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Supreme Court No. 89343-8

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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.; LSI TITLE AGENCY,  
INC.; U.S. BANK, N.A.; MORTGAGE ELECTRONIC REGISTRATION  
SYSTEMS, INC.; and DOE DEFENDANTS 1 through 20,

Defendants.

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**PLAINTIFF FLORENCE R. FRIAS' RESPONSE TO *AMICUS*  
BRIEF OF WASHINGTON BANKERS ASSOCIATION**

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 ORIGINAL

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## I. INTRODUCTION

Plaintiff Florence Frias files this response to the brief submitted by *amicus* Washington Bankers Association (“WBA”). Ms. Frias reiterates her position that the Washington Legislature clearly intends those who violate the requirements of the Deed of Trust Act (“DTA”) to be held liable for those violations, whether or not a foreclosure sale occurred. WBA’s position would permit its members to violate the DTA with impunity. WBA’s arguments were unsuccessful in the *Bain* case; they are no more persuasive here. WBA’s *Amicus* Brief in *Bain v. Metropolitan Mortg. Group, Inc.*, 175 Wn.2d 83, 285 P.3d 34 (2012) at 3, 7-9.

WBA purports to advocate for strict adherence to the DTA, but disregards the injuries and damages suffered by homeowners who are forced to take action to prevent a wrongful foreclosure, such as in the *Keahey*, *Provost* and *Ross* cases.<sup>1</sup> It takes the untenable position that only those who lose equity after a foreclosure sale have suffered an injury. WBA Brief at 6. Ms. Frias has alleged specific injuries, including participation in a Foreclosure Fairness Act (“FFA”) mediation in which the beneficiary did not participate in good faith, a demand for fees in order to stop the foreclosure process which have been added to Ms. Frias’ loan balance, some of which she maintains are inflated and unreasonable, and

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<sup>1</sup> *Keahey v. Jared*, U.S. Court of Appeals, 9th Circuit Case No. 09-60000, Memorandum Opinion (Jan. 31, 2011) (unpublished); *Provost v. Kandi*, King County Superior Court Case No. 09-2-25191-6; and *Maas v. Ross*, King County Superior Court Case No. 96-2-10058-7 SEA.

costs incurred in order to investigate her claims before bringing the instant litigation. *See*, Ms. Frias' Complaint (Dkt. 1) and Responses to the Motions to Dismiss (Dkt. 14, 15, 16). What the WBA actually asks this Court to do is allow its members and foreclosing trustees to violate the DTA's requirements without any possibility of facing liability for their actions, to the detriment of the integrity of the nonjudicial foreclosure process and more importantly, to Washington homeowners.

## II. ARGUMENT

### A. **WBA Fundamentally Mischaracterizes the Nature of a Wrongful Foreclosure—It Is a *Process*, Not an *Event*.**

WBA mischaracterizes the nature of a wrongful foreclosure: "After all, the borrower's equity is what she *actually loses* if the trustee wrongfully forecloses upon her property." WBA Brief at 6 (emphasis in original). WBA fails to recognize that a non-judicial foreclosure is a *process*, not an *event*. It ignores the significant injuries and damages that homeowners suffer as a result of a foreclosure wrongfully initiated in violation of the DTA, even when a trustee's sale does not occur. *See* Plaintiff's Opening Brief at 10-22 & 43-45, Plaintiff's Reply at 8-10 & 15-17; *see also Amicus Curiae* Brief of The Northwest Justice Project, Northwest Consumer Law Center, and Columbia Legal Services as Counsel for Washington Homeowners ("Brief of Consumer Advocates") at 4-15.

The Ninth Circuit has just considered similar arguments in a case involving an attempted foreclosure in California that was done in violation

of the Servicemembers' Civil Relief Act ("SCRA") and made an explicit finding that foreclosure is a process and not a singular event. Citing to California cases describing "foreclosure proceedings" and a law dictionary definition of "foreclosure", the Court determined that a servicer which initiates a foreclosure wrongfully may be liable for that act even though the sale was discontinued. *Brewster v. SunTrust Mortgage*, Case No. 56560, 6-7 (9<sup>th</sup> Cir., February 7, 2014), citing Black's Law Dictionary (9<sup>th</sup> Ed. 2009) ("describing 'foreclosure proceedings' as encompassing 'appropriate statutory steps' that precede the sale of mortgaged property.)" The *Brewster* opinion is consistent with this Court's decisions in *Cox v. Helenius*, 103 Wn.2d 383, 693 P.2d 683 (1985); *Plein v. Lackey*, 149 Wn.2d 214 (2003), *Bain v. Metro. Mrtg. Group, Inc.*, 175 Wn.2d 83, wherein there are multiple references to "foreclosure proceedings" and other language consistent with a foreclosure being treated as a process and not a singular event.

**B. WBA's Argument that the Legislature "Acquiesced" in *Krienke's* Holding Fails.**

WBA suggests that by not specifically disavowing the *unpublished* appellate decision in *Krienke v. Chase Home Finance, LLC*, 2007 WL 2713737, \*5 (Wash. App. Div. II Sept. 18, 2007), when it adopted RCW 61.24.127 in 2009, the legislature somehow acquiesced in *Krienke's* holding that a homeowner cannot bring a claim for damages for wrongful foreclosure proceeding if the process is halted and there is no completed sale. See WBA Brief at 7-8 (citing *Soproni v. Polygon*

*Apartment Partners*, 137 Wn.2d 319, 327 n.3, 971 P.2d 500 (1999)).

WBA repeatedly refers to “*Krienke* and its progeny,” and suggests that this unpublished decision was a significant judicial ruling, that the legislature was aware of it and ratified it by not expressly disavowing it. *Id.* at 8 (contending that the legislature’s “acquiescence could not be clearer,” citing *Soproni*, 137 Wn.2d at 327 n.3).

WBA fails to tell the Court that as of February 3, 2009, when Senate Bill 5810 was first introduced, and throughout the time the bill proceeded through the legislature until its signature by the Governor on April 30, 2009, ***not a single Washington court had ever cited Krienke***. A simple Westlaw search shows that the only court that had ever cited *Krienke* prior to enactment of ESB 5810 was an ***unpublished*** federal district court decision, *Pfau v. Washington Mutual, Inc.*, 2009 WL 484448, \*12 (E.D. Wash. Feb. 24, 2009), decided after the bill had been introduced. The WBA’s claim that the legislature acquiesced in a judicial interpretation set forth by “*Krienke* and its progeny,” WBA at 8, is unpersuasive.<sup>2</sup>

Similarly, the WBA contends that because the legislature acted quickly to pass RCW 61.24.127 within months of the *Brown* decision, this

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<sup>2</sup> A comparison to the facts of the *Soproni* case on which WBA relies, *see* WBA Brief at 7 & 8, is also instructive. In *Soproni*, decided in 1999, the decision the legislature was presumed to be aware of, *Falk v. Keene Corp.*, 113 Wn.2d 645, 782 P.2d 974 (1989), was a leading, published, Washington Supreme Court decision that had been on the books for 10 years without any revision of the statute that was interpreted in that case, RCW 7.72.030. *See Soproni*, 137 Wn.2d at 327 n.3. A Westlaw search shows that during just those 10 years, *Falk* was cited by Washington state courts at least 26 times.

Court should infer that the legislature acts immediately in response to any other divergent court opinion, such as *Vawter*. WBA Brief at 7-10. The WBA cannot cite to any court decision, law review article or any other authority for such a proposition. First, the legislature cannot be expected to read and respond to every decision rendered by every court in Washington with new legislation. Second, the *Vawter* decision was rendered by a U.S. District Court judge. It was nothing more than persuasive authority for Washington courts. This is in stark contrast to *Brown*, which was a published decision of Division I of the Court of Appeals and had been rejected by the Supreme Court for review. *Brown v. Household Realty Corp.*, 146 Wn. App. 157, 189 P.3d 233 (2008), *review denied*, 165 Wn.2d 1023, 202 P.3d 308 (2009). It was a binding decision upon Washington courts. In contrast, *Vawter* was appealed to the Ninth Circuit Court of Appeals but was settled before a decision was rendered.<sup>3</sup> Thus, the case remained as nothing more than the opinion of one district court judge. While other district court judges followed the case, there were also federal judges who rejected its reasoning, finding it was not consistent with the opinions of the Washington appellate courts. *Barrus v. ReconTrust, N.A.*, No. 11-01578 KAO, Dkt. No. 114, \*11-21 (Bankr. W.D. Wash. May 6, 2013) (Order on Cross Motions for Summary Judgment) (denying defendant's motion for summary judgment on CPA

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<sup>3</sup> *Vawter v. Quality Loan Service Corp.*, 707 F. Supp. 2d 1115, 1129-30 (W.D. Wash. 2010), Dkt. 81, Order on Voluntary Dismissal.

claim where no trustee's sale of property had occurred); *Beaton v. JPMorgan Chase Bank N.A.*, 2013 WL 1282225, \*5 (W.D. Wash. 2013) (concluding that plaintiff's DTA cause of action survived a motion to dismiss since if the foreclosing entity "did not have authority to *initiate foreclosure proceedings* without knowledge of the beneficiary as required by RCW 61.24.030(7)[, t]his would result in a material violation of the DTA") (emphasis added), *accord Mickelson v. Chase Home Finance, LLC*, 2012 WL 3240241, \*3-5 (W.D. Wash. 2012) (also sustaining claim for violation of DTA duty of good faith for "*bringing non judicial foreclosures without being the proper trustee*") (emphasis added); *McDonald v. OneWest Bank*, 2013 WL 858178, \*15 n.11 (W.D. Wash. 2013) (in the absence of a trustee's sale, "[d]amages may ... be available under ... the Washington Consumer Protection Act or fraud") (citing *Bain*, 175 Wash.2d at 115-20; *Myers v. Mortgage Electronic Registration Systems, Inc.*, 2012 WL 678148, \*2 n.3 (W.D. Wash. 2012)); and *Meyer v. US Bank, N.A., et al.*, Adv. No. 12-01630 KAO Memorandum Decision (Bankr. W.D. Wash. Feb. 18, 2014) (finding the foreclosing trustee liable for damages under the DTA and the CPA).

It was not until August 2013 that a Washington appellate court rendered a published opinion specifically addressing the *Vawter* decision and expressly rejecting the entirety of its reasoning and analysis in *Walker*. *Walker v. Quality Loan Service Corp.*, 176 Wn. App. 294, 304-13, 308 P.3d 716 (2013). With this case, this Court will render a decision which will make clear whether or not it adopts the reasoning in *Walker*. Thus,

the Washington appellate process is operating properly and the reasonable conclusion that must be reached is that the legislature, to the extent it was even aware of the existence of the *Vawter* decision, is allowing the court system to function as intended by the Washington Constitution.

**C. WBA’s Argument Based on its Parsing of the Language of the Sub-Provisions RCW 61.24.127 is Strained and Unsound.**

WBA contends that in listing the four categories of damages claims in RCW 61.24.127(1) that are not waived by failure to bring an action to enjoin a sale, “the legislature plainly had in mind the potential waiver of rights *that would mature only after a sale.*” WBA Brief at 3 (emphasis added). It then parses the same sub-provisions of RCW 61.24.127 as did Defendant LSI in an attempt to show that the damages claims not waived by failure to enjoin a sale are exclusively post-sale claims. *Id.* at 4-6; *see also* LSI Opp. at 21-24. Plaintiff has already shown in response to LSI’s almost identical textual analysis that there is nothing in the language of RCW 61.24.127 that limits the claims for injury and damages which are pursued before the foreclosure sale occurs. *See* Plaintiff’s Reply at 4-7. Plaintiff will not repeat those prior arguments in response to WBA, but refers the Court to that briefing. Rather, because RCW 61.24.127 is applicable once the homeowner has failed to mitigate her damages by enjoining the sale, there are some limitations on the claims. No such limitations were intended by the legislature for those who act to mitigate their damages and prevent the sale from occurring.

In further answer to WBA, there is also legislative history that rebuts the WBA contention that when the legislature enacted RCW 61.24.127, it intended to limit the ability to pursue claims in any way other than *after* a trustee's sale. On March 23, 2009, in a public hearing on the draft bill, ESB 5810, Representative Jamie Pedersen, then-Chair of the House Judiciary Committee, asked Trudes Tango, Senior Counsel to the House Judiciary Committee, to explain the effect of ESB 5810 to the Committee. She explained that under the provision, the listed categories of damages claims would “*survive*” a foreclosure sale, stating that “[t]he third component of the bill [ESB 5810] deals with claims that *survive* a foreclosure sale.”<sup>4</sup> Obviously, in order to “*survive*” a foreclosure sale as discussed during the House Judiciary Committee hearing, the non-waived claims must have matured *before* the sale.

As noted above, WBA contends that the legislature was only concerned with preserving the ability to recover lost equity when it passed RCW 61.24.127 into law, in direct response to the *Brown* decision. WBA Brief at 6; *Brown v. Household Realty Corp.*, 146 Wash. App. 157, *supra*.

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<sup>4</sup> This explanatory statement is at the 44:58 mark of the March 23, 2009 House Judiciary Committee hearing on ESB 5810. The audio recording of the March 23, 2009 House Judiciary Committee hearing with this statement is at [http://www.tvw.org/index.php?option=com\\_tvwplayer&eventID=2009030181](http://www.tvw.org/index.php?option=com_tvwplayer&eventID=2009030181). Plaintiff asks the Court to take judicial notice of this contemporaneous summary of ESB 5810 provided to the House Judiciary Committee by its Senior Counsel. See *Seattle Times Co. v. Benton County*, 99 Wn.2d 251, 255 n.1, 661 P.2d 964 (1983) (taking judicial notice of overview of SSB 2768 provided to Senate Judiciary Committee in discerning legislative intent underlying the bill); see also *Cosmopolitan Engineering Group, Inc. v. Ondeo Degremont, Inc.*, 159 Wn.2d 292, 304, 149 P.3d 666 (2006) (discerning legislative intent from review of committee hearings, citing audio recordings available at <http://www.tvw.org>).

Such an assertion ignores the fact that the *Brown* case had nothing whatsoever to do with claims for equity lost in the foreclosure. The *Brown* plaintiff did not contest the validity of the foreclosure and was pursuing claims relating to loan origination. *Id.* The only foreclosure issue considered in *Brown* was whether failing to enjoin the foreclosure sale precluded the plaintiff from pursuing his predatory lending claims. Neither the legislative history nor the plain language of RCW 61.24.127 refers to recovery of lost equity or any other limitation upon the nature of injury or damages for which a plaintiff might seek recovery. *Brown* at 163-165; RCW 61.24.127 and its legislative history.

**D. WBA Overemphasizes the Efficiency Goal of the DTA and Ignores the Goals of Preventing Wrongful Foreclosures and Promoting Stability of Land Titles Which Are No Less Important.**

As this Court has often stated, the goals of the DTA are three-fold: (1) to create an efficient and inexpensive process, (2) to promote stability of land titles, and (3) to prevent wrongful foreclosures. *See Albice v. Premier Mortgage Servs. of Washington, Inc.*, 174 Wn.2d 560, 567, 276 P.3d 1277 (2012).<sup>5</sup> *All* of these goals are important, and they must all be considered in deciding the certified questions presented here. WBA,

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<sup>5</sup> It is also pertinent to note that the opinions of this Court in *Albice v. Premier Mort. Serv. of Washington, Inc.*, 174 Wn.2d 560, 567, 276 P.3d 1277 (2012) and *Schroeder v. Excelsior Management Group, LLC*, 177 Wn.2d 94, 106-07, 297 P.3d 677 (2013) rejected the overbroad application of the waiver doctrine utilized in *Brown*. But *Brown* was a post-foreclosure sale case and thus the cases cited in that opinion and the resulting new statute, RCW 61.24.127, dealt only with post-sale remedies. The purpose in considering the language of RCW 61.24.127 in a pre-sale context here is to illuminate the foundation upon which the legislature rested its new statutory language, which demonstrates its recognition of the ability to recover for pre-sale injury and damages.

however, focuses almost exclusively on the first goal—creating an efficient and inexpensive process—at the expense of the other two. *See* WBA Brief at 8-15. The Court should reject WBA’s invitation to put efficiency and profits for lenders and loan servicers above all other considerations, and should instead consider all of these goals together. *See* Brief of Consumer Advocates at 15-20.

Citing mostly to cases and law review articles that pre-date the 2008 financial crisis, WBA provides this Court with a one-sided history of securitization and extols its virtues and those of MERS, carefully quoting select portions of the *Bain* decision out of context in an effort at convincing this Court that none of the damage to the U.S. economy and the American taxpayers caused by its members really happened. WBA Brief at 10-16. Its purpose in doing so is the same as its purpose in submitting an *amicus* in *Bain* filled with similar horror stories about delays in foreclosure and damage to the economy and recovery: to scare this Court into refusing to recognize what the legislature intended in allowing claims for violations of the DTA pre-foreclosure. These same scare tactics did not influence this Court in *Bain* nor Division I in *Walker*, and this Court should similarly reject such scare tactics in this case. WBA Brief at 8-15. As noted by Division I in *Walker*,

Thus, the lending industry and MERS have already spawned the feared litigation with their institutionalized practices. Holding the lending industry liable for damages caused by its DTA violations should produce greater compliance and a reduction in future litigation. Thus, the availability of a presale cause of action for damages could

significantly reduce the long-term systemwide expenses of nonjudicial foreclosures under the DTA.

*Walker v. Quality Loan Serv.*, 176 Wn. App. 294, 299, citing to *Bain*, 175 Wn.2d 117-118.

As noted in her briefs, Ms. Frias maintains that the stability of land titles is best served by recognizing the claims that can be made pre-foreclosure because they prevent the wrongful foreclosure of property. If the foreclosure sales in *Albice* and *Schroeder* had been enjoined, then the title to those properties would never have changed hands and this Court would not have been required to invalidate the foreclosure sales. The prevention of wrongful foreclosures is similarly satisfied by the recognition of pre-sale remedies because borrowers will be able to recover for the wrongful acts of those involved in the foreclosure process. Those committing the wrongful acts will be liable for their actions, which should serve as an incentive to avoid the wrongful acts in the first place. For example, the plaintiffs in *Vawter* obtained injunctive relief, preventing the wrongfully initiated foreclosure sale, but they were forced to do so at their own expense and were prevented from obtaining recovery from those who wrongfully initiated the sale. *Vawter v. Quality Loan Service Corp.*, 707 F. Supp. 2d 1115, 1129-30 (W.D. Wash. 2010) (Dkt. 1, 17, 18, 50, 51). Similarly, Mr. Keahey's ability to recover for his damages incurred in connection with the blatant abuse of the foreclosure process by Mr. Jared helped prevent the wrongful attempts at foreclosure from continuing. *Keahey v. Jared*, U.S. Court of Appeals, 9th Circuit Case No. 09-60000, Memorandum Opinion (Jan. 31, 2011) (unpublished).

WBA engages in other tactics in an effort at misleading this Court, including several pages devoted to an effort to convince this Court that the myriad of problems with the loan modification programs which have been in place since 2009 rests with borrowers and an inability of servicers to determine whether or not a borrower will “self-cure”. WBA Brief at 10-16. The premise seems to be that the industry’s refusal to adhere to the requirements of the DTA somehow correlates to decisions regarding loan modifications and that the alleged problems with modifying loans serves as a justification for DTA noncompliance. Nothing could be further from the truth. There is nothing that excuses willful efforts to avoid the requirements of the DTA, such as those at issue in this case, just as there is no legal requirement under federal or state law for any loan owner to modify a loan (with the obvious exception of federal loan guarantee programs). The fact that cases related to the refusal to adhere to the requirements of the DTA are still winding their way through Washington courts demonstrates the fallacy of the WBA’s position that the potential for liability under the DTA will hinder or impede the use of the nonjudicial foreclosure process.<sup>6</sup> Even after this Court’s decision in *Bain*, and other recent decisions reiterating the need for strict compliance with

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<sup>6</sup> A recent news article, citing to data obtained from RealtyTrac, confirms that Washington continues to see increases in foreclosure rates through 2013. REALTYTRAC: 1.4 Million U.S. Properties with Foreclosure Filings in 2013, Huntington News, January 22, 2014, noting that foreclosures were up by 13% over the previous year. The number of properties repossessed by lenders also increased in Washington in 2013 by 30%. The Consumer Advocates’ *Amicus* Brief cites to similar statistics regarding the number of foreclosures in Washington. Consumer Advocates’ *Amicus* Brief, 2-3.

the DTA, the foreclosure rates in Washington have increased rather than decreased, and there is no evidence whatsoever that more lenders are using the judicial foreclosure process in Washington as a result of these decisions.

The attempted wrongful foreclosure of Ms. Frias' home and the refusal to participate in the FFA mediation in good faith occurred more than two years after the DTA was amended in several ways in 2009 (RCW 61.24.127 and RCW 61.24.030(7), among others) and within a few months of the passage of the FFA into law.<sup>7</sup> Defendant LSI was intentionally acting in violation of DTA provisions that had been the law in Washington for many years. RCW 61.24.010; 61.24.030(6). *See,*

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<sup>7</sup> The 2009 enactment of ESB 5810 was the predecessor to the FFA. ESB 5810 added another 30 days to the foreclosure process established a "meet and confer" process prior to the issuance of the Notice of Default. This new notice regarding "Pre-Foreclosure Options" was to be mailed to homeowners and the "beneficiary" or its agent was required to certify in the "Foreclosure Loss Mitigation Form" that it had complied with these new pre-foreclosure requirements. The statute permitted homeowners to request in-person meetings with the lenders and/or servicers to explore options to avoid foreclosure. The lobby for the industry, including the WBA, convinced the legislature that the stronger foreclosure mediation statute that had been promoted by consumer advocates was unnecessary. In 2010, the Washington State Housing Finance Commission was required by the legislature to prepare a report on the effectiveness of the notice and meeting provisions of ESB 5810, primarily section 61.24.03 and whether the contact requirement resulted in an increase in the number of loan modifications. That report concluded that the meeting requirements were not recognized, were not properly implemented by a majority of lenders or borrowers and were not effective in causing the lender or foreclosing party to meet and confer with borrowers in a timely manner for the purpose of assessing the borrower's financial ability to repay the debt and to discuss alternatives to foreclosure before issuing a notice of default.. Thus, assertions by the WBA and its members regarding efforts at loan modifications and/or foreclosure avoidance are not only irrelevant to this Court's determination about liability for wrongfully initiating a nonjudicial foreclosure, they are also disingenuous. *See also,* Report on the Effectiveness of RCW 61.24.031 dated November 30, 2010 by the Washington State Housing Finance Commission, a copy of which is attached hereto.

Consent Order between Defendant LSI and the Washington Insurance Commissioner, which has been previously provided to this Court. Obviously, it was completely unconcerned about being liable for its actions in violation of the DTA.

The WBA completely ignores this Court's oft-repeated admonition about the importance of adherence to the requirements of the DTA. Because the DTA "dispenses with many protections commonly enjoyed by borrowers under judicial foreclosures, lenders must strictly comply with the statutes, and courts must strictly construe the statutes in the borrower's favor." *Albice v. Premier Mortg. Servs. of Wash., Inc.*, 174 Wn.2d 560, 567, 276 P.3d 1277 (2012) (citing *Udall v. T.D. Escrow Servs., Inc.*, 159 Wn.2d 903, 915-16, 154 P.3d 882 (2007)). While the WBA is completely unconcerned with this language, just as it is unconcerned about adherence to the statutory requirements, it is nevertheless the guiding principle utilized by this Court in interpreting the DTA for many years. And it is the principle to which the legislature has clearly acquiesced since that reasoning has provided the foundation for the Washington appellate courts' opinions interpreting the DTA for years.

### **III. CONCLUSION**

For all of the reasons Ms. Frias has previously stated, which are supported by the *amicus* briefing supplied by the Washington Attorney General's Office and the Consumer Advocates, this Court should hold that (1) she may state damages claims for Defendants' violations of the DTA, under both the DTA and the CPA, without requiring a trustee's sale, and

(2) the legal principles governing Plaintiff's damages claims under the DTA and CPA should be the usual principles that govern tort and CPA claims, as articulated by the Court of Appeals in *Walker*, and by this Court in *Hangman Ridge*, *Panag*, *Bain*, and many other cases.

DATED this 18th day of February, 2014.

/s/ Melissa A. Huelsman  
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Attorney for Plaintiff Florence R. Frias

**DECLARATION OF SERVICE**

I, Carl Turner, assistant at the Law Offices of Melissa A. Huelsman, P.S., certify under penalty of perjury under the laws of the State of Washington, that on the day I signed this declaration of service, I caused a copy of Plaintiff Florence R. Frias' Response to *Amicus* Brief of Washington Bankers Association to be electronically mailed and mailed (via first class, postage prepaid), to the following counsel of record:

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Signed at Seattle, Washington, this 18th day of February, 2014.

LAW OFFICES OF MELISSA A. HUELSMAN, P.S.

/s/ Carl Turner  
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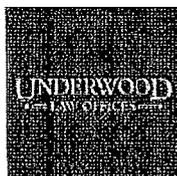


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REALTYTRAC: 1.4 Million U.S. Properties with Foreclosure Filings in 2013 -- Down 26% to Lowest Annual Total Since 2007

Wednesday, January 22, 2014 - 13:56

BY DAVID M. KINCHEN HUNTINGTONNEWS.NET REAL ESTATE WRITER



RealtyTrac® (www.realtytrac.com), Irvine, CA, has released its Year-End 2013 U.S. Foreclosure Market Report™, which shows foreclosure filings — default notices, scheduled auctions and bank repossessions — were reported on 1,361,795 U.S. properties in 2013, down 26 percent from 2012 and down 53 percent from the peak of 2.9 million properties with foreclosure filings in 2010. The 1.4 million total properties with foreclosure

filings in 2013 was the lowest annual total since 2007, when there were 1.3 million properties with foreclosure filings.

The report also shows that 1.04 percent of U.S. housing units (one in every 96) had at least one foreclosure filing during the year, down from 1.39 percent of housing units in 2012 and down from a peak of 2.23 percent of housing units in 2010.

"Millions of homeowners are still living in the shadow of the massive foreclosure crisis that the country experienced over the past eight years since the housing price bubble burst — both in the form of homes lost to directly to foreclosure as well as home equity lost as a result of a flood of discounted distressed sales," said Daren Blomquist, vice president at RealtyTrac. "But the shadow cast by the foreclosure crisis is shrinking as fewer distressed properties enter foreclosure and properties already in foreclosure are poised to exit in greater numbers in 2014 given the greater numbers of scheduled foreclosure auctions in 2013 in judicial states — which account for the bulk of U.S. foreclosure inventory.

"The push to schedule these auctions is certainly coming at an opportune time for the foreclosing lenders," Blomquist added. "There is unprecedented demand from institutional investors willing to pay with cash to buy at the foreclosure auction, helping to raise the value of properties with a foreclosure filing in 2013 by an average of 10 percent nationwide."

Other high-level findings from the report:

- States with the highest foreclosure rates in 2013 were Florida (3.01 percent of all housing units with a foreclosure filing), Nevada (2.16 percent), Illinois (1.89 percent), Maryland (1.57 percent), and Ohio (1.63 percent).
• Total foreclosure activity in 2013 increased in 10 states in 2013 compared to 2012, including Maryland (up 117 percent), New Jersey (up 44 percent), New York (up 34 percent), Connecticut (up 20 percent), Washington (up 13 percent), and Pennsylvania (up 13 percent).

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- Scheduled judicial foreclosure auctions (NFS) increased 13 percent in 2013 compared to 2012 to the highest level since 2010. NFS were the only foreclosure document type among the five tracked by RealtyTrac to post an increase nationwide in 2013 compared to 2012.
- States with big increases in scheduled judicial foreclosure auctions included Maryland (up 107 percent), New Jersey (64 percent), Connecticut (up 55 percent), Florida (up 53 percent), Pennsylvania (up 24 percent), and New York (up 15 percent).
- The average estimated value of a property receiving a foreclosure filing in 2013 was \$191,693 at the time of the foreclosure filing, up 1 percent from the average value in 2012, and the average estimated market value of properties that received foreclosure filings in 2013 has increased 10 percent since the foreclosure notice was filed.
- The average time to complete a foreclosure nationwide in the fourth quarter increased 3 percent from the previous quarter to a record-high 564 days. States with the longest time to foreclose were New York (1,029 days), New Jersey (999 days) and Florida (944 days).
- Including the 2013 numbers, over the past eight years 10.9 million U.S. properties have started the foreclosure process and 5.6 million have been repossessed by lenders through foreclosure.



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**2013 starts down in 37 states, 25 states post monthly increase in December**

A total of 747,728 U.S. properties started the foreclosure process in 2013, down 33 percent from 2012 to the lowest annual total since RealtyTrac began reporting on foreclosure starts in 2006, but 13 states bucked the downward trend, including Maryland (up 194 percent from 2012), Arkansas (up 64 percent from 2012), New Jersey (up 54 percent from 2012), Connecticut (up 47 percent from 2012), New York (up 42 percent from 2012), and Nevada (up 21 percent from 2012).

Foreclosure starts decreased in 2013 compared to 2012 in 37 states. States with the significant decreases in foreclosure starts included California (down 60 percent from 2012), Arizona (down 59 percent from 2012), Colorado (down 58 percent from 2012), Georgia (down 47 percent from 2012) and Michigan (down 42 percent from 2012) — all non-judicial states.

Foreclosure starts in some judicial states turned the corner and headed lower in 2013: Florida (down 31 percent from 2012), Illinois (down 41 percent from 2012), Ohio (down 28 percent from 2012), and South Carolina (down 24 percent from 2012).

U.S. foreclosure starts in December decreased 1 percent from the previous month and were down 28 percent from a year ago, but 25 states posted a month-over-month increase in foreclosure starts during the month, including some non-judicial states: Oregon (52 percent increase), California (19 percent increase), Arizona (13 percent increase), Georgia (10 percent increase), and Virginia (9 percent increase).

**Bank repossessions decrease in 39 states in 2013 despite increase in December**

A total of 462,970 U.S. properties were repossessed by lenders (REO) in 2013, down 31 percent from 2012 to the lowest level since 2007, but 12 states bucked the downward trend, including Maryland (up 57 percent), Arkansas (43 percent), Washington (up 30 percent), New York (up 28 percent), Oklahoma (up 26 percent), and Connecticut (up 15 percent).

Bank repossessions (REO) decreased in 2013 compared to 2012 in 38 states. States with the significant decreases included California (down 60 percent), Texas (down 56 percent), Arizona (down 52 percent), Georgia (down 50 percent), Michigan (down 47 percent), and Illinois (down 33 percent).

U.S. REO activity in December increased 4 percent from the previous month but was still down 40 percent from a year ago — the 13th consecutive month where U.S. REOs have decreased annually. REO activity in December decreased from a year ago in 41 states, but 25 states posted an increase in REO activity from the previous month, including Texas (57 percent increase), Arizona (39 percent increase), Virginia (37 percent increase), Nevada (30 percent increase), and Michigan (27 percent increase).

**Florida, Nevada, Illinois post top state foreclosure rates**

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More than 3 percent of Florida housing units (3.01 percent, or one in 33) had at least one foreclosure filing in 2013, the nation's highest state foreclosure rate for the year. A total of 269,649 Florida properties had a foreclosure filing during the year, a 3 percent decrease from 2012 but still up 48 percent from 2011. Florida foreclosure activity in 2013 was down 48 percent from the peak of 516,711 Florida properties with foreclosure filings in 2009.

With 2.16 percent of housing units (one in 46) with a foreclosure filing in 2013, Nevada posted the nation's second highest state foreclosure rate for the year despite a 21 percent decrease in foreclosure activity compared to 2012. A total of 25,058 Nevada housing units had a foreclosure filing during the year, down 78 percent from a peak of 112,097 properties with foreclosure filings in 2009.

A total of 99,666 Illinois properties had at least one foreclosure filing in 2013, down 27 percent from 2012 but still enough to give the state the nation's third highest foreclosure rate: 1.89 percent of housing units (one in 53) with a foreclosure filing.

Maryland foreclosure activity in 2013 increased 117 percent from 2012 — one of only 10 states where total foreclosure activity increased from 2012 to 2013 — boosting the state's foreclosure rate to fourth highest for the year. A total of 37,186 Maryland properties had a foreclosure filing in 2013, 1.57 percent of all housing units (one in every 64). Maryland foreclosure activity in 2013 was still down 14 percent from the peak of 43,248 properties with foreclosure filings in 2009.

Other states with foreclosure rates among the nation's 10 highest in 2013 were Ohio (1.53 percent of housing units with a foreclosure filing), Georgia (1.40 percent), Connecticut (1.36 percent), South Carolina (1.36 percent), Arizona (1.25 percent), and Delaware (1.23 percent).

#### **Foreclosure inventory down 22 percent from 2012, down 44 percent from peak**

In December 2013, more than 1.2 million properties nationwide were in some stage of foreclosure or bank owned, down 19 percent from December 2012 and 44 percent below the peak of more than 2.2 million in December 2010.

Florida accounted for the biggest share of U.S. foreclosure inventory, with 306,018 properties in some stage of foreclosure or bank owned — 25 percent of the national total. Florida foreclosure inventory was virtually unchanged from a year ago, although down 18 percent from the peak of 371,216 in November 2010.

Other states with the 10 largest foreclosure inventories were California with 102,237 (8 percent of the national total), Illinois with 98,188 (8 percent), New York with 79,682 (7 percent), Ohio with 70,072 (6 percent), New Jersey with 52,511 (4 percent), Georgia with 47,765 (4 percent), Michigan with 40,648 (3 percent), Pennsylvania with 36,674 (3 percent), and Arizona with 35,817 (3 percent).

The average age of properties in foreclosure or bank-owned as of December 2013 was 45 years old nationwide, with the oldest average age in Massachusetts (73 years old), Rhode Island (71 years old), Pennsylvania (70 years old), Connecticut (70 years old), and New York (69 years old), and the youngest average age in Nevada (23 years old), Arizona (26 years old), New Mexico (28 years old), Texas (28 years old), South Carolina (29 years old) and Georgia (29 years old).

Among properties actively in the foreclosure process but not yet bank owned, 53 percent had been owned by the current owner between five and 10 years, while 19 percent had been owned between 10 and 15 years, 16 percent had been owned more than 15 years, and 12 percent had been owned five years or fewer.

Lenders with the most inventory of bank-owned (REO) properties — based on the name of the beneficiary listed on the foreclosure documents — were the government-backed entities of Fannie Mae, Freddie Mac and the U.S. Department of Housing and Urban Development (HUD), with a combined 41 percent of all REO inventory. Other top beneficiaries were Bank of America (11 percent of all active REO inventory), Wells Fargo (11 percent of all REO inventory), Chase (8 percent), US BankCorp (7 percent), Deutsche Bank (5 percent), and CitiGroup (4 percent).

#### **Average days to foreclose nationwide at record-high 564 days in fourth quarter**

Properties that completed the foreclosure process in the fourth quarter of 2013 took an average of 564 days to complete the foreclosure process nationwide, up from 547 days in the third quarter and the highest average time to foreclose since RealtyTrac began tracking this metric in the first quarter of 2007.

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States with the longest average time to foreclose were New York (1,029 days), New Jersey (999 days), Florida (944 days), Hawaii (835 days), Illinois (815 days), New Mexico (697 days), and Connecticut (666 days).

States with the shortest average time to foreclose were Texas (176 days), Delaware (176 days), Virginia (198 days), New Hampshire (224 days), and Alabama (227 days).

**Top metro foreclosure rates**

A 6 percent annual increase in total foreclosure activity helped push the foreclosure rate in Miami to highest among metropolitan statistical areas with a population of 200,000 or more in 2013. A total of 96,710 properties had foreclosure filings in the three-county metro area during the year, 3.93 percent of housing units (one in every 25). Miami foreclosure activity in 2013 was up 44 percent from 2011 but still 44 percent from the peak of 172,894 properties with foreclosure filings in 2009.

Seven other Florida metro areas posted 2013 foreclosure rates among the 10 highest in the country: Jacksonville at No. 2 (3.32 percent of housing units with a foreclosure filing); Orlando at No. 3 (3.20 percent); Palm Bay-Melbourne-Titusville at No. 4 (3.16 percent); Port St. Lucie at No. 5 (3.06 percent); Tampa at No. 6 (3.06 percent); Ocala at No. 7 (2.96 percent); and Sarasota at No. 10 (2.42 percent).

The two other metro areas with foreclosure rates in the top 10 were Rockford, Ill., at No. 8 (2.59 percent of housing units with foreclosure filings); and Las Vegas at no. 9 (2.45 percent). Other metros with foreclosure rates in the top 20 included Chicago at No. 11 (2.40 percent); and Cleveland at No. 20 (1.81 percent).

Of the 209 metro areas tracked in the report, 51 bucked the national trend and posted increasing foreclosure activity in 2013 compared to 2012. Among these 51 were Baltimore, Md., (149 percent increase), New York (33 percent increase), Philadelphia (19 percent increase), and Washington, D.C. (14 percent increase).



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## **Report of the Effectiveness of RCW 61.24.031**

**November 30, 2010**

### **INTRODUCTION**

According to RealtyTrac<sup>1</sup>, there were 6,346 new foreclosures filed in Washington in October of 2010, representing 1 in every 440 units of housing. This made Washington the 10<sup>th</sup> highest state in the nation for the number of foreclosure filings for the month of October. RealtyTrac also reported a total of 39,875 foreclosed homes for sale in Washington in October of 2010. By contrast, the number of Home Affordable Modification Program (HAMP) temporary and permanent loan modifications completed in Washington since the beginning of the program through September of 2010 was 12,444.<sup>2</sup>

While the number of HAMP modification arrangements started since April of 2009 through August of 2010 nationwide was nearly three times the number of foreclosure completions during that time, the number of loan modification starts in Washington has not kept pace.

The passage of Engrossed Senate Bill 5810 during the 2009 legislative session was an effort by the Governor and Legislature in Washington to address the growing number of foreclosures in Washington and was largely developed from the recommendations of an industry task force established by the Governor in late 2009 to recommend how Washington could best respond to the growing number of foreclosures caused by the sub-prime crisis of 2008.

In the 2010 legislature, several bills were introduced to amend the provisions of ESB 5810 but the Legislature wanted to review the effectiveness of the notice and meeting provisions of ESB 5810, primarily section 61.24.031, before enacting any amendments. That desire led to this report.

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<sup>1</sup> [www.realtytrac.com](http://www.realtytrac.com), November 20, 2010.

<sup>2</sup> 1.9% of the loan modifications under the HAMP program in the nation.

## **THE LEGISLATIVE MANDATE FOR THIS REPORT**

In the 2010 Legislative Session, the following proviso mandated that the Housing Finance Commission review the notice and meeting requirements of RCW 61.24.031, which was enacted in 2009.

### **STATE HOUSING FINANCE COMMISSION FORECLOSURE REVIEW**

In an effort to reduce the number of residential foreclosures while protecting the interests of both borrowers and beneficiaries, the state housing finance commission shall conduct a review of the effectiveness of RCW 61.24.031, which requires a beneficiary or authorized agent to contact the borrower before issuing a notice of default for the purposes of assessing the borrower's financial ability to repay the debt and discussing alternatives to foreclosure. The commission's review of the process shall, at a minimum, examine whether the contact requirement has resulted in an increase in the number of loan modifications and whether additional statutory provisions, such as mandatory mediation, are needed to produce effective communication between beneficiaries and borrowers. The state housing finance commission shall report its findings and any recommendations for legislation to the appropriate committees of the legislature by November 30, 2010.

In compliance with this mandate, the Housing Finance Commission is submitting to the Legislature this report of our review of the notice and meeting requirements and our recommendations for amendments to RCW 61.24.031 to reduce the number of foreclosures in Washington and protect the interests of both borrowers and beneficiaries in the foreclosure process.

### **PROCESS FOR CONDUCTING THE REVIEW**

There are three components in the law for Deeds of Trust Originated between January 1, 2003 and December 31, 2007 (RCW 61.24.031) included in the review:

1. At the initial contact, the borrower must be provided the toll-free telephone number made available by the U.S. Department of Housing and Urban Development (HUD) to find a HUD-certified housing counseling agency and the toll-free numbers for the Department of Financial Institutions and the statewide civil legal aid hotline for possible assistance and referrals.
2. During the initial contact the lender shall advise the borrower that he or she has the right to request a subsequent meeting and, if requested, the meeting shall be scheduled to occur within fourteen days of the request.

The assessment of the borrower's financial ability to repay the debt and a discussion of options may occur during the initial contact or at a subsequent meeting scheduled for that purpose.

All meetings can be over the phone and do not have to be in person.

3. Within fourteen days after the initial contact, if a borrower has a designated HUD-certified housing counseling agency, attorney, or other advisor to discuss their situation with the lender, the borrower shall inform the lender and provide the contact information. Then the lender shall contact the designated representative within fourteen days after the representative is designated by the borrower.

Prior to a foreclosure sale, a declaration must be provided by the lender to the foreclosure trustee that they have complied with the contact requirements, unless they could not reach the borrower, the borrower surrendered the property or the borrower declared bankruptcy.

### **REQUIREMENT TO REPORT TO THE LEGISLATURE**

The Commission must complete the review of RCW 61.24.031 and report findings and recommendations for legislation to the appropriate legislative committees by November 30, 2010.

### **PROCESS FOR DEVELOPING THE REVIEW SURVEY**

1. The Commission staff drafted the survey document.
2. The Commission staff solicited input from stakeholders, including:
  - Lenders
  - Lobbyists
  - Mortgage insurance company
  - Housing counselors
  - Department of Financial Institutions
  - Northwest Justice Project
  - Attorney General's Office
  - Columbia Legal Services
3. The survey document was finalized based on input received from stakeholders.
  - The survey to the counselors asked whether their clients were being advised of their right to a subsequent meeting within 14 days, whether the counselors had been contacted by lenders for a discussion of their client's options and if the toll-free numbers were provided (see Attachment B).
  - Similar but slightly different questions were asked of the lenders; plus, we asked lenders for sample documents to demonstrate they had the relevant

processes and procedures in place to inform their servicers/staff of these requirements (see Attachment A).

4. August 7, 2010 – we emailed both surveys to the lists below, after attempting to contact each of the lenders to identify the appropriate person to respond to the survey.
5. Survey responses were initially due back August 31, 2010. We subsequently provided three lenders a two week extension at their request.
6. On September 9, 2010, Representatives Tina Orwall and Jamie Pedersen sent a letter to the lenders encouraging them to complete the survey (see Attachment C).

## **LIST OF SURVEY RECIPIENTS**

### **Lenders Contacted<sup>3</sup>**

|                       |                                     |
|-----------------------|-------------------------------------|
| Bank of America       | Mortgage Master Service Corporation |
| Banner Bank           | Network Mortgage Services           |
| Chase                 | Numerica Credit Union               |
| Cherry Creek Mortgage | Peoples Bank                        |
| Cobalt Mortgage       | Prospect Mortgage                   |
| DHI Mortgage - Austin | Pulte Mortgage, LLC                 |
| Eagle Home Mortgage   | Republic Mortgage                   |
| Evergreen Home Loans  | Seattle Metropolitan Credit Union   |
| Golf Mortgage         | Seattle Mortgage                    |
| Guild Mortgage        | The Bank of the Pacific             |
| HomeStreet Bank       | U.S. Bank                           |
| Key Bank              | Washington Trust                    |
| Kitsap Credit Union   | Wells Fargo                         |
| Legacy Group Mortgage |                                     |
| Mann Mortgage         |                                     |
| MetLife Home Loans    |                                     |

### **Lobbyists Contacted**

| <b>Name</b>    | <b>Organization</b>            |
|----------------|--------------------------------|
| Brad Tower     | Tower LTD                      |
| Brian Finch    | JPMorgan Chase                 |
| Denny Eliason  | Alliances Northwest            |
| Jim Pishue     | Washington Bankers Association |
| Marcus Gaspard | Washington Financial League    |

---

<sup>3</sup> The Commission developed this list from lenders involved in the Commission's bond loan programs.

Mark Minickiello  
Stacy Augustine

Washington Credit Union League  
Washington Credit Union League

**Counselors Surveyed**

| <b>Name</b>       | <b>Organization</b>  |
|-------------------|--|
| Alex Kamaunu      | Family Finance Resource Center                             |
| Arturo Gonzales   | El Centro de la Raza                                       |
| Barbara Mascarin  | American Financial Services                                |
| Dixie Palmer      | CCCS- Apprisen Financial Advocates                         |
| Estela Ortega     | El Centro de la Raza                                       |
| Jan Owens         | Rural Resources  |
| Jane Bloom        | Parkview Services/Washington Homeownership Resource Center |
| Julie L Galligan  | NeighborWorks of Grays Harbor                              |
| Kelly Cooper      | NeighborWorks of Grays Harbor                              |
| Kevin Gillette    | Community Housing Resource Center                          |
| Linda Taylor      | Urban League of Metropolitan Seattle                       |
| Liza Beam         | Consumer Credit Counseling Service of the Tri-Cities       |
| Marc Cote         | Parkview Services/Washington Homeownership Resource Center |
| Marnie Claywell   | Parkview Services/Washington Homeownership Resource Center |
| Loren Shekell     | Parkview Services/Washington Homeownership Resource Center |
| Margarita Mueses  | American Financial Services                                |
| Marvelle Lahmeyer | American Financial Services                                |
| Neal McKeever     | Community Housing Resource Center                          |
| Peggy Burrell     | Spokane Neighborhood Action Program                        |
| Randy Felice      | Spokane Neighborhood Action Program                        |
| Robin Finley      | HomeSight  |
| Shawna Hardeman   | El Centro de la Raza                                       |
| Teresa Seeley     | South Sound Outreach Services                              |
| Teri Duffy        | Community Housing Resource Center                          |
| Tom Jacobi        | HomeSight  |
| Troy Hanke        | American Financial Solutions                               |

## SURVEY RESPONSES

### Responses to the survey from counselors:

1. Written answers to the survey were received from 4 housing counselors.
2. In response to a request from counselors, 25 housing counselors participated in a telephone conference call to verbally respond to the survey.

### Written answers to survey from lenders:

1. Only one major mortgage lender sent in a survey response<sup>4</sup>.
2. Another mortgage lender responded that they have one loan that fit within the origination period covered by 61.24.031 that came to them by way of a merger<sup>5</sup>.
3. Three lenders requested additional time to complete the survey, which was granted, but only one of these lenders submitted a response.

The findings of our survey and discussions with lenders, counselors and advocates are provided in the next section.

## FINDINGS

1. **Lenders are generally providing the required toll-free numbers to assist delinquent borrowers to find counselors to avoid foreclosure (the counselor notice requirement). When borrowers get the toll-free numbers and contact housing counselors they are faring better that those who do not.**

### Discussion:

Based on information and responses from counselors about how borrowers were being contacted, we concluded the contact and counselor notice requirements under 61.24.031 appear to have been implemented by a majority of the lenders with borrowers facing foreclosure in Washington. The majority of the lenders appear to have contacted borrowers in writing using the new format and provided the telephone number or numbers where they could be referred to a counselor for help. The majority of lenders also appear to have either: made telephone contact with borrowers as required; or, completed the due process requirements of attempting to contact borrowers as provided in RCW 61.24.031<sup>6</sup>.

Our findings indicate that the new contact requirements were largely successful and led to an increased number of borrowers faced with foreclosure contacting a counselor or their lender with a resulting increase in the prevention of foreclosure. Once borrowers contacted a counselor, they significantly increased their chances

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<sup>4</sup> U.S. Bank

<sup>5</sup> Pulte Mortgage

<sup>6</sup> In a subsequent October survey of the websites of five large mortgage lenders in the state, we found that three of the five had the HUD counseling number posted on their website as required by 61.24.031; One had a HUD Resource Center number posted; and, one had an 800 number for reaching their foreclosure representatives posted on their website.

for obtaining either a temporary or permanent loan modification, or both. Many borrowers were also able to find and access other resources or methods of avoiding foreclosure as a result of contacting a counselor that they may not have been aware of had the contact not taken place.

### **Borrower Outcomes When Working with a Counselor**

Attachment D provides a summary of the client count by outcomes from four rounds of federal foreclosure counseling funds provided by NeighborWorks America to the Housing Finance Commission. The four rounds of grants provided some level of contact or counseling to 3,695 borrowers during the period from April of 2008 through October 2010. After analyzing the outcomes, we made the following conclusions:

- Only 56 of the clients ended up in direct foreclosure out of the 3,695 clients served. That is 1.5% of the clients.
- There are still 1,256 (34%) clients in negotiations with a servicer. This demonstrates that the process is taking a considerable amount of time with the majority of the delinquent loans from the 4/08 - 5/09 time period.
- There are many options which borrowers may not be considering without counselors bringing these alternatives to their attention and guiding them through the process.
- Housing counselors have contacts at the mortgage companies/servicers that they work with on a regular basis and this makes it easier for them to discuss possible solutions and options.
- Clients are getting resolutions that, for the overwhelming majority, appear to be positive.
- Without the dedication and tenacity of the counselors, many of the borrowers would have given up long ago.
- Counselors have a great deal of knowledge about local resources that may be available to help borrowers avoid foreclosure that borrowers don't know about.
- Once a home is saved from foreclosure the counselor can continue to help clients assess their situation and suggest realistic and sustainable goals to increase the likelihood that the borrower will successfully remain in their home.

- 2. The survey did not provide evidence that a significant number of lenders are telling delinquent borrowers that they have the right to a subsequent meeting with the lender's representative within 14 days to discuss their options to avoid foreclosure (the 14 day meeting notice).**

**Discussion:**

We were provided with no significant evidence that the 14 day meeting requirement was properly implemented by a majority of the mortgage lenders in the state nor did we find that the 14 day meeting requirement led to any increase in the number of loan modifications obtained by borrowers facing foreclosure.

We received only one completed survey from a major lender, who should be commended for responding. This lender indicated in the survey that they were notifying delinquent borrowers, when contacted by telephone, that they had the right to a subsequent meeting within 14 days. The response also provided copies of training documents to demonstrate their callers had been trained to notify borrowers of this right. However, the survey response indicated that out of 9,004 delinquent borrowers contacted by their callers, less than 1% of the borrowers asked for a subsequent meeting within 14 days.

While we were told in a follow-up meeting with a group of lenders that one other major lender also trained their callers to notify borrowers of their right to a subsequent meeting, we never received a survey response from this lender or any other evidence to support this claim.

However, in our contact with lenders prior to the release of the survey and in our discussions with lenders about the survey, more often than not, the lender representatives indicated to us that they were not aware of their responsibility to inform borrowers they had the right to a subsequent meeting within 14 days or they were unaware that the meeting notice requirement existed.

Further, our discussions and responses from counselors around the state largely confirmed that neither they nor their clients had been informed upon initial contact by their lender that they had the right to a subsequent meeting with the lender's representative within 14 days of their initial contact<sup>7</sup>.

The findings indicate that lenders are not generally in compliance with the "14 day meeting notice" to the borrowers or their counselors, attorneys or advisors.

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<sup>7</sup> October 8, 2010 was the first time Parkview Services/WA Homeownership Center reported a lender had informed a client they had a right to a meeting within 14 days. The lender offered to fly a person to Seattle for a face-to-face meeting. The trustee sale was scheduled to happen in one week.

- 3. Delinquent borrowers are not advising lenders within fourteen days of the initial contact that they have a counselor, advisor or attorney and that the lender has an obligation to contact their counselor, advisor or attorney within 14 days to discuss the borrower's options to avoid foreclosure (the counselor meeting requirement).**

**Discussion:**

Our discussions with counselors across the state and their responses to our survey indicated that neither borrowers nor counselors were aware of the counselor meeting requirement in RCW 61.24.031. The counselor meeting requirement said that if within 14 days of the initial contact, a borrower facing foreclosure engaged a counselor, advisor or attorney, the borrower could notify the lender of that fact and the lender had to contact the counselor, advisor or attorney within 14 days to discuss the borrower's options to avoid foreclosure.

However, the counselors have consistently told us that despite of not being aware of the counselor meeting requirement, they have been requesting meetings or telephone conversations on behalf of their clients with lenders or their representatives to discuss their clients options to avoid foreclosure and they have had serious problems getting timely meetings or telephone conversations scheduled with lenders or their representatives. In fact, the greatest frustration voiced by counselors to us during our review was their frustration at not being able to reliably or consistently communicate with a lender representative to adequately discuss the situation of their client.

Therefore, we have no evidence that the counselor meeting requirement led to any increase in the number of loan modifications obtained by borrowers facing foreclosure.

### **SUBSEQUENT MEETINGS WITH INTERESTED PARTIES**

In anticipation of preparing this report, the Commission gathered together a list of statements representing proposed recommendations from a variety of sources including articles and reports on preventing foreclosure, the results and discussions from the survey process, discussions with the Attorney General's office and other legal firms and representatives of interested parties. The members of the Commission staff that work on foreclosure problems also suggested potential recommendations.

Prior to writing the recommendations, the Commission consulted with members of the counseling network, with the lending community and with the advocate community about the potential recommendations for consideration in this report to the legislature.

- On October 8, 2010, at the invitation of the Attorney General's office, we met with representatives of the realtor, lender and nonprofit communities.

- On October 26, 2010, we met with representatives of the mortgage lending community.
- On October 29, 2010, we held a conference call/meeting with counselors from our counseling network and a representative of the City of Seattle.
- On November 5, 2010, we met with representatives of the NW Justice Project/WA State Bar Association, Poverty Action Network and Columbia Legal Services.

The Commission used the same agenda and list of potential recommendations for each of these meetings. A copy of the agenda and list of potential recommendations from the meeting with the lender community is provided in Attachment E.

The Commission asked attendees in each meeting to give comments as to which proposed recommendations they felt were important and which proposed recommendations they did not like or raised concerns. Following these discussions, the Commission staff discussed the proposals and determined which recommendations merited inclusion in this report.

## RECOMMENDATIONS

1. In response to the review findings that the contact requirements have effectively increased the number of loan modifications and prevented foreclosures, *the Legislature should keep Washington's good notice provisions in 61.24.031. These helped reduce the number of foreclosures, as demonstrated by the results of borrowers working with a qualified counselor (see Attachment D).*
2. However, to improve the effectiveness of the notice requirements and better prepare borrowers to explore options to avoiding foreclosure, *the Legislature should require the lender or foreclosing party to provide homeowners with a loss mitigation/loan modification application in tandem with the pre-foreclosure written notice now required in 61.24.031<sup>8</sup>.*
3. At the time 61.24.031 was passed it was assumed the surge in foreclosures would be caused by sub-prime loans originated between 2003 and 2007. Now the state is suffering from massive numbers of foreclosures caused by the near collapse of the banking system in 2008 and the Great Recession and job losses that have ensued, causing thousands of families to become delinquent on their mortgages. *Therefore, the Legislature should delete the reference in RCW 61.24.031 that requires compliance with the notice and meeting requirements "only on loans originated between 2003 and 2007". This will make the notice and meeting requirements apply to all foreclosures in the state.*
4. As noted in three above, the assumption at the time 61.24.031 was enacted was that foreclosures caused by the sub-prime crisis would subside by the end of 2012 and the

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<sup>8</sup> Foreclosure as a Last Resort, Center for Responsible Lending, October 2010

contact and meeting requirements would no longer be needed. Now however, we realize that a significant number of foreclosures will be with us for many years to come. *Therefore, the Legislature should repeal the un-codified section of Chapter 292, Section 13, which would allow RCW 61.24.031 to expire at the end of 2012. Repealing this section will make the provisions of RCW 61.24.031 permanent.*

5. Our review found that the meeting requirements currently contained in 61.24.031 were not recognized, were not properly implemented by a majority of lenders or borrowers and were not effective in causing the lender or foreclosing party to meet and confer with borrowers in a timely manner for the purpose of assessing the borrower's financial ability to repay the debt and to discuss alternatives to foreclosure with the borrower before issuing a notice of default.

In addition, there is no recourse currently available for borrowers if the "meet and confer" requirements are not implemented in good faith or borrowers are subjected to abusive practices. *Therefore, we recommend the Legislature amend 61.24.031 to require one of the following:*

- A. *That prior to a notice of sale, the borrower and lender or foreclosing party must participate, in good faith, in a mediation process with a qualified, independent third party mediator to evaluate the borrower's eligibility for a loan modification and other available options that will prevent the foreclosure sale from going forward, unless the borrower waives the right to mediation in writing. The Legislature should also require the foreclosing party to stop the foreclosure process during mediation and require that no trustee sale can happen within 60 days of the end of mediation.*
  - B. *Make a violation of the requirements of 61.24.031 and failure of the lender or foreclosing party to engage in a good faith review of foreclosure alternatives with the borrower within 45 days of receipt of a loss mitigation application a violation of the WA Consumer Protection Act with enforceable penalties, including fines, the fees from which will support counseling programs<sup>9</sup>.*
  - C. *Amend 61.24.031 to include both of the above recommendations.*
6. To provide relief to borrowers if the lender or foreclosing party does not engage in a good faith review of foreclosure alternatives, *the Legislature should create a borrower's right to defend against the foreclosure based on that failure.<sup>10</sup>*
  7. To provide borrowers with a reasonable expectation of how and when their loss mitigation application will be reviewed and a determination made, *the Legislature should require that within 10 business days following receipt of a completed loss mitigation application, the lender or foreclosing party must provide the borrower written confirmation that the loss mitigation application was received and a*

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<sup>9</sup> *Ibid*

<sup>10</sup> *Ibid*

*description of the foreclosing party's evaluation process and timeline. If the application was received via email, the confirmation may be made via email<sup>11</sup>.*

8. To provide borrowers with a reasonable opportunity to review and correct any errors in the consideration of their loss mitigation application or to appeal a denial, *the Legislature should require the lender or foreclosing party to submit to the borrower an affidavit disclosing the specific basis for the denial of a loan modification (loss mitigation) application, including the input data and output data of any Net Present Value (loss mitigation) calculation, at the time of denial<sup>12</sup>.*
9. To provide borrowers and counselors with an opportunity to engage the lender or foreclosing party in a good faith review of the borrowers options to avoid foreclosure in a timely and reasonable manner, *the Legislature should require the foreclosing party to have reliable points of contact, including a working telephone number and an email address, where borrowers seeking options to avoid foreclosure can contact a trained, qualified representative of the foreclosing party on a reliable basis. A loan modification center with trained staff on hand is recommended.*
10. To provide borrowers and counselors with an opportunity to submit the necessary documents for a loss mitigation application and a good faith review of the borrower's options to avoid foreclosure in a timely and reasonable manner, *the Legislature should require the lender or foreclosing party to accept electronic, faxed or scanned documents and communications submitted by or on behalf of the borrower.*
11. In order to be sure the lender or foreclosing party is entitled to foreclose against the borrower, *the Legislature should require that the lender or foreclosing party sign an affidavit stating they can produce and demonstrate a clean chain of assignment of the promissory note or obligation secured by the deed of trust, under penalty of a violation of the state's Consumer Protection Act.*
12. In order to improve and promote expanded use of the "cash for keys" option for borrowers who are not eligible for a foreclosure prevention option, *the Legislature should extend the payment of the excise tax requirements until the sale of a foreclosed property by the lender or foreclosing party to another buyer; or, exempt foreclosed properties from payment by the foreclosing party.*
13. Finally, to prevent the common occurrence of a borrower being faced with a very short and unreasonable time to relocate due to the foreclosure process continuing while the borrower's loss mitigation application is being considered and upon denial, being faced with imminent foreclosure, *the Legislature should require that no trustee sale can happen within 60 days of the final denial of a loss mitigation application or within 60 days of the end of mediation or a denied "second look" or appeal process.*

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<sup>11</sup> HAMP Supplemental Directive 10-01, page 2

<sup>12</sup> Foreclosure as a Last Resort, Center for Responsible Lending, October 2010

## **IN CLOSING**

While the Housing Finance Commission recognizes not every participant which contributed to this process will agree with the recommendations above, the Commission believes these recommendations best fulfill the mandate of the Legislature to “examine whether the contact requirement has resulted in an increase in the number of loan modifications and whether additional statutory provisions, such as mandatory mediation, are needed to produce effective communication between beneficiaries and borrowers.”

The Commission hereby commends these recommendations for full consideration and deliberation by the Legislature during the 2011 legislative session.

## Attachment A: Lender Survey

To all Lenders issuing notices of default under RCW 61.24.030(8) in Washington State:

The Washington State legislature is concerned about the increasing numbers of homeowners facing foreclosure and how mortgage lenders/servicers are assisting their delinquent borrowers.

Senate bill 5810 was passed during the 2009 regular legislative session to help homeowners who are making the effort to save their homes, but finding it difficult to work through the permanent loan modification process. The law became effective July 26, 2009 as RCW 61.24.031. (See attached) It applies to deeds of trust made from January 1, 2003 to December 31, 2007, for owner-occupied, residential property.

One of the initiatives that came out of the 2010 legislative session was to require the Commission to conduct a review of the effectiveness of RCW 61.24.031. The focus of the study is primarily on the contact requirements contained in the law. The Commission must complete the study and report findings and any recommendations for legislation to the appropriate legislative committees by November 30, 2010.

You are receiving this email because we believe the requirements of the law apply to your organization and you are an integral part of the process to determine if the contact requirements contained in the 2009 law have resulted in an increase in the number of permanent loan modifications. If it has not brought the desired results, then additional statutory provisions, such as mandatory mediation, may be needed to produce more effective communication and better results between lenders/servicers and borrowers.

To prepare for the report to the legislature, we would appreciate your comments to the questions below that are based on the contact requirements contained in RCW 61.24.031 by **August 31, 2010**. Please email your responses to me at: [Dee.Taylor@wshfc.org](mailto:Dee.Taylor@wshfc.org) or by mail to:

Dee Taylor  
Director, Homeownership Division  
Washington State Housing Finance Commission  
1000 2<sup>nd</sup> Avenue, Suite 2700  
Seattle, WA 98104

Thank you very much for completing the survey. If you have questions, please do not hesitate to contact me at (206) 287 4414 or by email at [Dee.Taylor@wshfc.org](mailto:Dee.Taylor@wshfc.org).

Sincerely,

Dee Taylor  
Director, Homeownership Division

# Survey Questions

[Note: the law refers to beneficiary or authorized agent, for purposes of this survey we use the term lender/servicer.]

## General Questions:

1. How many of the borrowers you are servicing have a Washington State deed of trust made from January 1, 2003, to December 31, 2007, for owner-occupied, residential property?
2. Of these borrowers, henceforth called Contact Borrowers, how are you making sure you are following the guidelines for informing the Contact Borrowers of their communication rights as required by the law?

## Contact Requirements:

[Note: Any meeting required by the law may occur telephonically.]

The law requires the lender/servicer to contact the Contact Borrower by letter and telephone to assess the Contact Borrower's financial ability to repay the debt and discuss alternatives to foreclosure before the lender/servicer can send a notice of default.

During the initial contact, the lender/servicer shall advise the Contact Borrower that he or she has the right to request a subsequent meeting and, if requested, the meeting shall be scheduled to occur within fourteen days of the request. The assessment of the Contact Borrower's financial ability to repay the debt and a discussion of options may occur during the initial contact or at a subsequent meeting scheduled for that purpose.

3. What is your process for ensuring you have complied with the 14 day meeting requirement request? Please attach any documentation provided to the Contact Borrower.
4. What percentages of your Contact Borrowers have requested the subsequent meeting?

At the initial contact, the Contact Borrower must be provided the toll-free telephone number made available by the U.S. Department of Housing and Urban Development (HUD) to find a HUD-certified housing counseling agency and the toll-free numbers for the Department of Financial Institutions and the statewide civil legal aid hotline for possible assistance and referrals.

5. What is your process for ensuring you have complied with the toll-free numbers for assistance requirement?
6. What phone numbers are you providing to Contact Borrowers?

Within fourteen days after the initial contact, if a Contact Borrower has a designated HUD-certified housing counseling agency, attorney, or other advisor to discuss their situation with the lender/servicer, the Contact Borrower shall inform lender/servicer and provide the contact information. The lender/servicer shall contact the designated representative within fourteen days after the representative is designated by the Contact Borrower.

7. What is your process for ensuring you have complied with the designated representative contact requirement?
8. What percentage of your Contact Borrowers has a designated representative?
9. What percentage of your Contact Borrowers has requested the subsequent meeting with their designated representative?
10. Do you do anything proactively to make the Contact Borrower aware of this provision in the law? Or, do you leave it up to the Contact Borrower to know this section of the law?

A notice of default under RCW 61.24.030(8) may not be issued until thirty days after initial contact with the Contact Borrower is made or thirty days after satisfying the due diligence requirements in subsection (5) of the law (see attached copy of the law). The 30 days are measured from the time the lender contacts the Contact Borrower, or satisfies the due diligence requirements to contact the Contact Borrower to try and work out a way to avoid foreclosure.

*Note: The 30 day requirement does not apply if any of the following occurs:*

*(a) The lender/servicer has evidence that the property has been surrendered by the Contact Borrower; or (b) the Contact Borrower has filed for bankruptcy, and the bankruptcy stay remains in place, or the Contact Borrower has filed for bankruptcy and the bankruptcy court has granted relief from the bankruptcy stay allowing enforcement of the deed of trust.*

11. Please describe your process for complying with the due diligence requirements as required under subsection (5) of the law (see attached copy of the law). Include relevant sections from internal manuals, training materials and quality control measures taken to ensure all requirements are followed.
12. The notice of default must include a declaration from the lender/servicer that they contacted the Contact Borrower, or if they were not able to contact the Contact Borrower they used due diligence in attempting to do so. Please provide a copy of the "Foreclosure Loss Mitigation Form" used to by the lender/servicer to ensure the trustee is entitled to rely on as evidence that the due diligence requirements have been met.

Results:

13. We want to know the status of delinquent first mortgages for Contact Borrowers since 7/26/09, the effective date of the new requirements? Please tell us how many of your Contact Borrowers fell into each of the following categories on 7/26/09 and on August 15, 2010:
  - a. No Resolution (includes trial modification, forbearance, repayment plan, bankruptcy)
  - b. Permanent Loan Modification
  - c. Reinstated
  - d. Short Sale
  - e. Deed in Lieu of Foreclosure
  - f. Foreclosed
  - g. Other (please specify)
  
14. What additional comments do you want to make for inclusion in the study to be presented to the legislature?

## Attachment B: Counselor Survey

To Housing Counselors:

The Washington State legislature is concerned about the increasing numbers of homeowners facing foreclosure and how mortgage lenders/servicers are assisting their delinquent borrowers.

Senate bill 5810 was passed during the 2009 regular legislative session to help homeowners who are making the effort to save their homes, but finding it difficult to work through the permanent loan modification process. The law became effective July 26, 2009 as RCW 61.24.031. (See attached) It applies to deeds of trust made from January 1, 2003, to December 31, 2007, for owner-occupied, residential property.

One of the initiatives that came out of the 2010 legislative session was to require the Commission to conduct a review of the effectiveness of RCW 61.24.031. The focus of the study is primarily on the contact requirements contained in the law. The Commission must complete the study and report findings and any recommendations for legislation to the appropriate legislative committees by November 30, 2010.

You are receiving this email because we believe the requirements of the law impact your ability to work with lenders/services of the clients you are counseling to avoid foreclosure. You are an integral part of the process to determine if the contact requirements contained in the 2009 law have resulted in an increase in the number of permanent loan modifications. If it has not brought the desired results, then additional statutory provisions, such as mandatory mediation, may be needed to produce more effective communication and better results between lenders/servicers and borrowers.

To prepare for the report to the legislature, we would appreciate your comments to the questions below that are based on the contact requirements contained in RCW 61.24.031 by **August 31, 2010**. Please email your responses to me at: [Dee.Taylor@wshfc.org](mailto:Dee.Taylor@wshfc.org) or by mail to:

Dee Taylor  
Director, Homeownership Division  
Washington State Housing Finance Commission  
1000 2<sup>nd</sup> Avenue, Suite 2700  
Seattle, WA 98104

Thank you very much for completing the survey. If you have questions, please do not hesitate to contact me at (206) 287 4414 or by email at [Dee.Taylor@wshfc.org](mailto:Dee.Taylor@wshfc.org).

Sincerely,

Dee Taylor  
Director, Homeownership Division

# Survey Questions

[Note: the law refers to beneficiary or authorized agent, for purposes of this survey we use the term lender/servicer.]

## Contact Requirements (RCW 61.24.031):

[Note: Any meeting required by the law may occur telephonically.]

The law requires the lender/servicer to contact the borrower by letter and telephone to assess the borrower's financial ability to repay the debt and discuss alternatives to foreclosure before the lender/servicer can send a notice of default.

During the initial contact, the lender/servicer shall advise the borrower that he or she has the right to request a subsequent meeting and, if requested, the meeting shall be scheduled to occur within fourteen days of the request. The assessment of the borrower's financial ability to repay the debt and a discussion of options may occur during the initial contact or at a subsequent meeting scheduled for that purpose.

1. Are lenders/servicers telling your clients about the right to a subsequent meeting within 14 days of the request?
2. If available, please provide a sample of the letters your clients are receiving from their lender/servicer informing them of their right to a subsequent meeting.  
(Please redact your client's personal information to protect their confidentiality.)

At the initial contact, the borrower must be provided the toll-free telephone number made available by the U.S. Department of Housing and Urban Development (HUD) to find a HUD-certified housing counseling agency and the toll-free numbers for the Department of Financial Institutions and the statewide civil legal aid hotline for possible assistance and referrals.

3. Are lenders/servicers providing toll-free numbers to your clients?
4. What phone numbers are your clients receiving?
5. If available, please provide a sample of the letters your clients are receiving from their lender/servicer informing them of the numbers. Please redact your client's personal information to protect their confidentiality.

Within fourteen days after the initial contact, if a borrower has a designated HUD-certified housing counseling agency, attorney, or other advisor to discuss their situation with the lender/servicer, the borrower shall inform lender/servicer and provide the contact information. The lender/servicer shall contact the designated representative within fourteen days after the representative is designated by the borrower.

15. Have your clients been told about this meeting requirement by their lender/servicer?
16. Have you informed your clients about this meeting requirement?
17. How many lenders/servicers have contacted you as a direct result of this meeting requirement?
18. What additional comments do you want to make for inclusion in the study to be presented to the legislature?

Attachment C: Request letter

State of  
Washington  
House of  
Representatives



September 10, 2010

Dear Lenders:

You recently received a request from the Washington State Housing Finance Commission to complete a survey they will use to evaluate the effectiveness of foreclosure prevention legislation passed by the 2009 legislature, which is codified in part at RCW 61.24.031. The law, which imposes a “meet and confer” requirement before a foreclosure can proceed, applies to deeds of trust made from January 1, 2003 to December 31, 2007, for owner-occupied, residential property.

We are writing to you to encourage you to complete the survey so that we have your input on the law and any recommendations you may have to deal with the foreclosure problem in the state of Washington. As members of the Washington State legislature and citizens of the State, we are committed to helping keep people in their homes whenever possible. We want to work with you to find ways to avoid home foreclosures and welcome your feedback on how to make the process more effective.

Sincerely,

Jamie Pedersen  
State Representative  
43<sup>rd</sup> District

Tina L. Orwall  
State Representative  
33<sup>rd</sup> District

## Attachment D: Clients Counts by Outcome

| <b>Outcome</b>                                  | <b>Round 4<br/>3/10- 12/10</b> | <b>Round 3<br/>2/10-<br/>5/10</b> | <b>Round 2<br/>6/09-<br/>2/10</b> | <b>Round 1<br/>4/08-<br/>5/09</b> | <b>TOTAL<br/>All<br/>Rounds</b> |
|---|--------------------------------|-----------------------------------|-----------------------------------|-----------------------------------|---------------------------------|
| Initiated Forbearance Agreement/Repayment Plan: | 107                            | 38                                | 354                               | 101                               | 600                             |
| Executed a Deed-in-Lieu:                        | 2                              | 0                                 | 3                                 | 2                                 | 7                               |
| Mortgage Foreclosed:                            | 18                             | 2                                 | 16                                | 20                                | 56                              |
| Received Second Mortgage:                       | 0                              | 1                                 | 1                                 | 4                                 | 6                               |

### **NFMC Client Count by Outcome**

|  |     |     |     |     |      |
|--|-----|-----|-----|-----|------|
| Other:   | 7   | 10  | 47  | 44  | 108  |
| Counseled and referred to another social service or emergency assistance agency:   | 2   | 2   | 329 | 19  | 352  |
| Obtained partial claim loan from FHA lender:   | 0   | 0   | 3   | 6   | 9    |
| Bankruptcy:  | 25  | 1   | 25  | 20  | 71   |
| Counseled and referred for legal assistance:   | 24  | 4   | 98  | 39  | 165  |
| Withdrew from counseling:  | 30  | 5   | 56  | 49  | 140  |
| Currently in negotiation with servicer; outcome unknown:   | 153 | 138 | 450 | 515 | 1256 |
| Referred homeowner to servicer with action plan and no further counseling activity; outcome unknown:   | 0   | 11  | 34  | 0   | 45   |
| Foreclosure put on hold or in moratorium; final outcome unknown:   | 0   | 0   | 3   | 0   | 3    |
| Brought mortgage current with rescue funds:  | 0   | 0   | 1   | 0   | 1    |
| Brought mortgage current (without rescue funds):   | 9   | 2   | 5   | 20  | 36   |
| Mortgage refinanced into FHA product:  | 1   | 0   | 3   | 9   | 13   |
| Mortgage refinanced (non-FHA product):   | 1   | 1   | 3   | 0   | 5    |
| Mortgage Modified:   | 0   | 0   | 0   | 88  | 88   |
| Mortgage modified with PITI less than or equal to 38% of gross monthly income with at least a 5 year fixed rate:                                 | 26  | 6   | 73  | 0   | 105  |
| Mortgage modified with PITI greater than 38% of gross monthly income or interest rate fixed for less than 5 years and appears to be sustainable: | 8   | 2   | 13  | 0   | 23   |

|  |            |            |              |             |             |
|--|------------|------------|--------------|-------------|-------------|
| Mortgage modified with PITI greater than 38% of gross monthly income or interest rate fixed for less than 5 years and appears not to be sustainable: | 1          | 0          | 3            | 0           | 4           |
| Homeowner(s) sold property (not short sale):   | 3          | 2          | 7            | 20          | 32          |
| Pre-foreclosure sale/short sale:   | 9          | 1          | 16           | 17          | 43          |
| Counseled on debt management or referred to debt management agency:  | 9          | 0          | 9            | 3           | 21          |
| Home lost due to tax sale or condemnation:   | 0          | 0          | 0            | 0           | 0           |
| Ending counseling after level 1 -- outcome unknown:  | 87         | 50         | 267          | 102         | 506         |
| <b>TOTAL:</b>  | <b>522</b> | <b>276</b> | <b>1,819</b> | <b>1078</b> | <b>3695</b> |

## **Attachment E: Agenda and List of Proposed Recommendations**

### **WSHFC Meeting with Lenders**

**9:30 AM, October 26, 2010**

**Commission Offices, 1000 Second Ave., 28<sup>th</sup> Floor**

#### **Purpose of the Meeting:**

- Seek solutions that will foster the will and ability of servicers to process loan modifications quickly for qualifying homeowners
- Identify actions that can be included in legislation to provide a fair playing field between lenders/servicers/trustees and borrowers facing foreclosure and seeking loan modifications
- Identify what is working the best in WA state regarding foreclosure/modification processes at this time
- Discussion of suggested recommendations for the 5810 Study Report
- Set-up a process for moving forward following this meeting

#### **Agenda**

- 9:30 AM Kim Herman-Introduction of Attendees
- 9:40 AM Kim Herman-Brief review the Legislature's mandate to review and report on the effectiveness of SB 5810
- 9:55 AM All Attendees-Discussion of the proposed recommendations for inclusion in the Report to the Legislature due November 30, 2010
- 10:50 AM All Attendees-Discussion of next steps
- 11:00 AM Adjourn

**Attachment:** Proposed recommendations for the 5810 Report to the Legislature

#### **For discussion at the October 26<sup>th</sup> meeting:**

##### **Proposed recommendations under serious consideration:**

- Keep Washington's good notice provisions that worked, 61.24.031(1)(a) and (5)
- Repeal the un-codified provision of section of 5810 (c 292 s 13) to extend RCW 61.24.031 past 2012 and make permanent
- Remove reference in 61.24.031 that requires compliance only on loans originated between 2003 and 2007
- Require lenders/servicers to establish a formal "second look or appeal process" for borrowers who are declined for a modification

- Require lenders/servicers/trustees to accept electronic, faxed or scanned documents to be submitted; or, agree on a common electronic submission process (Example-Homeport)
- Allow only the initial contact with the borrower to be telephonic; require all subsequent meetings to be face-to-face between the borrower/counselor/advisor and a loan officer/servicer that can approve a loan modification
- Require lenders/servicers to make a decision within 30 days or receipt of a complete application for a loan modification
- Require/encourage lenders/servicers to have a single, primary point of contact to assist borrowers seeking options to avoid foreclosure
- Require/encourage lenders/servicers to review all options during the initial face-to-face contact, including loan modifications, short sales, deed-in-lieu of foreclosure, forbearance, etc.
- Require/encourage qualified lender/servicer foreclosure staff to improve efficiency and outcomes for both parties, including Spanish speaking staff or interpretive services when necessary

**Recommendations being strongly suggested for consideration:**

- Add mandatory mediation on every foreclosure unless knowingly waived by the borrower
- Make violation of the contact and meeting requirements in SHB 5810 (RCW 61.24.031(1) (a,b,c) a violation of the WA Consumer Protection Act
- Require a clear and clean “chain of assignment” of the promissory note and deed of trust at the beginning of the foreclosure process to ensure that the correct entity is asserting the security interest; or,
- Require that the trustee actually have in their possession the original promissory note at the beginning of the foreclosure process.
- Implement a fine or consequence to lenders/servicers/trustees for repeated loss of documents
- Require the input data for the Net Present Value (NPV) calculation to be disclosed early in the process to all parties to be sure the data is accurate
- Provide the NPV calculation results to the borrower/counselor with 45 days of submission of the correct data
- Guarantee transparency of key information to all involved parties to facilitate resolution
- Noncompliance with the provisions of 61.24.031 will result in a fine against lenders that will go to housing counseling agencies to support counselors
- Extend the 14 day meeting requirement to 30 days
- Extend Excise tax for deed in lieu to improve “cash for keys” option for those who are not eligible for foreclosure prevention options.
- Remove accounting impediments to loan forbearance as alternative to foreclosure

**Other recommendations:**

- Get improved information to counselors up-front to front load advice and decision making with distressed homeowners (on the assumption that the outcome of 95% of cases can be predicted early)
- Get the lender/servicer/trustee and counselor on same page early and provide early informed advice to the distressed homeowner
- Collect, distribute and implement “voluntary loan modification best practices” to facilitate loan modifications across national servicers and trustees in Washington
- Provide Transparency of loan modification qualification templates to borrowers and counselors
- Work with the industry to create standardized documents
- Recommend a method to fund counselors, legal services and pro bono attorneys to advise and represent distressed homeowners
- Recommend that Lenders pay for an effective Public Awareness Campaign on how to respond to a notice of foreclosure and apply for a loan modification
- Develop standardized disclosure/modification documents for all lenders/servicers/trustees in WA
- Distinguish between material and technical irregularities in the processing of foreclosures in Washington.
- Allow lenders to disclose critical modification numbers earlier in the process (assuming that Fannie Mae and Freddie Mac prohibit this early disclosure)

FILED

JAN 31 2011

NOT FOR PUBLICATION  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

In re JOHN PATRICK KEAHEY,

Debtor,

JEFF E. JARED,

Appellant,

v.

JOHN PATRICK KEAHEY,

Appellee.

No. 09-60000

BAP No. WW-08-1151-PaJuKa

MEMORANDUM\*

Appeal from the Ninth Circuit  
Bankruptcy Appellate Panel  
Pappas, Jury, and Kaufman, Bankruptcy Judges, Presiding

Argued and Submitted August 5, 2010  
Seattle, Washington

Before: CANBY, THOMPSON and BERZON, Circuit Judges.

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\* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Appellant Jeff E. Jared appeals a decision of the Bankruptcy Appellate Panel (“BAP”) affirming an order of the United States Bankruptcy Court for the Western District of Washington in which the court held that Jared had committed the tort of outrage in attempting to collect a debt owed by Chapter 13 Debtor and Appellee John P. Keahey. The bankruptcy court subsequently awarded Keahey \$98,376.01 in damages, \$51,287.50 in attorneys’ fees, and \$2,756.84 in costs.

Jared assigns four errors: first, that the court incorrectly held that his conduct was “extreme and outrageous,” thereby satisfying the first element of the tort of outrage; second, that the court lacked a legal basis for awarding attorneys’ fees to Keahey; third, that the court improperly took judicial notice of an attorneys’ fees and costs application in the related bankruptcy case; and, fourth, that the court exhibited bias against him. We vacate the award of attorneys’ fees and remand that matter for further proceedings. We affirm in all other respects.<sup>1</sup>

The parties are aware of the facts of this case. We therefore recite them only to the extent necessary to our disposition of the case.

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<sup>1</sup> We have jurisdiction of the appeal pursuant to 28 U.S.C. § 158(d)(1). Because we are in as good a position as the BAP to consider the decision of the bankruptcy court, we independently review the decision without deference to the BAP. *See In re Saylor*, 108 F.3d 219, 220 (9th Cir. 1997). We review the bankruptcy court’s conclusions of law de novo and its factual findings for clear error. *See id.* We review de novo mixed questions of law and fact. *See In re Bammer*, 131 F.3d 788, 792 (9th Cir. 1997) (en banc).

## DISCUSSION

### I. “Extreme and Outrageous” Conduct

The tort of outrage requires the proof of three elements: (1) extreme and outrageous conduct, (2) intentional or reckless infliction of emotional distress, and (3) actual result to the plaintiff of severe emotional distress. *See Kloepfel v. Bokor*, 66 P.3d 630, 632 (Wash. 2003) (en banc). Jared contends that the first element was not established. He does not contest the underlying factual findings of the bankruptcy court, but argues that those facts do not support the court’s finding that Jared’s conduct was “extreme and outrageous.” We reject his contention.

The bankruptcy court based its finding of outrageousness on numerous misdeeds committed by Jared in the attempted foreclosure proceedings, including the following:

Jared “had no idea how to conduct a non-judicial foreclosure sale[,] . . . did just about everything wrong,” and “signaled to Mr. Keahey with each and every communication that Mr. Keahey would never be able to keep his house.”

Jared stipulated to having breached his fiduciary duty to Keahey as a trustee under Washington’s Deed of Trust Act (the “DOTA”). *See* Wash. Rev. Code Ann. §§ 61.24.010(4).

Although “there was no . . . interest due under the note,” Jared demanded a 10 percent interest charge, amounting

at first to \$36,000—a “huge amount[] to people like Keahey.” He likewise demanded payment for incorrect and excessive property tax, insurance, and utility charges.

Jared arranged for the foreclosure sale to take place in the parking lot of his condominium, rather than a public place, as required by the DOTA. Jared later testified that he opted for the parking lot because he “was going to personalize it, make it nice for the bidders, . . . [to] boutiqueify it.”

Even “[w]hen the claimed defaults were cured, Mr. Jared immediately claimed new defaults entitling him to restart the foreclosure process and charge additional fees and costs for his own benefit.” By continually and unjustifiably varying the amount of debt owed, he unjustly prevented Keahey from exercising the right to cure for a period of three years.

On this record, we conclude that “reasonable minds (such as the one exercised by the trial judge) could conclude that, in light of the severity and context of the conduct, [the defendant’s conduct] was *beyond all possible bounds of decency, . . . atrocious and utterly intolerable in a civilized community.*” *Robel v. Roundup Corp.*, 59 P.3d 611, 620 (Wash. 2002) (emphasis original) (internal quotation marks and citations omitted).<sup>2</sup> We therefore affirm the finding of outrageousness.

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<sup>2</sup> Even if we review the bankruptcy court’s finding of outrage de novo as a mixed question of law and fact, *see In re Bammer*, 131 F.3d 788, 792 (9th Cir. 1997)(stating standard of review of mixed questions), we reach the same result.

## II. The Fees-and-Costs Provision of the Washington Deed of Trust Act

Jared argues that the bankruptcy court erred in awarding attorneys' fees on the basis of the fees-and-costs provision of the Deed of Trust Act.<sup>3</sup> See Wash. Rev. Code Ann. § 61.24.090(2). We review de novo the interpretation and application of state statutes. See *Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d 877, 883 (9th Cir. 2000).

Jared's primary contention is that the underlying adversary action was not an action to determine the reasonableness of any fees under the Deed of Trust Act, but was an entirely different "personal injury tort trial." We agree with Jared, but only in part.

The Deed of Trust Act is meant to provide an alternative to the judicial foreclosure process by authorizing the foreclosure of deeds of trust without resort to litigation. See Joseph L. Hoffmann, Comment, *Court Actions Contesting the Nonjudicial Foreclosure of Deeds of Trust in Washington*, 59 Wash. L. Rev. 323, 323 (1984). The fees-and-costs provision provides in pertinent part:

Any person entitled to cause a discontinuance of the sale proceedings shall have the right, before or after reinstatement, to request any court . . . to determine the reasonableness of any fees demanded or paid as a

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<sup>3</sup> Because Jared has included no argument against the award of costs, we address only the award of attorneys' fees.

condition to reinstatement. The court shall make such determination as it deems appropriate, which may include an award to the prevailing party of its costs and reasonable attorneys' fees . . . .

Wash. Rev. Code Ann. § 61.24.090(2). The “fees demanded or paid” are the fees a party must pay the trustee “to cause a discontinuance of the sale proceedings by curing the default set forth in the notice.” *Id.* § 61.24.090(1)(b). These provisions do not appear to have been construed by any Washington court.

Jared contends that § 61.24.090(2) contemplates a limited action by a plaintiff to forestall foreclosure and to contest the reasonableness of fees demanded or paid as a condition of curing defaults owing under a deed of trust. He argues that the action under review was a totally different proceeding – an adversary action based on the tort of outrage. Under the normal American rule, the prevailing party in a tort action is not entitled to an award of attorneys' fees. *See McGreevy v. Oregon Mut. Ins. Co.*, 128 Wn.2d 26, 35 n.8 (1995).

We agree with Jared that Keahey's adversary tort action went well beyond a mere challenge to the fees charged as a condition of reinstatement and that, accordingly, Keahey was not entitled to recover all or even most of his fees for the tort action. We do not, however, construe § 61.24.090(2) to be as limited as Jared contends. It permits a challenge to excessive fees demanded to cure a default

under a deed of trust to be brought in “any court.”<sup>4</sup> The statute does not specify the form in which a request to determine reasonableness of fees must be made.

Keahey’s complaint recites that Jared imposed excessive fees as a condition of terminating the foreclosure attempts, and excessive fees were an element in the bankruptcy court’s findings of outrage, which we have already quoted.

Under these circumstances, we conclude that the bankruptcy court and appellate panel could reasonably conclude that some portion of the litigation of the outrage claim, and some limited part of the recovery, fell within the scope of § 61.24.090(2). We also conclude, however, that at least a majority of the fees were incurred in successfully prosecuting the tort action that resulted in a recovery that went well beyond any restitution of overcharges of fees or costs.

We therefore vacate the award of attorneys’ fees and remand the matter for a determination of the portion of the tort recovery that may reasonably be interpreted as representing a refund of fees excessively charged or demanded. Attorneys’ fees reasonably attributable to that proportion of the total tort recovery may then be awarded under § 61.24.090(2).

### **III. Judicial Notice of Application for Attorneys’ Fees and Costs in the Bankruptcy Proceeding.**

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<sup>4</sup> The only qualification of “any court” in § 61.24.090(2) is an exclusion, not relevant here, of small claims courts.

In determining the amount of damages due Keahey, the bankruptcy court took judicial notice of an application for, and award of, attorneys' fees to Keahey's counsel in the related bankruptcy case. Jared contends that it was error to take judicial notice of the award because, unlike "statistics or geographical, historical or scientific facts," requests for attorneys' fees and costs "are just not something courts admit into evidence via judicial notice."<sup>5</sup>

The bankruptcy court did not abuse its discretion. A trial court may take judicial notice of its own records, even in unrelated cases, provided that the court complies with Federal Rule of Evidence 201 concerning judicial notice of adjudicative facts. *See United States v. Wilson*, 631 F.2d 118, 119 (9th Cir. 1980). Here, the bankruptcy court took notice of an award of attorneys' fees and costs, granted after notice (including notice to Jared) and hearing, in a directly related case. The facts in question were "capable of accurate and ready determination by resort to a source whose accuracy cannot reasonably be questioned," and were properly subject to judicial notice. *See Fed. R. Evid. 201(b)(2)*.

#### **IV. Judicial Bias**

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<sup>5</sup> We review for an abuse of discretion a trial court's decision to take judicial notice. *See United States v. Daychild*, 357 F.3d 1082, 1099 n.26 (9th Cir. 2004).

Jared claims that the bankruptcy court exhibited bias sufficient to require a retrial when it expressed an opinion and a preliminary ruling at a phone conference before the trial. Having considered the transcript in its entirety, we find no indication of bias or hostility in the court's remarks. *See Liteky v. United States*, 510 U.S. 540, 555 (1994) (“[J]udicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge.”). Furthermore, the remarks reflected no extrajudicial source. *See id.* We therefore find no merit in Jared's claim of bias.

#### CONCLUSION

The order of the bankruptcy court is **VACATED** as to the award of attorneys' fees, and that matter is remanded for further proceedings. In all other respects, the judgment of the Bankruptcy Appellate Panel is **AFFIRMED**. The parties will bear their own costs on appeal.

**AFFIRMED IN PART, VACATED and REMANDED in part.**

Below is a Memorandum Decision of the Court.



*Karen A. Overstreet*

**Karen A. Overstreet**  
**U.S. Bankruptcy Court Judge**  
(Dated as of Entered on Docket date above)

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Karen A. Overstreet  
Bankruptcy Judge  
United States Courthouse  
700 Stewart Street, Suite 6301  
Seattle, WA 98101  
206-370-5330

IN THE UNITED STATES BANKRUPTCY COURT FOR THE  
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

In re

Peter James Meyer and  
Sharee Lynn Meyer,

Debtor(s).

Case No. 10-23914

Peter James Meyer and  
Sharee Lynn Meyer,  
Plaintiffs,

Adv. No. 12-01630

v.

U.S. BANK N.A, as Trustee for Structured  
Asset Securities Corporation Mortgage  
Pass-Through Certificates, 2006-GEL2, a  
National Bank; AMERICA'S SERVICING  
COMPANY, a division of Wells Fargo  
Bank N.A. dba Wells Fargo Home  
Mortgage, a National Bank; WELLS  
FARGO BANK NA, a National Bank;  
MORTGAGE ELECTRONIC  
REGISTRATION SYSTEMS, INC., a

**MEMORANDUM DECISION**

Below is a Memorandum Decision of the Court.

1 Delaware Corporation; and NORTHWEST  
2 TRUSTEE SERVICES, INC., a  
3 Washington Corporation,  
4  
5 Defendants.

6 The trial of this matter commenced on October 8, 2013 and concluded on November 5,  
7 2013. The Court has considered the evidence presented at trial, the records and files in the case,  
8 and the parties' post trial submissions. This Memorandum Decision contains the Court's  
9 findings of fact and conclusions of law for purposes of Bankruptcy Rule 7052.<sup>1</sup>

## 10 I. BACKGROUND

11 Plaintiffs, Peter and Sharee Meyer, commenced this action against Northwest Trustee  
12 Services Inc. ("NWTS") and other defendants, asserting various causes of action against the  
13 defendants related to foreclosure proceedings against their home located at 12412 – 84<sup>th</sup> St. S.E.,  
14 Snohomish, WA (the "Residence"). After summary judgment proceedings, the Meyers' claims  
15 remaining for trial included violation of the Washington State Deeds of Trust Act, RCW 61.24 et  
16 seq. (the "DOTA"), the Washington State Consumer Protection Act, RCW 19.86 et seq. (the  
17 "WACPA"), and the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692-1692p (the  
18 "FDCPA"). By the time of trial, all of the defendants had been dismissed from the case except  
19 NWTS, so the case proceeded to trial on these claims only against NWTS.  
20  
21

## 22 II. FACTS

23  
24 On November 10, 2005, the Meyers executed a promissory note in favor of Finance  
25 America LLC. (the "Note"). Ex. P-1. To secure payment of the Note, they executed a Deed of  
26

27 <sup>1</sup> Unless otherwise indicated, all Code, Chapter, Section and Rule references are to the Bankruptcy Code, 11 U.S.C.  
28 §§101 et seq. and to the Federal Rules of Bankruptcy Procedure, Rules 1001 et seq.

**Below is a Memorandum Decision of the Court.**

1 Trust on the same date (the "Deed of Trust") against their Residence. Ocwen Loan Servicing  
2 was identified as the servicer in the Deed of Trust, although the Deed of Trust provides both that  
3 the servicer might change and that the Note can be transferred. *See* Ex. P-2. The Deed of Trust  
4 named DCBL, Inc. as trustee, Finance America LLC as lender, and Mortgage Electronic  
5 Registration Systems ("MERS") as nominee of the lender and beneficiary under the Deed of  
6 Trust. The Deed of Trust was recorded on November 18, 2005. *Id.* The Meyers moved into the  
7 Residence with their three children and began making their payments under the Note in January  
8 of 2006.  
9

10  
11 **A. The Transfer of the Loan.**

12  
13 Unbeknownst to the Meyers, after the closing of their loan transaction, the Note was  
14 transferred into a so-called securitized trust. When and to whom the Note was transferred was  
15 highly contested at the trial. After reviewing all of the evidence and testimony, the Court is  
16 persuaded that in or around April of 2006, the Meyers' loan became part of a securitized trust  
17 entitled Structured Asset Securities Corporation Mortgage Pass-Through Certificates Series  
18 2006-GEL2 ("GEL2"). At some point prior to April 1, 2006, the Note was indorsed in blank via  
19 a separate Allonge, which is undated (the "Allonge"), but which is signed by a Loan  
20 Administration Supervisor for Finance America. *See* Ex. D-1. Although the path of the Note  
21 into GEL2 is not clear, the Court finds it more probable than not that possession of the Note,  
22 after its indorsement in blank, was first obtained by Lehman Brothers Holdings, Inc. ("Lehman")  
23 and then deposited by Lehman into GEL2 pursuant to the terms of a Trust Agreement dated  
24 April 1, 2006 (the "Trust Agreement"), among Structured Asset Securities Corp, as Depositor,  
25 Aurora Loan Services LLC, as Master Servicer, Clayton Fixed Income Services, Inc., as Credit  
26  
27  
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Below is a Memorandum Decision of the Court.

1 Risk Manager, and U.S. Bank National Association, as Trustee (“U.S. Bank”). The Deed of  
2 Trust has never been assigned by Finance America.

3  
4 According to the Trust Agreement, Lehman acquired various loans, sold them to  
5 Structured Asset Securities Corp., which in turn “deposited” the loans into GEL2. Ex. D-3, pp.  
6 1, 46. Under the Trust Agreement, individual investors could acquire differing types of interests  
7 in GEL2 by purchasing the certificates described in the Trust Agreement.

8  
9 John Richards, a vice president of U.S. Bank, testified concerning the Trust Agreement.  
10 According to his testimony, GEL2, as a trust, is not an operating entity. It has no employees, no  
11 office, and acts solely through its trustee, U.S. Bank. According to Mr. Richards, U.S. Bank’s  
12 duties as trustee were primarily to address the needs of the investor certificate holders, with the  
13 Trust Agreement placing responsibility for the management of the loans with one or more  
14 servicers. Under the Trust Agreement, U.S. Bank also stands as the title holder of the loans, by  
15 its possession of the loan notes or possession through one or more custodians.

16  
17  
18 By separate agreement, Wells Fargo Bank, N.A. (“Wells Fargo”) acted as an independent  
19 contractor and servicer of the loans which were part of GEL2 for the “seller,” defined under the  
20 agreement as “Lehman Brothers Holdings Inc. or its successor in interest or assigns.” Ex. D-4,  
21 Securitization Subservicing Agreement, dated April 1, 2006 (the “Servicing Agreement”), Art. 1,  
22 Art. III §§ 3.01. U.S. Bank is not a party to that agreement, and only acknowledged it as the  
23 trustee. *Id.* Mr. Richards testified that Wells Fargo also acted as a custodian for GEL2. Under  
24 the Servicing Agreement, Wells Fargo was to maintain possession of loan files on behalf of U.S.  
25 Bank, as trustee for GEL2. Ex. D-4, p. 13. Under the Trust Agreement, U.S. Bank was  
26 authorized to execute powers of attorney in favor of any servicer to permit the servicer to  
27  
28

Below is a Memorandum Decision of the Court.

1 foreclose against any mortgaged property in GEL2 [Ex. D-3, p. 123], but all actions in pursuit of  
2 foreclosure were delegated to the servicer under the Servicing Agreement. Brock Wiggins, a  
3 vice president for loan documentation for Wells Fargo, identified three separate Limited Power  
4 of Attorney documents, each executed by U.S. Bank and recorded in Snohomish County in 2007,  
5 pursuant to which he testified Wells Fargo acted as attorney-in-fact for U.S. Bank under the  
6 Servicing Agreement. Ex. D-6, D-7, D-8.  
7

8 The Meyers sought to show at trial that their loan was not part of GEL2 and that neither  
9 GEL2 nor U.S. Bank had possession of the Note. NWT's submitted a redacted schedule of loans,  
10 which included the Meyers' loan, and which Brock Wiggins testified was the schedule of loans  
11 which were part of GEL2 and being serviced by Wells Fargo under the Servicing Agreement.  
12 Ex. D-5. The Court ordered an *in camera* submission of an unredacted version of the schedule  
13 of loans, and the Court verified that the Meyers' loan was referenced on line 858 of the schedule  
14 of loans. See Declaration of Brock Wiggins, Dkt. 136. A column in that spreadsheet states that  
15 information concerning the Meyer loan was shown as of April 1, 2006, indicating that the loan  
16 had become part of GEL2 on or before that date. Mr. Wiggins testified that according to Wells  
17 Fargo's records, Wells Fargo took possession of the Note and the Allonge on March 1, 2006, and  
18 that those documents and the other documents related to the Meyer loan had been maintained  
19 initially in Wells Fargo's document vault in San Bernadino, but subsequently moved to Wells  
20 Fargo's vault in Minnesota. Ex. P-13. The original Note, which Mr. Wiggins testified had been  
21 in Wells Fargo's continuous possession pursuant to the terms of the Servicing Agreement, was  
22 produced at trial for the Court's examination. Based upon the evidence, the Court concludes that  
23 the holder of the Note is Wells Fargo, as custodian for U.S. Bank, as trustee for GEL2.  
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1 **B. Foreclosure.**

2 The Meyers continued to make their payments under the Note until they started to  
3 experience financial problems toward the end of 2008. It is not clear from the evidence when  
4 the Meyers initially defaulted in their payments under the Note. There is no evidence that any  
5 lender ever issued a formal notice of default.<sup>1</sup> On March 9, 2009, NWTS received its first  
6 referral to foreclose the Deed of Trust, which referral was in the form of a Case Information  
7 Report (the "2009 CIR") that NWTS pulled from a third party website called Vendorscape. Ex.  
8 D-9.  
9  
10

11 Jeff Stenman, the Foreclosure Manager and Director of Operations for NWTS, testified  
12 that NWTS has used Vendorscape to access foreclosure assignments for 10 years. NWTS has no  
13 procedures to verify the accuracy of the information contained in Vendorscape, even though Mr.  
14 Stenman admitted that he does not know how the information is generated within Vendorscape  
15 or who prepares it. He described Vendorscape as a secure website which NWTS can access  
16 using a password. If a NWTS employee has any question about the foreclosure process or any  
17 documentation, they may leave a message in Vendorscape and await a response. Mr. Stenman  
18 affirmed that NWTS employees do not contact servicers or lenders in any other way, and are  
19 instead trained to rely on the information provided through Vendorscape.  
20  
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22

23 Consistent with NWTS's customary practice, it used the information from Vendorscape  
24 and the 2009 CIR, without any verification, to initiate the foreclosure against the Meyers'  
25 Residence. The 2009 CIR is a table collection of data and does not contain any instructions. The  
26 2009 CIR lists the Meyers as the obligors under the Note, it includes the Residence address and  
27

28 <sup>1</sup> Mr. Richards testified that it was the servicer's responsibility under the Servicing Agreement to declare a default under a loan which was part of GEL2, and not the duty of U.S. Bank as trustee.

**Below is a Memorandum Decision of the Court.**

1 the Meyers' social security numbers, and it shows U.S. Bank as the trustee for GEL2 as the  
2 "beneficiary." The report mistakenly lists the interest rate on the Note as not being adjustable,  
3 when in fact it was adjustable. The interest rate is listed as 9.6050% with the last payment made  
4 on September 1, 2008. Mr. Stenman testified that he assumed the information in this report  
5 came from America's Servicing Company ("ASC"), which is listed in the report as the servicer,  
6 and he testified that he thought (but did not say for sure) that ASC was a division of Wells Fargo.  
7

8  
9 Based upon the information in the 2009 CIR, Mr. Stenman executed an Assignment of  
10 Deed of Trust from MERS to "U.S. Bank National Association as Trustee for Structured Asset  
11 Securities Corporation Mortgage Pass-Through Certificates 2006 GEL2, as beneficiary" on  
12 March 10, 2009, the day after receiving the referral. Ex. P-3. Although Mr. Stenman was an  
13 employee of NWTS, he prepared and signed the assignment as a Vice President of MERS  
14 pursuant to what he described as a tri-party agreement between himself, Wells Fargo and MERS.  
15 Although NWTS repeatedly relied at trial on the authority of this so-called tri-party agreement,  
16 the agreement was never produced in evidence. The Assignment of Deed of Trust was recorded  
17 on July 1, 2009.  
18

19  
20 On March 26, 2009, Anne Neely signed an appointment of successor trustee, appointing  
21 NWTS as successor trustee. *See* Ex. P-4. Ms. Neely is identified in the document as a vice  
22 president of loan "doc" Wells Fargo, acting as attorney-in-fact for U.S. Bank, trustee for  
23 Structured Asset Securities Corporation Mortgage Pass-Through Certificates 2006 GEL2. The  
24  
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Below is a Memorandum Decision of the Court.

1 appointment of successor trustee was recorded July 1, 2009. It incorrectly refers to MERS as the  
2 beneficiary.<sup>2</sup>

3  
4 For reasons that were not disclosed during the trial, the 2009 foreclosure proceeding  
5 against the Meyers was discontinued and a new proceeding started in 2010. The 2010  
6 foreclosure was based upon a case information report which NWTs accessed in Vendorscape on  
7 June 23, 2010 (the "2010 CIR"). Ex. P-15. With the report was a separate set of instructions  
8 with an express request to commence foreclosure, but it is not clear from whom those  
9 instructions originated. Ex. P-16. The 2010 CIR carried over the incorrect reference to the Note  
10 as not adjustable, it showed a lower principal balance than the 2009 CIR, and a higher interest  
11 rate of 9.6250%. It also showed the last payment made on February 1, 2009.  
12

13  
14 Heather Smith of NWTs prepared the Notice of Default dated July 9, 2010 (the "Notice  
15 of Default") based on the information contained in the 2010 CIR. Ex. P-5. At the time, Ms.  
16 Smith was a foreclosure assistant with NWTs. Paragraph (K) of the Notice of Default provides:  
17

18 K) Contact Information for Beneficiary (Note Owner) and Loan  
19 Servicer

20 The beneficiary of the deed of trust is US Bank National  
21 Association, as Trustee for Structured Asset Securities  
22 Corporation Mortgage Pass-Through Certificates, 2006-GEL2,  
whose address and telephone number are:

23 c/o America's Servicing Company  
24 MAC X7801-02T, 3476 Stateview Blvd  
25 Fort Mill, SC 29715  
855-248-5719

26  
27  
28 <sup>2</sup> On March 10, 2009, Mr. Stenman had assigned MERS' interest in the Deed of Trust to U.S. Bank.

Below is a Memorandum Decision of the Court.

1 The loan servicer for this loan is America's Servicing Company,  
2 whose address and telephone number are:

3 MAC X7801-02T  
4 3476 Stateview Blvd  
5 Fort Mill, SC 29715  
6 800-662-5014

7 In paragraph L of the notice, under "Notice pursuant to the Federal Fair Debt Collection  
8 Practices Act" it states "[t]he creditor to whom the debt is owed [sic] US Bank National  
9 Association, as Trustee for Structured Asset Securities Corporation Mortgage Pass-Through  
10 Certificates 2006-GEL2/America's Servicing Company." The Notice of Default incorrectly  
11 referred to NWTS as the "authorized agent" for U.S. Bank. As of the date of the notice, there is  
12 no evidence that NWTS was an authorized agent for any of Wells Fargo, U.S. Bank, or GEL2;  
13 instead, by that time NWTS was already the trustee under the Deed of Trust with statutory duties  
14 to the Meyers. The Notice of Default also states "[t]he beneficiary declares you in default for  
15 failing to make payments as required by your note and deed of trust." *Id.*, ¶ C. However, there  
16 is no evidence that GEL2, U.S. Bank, or Wells Fargo/ASC ever formally declared the Meyers in  
17 default and no evidence that NWTS was the beneficiary or was authorized to declare such a  
18 default.  
19

20 In connection with the preparation of the Notice of Default, NWTS received a  
21 Foreclosure Loss Mitigation Form declaration (the "Loss Mitigation Form") and a Beneficiary  
22 Declaration (the "Beneficiary Declaration") as required by RCW 61.24, each dated June 24,  
23 2010. The Loss Mitigation Form was signed under penalty of perjury by John Kennerty, "VP of  
24 Loan Documentation" for ASC. *See* Ex- P-5. The declaration states that "[t]he Beneficiary or  
25 Beneficiary's authorized agent has contacted the borrower under, and has complied with, Section  
26 2 of Chapter 292, Laws of 2009 (contact provision to 'assess the borrower's financial ability to  
27  
28

Below is a Memorandum Decision of the Court.

1 pay the debt secured by the deed of trust, and explore options for the borrower to avoid  
2 foreclosure’).” There is no evidence that any employee or representative of ASC, U.S. Bank, or  
3 GEL2 contacted the Meyers before the foreclosure was commenced. Mr. Kennerty also signed  
4 the Beneficiary Declaration, signing that document as a “VP Loan Documentation” for Wells  
5 Fargo as attorney-in-fact for US Bank. *See also*, Exhibit D6, 7 and 8, Limited Power of  
6 Attorney. The Beneficiary Declaration, which is also under penalty of perjury, states that U.S.  
7 Bank, as trustee for GEL2, was the holder of the Note. Ex. P-5. Mr. Kennerty testified at a  
8 deposition that he routinely signed documents of this type despite the fact that he had no personal  
9 knowledge of any of the factual statements therein, but that he merely received these forms from  
10 other departments at Wells Fargo and signed them. Ex. P-17, pp. 59-67.<sup>3</sup>  
11  
12

13 No one at NWTS took any action to verify any of the information used in the Notice of  
14 Default or referenced in the Loss Mitigation Form or Beneficiary Declaration. The information  
15 in the Notice of Default was merely pulled mechanically from the 2010 CIR. Ms. Smith testified  
16 that she had been trained not to make any inquiries concerning these documents, but instead to  
17 rely on them. In fact, when asked repeatedly by counsel for the Meyers whether she had verified  
18 information she received, her consistent response was “I have been trained to rely on the referral  
19 information in Vendorscape” or “I have been trained to rely on the Beneficiary Declaration.” As  
20 to Mr. Kennerty's authority, Ms. Smith testified that she knew he worked for Wells Fargo and/or  
21 ASC. She further testified that in her experience, Wells Fargo routinely executed documents for  
22 U.S. Bank.  
23  
24  
25

26  
27 <sup>3</sup> Mr. Kennerty's deposition was taken in the case of *Geline v. NWTS* on May 20, 2010, so it would be directly  
28 relevant to the procedures used by him at or around the time the Meyers' home foreclosure was commenced. Over  
the objection of NWTS, the Court admitted Mr. Kennerty's deposition pursuant to Rules 804(a)(5)(A) and 804(b)(1),  
and gave NWTS the opportunity to object to particular parts of the deposition. NWTS raised no objections to any  
part of the deposition.

**Below is a Memorandum Decision of the Court.**

1 The Meyers found the Notice of Default taped to the door of their Residence. They were  
2 not familiar with any of the entities identified in the notice except for ASC, to which they had  
3 been making mortgage payments. The notice stated that in order to avoid foreclosure, the  
4 Meyers would have to pay \$82,035.65. When Mr. Meyer called the phone number for ASC  
5 listed in the notice, the individual who answered the phone identified themselves as an employee  
6 of Wells Fargo. No one explained to him what the relationship was between these two entities.  
7  
8 When he contacted NWTs, he was referred to "a local law firm."

9  
10 Mr. Meyer did not agree with the information contained in the notice. He believed that  
11 the arrears listed were incorrect because he believed the interest rate listed in the Notice of  
12 Default of 9.6% was incorrect. He contended that their monthly payment was only \$3200,  
13 whereas the payment shown in the Notice of default was \$4,066.50. The Meyers did not believe  
14 they owed any money to U.S. Bank or GEL2. Mr. Meyer attempted to contact Wells Fargo,  
15 ASC and NWTs with his concerns, but was unable to resolve the issues. Mr. Meyer also  
16 attempted to locate Finance America, the original lender.  
17

18  
19 On August 13, 2010, NWTs executed a notice of trustee's sale (the "Notice of Trustee's  
20 Sale"). Ex. P-6. The notice recited that the Residence would be sold on the steps of the  
21 Snohomish County Courthouse on November 19, 2010, unless the Meyers paid \$82,431.77 by  
22 November 8, 2010. Ms. Smith signed the Notice of Trustee's Sale for NWTs.  
23

24 **C. The Bankruptcy Proceedings.**

25  
26 Failing to resolve the situation on their own, the Meyers hired attorney Richard Jones to  
27 represent them in July of 2010. *See* Standard Retainer Agreement attached to the Declaration of  
28

Below is a Memorandum Decision of the Court.

1 Richard L. Jones, Case No. 10-23914, Dkt. 51.<sup>4</sup> The Meyers also retained attorney Larry  
2 Feinstein to assist them with the filing of a chapter 13 bankruptcy proceeding on November 18,  
3 2010, the day before the scheduled trustee's sale of their Residence. Mr. Meyer testified that but  
4 for the foreclosure, he would not have filed bankruptcy and that the sole reason for the filing was  
5 to find a way to save their home from foreclosure.  
6

7 Through Mr. Jones, by letter dated December 17, 2010, the Meyers issued a Qualified  
8 Written Request under the Truth in Lending Act, directed at ASC, in order to determine the  
9 holder and owner of the Note. Ex. P-7. ASC sent a response to Mr. Feinstein on January 12,  
10 2011. Ex. P-14. The letter advised that the Meyers' loan was in a "pool of loans" managed by  
11 U.S. Bank, but it provided no detailed information about how or when that had occurred, or even  
12 the name of the fund. The letter did, however, contain a contact address for U.S. Bank.  
13  
14

15 On December 21, 2010, U.S. Bank, as trustee for GEL2, filed a proof of claim in the  
16 Meyers' bankruptcy proceeding listing a total amount due under the Deed of Trust as  
17 \$502,190.76. In the proof of claim, unpaid interest is calculated at the rate of 9.625% (the rate  
18 shown in the 2010 CIR) from January 1, 2009. The claim shows a payment amount of \$4,066.50  
19 per month for the period February 1, 2009, to June 2009, but then reduced payments of  
20 \$3,448.30 per month as of December 1, 2010. The Meyers' first proposed chapter 13 plan  
21 provided only for payments of \$2,000 per month on their mortgage; their plan stated that they  
22 were working on a loan modification with the lender. Case No. 10-23914, Dkt. 6. U.S. Bank  
23 opposed confirmation of the plan on the grounds that it did not provide for payment of the  
24 current mortgage payment of \$3,448.30 per month or provide for the cure of the prepetition  
25 arrears totaling \$86,020.02. *Id.*, Dkt. 19.  
26  
27  
28

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<sup>4</sup> The Court may take judicial notice of its pleadings and files. Fed.R.Evid. 201.

**Below is a Memorandum Decision of the Court.**

1 The Meyers and U.S. Bank were unable to resolve their disputes over plan confirmation.  
2 On June 1, 2011, the Meyers stipulated that U.S. Bank could have relief from the automatic stay  
3 effective June 22, 2011. Case No. 10-23914, Dkt. 30. They removed their home mortgage from  
4 their plan and their plan was confirmed on August 19, 2011. *Id.*, Dkt. 40.  
5

6 On June 29, 2011, NWTS restarted the foreclosure process with the issuance of an  
7 Amended Notice of Trustee's Sale with a sale date of August 12, 2011. Ex. P-8. Despite  
8 having agreed in the bankruptcy case to relief from stay, the Meyers then commenced this  
9 adversary proceeding on July 23, 2012, and sought a temporary restraining order enjoining the  
10 scheduled foreclosure sale. U.S. Bank did not appear at the hearing on August 1, 2012, nor did it  
11 file any opposition to the entry of the temporary restraining order. Heidi Buck appeared for  
12 NWTS at the hearing as NWTS was also a named defendant in the action. On August 2, 2012, a  
13 temporary restraining order was entered, which required the Meyers to deposit \$3,616.03 into the  
14 Registry of the Court by August 6, 2012, pursuant to RCW 61.24.130. A hearing on the entry of  
15 a preliminary injunction was scheduled for August 10, 2012. U.S. Bank and ASC, through the  
16 same counsel, filed a joint non-opposition to the request for a preliminary injunction, provided  
17 the Meyers would continue to make monthly payments of \$3,616.03 pursuant to the terms of the  
18 temporary restraining order. Dkt. 19. The non-opposition recited that the parties had engaged in  
19 three failed mediation attempts. This Court entered the preliminary injunction on August 20,  
20 2012, requiring the Meyers to continue to make monthly payments into the Registry of the Court.  
21 Dkt. 22.  
22  
23  
24  
25

26 Multiple motions were filed in this case, including various discovery motions. On March  
27 29, 2013, U.S. Bank and MERS filed a motion to compel the Meyers' responses to  
28 interrogatories and request for production of documents. The Meyers responded and at a hearing

**Below is a Memorandum Decision of the Court.**

1 on April 19, 2013, the Court gave the Meyers until April 30, 2013 to fully respond to the  
2 discovery requests. In addition, the Court awarded discovery sanctions of \$1,200 to U.S. Bank  
3 and MERS. *See* Order at Dkt. 76. U.S. Bank and Wells Fargo then moved on May 17, 2013 to  
4 dissolve the preliminary injunction entered by the Court on the ground that the Meyers had failed  
5 to make the monthly payments into the court registry since September 10, 2012. These  
6 defendants also filed their second motion to compel discovery responses from the Meyers,  
7 complaining that the Meyers had failed to comply with the Court's prior order to compel. The  
8 Meyers did not respond to either motion, and on June 5, 2013, the Court entered orders granting  
9 the defendants' motion to dissolve the preliminary injunction (Dkt. 90), and dismissing all claims  
10 against U.S. Bank and MERS as a discovery sanction (Dkt. 91). The motion to dissolve the  
11 injunction also sought an order allowing the trustee's sale to be reset. On June 13, 2013, the  
12 Court entered an order providing that the trustee's sale could be reset pursuant to applicable non-  
13 bankruptcy law. As of the date of trial, however, the Meyers' Residence had not been sold at  
14 trustee's sale.  
15  
16  
17

18 The Meyers contend that NWTS violated its duties as a foreclosure trustee under  
19 Washington state law. They contend that they have been damaged as a consequence of NWTS's  
20 unlawful acts by having to (1) hire Mr. Jones to issue a Qualified Written Request to determine  
21 the name and contact information for the holder and owner of their loan, (2) file a bankruptcy  
22 proceeding in order to stop what they believed was an unlawful foreclosure action against their  
23 Residence, (3) incur attorney's fees in connection with the foreclosure and the bankruptcy, and  
24 (4) incur expenses moving to a rental house to avoid the uncertainty associated with the multiple  
25 notices of trustee's sale.  
26  
27  
28

**Below is a Memorandum Decision of the Court.**

1 Between the time the Meyers hired Mr. Jones and the time ASC responded to their  
2 Qualified Written request, Mr. Jones incurred fees of \$980. Case No. 10-23914, Dkt. 54, p. 3.  
3 Mr. Feinstein charged the Meyers \$3,500 for the filing and preparation of their bankruptcy case,  
4 and the Meyers paid the bankruptcy filing fee of \$274.  
5

6 Mr. and Mrs. Meyer also testified to the emotional effects of the foreclosure proceedings  
7 on them. Mr. Meyer described it as "four years of hardship." Although he took full  
8 responsibility for his financial problems and default in payments under the Note, he testified that  
9 the stress of foreclosure and the attempts to get back on track with his mortgage resulted in  
10 severe stress affecting his work, his marriage, and his parenting, for which he ultimately sought  
11 professional help. Given the stress, he and his wife made the decision to move into a rental  
12 house in July of 2013. Their monthly rent under the lease is \$2,595, which they had paid from  
13 July through October as of the time of trial (\$10,380).<sup>5</sup> The Meyers were also required to pay a  
14 security deposit of \$2,245 and a pet deposit of \$300. In addition, Mr. Meyer testified to moving  
15 expenses incurred of \$2,625, which included the time that he and his wife were off work in order  
16 to handle the move themselves. Mr. Meyer also calculated his and his wife's time off from work  
17 in order to attend multiple mediations and hearings, which he estimated cost him \$3,200 in total,  
18 including travel expenses. Their damages, according to the evidence, amount to \$23,504. Mr.  
19 Meyer testified that he has also incurred attorney's fees and costs in this litigation.  
20  
21  
22

23 **III. JURISDICTION**  
24

25 The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334 and  
26 this is a core proceeding under 28 U.S.C. § 157(b)(2)(B),(K).  
27

28 <sup>5</sup> The Meyers were required to pay \$3,616.03 into the registry of the court pursuant to the Court's preliminary injunction, thus the move reduced their monthly housing expense by just over \$1,000.

IV. DISCUSSION

A. Violation of the Washington Deeds of Trust Act.

Washington permits the foreclosure of deeds of trust nonjudicially under the DOTA. The statute offers a convenient and relatively inexpensive method for foreclosing deeds of trust, provided the lender complies with the terms of the statute.

Washington's deed of trust act should be construed to further three basic objectives. *See Comment, Court Actions Contesting the Nonjudicial Foreclosure of Deeds of Trust in Washington*, 59 Wash.L.Rev. 323, 330 (1984). First, the nonjudicial foreclosure process should remain efficient and inexpensive. *Peoples Nat'l Bank v. Ostrander*, 6 Wash.App. 28, 491 P.2d 1058 (1971). Second, the process should provide an adequate opportunity for interested parties to prevent wrongful foreclosure. Third, the process should promote the stability of land titles.

*Cox v. Helenius*, 103 Wash.2d 383, 387, 693 P.2d 683 (1985).

1. The Changing Legal Landscape of the DOTA.

The Meyers contend that NWTS violated the DOTA by commencing a foreclosure against their Residence without the proper authority under Washington State law and that NWTS failed to comply with its duties to them as trustee under RCW 61.24.010(3).

As is typical in a number of similar cases asserting claims under the DOTA, NWTS argues that because the Residence has not been sold, the Meyers cannot, as a matter of law, establish damages. As is also typical in these cases, NWTS argues that in Washington, there is no cause of action for wrongful initiation of foreclosure. Federal judges in the Western District of Washington addressing these issues have generally followed the case of *Vawter v. Quality Loan Service Corp.*, 707 F.Supp.2d 1115, 1123 (W.D. Wash. 2010). In that case, addressing a motion to dismiss by the lender and MERS, the court held that under Washington state law "the DTA does not authorize a cause of action for damages for the wrongful initiation of nonjudicial

Below is a Memorandum Decision of the Court.

1 foreclosure proceedings where no trustee's sale occurs." However, recent state court cases have  
2 undermined the validity of this statement of the law. In *Walker v. Quality Loan Service Corp.*,  
3 176 Wash.App. 294, 308 P.3d 716 (Wash.Ct.App. 2013), the Washington State Court of Appeals  
4 stated its disagreement with the holding in *Vawter*, concluding that *Vawter* relied on cases which  
5 were decided before the legislature enacted the current version of RCW 61.24.127 and before the  
6 Washington Supreme Court decided *Bain v. Metropolitan Mortgage Group, Inc.*, 175 Wash. 2d  
7 83, 10, 285 P.3d 34 (2012). The court in *Walker* held:

9           Because the legislature recognized a presale cause of action for damages  
10           in RCW 61.24.127(1)(c), we hold that a borrower has an actionable claim  
11           against a trustee who, by acting without lawful authority or in material  
12           violation of the DTA, injures the borrower, even if no foreclosure sale  
13           occurred. Additionally, where a beneficiary, lawful or otherwise, so  
          controls the trustee so as to make the trustee a mere agent of the  
          beneficiary, then, as principal, it may have vicarious liability."

14 176 Wash.App. at 313. See also *Bavand v. OneWest Bank, F.S.B.*, 176 Wash.App. 475, 309 P.3d  
15 636 (Wash.Ct.App. 2013)(rejecting *Vawter*).

16           NWTS urges the Court to decline to follow *Walker*, arguing that as an intermediate  
17 appellate decision, it is not binding on this Court, and further, that the question addressed by  
18 *Walker* was certified to the Washington Supreme Court for review by District Judge Marsha  
19 Pechman in *Frias v. Asset Foreclosures Services, Inc.*, Case no. C13-760-MJP, by order entered  
20 September 25, 2013. In addition, NWTS offers the additional authority from the Ninth Circuit  
21 Bankruptcy Appellate Panel, *Brown v. Bank of America, et al.*, BAP No. WW-12-1534, in which  
22 the panel followed *Vawter*, without any citation to *Walker* or *Bavand*.  
23  
24

25           As far as this Court is concerned, the Washington courts have spoken: *Walker* and  
26 *Bavand* reject the holding in *Vawter* that there is no cause of action for violation of the DOTA.  
27 Bankruptcy courts routinely follow state courts when addressing legal issues under state law,  
28

Below is a Memorandum Decision of the Court.

1 particularly with respect to questions involving real property. *Butner v. U.S.*, 440 U.S. 48, 99  
2 S.Ct. 914 (1979). In following state court cases, this Court has never distinguished between state  
3 appellate and supreme court cases. Moreover, the Court finds the *Walker* case particularly  
4 thoughtful and on point. Following *Walker*, the Court must determine whether the Meyers  
5 proved that NWTS violated some provision of the DOTA.  
6

7 **2. NWTS's Duties Under the DOTA.**

8 In 2008, the legislature amended the DOTA to provide that a trustee has no fiduciary duty  
9 to either the lender or the homeowner in a foreclosure action. Specifically, subsections (3) and  
10 (4) were added to RCW 61.24.010, and they provide:

11 (3) The trustee or successor trustee shall have *no fiduciary duty* or fiduciary  
12 obligation to the grantor or other persons having an interest in the property  
13 subject to the deed of trust.

14 (4) The trustee or successor trustee shall *act impartially* between the  
15 borrower, grantor, and beneficiary.

16 Laws of 2008, ch. 153, § 1, codified in part as RCW 61.24.010(3) and (4)(emphasis added). In  
17 2009, the statute was revised again, and RCW 61.24.010(4) was rewritten to read: "(4) The  
18 trustee or successor trustee has a duty of *good faith* to the borrower, beneficiary, and grantor."  
19 Laws of 2009, ch. 292, § 7, codified in part as RCW 61.24.010(4)(emphasis added).

20 In *Klem v. Washington Mutual Bank*, 176 Wash.2d 771, 295 P.3d 1179 (2013), the  
21 Washington Supreme Court reviewed the history of the DOTA and issued a strong statement  
22 with particular reference to the duty of a trustee under that statute. Squaredly at issue in the case  
23 was the trustee's failure to exercise independent discretion to postpone a trustee's sale.  
24 Recognizing the "tremendous power" given a trustee to sell a borrower's family home, and the  
25 need to construe the DOTA in favor of borrowers "because of the relative ease with which  
26 lenders can forfeit borrowers' interests," the court concluded that "[i]n a nonjudicial foreclosure,  
27  
28

Below is a Memorandum Decision of the Court.

1 the trustee undertakes the role of the judge as an impartial third party who owes a duty to both  
2 parties to ensure that the rights of both the beneficiary and the debtor are protected." *Id.* at 789-  
3 790. "If the trustee acts only at the direction of the beneficiary, then the trustee is a mere agent  
4 of the beneficiary and a deed of trust no longer embodies a three party transaction." *Id.* The  
5 *Klem* court rejected the trustee's argument that "no competent Trustee would fail to respect its  
6 Beneficiary's instructions not to postpone a sale without first seeking the Beneficiary's  
7 permission" and held that in failing to exercise its independent judgment as to whether the sale  
8 should be postponed, the trustee violated its duty to the borrowers. *Id.* at 791.<sup>6</sup>

10 Nonjudicial foreclosure in Washington is initiated by the issuance of a notice of default to  
11 the borrower. Under RCW 61.24.030, the notice of default must be transmitted "by the  
12 beneficiary or trustee" 30 days before the notice of sale is recorded, transmitted or served. The  
13 "beneficiary" under the DOTA is the "holder of the instrument or document evidencing the  
14 obligations secured by the deed of trust, excluding persons holding the same as security for a  
15 different obligation." RCW 61.24.005(2).

18 In this case, NWTs referred to itself in the Notice of Default as the authorized agent for  
19 the beneficiary even though the evidence established that it was not an authorized agent for U.S.  
20 Bank. Furthermore, at the time the Notice of Default was issued, NWTs was already the  
21 successor trustee under the DOTA with duties to both the Meyers and U.S. Bank. Ms. Smith  
22 testified that the misreference to its role as agent was just a mistake. The appearance to the  
23 Meyers, however, was that a lender they had never heard of, through an agent they had never  
24 heard of, was declaring them in default under their Note and attempting to take away their home.

26 At the time the Notice of Default was issued, NWTs was required to include additional  
27

28 <sup>6</sup> The court went on to hold that the trustee's failure to exercise independent judgment in continuing the trustee's sale was an unfair or deceptive act or practice under the WACPA.

Below is a Memorandum Decision of the Court.

1 and specific information in the notice pursuant to RCW 61.24.030(8), which was added to the  
2 DOTA effective July 26, 2009. Laws of 2009, Ch. 292, § 2. Of relevance here is the  
3 requirement in subsection (l) that NWTS include in the Notice of Default "the name and address  
4 of the owner of any promissory notes or other obligations secured by the deed of trust and the  
5 name, address, and telephone number of a party acting as a servicer of the obligations secured by  
6 the deed of trust." According to the statute, inclusion of this information is mandatory "in the  
7 event the property secured by the deed of trust is residential real property."  
8

9 At trial, NWTS successfully proved, by resort to many complicated and lengthy exhibits,  
10 that as of the commencement of the foreclosure, U.S. Bank, as trustee for GEL2, was the holder  
11 of the Note and that GEL2 was the owner of the Note.<sup>7</sup> Despite the simple direction of the  
12 statute, however, NWTS failed to include an address and phone number for either U.S. Bank or  
13 GEL2. Instead, NWTS merely listed the address for the servicer, ASC, for both the beneficiary  
14 and the servicer, with two different phone numbers for ASC. Accurate information identifying  
15 the beneficiary and owner of the obligation is important to homeowners like the Meyers, who  
16 learn for the first time in a notice of default that their mortgage obligation is owned by someone  
17 with whom they never did any business or to whom they have never made any payment, because  
18 they have no idea if it is real or a potential scam. In this case, the failure of NWTS to include  
19 accurate information in the Notice of Default eventually caused the Meyers to hire an attorney  
20 and file bankruptcy in order to verify the true owner of their home loan.  
21  
22  
23

24  
25 <sup>7</sup> RCW 61.24.030 refers in different places to the "beneficiary of the deed of trust," the "beneficiary" and the  
26 "owner" of the note or obligation secured by the deed of trust. The Court must assume those references are  
27 intentional. RCW 61.24.005(2) defines "beneficiary" as the "holder of the instrument or document evidencing the  
28 obligations secured by the deed of trust..." Under Article 3 of Washington's version of the Uniform Commercial  
Code, the "owner" and "beneficiary" of a note can be different persons. A person entitled to enforce an instrument  
means (i) the holder of the instrument or (ii) a nonholder in possession of the instrument who has the rights of the  
holder. RCW 62A.3-301. A person may be entitled to enforce a negotiable instrument even though the person is  
not the owner of the instrument. RCW 62A.3-301. Mr. Wiggins testified that although U.S. Bank was the holder of  
the Note, GEL2 was the owner of the Note.

Below is a Memorandum Decision of the Court.

1 Also by amendment in 2009, the Washington legislature added a new requirement  
2 enacted as subsection (7)(a) to RCW 61.24.030 as follows:

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

11 (b) Unless the trustee has violated his or her duty under RCW  
12 61.24.010(4), the trustee is entitled to rely on the beneficiary's  
13 declaration as evidence of proof required under this subsection.

14 In this case, NWTS had a declaration from Wells Fargo, the purported attorney-in-fact for U.S.  
15 Bank. Although NWTS submitted into evidence three separate powers of attorney issued by  
16 U.S. Bank to Wells Fargo in 2007 which, if still in effect in 2010 when the Meyers' foreclosure  
17 was commenced, would have given Wells Fargo broad powers to sign documents related to  
18 foreclosures on behalf of U.S. Bank, NWTS had no notice or knowledge of any of these powers  
19 of attorney or any other agreement substantiating the authority of Wells Fargo to act on behalf of  
20 U.S. Bank. Further, Ms. Smith, as the foreclosing NWTS officer, was specifically trained not to  
21 seek out that information. Instead, NWTS merely accepted without question the purported  
22 authority of these entities.<sup>8</sup>

23 The Meyers argue that a trustee may not rely on a beneficiary declaration executed by  
24 anyone other than the beneficiary. Further, they argue that the trustee must have proof, in the  
25 words of the statute, that the beneficiary is the "owner" of the note as opposed to the holder of

26 \_\_\_\_\_  
27 <sup>8</sup> The 2010 CIR listed ASC as the servicer of the Meyers' loan. Nowhere in that report, however, does it refer to  
28 Wells Fargo as attorney in fact for U.S. Bank. Because the powers of attorney were recorded in Snohomish County,  
presumably NWTS could have located them in a title search. Ms. Smith, however, testified that she did not see the  
powers of attorney prior to issuing the Notice of Default. Instead, she relied on the Beneficiary Declaration and on  
her knowledge that Mr. Kennerty worked for ASC/Wells Fargo.

Below is a Memorandum Decision of the Court.

1 the note. It is not necessary to address either of these arguments, however, because the Court  
2 concludes that NWTS could not rely on the Beneficiary Declaration because it had no proof that  
3 Wells Fargo had authority to execute that declaration on behalf of U.S. Bank.

4 In this case, NWTS also failed to comply with the requirements of RCW 61.24.030(9).  
5 Under that section, before a notice of trustee's sale may be recorded, in the case of owner-  
6 occupied residential real property, the beneficiary must have complied with RCW 61.24.031.  
7 RCW 61.24.031(1)(a) provides that a trustee, beneficiary, or its authorized agent may not issue  
8 the notice of default until 30 days after satisfying the due diligence requirements described in  
9 subsection (5) if the borrower has not responded, or 90 days after contact was initiated if the  
10 borrower does respond. Under RCW 61.24.031(9), the beneficiary or authorized agent must  
11 prepare a "Foreclosure Loss Mitigation Form" the contents of which are set out in the statute.  
12 The purpose of the foreclosure loss mitigation form is to confirm for the trustee that the due  
13 diligence required under the statute has been completed as required.  
14  
15

16 In this case, NWTS accepted the Loss Mitigation Form from ASC signed by John  
17 Kennerty. The form stated that "[t]he beneficiary, *or their authorized agent* has contacted the  
18 borrower under, and has complied with, Section 2 of Chapter 292, Laws of 2009...." This is in  
19 reference to the requirement of RCW 61.24.031(b) that the "beneficiary or its authorized agent"  
20 contact the borrower in writing or by telephone to assess their financial ability to pay the debt  
21 and to explore options for the borrower to avoid foreclosure. The statute contains specific  
22 requirements for the content of the communication between the beneficiary and the borrower.  
23 ASC was not the beneficiary, nor was it an authorized agent of the beneficiary. Wells Fargo was  
24 an independent contractor under the Servicing Agreement, and not an authorized agent of U.S.  
25 Bank. Thus, any communication by ASC to the Meyers (assuming there was some  
26  
27  
28

Below is a Memorandum Decision of the Court.

1 communication initiated by ASC; there was no evidence of same) would not have satisfied the  
2 statute. Moreover, Mr. Kennerty testified in his deposition that he had no personal knowledge of  
3 the statements in these declarations, and that he relied completely on his collections and  
4 foreclosure departments to provide the information to him. NWTS had no evidence that ASC  
5 was the authorized agent of U.S. Bank for the purpose of executing this document.  
6

7 The Court concludes that NWTS failed to materially comply with its duties under the  
8 DOTA. RCW 61.24.127(1)(c). Misrepresenting itself in the Notice of Default as the authorized  
9 agent of U.S. Bank, NWTS declared a default under the Note, commenced a foreclosure against  
10 the Residence without verifying in any way the authority of Wells Fargo or U.S. Bank to  
11 maintain such foreclosure, and failed to provide the Meyers with the most basic information  
12 required by statute about the current holder and owner of their loan. The Notice of Default,  
13 which did not meet the requirements of the DOTA, tainted the entire foreclosure process.  
14

15 **B. Violation of the Washington Consumer Protection Act.**

16 The WACPA, RCW 19.86 et seq., prohibits unfair methods of competition and unfair or  
17 deceptive acts or practices in the conduct of any trade or commerce. RCW 19.86.020. The  
18 Meyers base their WACPA claim on the failure of NWTS to comply with the DOTA. Because  
19 NWTS's violation of the DOTA is not a *per se* violation of the WACPA under the facts of this  
20 case, the Court must examine whether the Meyers have proved each element required under the  
21 WACPA.<sup>1</sup>  
22

23 Case law in Washington mandates that a plaintiff prove the following elements to recover  
24 under the WACPA: (1) an unfair or deceptive act or practice; (2) the act or practice occurred in  
25  
26

27 <sup>1</sup> See RCW 61.24.135. "A *per se* unfair trade practice exists when a statute which has been declared by the  
28 Legislature to constitute an unfair or deceptive act in trade or commerce has been violated." *Hangman Ridge  
Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wash.2d 778, 786, 719 P.2d 531 (1986).

Below is a Memorandum Decision of the Court.

1 trade or commerce; (3) the act or practice impacts the public interest; (4) the act or practice  
2 caused injury to the plaintiff in his business or property; and (5) the injury is causally linked to  
3 the unfair or deceptive act. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105  
4 Wash.2d 778, 780, 719 P.2d 531 (1986). To clear up any confusion about these elements, the  
5 court in *Klem* held "that a claim under the Washington CPA may be predicated upon a per se  
6 violation of statute, an act or practice that has the capacity to deceive substantial portions of the  
7 public, or an unfair or deceptive act or practice not regulated by statute but in violation of public  
8 interest." *Klem*, 176 Wash.2d at 787.

10 The statutory definitions of "trade" and "commerce" require that the act directly or  
11 indirectly affect the people of the State of Washington. The act permits any "person who is  
12 injured in his or her business or property" to bring a civil suit for injunctive relief, damages,  
13 attorneys' fees and costs, and treble damages. RCW 19.86.090.

15 **1. Unfair and Deceptive Act.**

16 After the decision of the Washington Supreme Court in *Klem v. Washington Mutual*,  
17 there is no uncertainty as to how to apply the WACPA elements in a case like this one. The  
18 court in *Klem* held that the practice of a trustee in a nonjudicial foreclosure deferring to the  
19 lender on whether to postpone a foreclosure sale and thereby failing to exercise its independent  
20 discretion as an impartial third party with duties to both parties is an unfair or deceptive act or  
21 practice and satisfies the first element of the WACPA. Like the record before the court in *Klem*,  
22 the record in this case supports the conclusion that NWTS abdicated its duty to act impartially  
23 toward both sides. For the following reasons, the Court finds that NWTS's multiple violations of  
24 the DOTA, as detailed in the preceding section, also constitute violations of the WACPA.  
25  
26

27 The standard practices of NWTS ignore the importance of a foreclosure trustee's duties  
28

Below is a Memorandum Decision of the Court.

1 to the consumer borrower. The requirements for a notice of default under RCW 61.24.030 and  
2 031 are straightforward and unambiguous. The trustee is required to provide the name and  
3 address of the owner of the homeowner's loan. RCW 61.24.030(8)(l). All NWTS provided to  
4 the Meyers was the address and two phone numbers for ASC. When Mr. Meyer called the phone  
5 numbers, a representative of Wells Fargo answered. Counsel for NWTS argued that everyone  
6 knows that ASC is a "dba" of Wells Fargo. In fact, everyone does not know that – most, if not  
7 all, homeowners do not know that. Most, if not all, homeowners would be completely perplexed  
8 by a reference to their home loan lender as "U.S. Bank National Association, as Trustee for  
9 Structured Asset Securities Corporation, Mortgage Pass-Through Certificates, 2006-GEL2."  
10 And while there is no law against maintaining a lender's name in that form, common sense  
11 dictates that if a foreclosure trustee is going to put that in a notice of default, some additional  
12 explanation will likely be necessary to the average homeowner. Because NWTS provided no  
13 contact information for U.S. Bank as the trustee for GEL2, or for GEL2, the Meyers had no way  
14 to contact either to verify the information in the Notice of Default except through the servicer  
15 ASC. The statute specifically requires the Notice of Default to include contact information for  
16 both the owner of the note and the servicer.  
17  
18  
19

20 The Notice of Default purports to be a formal declaration that the Meyers were in default  
21 under their Note, in that it states "[t]he beneficiary *declares* you in default for failing to make  
22 payments as required by your note and deed of trust." (Emphasis added). Yet, there is no  
23 evidence that U.S. Bank ever declared the Meyers in default. NWTS's misrepresentation of itself  
24 as the "authorized agent" of U.S. Bank made it appear that the Notice of Default did suffice as a  
25 declaration of default by the beneficiary. In fact, RCW 61.24.030(8)(c), in effect at the time the  
26 Notice of Default was issued, required "[a] statement that the beneficiary *has declared* the  
27  
28

**Below is a Memorandum Decision of the Court.**

1 borrower or grantor to be in default...." (Emphasis added). The Meyers were insistent in their  
2 testimony that they had not received any formal notice of default from their lender prior to their  
3 receipt of the Notice of Default issued by NWTS.

4 In order to obtain contact information for their new lender, the Meyers were forced to  
5 hire an attorney to prepare a Qualified Written Request for them under the Truth in Lending Act.  
6 It wasn't until ASC responded to that request on January 12, 2011, six months after the  
7 foreclosure was commenced, that contact information for U.S. Bank was provided, with, of  
8 course, the admonition by ASC that "[a]lthough we are providing this information, the Trustee  
9 will more than likely refer you back to us [ASC] to answer any questions about the loan or the  
10 servicing of the loan." Ex. P-14.  
11

12 Finally, as noted above, foreclosure against owner-occupied real property may not be  
13 commenced unless the due diligence requirements of RCW 61.24.031(5) have been completed  
14 by the beneficiary or an authorized agent, and unless the trustee has proof that the beneficiary is  
15 the owner of the promissory note. NWTS, because of its standard policy of accepting whatever  
16 is contained in a Loss Mitigation Form and Beneficiary Declaration without question, moved  
17 forward with foreclosure against the Meyers' Residence without exercising any diligence of its  
18 own to confirm the authority of U.S. Bank and Wells Fargo to initiate foreclosure.  
19

20 While a foreclosure trustee is not required to be an attorney, they must be capable of  
21 assembling enough information about the lender, servicer and others involved in the lending  
22 chain to be able to objectively satisfy the homeowner that the correct party is initiating the action  
23 to take their home. The foreclosure trustee should be able to accurately state minimal  
24 information required by the DOTA to be included in the notice of default, which is, from the  
25 perspective of the homeowner, the frightening first step to the loss of their home. A homeowner  
26  
27  
28

**Below is a Memorandum Decision of the Court.**

1 should not be required to hire an attorney to draft a Qualified Written Request under the Truth in  
2 Lending Act just to get the name and address of their home loan lender. In short, NWTS must be  
3 more than a typing service for the lending community. The Court therefore concludes that the  
4 failures of NWTS under the DOTA in this case are both unfair and deceptive acts within the  
5 meaning of the WACPA.  
6

7 **2. Occurring in Trade or Commerce.**

8 There can be no serious question that the actions of NWTS relative to the Meyers'  
9 foreclosure action and the other foreclosures handled by NWTS in the State of Washington  
10 occurred in trade or commerce.  
11

12 **3. Public Interest Impact.**

13 Whether NWTS complies with its duties under the DOTA has a significant impact on the  
14 public interest. Homeowners have a right to a trustee who acts in good faith toward them in the  
15 exercise of its foreclosure duties. Homeowners have a right to accurate information and conduct  
16 by the trustee which complies with state law. The testimony demonstrated that NWTS, as a  
17 matter of practice, accepts all information provided to it through its Vendorscape portal without  
18 verification or question, without any knowledge concerning the source or accuracy of that  
19 information, and without exercising any discretion relative to the interests of the borrower. Mr.  
20 Meyer summed up the sentiment of the thousands of Washington homeowners who have lost  
21 their homes to foreclosure in the recent economic downturn: the threat of foreclosure of his  
22 family's home was the worst event of his life. The Court concludes that the Meyers have proved  
23 the public interest element of their WACPA claim.  
24  
25

26 **4. Causation and Injury.**

27 Before a violation of the WACPA may be found, an injury to the claimant's business or  
28

Below is a Memorandum Decision of the Court.

1 property must be established. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105  
2 Wash.2d at 792, 719 P.2d 531. The injury “need not be great” and no monetary damages need  
3 be proven. *Mason v. Mortgage America, Inc.*, 114 Wash.2d 842, 854, 792 P.2d 142 (1990);  
4 *Sign-O-Lite Signs, Inc. v. DeLaurenti Florists, Inc.*, 64 Wash.App. 553, 563, 825 P.2d 714  
5 (1992). Nonquantifiable injuries, such as loss of goodwill, suffice to prove injury, *Nordstrom,*  
6 *Inc. v. Tampourlos*, 107 Wash.2d 735, 733 P.2d 208 (1987), but mental distress alone does not  
7 establish injury. *Stephens v. Omni Ins. Co.*, 138 Wash.App. 151, 180, 159 P.3d 10  
8 (Wash.Ct.App. 2007). Incurring time and money to prosecute a WACPA claim does not suffice  
9 as an injury to business or property. *Sign-O-Lite*, 64 Wash.App. at 564, 825 P.2d 714. On the  
10 other hand, “[c]onsulting an attorney to dispel uncertainty regarding the nature of an alleged debt  
11 is distinct from consulting an attorney to institute a CPA claim.” *Panag v. Farmers Ins. Co. of*  
12 *Washington*, 166 Wash.2d 27, 62, 204 P.3d 885 (2009). As for damages, as opposed to injury,  
13 the court in *Mason* stated:  
14  
15

16 [W]hether an “injury” has been sustained so as to support an award  
17 of attorneys’ fees and costs under the Consumer Protection Act is a  
18 different inquiry than whether treble damages are appropriately  
19 awarded. An injury cognizable under the Act will sustain an award  
20 of attorneys’ fees while treble damages are based upon “actual”  
21 damages awarded.

22 *Mason*, 114 Wash.2d at 855, 792 P.2d 142. Finally, on causation, the Washington Supreme  
23 Court instructs that “[i]f investigative expense would have been incurred regardless of whether a  
24 violation existed, causation cannot be established.” *Panag*, 166 Wash.2d at 64, 204 P.3d 885.

25 In this case, NWTs had a simple task: provide the Meyers with an address and telephone  
26 number for the owner of the Note and exercise independent judgment to confirm the authority of  
27 the entities requesting foreclosure of the Residence. But for the failure of NWTs to provide that  
28 information in the Notice of Default as required by the DOTA and to exercise independent

Below is a Memorandum Decision of the Court.

1 judgment, the Meyers would not have been forced to incur the expense of retaining Mr. Jones to  
2 pursue additional information concerning their loan and Mr. Feinstein to file a bankruptcy  
3 proceeding in order to stop a foreclosure which was improperly instituted as to their Residence.

4 **5. Damages.**

5 Under the WACPA, the Meyers are entitled to actual damages, together with the costs of  
6 suit, including a reasonable attorney's fee. RCW 19.86.090. The Court may increase the award  
7 to three times the amount of actual damages, provided the award does not exceed \$25,000.  
8

9 Because the Notice of Default issued by NWTs was completely defective, the Meyers are  
10 entitled to all of the damages they suffered which flowed from the unlawful foreclosure activities  
11 of NWTs. In short, they should not have been displaced from their home based upon the Notice  
12 of Default. As detailed in the facts above, those damages total \$23,504. The Court further finds  
13 that trebling under RCW 19.86.090 is also warranted up to the statutory maximum of \$25,000.  
14 The Meyers are also entitled to seek recovery of the costs of this suit, including a reasonable  
15 attorney's fee.  
16

17 **C. Fair Debt Collection Practices Act.**

18 The Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692-1692p ("FDCPA") was  
19 enacted "to protect consumers from a host of unfair, harassing, and deceptive collection  
20 practices without imposing unnecessary restrictions on ethical debt collectors." *FTC v. Check*  
21 *Investors, Inc.*, 502 F.3d 159, 165 (3rd Cir. 2007) *cert. denied Check Investors, Inc. V. F.T.C.*,  
22 555 U.S. 1011, 129 S.Ct. 569, 172 L. Ed. 429 (2008)(quoting *Staub v. Harris*, 626 F.2d 275,  
23 276-77 (3rd Cir. 1980) (internal quotations omitted)). Under the act, a debt collector may not  
24 use unfair or unconscionable means to collect or attempt to collect any debt (15 U.S.C. §1692f),  
25 nor may a debt collector use any "false, deceptive, or misleading representation or means in  
26  
27  
28

Below is a Memorandum Decision of the Court.

1 connection with the collection of any debt" (15 U.S.C. §1692e). In *Walker, supra*, the  
2 Washington appellate court addressed the potential liability of foreclosure trustees under these  
3 two sections and discussed developing federal law on the issues, concluding that as long as a  
4 trustee confines itself to actions necessary to effectuate a foreclosure, its liability will be solely  
5 under Section 1692f rather than Section 1692e. 308 P.3d at 725-26.<sup>9</sup>  
6

7 In analyzing liability under Section 1692, *Walker* relied on *McDonald v. OneWest Bank*,  
8 2012 WL 555147 (W.D. Wash. Feb. 21, 2012). In *McDonald*, the court noted the current trend  
9 among federal district courts in the Ninth Circuit to limit a trustee's liability to Section 1692f if  
10 they confine their activities to foreclosure, citing *Jara v. Aurora Loan Services, LLC*, 2011 WL  
11 6217308, at \* 5 (N.D.Cal. Dec.14, 2011); *Pizan v. HSBC Bank USA, N.A.*, 2011 WL 2531104, at  
12 \*3 (W.D.Wash. June 23, 2011) ; *Lettenmaier v. Fed. Home Loan Mortg. Corp.*, 2011 WL  
13 1938166, at \*11–12 (D.Or. May 20, 2011); *Armacost v. HSBC Bank USA*, 2011 WL 825151, at \*  
14 5–6 (D. Idaho Feb. 9, 2011); *Long v. Nat'l Default Servicing Corp.*, 2010 WL 3199933 at \*4 (D.  
15 Nev. Aug. 11, 2010). In the absence of any Ninth Circuit law, the Court sees no reason to depart  
16 from this trend.  
17

18  
19 In this case, there is no evidence that NWTs took any action other than that which was  
20 necessary to effectuate a nonjudicial foreclosure against the Residence. Accordingly, NWTs  
21 could be liable only under Section 1692f if it commenced the foreclosure against the Residence  
22 when (A) there was no present right to possession of the property claimed as collateral through  
23 an enforceable security interest; (B) there was no present intention to take possession of the  
24 property; or (C) the property was exempt by law from such dispossession or disablement. 15  
25 U.S.C. § 1692f(6). In *Walker*, the court noted that the trustee there could be liable under Section  
26

27  
28 <sup>9</sup> For purposes of Section 1692f(6), a "debt collector" includes a "person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests." 15 U.S.C. § 1692a(6).

**Below is a Memorandum Decision of the Court.**

1 1692f(6)(A) if it commenced foreclosure without a valid appointment as trustee. 308 P.3d 716,  
2 726. In this case, however, NWTS had been appointed successor trustee when it issued the  
3 Notice of Default, and it proved at trial that U.S. Bank was the holder of the Note with a right to  
4 foreclose against the Residence. Accordingly, the Court finds there was a present right of  
5 possession of the property through an enforceable security interest, although the procedure  
6 initiating the enforcement of that security interest was defective. Accordingly, the Court finds  
7 that the Meyers have failed to prove entitlement to relief under the FDCPA.  
8

9 **CONCLUSION**

10 For the foregoing reasons, the Court finds in favor of the Meyers in the amount of  
11 \$48,504, consisting of actual damages of \$23,504, plus treble damages under the WACPA of  
12 \$25,000. The Meyers may request costs of suit and a reasonable attorney's fee under the  
13 WACPA by separate motion and submit an order and judgment in conformance with this  
14 Memorandum Decision.  
15

16  
17 **///END OF MEMORANDUM DECISION///**  
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FOR PUBLICATION

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

CHRISTOPHER AYDEN BREWSTER,  
individually,

*Plaintiff-Appellant,*

v.

SUN TRUST MORTGAGE, INC.,  
*Defendant,*

and

NATIONSTAR MORTGAGE, LLC,  
*Defendant-Appellee.*

No. 12-56560

D.C. No.  
3:12-cv-00448-  
LAB-WMC

OPINION

Appeal from the United States District Court  
for the Southern District of California  
Larry A. Burns, District Judge, Presiding

Argued and Submitted  
November 8, 2013—Pasadena, California

Filed February 7, 2014

Before: Ronald M. Gould and Jay S. Bybee, Circuit Judges,  
and Edward M. Chen, District Judge.\*

Opinion by Judge Gould

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\* The Honorable Edward M. Chen, District Judge for the U.S. District Court for the Northern District of California, sitting by designation.

**SUMMARY\*\***

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**Servicemembers Civil Relief Act**

Reversing the district court's dismissal under Federal Rule of Civil Procedure 12(b)(6), the panel held that a complaint stated a claim under § 533 of the Servicemembers Civil Relief Act by alleging that the defendant failed to remove improper foreclosure fees associated with a prior mortgage-service company's rescinded Notice of Default while the plaintiff was on active duty.

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**COUNSEL**

Christopher Ayden Brewster (argued) and Kenneth Alexander Lee (argued), Brewster & Lee, PC, Costa Mesa, California, for Plaintiff-Appellant.

Regina J. McClendon (argued) and Sally W. Mimms, Locke Lord LLP, San Francisco, California, for Defendant-Appellee.

Nathaniel S. Pollock, United States Department of Justice, Washington, D.C., for Amicus Curiae the United States of America.

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\*\* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

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**OPINION**

GOULD, Circuit Judge:

In this appeal, we must determine the scope of the term “foreclosure” for the purposes of § 533 of the Servicemembers Civil Relief Act (“SCRA”). Christopher Brewster appeals the district court’s dismissal under Federal Rule of Civil Procedure 12(b)(6) of his claim that Defendant Nationstar Mortgage, LLC, (“Nationstar”) violated § 533 when it maintained certain fees related to a rescinded Notice of Default on his account while he was on active duty. 50 U.S.C. app. § 533. We review a district court’s grant of a motion to dismiss for failure to state a claim de novo. *Dennis v. Hart*, 724 F.3d 1249, 1252 (9th Cir. 2013). We have jurisdiction under 28 U.S.C. § 1291, and we reverse.

**I**

Brewster is a Lieutenant Colonel in the United States Marine Corps Reserve, and was called up to active duty on three occasions between 2008 and 2011, including an overseas deployment from October of 2010 to March of 2011.<sup>1</sup> During this time, Brewster failed to make the full payments owed on the mortgage on his home in California. Brewster had originally taken out the mortgage in 2007, before he was recalled to active duty service. His initial loan servicer, Sun Trust Mortgage, Inc., (“Sun Trust”) started

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<sup>1</sup> Because this case is an appeal of a motion to dismiss under Fed. R. Civ. P. 12(b)(6), all facts are taken from the complaint and interpreted in the light most favorable to the non-moving party. Brewster’s complaint also contained additional allegations against Sun Trust, but those claims were settled prior to this appeal and are therefore not at issue here.

foreclosure proceedings on December 11, 2009 by filing a Notice of Default, which was accompanied by various fees. Sun Trust rescinded the Notice of Default in August 2010, but it did not remove the associated foreclosure fees from his account. During the month of November 2010, Sun Trust transferred the servicing rights on Brewster's mortgage to Nationstar, the appellee in this action. Nationstar similarly did not remove the fees associated with Sun Trust's attempted foreclosure before Brewster's filing of this suit, and it attempted to recover those fees during roughly five months of Brewster's active-duty service, including three and a half months while Brewster was deployed overseas.<sup>2</sup>

## II

The Servicemembers Civil Relief Act was passed “to enable [servicemembers] to devote their entire energy to the defense needs of the Nation.” 50 U.S.C. app. § 502(1). It accomplishes this purpose by imposing limitations on judicial proceedings that could take place while a member of the armed forces is on active duty, including insurance, taxation, loans, contract enforcement, and other civil actions. 50 U.S.C. app. § 501 *et seq.* These limitations are “always to be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation.”

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<sup>2</sup> In the briefing, the parties note that Nationstar removed the fees from Brewster's account after Brewster filed this lawsuit. However, while the fact that Brewster does not allege that Nationstar ever actually collected the fees goes to the amount of damages to which Brewster may be eligible if he is successful in this lawsuit, it does not impact the analysis of whether or not the SCRA was violated in the first place, because we hold that the attempted collection of fees incident to a Notice of Default was itself a part of the foreclosure proceedings barred by the SCRA. 50 U.S.C. app. § 533.

*Boone v. Lightner*, 319 U.S. 561, 575 (1943) (granting a stay in state trustee proceedings); *see also LeMaistre v. Leffers*, 333 U.S. 1, 6 (1948) (overturning a state tax sale by giving a broad construction to the SCRA in light of its “beneficent purpose” and noting that “the Act must be read with an eye friendly to those who dropped their affairs to answer their country’s call”).

The part of the statute at issue in this case provides that “[a] sale, foreclosure, or seizure of property for a breach of an obligation described in subsection (a) [a mortgage that originated before the servicemember’s military service] shall not be valid if made during, or within one year after, the period of the servicemember’s military service” unless the foreclosure is approved by a court. 50 U.S.C. app. § 533(c). Violations or attempted violations of this section can be punished by the federal government through fines or imprisonment of up to one year and private plaintiffs<sup>3</sup> may receive equitable relief as well as appropriate monetary damages,<sup>4</sup> costs, and attorney’s fees. 50 U.S.C. app.

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<sup>3</sup> 50 U.S.C. app. § 597a was added to the SCRA by the Veterans Benefits Act of 2010, which became law on October 13, 2010. Pub. L. 111-275 (2010); *Gordon v. Pete’s Auto Serv. of Denbigh, Inc.*, 637 F.3d 454, 457 (4th Cir. 2011). This section contains an explicit private right of action. Because we hold that Nationstar violated the SCRA by failing to remove the improper fees from Brewster’s account between November 2010 and April 2011, *see* Part III, *infra*, after the adoption of the Veterans Benefits Act, we need not reach the questions raised in Nationstar’s supplemental briefing of whether the remainder of the SCRA contains an implied right of action or whether the Veterans Benefits Act of 2010 applies retroactively.

<sup>4</sup> At this stage of the litigation, we need not and do not reach the question of whether punitive damages are available under this section of the SCRA. We asked for supplemental briefs on this issue, and we have

§ 533(d); 50 U.S.C. app. § 597a. The SCRA sets a serious prohibition aimed at keeping members of the armed forces free of foreclosures which would be distractions and unfair while they serve their country.

### III

Brewster alleges that Nationstar violated § 533 of the SCRA when it did not remove improper foreclosure fees associated with the prior mortgage-service company's Notice of Default, even after Brewster complained about the fees that appeared on a statement. We agree.

Section 533 does not define the term "foreclosure." Appellee argues that the statute should be read only to apply to the proceedings which were terminated before Nationstar assumed the serving rights of Brewster's mortgage. However, the statute's plain language suggests two reasons that the term encompasses more than just the formal foreclosure proceeding seeking the transfer of ownership or the sale of property. First, the statute refers to foreclosure "proceedings," a term which generally means a process rather than a single act. 50 U.S.C. app. § 533(b) (providing for a "stay of proceedings"); *Metro One Telecomms., Inc. v. C.I.R.*, 704 F.3d 1057, 1061 (9th Cir. 2012) ("[I]n the absence of an indication to the contrary, words in a statute are assumed to bear their ordinary, contemporary, common meaning." (quoting *Walters v. Metro. Educ. Enters., Inc.*, 519 U.S. 202, 207 (1997))); *see also Kachlon v. Markowitz*, 85 Cal. Rptr. 3d 532, 542 (2008) (describing a "foreclosure proceedings"

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competing views of counsel, but we have concluded that this issue should not be decided absent an appropriate record developed in the district court, and that there should be a decision of the district court in the first instance.

that continued while a “foreclosure sale” was abandoned); “Foreclose,” Black's Law Dictionary (9th ed. 2009) (describing “foreclosure proceedings” as encompassing “appropriate statutory steps” that precede the sale of a mortgaged property). Second, the language of the statute specifically bars a “sale, foreclosure, or seizure of property,” thereby suggesting that foreclosure must mean more than just a sale or seizure. 50 U.S. app. § 533(c); *Spencer Enters., Inc. v. United States*, 345 F.3d 683, 691 (9th Cir. 2003) (noting the “cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant.”). We must move beyond the statute’s explicit terms to determine exactly what the word “foreclosure” encompasses, in addition to the sale or seizure that conclude the foreclosure proceedings.

California Civil Code § 2924 *et seq.* outlines the steps that make up a foreclosure proceeding in the state of California, where Brewster’s property and mortgage are located. The statute includes numerous requirements relating to fees, establishing the causes for which they can be imposed, creating time limits on their imposition, and requiring them to be in reasonable amounts. *See, e.g.*, Cal. Civ. Code § 2924c. Because the state-law statutory definition of foreclosure contemplates the inclusion of specified fees as a part of the foreclosure proceeding, and because the United States Supreme Court has unambiguously required courts to give a broad construction to the statutory language of the SCRA to effectuate the Congressional purpose of granting active-duty members of the armed forces repose from some of the trials and tribulations of civilian life, we hold that the attempted collection of fees related to a Notice of Default on a California property constitutes a violation of § 533 of the Servicemembers Civil Relief Act.

Nationstar gained servicing rights on Brewster's mortgage in November 2010, while Brewster was on active-duty service. Over the next five months, while Brewster remained on active duty (and deployed overseas for a large portion of the time), Brewster alleges that they attempted to collect fees from him. Even though Nationstar did not issue the Notice of Default that began the foreclosure proceeding, Brewster has pled facts sufficient to allege that Nationstar's continuing failure to remove the fees incidental to the Notice of Default was a continuation of that foreclosure proceeding while Brewster was on active duty service in violation of § 533 of the Servicemembers Civil Relief Act.

The decision of the district court is **REVERSED** and the case is remanded for further proceedings consistent with this opinion.

## OFFICE RECEPTIONIST, CLERK

---

**To:** Melissa Huelsman  
**Cc:** Pamela Hamilton; katrina@glogowskilawfirm.com; kimberly@glogowskilawfirm.com; brian.lewis@klgates.com; lauren.sancken@klgates.com; david.lenci@klgates.com; benjaminr@atg.wa.gov; rlj@richardjoneslaw.com; hadaojd@gmail.com; matt.heyman@columbialegal.com; lilis@nwjustice.org; lisavonbiela@live.com; sheila@NWCLC.org; Francis, Rebecca; Burnside, Fred; Rummage, Steve; Cadley, Jeanne  
**Subject:** RE: Case # 89343-8 - Florence R. Frias v. Asset Foreclosure Services, Inc., et al. - Responsive Briefs

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**From:** Melissa Huelsman [mailto:mhuelsman@predatorylendinglaw.com]  
**Sent:** Tuesday, February 18, 2014 4:42 PM  
**To:** OFFICE RECEPTIONIST, CLERK  
**Cc:** Pamela Hamilton; katrina@glogowskilawfirm.com; kimberly@glogowskilawfirm.com; brian.lewis@klgates.com; lauren.sancken@klgates.com; david.lenci@klgates.com; benjaminr@atg.wa.gov; rlj@richardjoneslaw.com; hadaojd@gmail.com; matt.heyman@columbialegal.com; lilis@nwjustice.org; lisavonbiela@live.com; sheila@NWCLC.org; Francis, Rebecca; Burnside, Fred; Rummage, Steve; Cadley, Jeanne  
**Subject:** RE: Case # 89343-8 - Florence R. Frias v. Asset Foreclosure Services, Inc., et al. - Responsive Briefs

To the Clerk of the Court:

Attached please find for filing the following:

1. Ms. Frias' Response to Amicus Brief of the Washington Bankers Association, and attachments thereto.

Thank you for your assistance.

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