1) to keep the non-judicial foreclosure process "efficient and inexpensive"; (2) to provide "interested parties . . . an adequate opportunity to prevent wrongful foreclosure"; and (3) to "promote stability of land titles." *Albice v. Premier Mortg. Servs.*, 174 Wn.2d 560, 567 (2012). The legislature viewed these goals as protecting the interests of *all* the parties involved in nonjudicial foreclosures, i.e., not just the borrower, but also the lender, trustee, and purchaser. The DTA's procedural requirements on these various parties promote "efficient, inexpensive and procedurally sound foreclosures and the stability of land titles." *Udall v. T.D. Escrow Servs., Inc.*, 159 Wn.2d 903, 916 (2007).

Because the DTA itself creates no rights, the Court has no reason to "assume[] that the Legislature would not enact a statute granting rights to an identifiable class without enabling members of that class to enforce that right." *Bennett*, 113 Wn.2d at 920. Instead, amici must prove that even though the legislature knew how to create damages remedies under

the DTA (*see, e.g.*, RCW 61.24.135), and even though the legislature expressly provided Ms. Frias with the power to restrain the foreclosure sale, the legislature *also* intended to (but did not) create a generalized presale damages remedy.

As Defendants have explained in their answering brief, the DTA’s legislative history shows the legislature *did not* intend to provide a generalized presale damages remedy under the DTA. *See* MERS & U.S. Bank Answering Br. at 33-36. That history shows the non-waiver provision of RCW 61.24.127 relates only to claims that mature post-sale. The history also shows a generalized presale damages remedy would conflict with the DTA’s goals of creating an efficient process in which parties may *prevent* wrongful nonjudicial foreclosure without unnecessarily delaying the process or unsettling land titles.¹

In addition, “when the Legislature has provided an adequate remedy in the statute”—as it has here—“no cause of action should be implied.” *Cazzanigi*, 132 Wn.2d at 446. The DTA provides a presale remedy that allows a borrower “to prevent wrongful foreclosure”—an action to restrain the sale under RCW 61.24.130. *See also* RCW 61.24.040(1)(f)(IX) (same). Because this remedy satisfies the only potential presale goal of the DTA (*preventing* wrongful foreclosure), Ms.

¹ Nor does the DTA’s legislative history support the conclusion that RCW 61.24.127 must imply a presale damages remedy on the theory that a party can only waive existing claims. Washington law allows parties to waive future, inchoate claims that have not yet matured or accrued at the time of waiver. *See, e.g., Chauvlier v. Booth Creek Ski Holdings, Inc.*, 109 Wn. App. 334, 337-38 (2001) (enforcing “preinjury waiver” release under which skier agreed “not to bring a claim against or sue” defendant).

Frias and amici must provide compelling evidence the legislature intended to buttress that remedy with an unwritten right to pursue damages.

Amici are right about one thing, however: “[a] wrongful non-judicial foreclosure is not an *event* that occurs at the moment of the trustee’s sale, but a *process* that occurs over months.” Nw. Justice Project Amicus at 4 (emphasis added). The legislature built into this process an opportunity for the borrower to raise issues with the foreclosure *before* it occurs—through an action to restrain the sale. RCW 61.24.130(1); RCW 61.24.040(1)(f)(IX). This design benefits the borrower (providing more time to cure), and also creates an incentive on the part of the trustee and lender to ensure against future procedural errors. In addition, the DTA’s explicit presale injunction remedy protects the integrity of the nonjudicial foreclosure process because it enables the trustee to correct errors in that process before the sale, fulfilling all three of the Act’s goals.

Indeed, a formal Complaint to restrain the sale is not always even necessary. According to the Court, a Trustee’s good-faith duty to the borrower means the Trustee must continue or cancel a sale pending a cure if a borrower discloses a prejudicial defect in the foreclosure process. *Klem v. Wash. Mut. Bank*, 176 Wn.2d 771 (2013). “[C]ommon law and equity requires [the] trustee to be evenhanded to both sides.” *Id.* at 789 (citations omitted). Thus, even without an injunction, if a borrower identifies to the Trustee a material flaw in the foreclosure initiation, the

Trustee's duty of good faith requires it to stop or postpone the nonjudicial foreclosure—or face potential damages liability after the sale. *Id.*

But nowhere in the DTA has the legislature provided an opportunity to file a claim for DTA violations to obtain monetary damages while the process remains incomplete, i.e. before the “event” of the foreclosure itself. Indeed, a presale damages remedy for procedural violations of the DTA would *conflict with the process* by assuming the Trustee could not efficiently cure those procedural flaws. Because the DTA's explicit remedial scheme fulfills the DTA's goals, it comes as no surprise that neither Ms. Frias nor amici have mustered *any* legislative history showing the legislature intended a borrower also to be able to seek damages presale for DTA violations.

B. Existing Remedies Address Improper Presale Conduct.

Amici trot out a parade of horrors they claim necessitate a newly implied presale remedy under the DTA. But in doing so, amici ignore that the DTA's remedies (as well as remedies under other statutes and common law principles) already assuage these concerns. Indeed, each Washington case amici cite involves a plaintiff recovering for the alleged wrongful conduct under legal theories *other* than the DTA. *See, e.g., Klem*, 176 Wn.2d at 792-95 (affirming CPA damages where trustee admitted to falsely predating notarizations); *Cox v. Helenius*, 103 Wn.2d 383, 389-91 (1985) (voiding sale and awarding post-sale relief to borrower for presale defective workmanship on a swimming pool with payment secured by a Deed of Trust); *Keahey v. Jared*, No. 05-1153 (Bankr. W.D. Wash. 2006)

[Dkt. 67] (awarding damages for outrage); *Sherwood v. Bellevue Dodge*, 35 Wn. App. 741, 749 (1983) (affirming damages under CPA and tort law for wrongful repossession of vehicle); *Theis v. Fed. Fin. Co.*, 4 Wn. App. 146, 150 (1971) (awarding damages in judicial foreclosure action, begun before DTA's enactment, where, among other things, defendant forged plaintiff's signature); *Provost v. Kandi*, No. 09-2-25191-6 (King Cnty. Super. Ct.) (awarding usury penalty and exemplary damages for usurious and extortionate loan); *Maas v. Ross*, No. 96-2-10058-7 (King Cnty. Super. Ct.) (awarding damages for fraud during attempted *judicial* foreclosure).

If anything, amici help explain *why* the DTA's legislative history evinces no legislative intent to provide a presale damages remedy in the DTA—i.e., plaintiffs may pursue that remedy under other common law principles and other statutes. For instance, where the borrower sues a foreclosing party for defective workmanship on a swimming pool (with payment secured by a Deed of Trust), that claim does not turn on a duty under the Deed of Trust Act and thus, the borrower may obtain whatever relief the claim provides (such as damages) presale. *Cox*, 103 Wn.2d at 385-86. Similarly, where a borrower challenges the underlying debt as usurious, that usury claim also does not implicate the nonjudicial foreclosure process, so the borrower may obtain whatever relief the usury statute permits, regardless any sale. *See Bingham v. Lechner*, 111 Wn. App. 118, 122 (2002). And even where the lender breaches the DTA by

“both creat[ing] and maintain[ing] the conditions which made it impossible for [borrowers] to comply with the terms” of the deed of trust, that conduct forms the basis for a separate contract claim, not a statutory DTA claim. *See Hardcastle v. Greenwood Sav. & Loan Ass’n*, 9 Wn. App. 884, 889 (1973).

This distinction between claims based on DTA violations and claims based on other actionable conduct occurring during a nonjudicial foreclosure comports with this Court’s recent decision in *Klem*. If a borrower can meet the essential elements of a statutory or common-law cause of action, the borrower may obtain whatever relief those claims permit, regardless whether a sale has occurred. The fact the borrower’s claims may have arisen in the context of a nonjudicial foreclosure does not give the borrower an additional damages remedy for those common law or statutory claims.

Thus, if a Trustee misrepresents a material fact to a borrower and that misrepresentation causes injury to her business or property, the borrower has a CPA claim. *Klem*, 176 Wn.2d at 794-95. Likewise, if a borrower can show a defendant’s deceptive conduct prevented the borrower from avoiding injury or invoking a legal right, then that conduct may well support liability. *See, e.g., Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 86, 118-19 (2012). Similarly, borrowers who can assert claims for “equity skimming and other fraudulent and predatory schemes” may have a claim under the Distressed Property Conveyances Act. *Jametsky v.*

Olsen, No. 88215-1, Slip Op. at 8 (Wash. Feb. 6, 2014). And if a DTA violation causes higher arrears and/or fees that “will carry over into the subsequent judicial foreclosure,” Nw. Justice Project Amicus at 5, the borrower can challenge those arrears and fees in that judicial foreclosure.²

Amici also ignore the federal regulations that already govern much of the presale conduct they discuss. For example, the newly-formed Consumer Financial Protection Bureau has promulgated regulations governing loan servicers, requiring “early intervention,” “continuity of contact” with the borrower, and “loss mitigation procedures.” 12 CFR §§ 1024.38-.41.³ Several provisions of the Fair Credit Reporting Act, the Truth in Lending Act, and the Real Estate Settlement Procedures Act also govern conduct that amici discuss. *See* 15 U.S.C. § 1641(g) (creditor must give notice to borrower every time loan is sold); 15 U.S.C. § 1681s-2 (barring “furnishers of information” from spreading inaccurate consumer-credit information); 12 U.S.C. § 2605(b), (e) (must disclose loan servicing transfers; lender must respond to borrower’s Qualified Written Request regarding loan servicing issues).

² Importantly, most harms amici discuss do not apply to this case because Ms. Frias does not dispute her default and has made less than a year’s payments on her loan since purchasing the home in September 2008. Any “sale stigma” or negative credit score impact results from her conceded default, not procedural deficiencies of the foreclosure.

³ Contrary to amici’s statement, the CFPB asserts that once a debtor is in default “servicers are not generally required to accept payments that do not equal at least one monthly payment.” *See* www.consumerfinance.gov/askcfpb/221/my-servicer-refuses-to-accept-my-payment-what-can-i-do.html. This is consistent with Ms. Frias’s Deed of Trust, which defines default as the failure to make a complete payment and states that the lender is not required to reinstate the loan absent receipt of all past payments. *See* Dkt. 10-1, at 6 ¶ 9(a), 7 ¶¶ 10-11.

Finally, amici overlook that a borrower may correct many procedural violations through the DTA’s express presale injunction remedy—or simply by calling the Trustee and pointing out material defects in the process. *See* RCW 61.24.130; RCW 61.24.040(1)(f)(IX). Rather than provide any persuasive reason why this remedy does not suffice for any garden-variety procedural flaws in a nonjudicial foreclosure, amici instead focus on the most egregious violations. But remedies already exist for even those violations under the common law and potentially, under other applicable statutes that do provide for damages.

In arguing otherwise, amici present a misleading picture of the effect procedural issues actually have on borrowers. In fact, although the DTA “must be construed in favor of borrowers,” a wrongful foreclosure where the borrower admits default and cannot cure “*does not injure the borrower’s interests*, because the debt secured by the trustee’s deed is per se satisfied by the foreclosure sale due to the Act’s anti-deficiency provision.” *Udall*, 159 Wn.2d at 915 (reversing order vacating nonjudicial foreclosure sale and reinstating quiet title in purchaser) (emphasis added) (citations omitted). Said otherwise, the DTA is a strictly construed statute, but not a strict-liability statute warranting damages at every turn.

C. The Court Should Leave Policy Decisions to the Legislature.

Amici use this proceeding as an opportunity to cite statistics on home foreclosures in Washington and make policy arguments on the

possible reasons for and solutions to Washington's foreclosure rate. But those arguments stray far afield from the certified questions and record. The state and federal legislatures, not this Court (and particularly not this Court on a limited record from a federal district court), have the "uniquely constituted fact-finding and opinion gathering processes [that] provide the best forum for addressing ... difficult policy questions." *McCleary v. State*, 173 Wn.2d 477, 517 (2012) (citation and internal quotation marks omitted).

The reasons for the frequency and duration of foreclosures, both locally and nationwide, are myriad and complex. To suggest that a single study or opinion provides a definitive say on the roots and causes of default, foreclosures, or refusals to modify a loan ignores that complexity. The Northwest Justice Project, for example, relies heavily on a law review article for the assertion that the dearth of loan modifications and increase in foreclosures results from loan servicers who intentionally extend the foreclosure period and generate fees. See Diane Thompson, *Foreclosing Modifications: How Servicer Incentives Discourage Loan Modifications*, 86 Wash. L. Rev. 755, 820 (2011). The author argues loan servicers *profit* from foreclosing rather than modifying loans.

But the Northwest Justice Project fails to mention that Ms. Thompson is not an impartial observer: she is a consumer advocate for the National Consumer Law Center. *Id.* at 820 n.*. Nor does the Northwest Justice Project acknowledge that Ms. Thompson's primary

thesis has as its only support her own speculative testimony and a single quote from a 2009 policy paper, *whose authors actually reached the opposite conclusion from the one she cites*.⁴ After four years of research, the authors (Federal Reserve Board Members) of the paper Thompson cites as supporting the thesis that securitized loans disincentivize modification, rejected that theory in the final (published) article:

Policymakers and researchers have also argued that the pooling and servicing agreements (PSAs), which govern the conduct of servicers when loans are securitized, place limits on the number and type of modifications a servicer can perform, and that the rules by which servicers are reimbursed for expenses may provide a perverse incentive to foreclose rather than modify. [¶] *The data cast significant doubt on the institutional theory. ... Indeed, at the peak of the crisis, portfolio [i.e., non-securitized] loans were slightly less likely to receive modifications [than securitized loans].*

Adelino, Girardi, & Willen, *Why Don't Lenders Renegotiate More Home Mortgages: Redefaults, Self-Cures, and Securitization*, 60 J. OF MONETARY ECON. 835, 836 (2013) (emphasis added).

Meanwhile, impartial government research has concluded no evidence exists to show that servicers' foreclosure documentation practices have caused systematic harm. Fed. Reserve Sys., Office of the

⁴ Thompson quotes a 2009 version of a working white paper by Manuel Adelino, et al., which states: "In addition, the rules by which servicers are reimbursed for expenses may provide a perverse incentive to foreclose rather than modify." Thompson, *supra*, at 761 n.25 (citing Manuel Adelino et al., *Why Don't Lenders Renegotiate More Home Mortgages? Redefaults, Self-Cures, and Securitizations* 4 (Fed. Reserve Bank of Bos., Pub. Policy Discussion Papers No. 09-4, July 6, 2009), available at <http://www.bos.frb.org/economic/ppdp/2009/ppdp0904.pdf>). But the authors, just two paragraphs later, assert that their "empirical evidence provides strong evidence *against* the role of securitization in preventing renegotiation." *Id.* (emphasis added). The authors did not even agree with the quote Thompson uses to support her primary thesis.

Comptroller of the Currency & Office of Thrift Supervision, Interagency Review of Foreclosure Policies and Practices, 3-4, 7-9 (2011).

In any event, the legislature provides the proper forum for evaluating this sort of statistical analysis. And amici's articles, statistical analyses, and policy arguments have no bearing on what remedies the Washington legislature intended the DTA to provide. The legislature could not have considered much of the sources amici cite when it enacted the DTA, since that enactment predates these sources, and amici offer no evidence showing the legislature considered these sources when amending the DTA in later years.

III. CONCLUSION

The Court should reject the amici's analysis and arguments, and confirm the absence of a generalized presale damages remedy for DTA violations.

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