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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

DIANNE KLEM, as administrator of the estate of Dorothy Halstien,

Respondent/Cross Appellant,

vs.

WASHINGTON MUTUAL BANK, a Washington corporation, and

Defendant,

QUALITY LOAN SERVICE CORPORATION OF WASHINGTON, a
Washington corporation, and QUALITY LOAN SERVICE
CORPORATION, a California corporation,

Appellants/Cross Respondents.

**REPLY BRIEF OF RESPONDENT/CROSS APPELLANT DIANNE
KLEM, AS ADMINISTRATOR OF THE ESTATE OF DOROTHY
HALSTIEN**

NORTHWEST JUSTICE PROJECT
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I. INTRODUCTION

Any person who is injured . . . by a violation of RCW 19.86.020 [which prohibits unfair practices in trade or commerce] . . . may bring a civil action in superior court to enjoin further violations, to recover the actual damages sustained by him or her, or both together with costs of suit, including a reasonable attorney's fee.

RCW 19.86.090.

In addition to preserving the judgment in favor of Ms. Halstien's estate, which was based in part on the jury's verdict that the defendants engaged in unfair or deceptive business practices, the Respondent/Cross Appellant ("Klem") seeks to reverse the trial judge's denial of an injunction. So that other Washington homeowners will not experience damages similar to those suffered by Ms. Halstien, an injunction should issue against the defendants, Quality Loan Service Corporation and Quality Loan Service Corporation of Washington (together "Quality"). In particular, when it comes to whether a foreclosure sale should be postponed, Quality's practice as the "trustee" is to do only what it is instructed to do by the banks. (RP 357-58, 395.) Quality follows this practice even when a short postponement of only a few weeks would save substantial equity for a homeowner. For example, with the knowledge that Ms. Halstien's guardian had arranged for a \$235,000 sale, Quality sold Ms. Halstien's home -- her only asset -- while she was in a nursing home, for only \$83,087.67. (RP 127-33.)

II. CROSS APPELLANT'S STATEMENT OF CASE

Throughout its reply brief, Quality makes caustic accusations such as: plaintiff's witness told a "blatant lie;" and plaintiff's counsel is "disingenuous." Looking beyond the vitriol, Klem requests that the Court review the record cited in Respondent/Cross Appellant's opening brief, because there is substantial evidence supporting the jury's finding that Quality engaged in unfair business practices.

For example, while the record shows that there was a misunderstanding about who was answering the telephone at Quality's office on February 19, 2008, when David Greenfield called for the second time, it was not a "blatant lie" for Mr. Greenfield to assume that the male employee at Quality who answered this call was Seth Ott since the call was placed to Mr. Ott's telephone extension. (RP 303.) The important fact is not who answered the telephone at Quality but that there is evidence of the call being made, Quality being notified about the \$235,000 sale agreement, and Quality being asked to postpone the foreclosure sale. (RP 303-304.) Moreover, Mr. Greenfield kept contemporaneously prepared notes that confirm his telephone calls. (*See, e.g.* Ex. 23.) In contrast, Quality employees admitted that their records do not reflect all of the calls that they received. (RP 358-59.)

Similarly, it was not "irrelevant" or "inaccurate" for Klem's counsel to argue that Quality's predated and falsely notarizing the Notice of Sale shortened the foreclosure process. It is true that the Notice of

Default provided for 30 days of notice and the Notice of Sale provided for 90 days of notice. However, it is also true that the Notice of Sale was predated and falsely notarized so that it could be transmitted one week earlier than allowed by the Deed of Trust Act, and so that the trustee's sale could occur earlier than if the Notice of Sale was truthfully dated and notarized. (RP 198-99, Br. of Respondent/Cross Appellant at pp.12-14, RCW 61.24.030(8).)¹

Additionally, there are at least six other aspects of this case that should not be overshadowed by Quality's hyperbole. First, Quality Loan Service Corporation, a California corporation, was paid by Washington Mutual Bank to foreclose on Dorothy Halstien's home and it did so by supervising the work performed for it by people employed by its sister corporation, Quality Loan Service Corporation of Washington. (Ex. 18; RP 156-57, 192, 344-45.) Accordingly, there was substantial evidence submitted to the jury about the agency relationship between Quality Loan Service Corporation and Quality Loan Service Corporation of

¹ The Notice of Default was posted on October 25, 2007, so Quality was required to wait until November 26, 2007 (since the 25th was a Sunday) before the Notice of Sale could be "recorded, transmitted or served." (Ex. 81; RCW 61.24.030(8)). However, by November 19, 2007, the Notice of Sale was already predated, signed, falsely notarized, and "transmitted" from Quality's San Diego office to a third party to take care of filing it in Island County, Washington. (Ex. 73 and RP 166-67). In addition, the record shows that it can take Quality's agent a full week to get Notices of Sale from Quality's San Diego office to relatively remote recording offices like the one in Island County, Washington. (See Ex. 73 and Ex. 8). Therefore, if Quality was honest about dating and notarizing the document, the Notice of Sale may not have been recorded until about December 3, 2007. If the notice was recorded on December 3rd, the foreclosure could not have been scheduled before Friday, March 7, 2008, but instead the sale occurred on February 29, 2008. See RCW 61.24.040(1) and (5).

Washington.

Second, in conducting the Halstien foreclosure, Quality followed the written instructions from Washington Mutual Bank, which provides:

Your office is not authorized to postpone a sale without authorization from ... Washington Mutual.

(RP 215-21, RP 357-58; Ex. 12.)

Third, in all of the foreclosures it conducts, Quality defers its discretion as a trustee to the banks. Mr. Ott, the Quality employee who prepared the Notice of Sale for Ms. Halstien's home, twice confirmed this policy at trial. (RP 357-58 and 395.)

Fourth, Quality knew the tax assessed value of Ms. Halstien's house was \$256,000, had access to the bank's \$320,000 appraisal, and was informed of the \$235,000 purchase and sale agreement, but nonetheless allowed its subcontractor, Priority Posting and Publishing Company, to sell Ms. Halstien's home for \$83,087.67. (RP 261-63, 303-04, 355-56, Ex. 9.)

Fifth, Quality follows a policy of treating all foreclosures the same regardless of whether a homeowner has any equity. When Quality's Chief Operations Officer was asked at trial if anybody at Quality was concerned about the loss of homeowners' equity, his answer was "No." (RP 214-15.)

Finally, after weighing the evidence presented at trial, the jury found that Quality's business practices were in violation of Washington's Consumer Protection Act. (CP 1488-92.)

III. ARGUMENT

A. **Quality's response to the Cross Appeal demonstrates the need for an injunction.**

As pointed out to the trial court in connection with Klem's motion for an injunction, Quality continues to treat other Washington homeowners as it treated Ms. Halstien. (CP 1457-63.) Quality's position was summed up by its Chief Operations Officer after he was asked what he would have Quality's employees do differently in future situations that are similar to Ms. Halstien's case. He answered: "I would not have them do anything differently." (CP 401.) Moreover, Quality has remained steadfast in its position; in its latest brief to this Court, Quality claims that it "neither breached fiduciary duties nor acted in bad faith." (Reply Br. of Appellants/Cross Respondents, at p. 1.)

However, what Quality did in connection with the Halstien foreclosure was not in accordance with its "fiduciary duty" to take "reasonable and appropriate steps to avoid sacrifice of the debtor's property," which was the law at the time of the foreclosure. *See Cox v. Helenius*, 103 Wn.2d 383, 693 P.2d 683 (1985). In addition, its current actions are not in accordance with its "duty of good faith" to take "reasonable and appropriate steps to avoid sacrifice of the debtor's property," which is the current law. *See Cox, and* RCW 61.24.010(4) as amended by Laws of 2009, ch. 292 §7.

Pursuant to Washington's Deed of Trust Act, a trustee is a neutral

third party as between the borrower and the beneficiary. *Vawter v. Quality Loan Service Corp. of Washington*, 707 F.Supp.2d 1115, 1121 (W.D. Wash. 2010) citing 18 William B. Stoebuck & John W. Weaver, Washington Practice, Real Estate: Transactions §20.1 at 403 (2d ed. 2004) and John A. Gose, The Trust Deed Act in Washington, 41 Wash. L. Rev. 94, 96 (1966). Therefore, when confronted with a borrower who: (1) has a signed purchase and sale agreement that would allow the borrower to retain significant equity, and (2) who asks the trustee to postpone a trustee's sale in order to consummate the purchase and sale agreement, a trustee acts unreasonably and contrary to its duty of good faith if it defers its discretion to the banks and sells houses in a way that sacrifices the borrower's equity.²

Based on the foregoing, an injunction is necessary in this case. An injunction is appropriate where, as here, the defendants have not demonstrated that their wrongful behaviors have ceased. *See State v. Ralph Williams*, 87 Wn. 2d 298, 312, 553 P.2d 423 (1976).

B. Quality was not caught in a “Catch 22.”

Contrary to Quality's assertion, following the law is not impossible for trustees to do. Quality was not presented with a “Catch 22” between

² “Good faith” is commonly defined as “honesty and lawfulness of purpose.” *E.g., St. Paul Ins. Co. v. Onvia, Inc.*, 165 Wn. 2d 121, 129, 196 P.3d 664 (2008). However, the best way to determine if Quality's business practices meet that standard is to see if Quality's practices are in “bad faith.” This Court found that actions are in bad faith if they are “unreasonable, frivolous, or unfounded.” *Mutual of Enumclaw v. Paulson Construction*, 161 Wn. 2d 903, 916, 169 P.3d 1 (2007).

fulfilling its duties to Washington Mutual Bank (“WaMu”) and preserving Ms. Halstien’s equity. There were several courses of action that Quality could have taken to uphold its statutory duty to both the bank and the borrower.

First, if Quality had exercised discretion to postpone the foreclosure so that the \$235,000 sale could close (as any reasonable trustee would do), Ms. Halstien would have received sale proceeds of over \$150,000 **and** WaMu would have been paid all of its principal, interest, costs and fees. (RP 236-40.) The problem here is not that Quality was in a bind, but that it refused to exercise any discretion at all.

Second, Quality could have negotiated a contract with WaMu that did not require Quality to act in bad faith toward the borrower or it could have declined to work for WaMu. If Quality was in a bind, it was only in a bind because it promised WaMu that it would take actions that were inconsistent with the Deed of Trust Act.³

Third, once the contract with WaMu was in place, Quality could have actively sought the permission of the bank to postpone the sale. Unfortunately, Quality did nothing.

The instant case provides a textbook example of the reason that the Washington legislature requires that a neutral third party trustee facilitate

³ Of course. WaMu could always try to find a successor trustee, but Quality’s fear of losing a client is not a sufficient reason for it to agree to violate the law.

foreclosure sales.⁴ A bank acting on its own would not want to postpone a foreclosure sale. However, an independent third party weighing the interests of both the bank and the borrower would have the ability to determine that a short postponement of a foreclosure sale would have no negative impact on the bank, while providing a significant benefit for the borrower. In addition, Washington State taxpayers, who had to pay for Ms. Halstien's nursing home care when her life savings was needlessly squandered, would have benefited from a short postponement.

The proposed injunction will help to ensure that Quality's actions comply with its duties under the Deed of Trust Act. The injunction is the only way to ensure that in the future borrowers will not suffer from Quality's continued policies of ignoring its duties as a trustee.

C. The Cross Appeal is well founded.

The injunction claim is supported by the facts and law. In particular, as shown in the Respondent/Cross Appellant's opening brief and as further clarified below, the injunction claim: (1) was not barred by the Deed of Trust Act; (2) was never waived; (3) promotes the goals of the Deed of Trust Act; and (4) is supported by a statute and case law.

⁴The legislature intended for the trustees to make decisions about home foreclosures. Otherwise the legislature would have provided the banks with self-help remedies that are available for the repossession of cars and refrigerators. *Compare* RCW 61.24.020, with RCW 62A-609(a)(1).

1. The plaintiff's injunction claim was not barred by the Deed of Trust Act.

The Deed of Trust Act in effect at the time of the Halstien foreclosure did not have any provision that requires a homeowner to enjoin the foreclosure sale in order to preserve post-foreclosure claims, such as the injunction claim raised here. *See* Respondent/Cross Appellant's Br. at pp. 23-24. At the time of the Halstien foreclosure in February 2008, the only mention of waiver in the Act was in the prescribed form for the Notice of Trustee's Sale that provides that failure to bring a lawsuit "may result in a waiver of any proper grounds for invalidating the trustee's sale." RCW 61.24.040(1)(f). The word "may" is used instead of "shall," and the reference to "waiver" in the notice of sale is limited to situations where a claimant attempts to invalidate the trustee's sale, which is not the case here.⁵

The recent amendments to the Deed of Trust Act did not change "may" to "shall" in the form for the Notice of Trustee's Sale. *See* Laws of 2009, ch. 292 § 6, which are now codified as RCW 61.24.040(1)(f). In addition, the 2009 amendments discussed for the first time "non-waived claims," and the new law expressly provides that damage claims that are based on the Consumer Protection Act or on the "failure of the trustee to

⁵ Halstien's representative was mindful of the Deed of Trust Act's objectives, which include protecting the stability of land titles. Therefore, the plaintiff never attempted to invalidate the sale. *See Cox v. Helenius*, 103 Wn.2d 383, 387, 693 P.2d 683 (1985).

materially comply with the provisions of this chapter [the Deed of Trust Act]” are not waived by the failure to enjoin a sale. *See* RCW 61.24.127(1).⁶

Thus, pursuant to the Deed of Trust Act, the plaintiff’s claims were not waived and the statute cannot be stretched to reach such a result because:

[T]he [Deed of Trust] Act must be construed in favor of borrowers because of the relative ease with which lenders can forfeit borrowers’ interest and the lack of judicial oversight in conducting nonjudicial foreclosure sales.

Udall v. T.D. Escrow Servs., Inc., 159 Wn.2d 903, 915-16, 154 P.3d 882 (2007).

In *Udall*, the bank instructed the trustee to open with a credit bid of \$159,421.20, but the trustee mistakenly opened the bidding at \$59,421.20 (\$100,000 less). Mr. Udall, who bid one dollar more than the opening bid, was the high bidder. The trustee took Mr. Udall’s payment and gave him a receipt, but after the trustee later learned of its bid mistake, the trustee refused to issue a deed. Mr. Udall filed a lawsuit to force the trustee to issue him a deed. This Court rejected the trustee’s defense that the mistake should excuse it from issuing a deed to Mr. Udall. The Court held

⁶ RCW 61.24.127(1), which was enacted in 2009, provides that the failure of the borrower or grantor to bring a civil action to enjoin a foreclosure sale under this chapter “**may not be deemed a waiver**” of a claim for damages based on: “(a) Common law fraud or misrepresentation; (b) A violation of Title 19 RCW [which includes the Consumer Protection Act]; or (c) Failure of the trustee to materially comply with the [this text isn’t showing in the draft provisions of this chapter.” *See* Laws of 2009, ch. 292 § 6 (emphasis added).

that the Deed of Trust Act was not promulgated to protect trustees from negligence claims. *Id.* at 916.

While it is true that the Court in *Udall* looked at the relationship of the bid price to the fair market value of a property to determine if a sale should be set aside, the Court noted that no harm was caused to the borrower because there would be no surplus proceeds available for the borrower in any event. *Id.* at 915. The *Udall* case undercuts Quality's arguments because Klem never attempted to invalidate a sale, Ms. Halstien had equity in her home, and the *Udall* Court held that trustees have to bear the costs associated with their mistakes.

2. *There was substantial evidence to support the finding that there was no waiver of the injunction claim.*

The determination of waiver is a mixed question of law and fact; however, “[w]hether facts on which a waiver claim is based have been proved, is a question for the trier of fact....” *Brundridge v. Fluor Fed. Servs.*, 164 Wn.2d 432, 441, 191 P.3d 879 (2008). Therefore, because there is no statutory waiver of the injunction claim (or the damage claim), the “waiver” question at issue in this case becomes a question of fact.

The waiver question was repeatedly raised in the trial court and the answers undermine Quality's claim of waiver. Quality asked both the jury and the judge to determine if the plaintiff's claims were waived, and on each occasion the answer that came back was in essence: “No waiver.” (CP 1488-92, 1580-81.)

The burden was on Quality to prove its affirmative defense of waiver. However, Quality failed to even propose a jury instruction that set forth the elements of waiver, and never asked for a specific waiver finding to be included in the agreed upon verdict form. Instead, Quality merely argued that the jury should not reach a verdict for the plaintiff because the plaintiff's claims were waived. (CP 1303-12, 1393-1409; RP 493-94.) Quality's waiver argument was then rejected by the jury when the jury found that the plaintiff was entitled to \$151,912.33 of damages. (CP 1491-92.)

Similarly, Quality did not specify what findings it wanted the trial court judge to make with respect to the affirmative defense of waiver, but in its motion for a judgment notwithstanding the verdict, it asked for the trial court to reject the jury's verdict on the ground that the plaintiff's claims were waived. (CP 1493-1507.) The trial judge, like the jury, rejected Quality's argument. (CP 1580-81, 1582-84.)

It is well settled that when findings of fact are supported by evidence, they will not be disturbed on appeal. *See State v. Williams*, 96 Wn.2d 215, 220, 634 P.2d 868 (1981). (See, e.g., RP 75, 103, 127-29, 352-53.) Therefore, the findings that there was no waiver of claims cannot be overturned because they are supported by substantial evidence. (RP 63-108.)

3. *The injunction would promote the objectives of the Deed of Trust Act.*

The defense raised by the trustee in the *Udall* case was rejected, at least in part, because the trustee's refusal to issue a deed would undermine public confidence in the finality of the foreclosure process. *Udall v. T.D. Escrow Servs., Inc.*, 159 Wn.2d 903, 916, 154 P.3d 882 (2007). Similarly, Quality's defense to the injunction claim in this case should fail because it is inconsistent with another objective of the Deed of Trust Act -- preventing wrongful foreclosures. The three objectives of the Deed of Trust Act are: (1) to make the nonjudicial foreclosure process "efficient and inexpensive;" (2) to "provide an adequate opportunity for interested parties to prevent wrongful foreclosure;" and (3) to "promote the stability of land titles." *See Cox v. Helenius*, 103 Wn.2d 383, 387, 693 P.2d 683 (1985).

With respect to the first goal of keeping the process efficient and inexpensive, the plaintiff has never argued for any foreclosure procedures that would require the banks or the trustees to suffer any additional expenses or delays that would not be covered by the homeowner. As demonstrated at trial, the cost of postponing the Halstien foreclosure would have only been \$50, and this cost, like interest accruing on the loan during the duration of the postponement, would have been paid out of the homeowner's proceeds from the sale. (RP 262-63.) Therefore, if Quality was forced to follow the law and take reasonable steps to avoid the

sacrifice of equity, the occasional short delays in the foreclosure process that may result would not cost the banks or Quality anything and would preserve substantial equity for homeowners. (RP 131.) Further, if speedy and cheap foreclosures were the only goals, which they are not, then the legislature would not have required that nonjudicial foreclosures be conducted by a third party trustee. The legislature recognized that homeownership is unique and that there must be more protections in home foreclosures than when creditors exercise repossession rights in other types of secured transactions.

Second, this lawsuit, and in particular the injunction claim, is based on the second goal of the Deed of Trust Act, which is to “provide an adequate opportunity for interested parties to prevent wrongful foreclosure.” *Id.* This goal is promoted by the three operative parts of the proposed injunction. (CP 1573.)⁷ Moreover, even if the injunction proposed to the trial court is considered by this Court to be too broad or

⁷ The text of the previously proposed injunction is:

In connection with acting as a trustee for deeds of trusts on Washington property, Quality Loan Service Corporation and Quality Loan Service Corporation of Washington will: (a) treat both the borrower and the lender in good faith; (b) take reasonable and appropriate steps to avoid sacrifice of the homeowner’s property; and (c) refuse to follow instructions from any lender that require them to obtain lender approval prior to postponing a foreclosure sale. Subsection (c) does not preclude Quality Loan Service Corporation or Quality Loan Service Corporation of Washington from considering the interests of lenders prior to exercising discretion on when to postpone a foreclosure sale; however, they are not allowed to defer the exercise of that discretion to any lender.

vague, the trial court should have crafted a more narrowly tailored injunction or invited the parties to submit alternative language rather than dismissing the plaintiff's motion. For example, Klem would not object to a simplified injunction order that provides as follows:

Quality, when acting as the trustee on a deed of trust against property located in Washington, is hereby enjoined and restrained from failing to consider in good faith a borrower's request for a postponement of a foreclosure sale when: (a) it has been informed that the borrower has a signed agreement to sell the subject property for a price sufficient to pay the bank in full for all of its principal, interest and costs; or (b) it has been informed that the borrower has some other means to promptly pay the bank in full for all of its principal, interest and costs.

Lastly, regarding the third objective of the Deed of Trust Act, to protect the stability of land titles, Klem did not name the purchaser of the property as a defendant and never attempted to revoke the deed issued to the purchaser.

In conclusion, the relief requested by Klem, including the injunction, is consistent with the objectives of the Deed of Trust Act.

4. *The injunction is supported by the Consumer Protection Act and the decisions of this Court.*

A party is entitled to relief under the Consumer Protection Act ("CPA") if it can prove five elements. *See, e.g., Hangman Ridge Training Stables, Inc. vs. Safeco Title Ins. Co.*, 105 Wn.2d 778, 784-85, 719 P.2d 531 (1986). Further, Quality concedes that Klem proved three of the five elements at trial. Quality argues that Klem "failed to prove an unfair or deceptive act or practice (element one) that caused injury to Ms. Halstien

(element five).” Reply Br. of Appellants/Cross Respondents, at p. 27.

Regarding the first element, Klem proved at trial that Quality engages in unfair or deceptive acts including doing only what it is told to do by the banks when it comes to postponing foreclosure sales, and treating all foreclosures the same whether or not there is equity. (RP 214-21, 357-58.) In addition, even though Quality says that it no longer falsely notarizes documents, the fact that it did so in the Halstien foreclosure is a fact that supports the first element of the claim for damages under the CPA.

Klem also satisfied the fifth element because she proved that Quality caused injury to Ms. Halstien. If Quality had exercised independent discretion and had taken reasonable efforts to avoid sacrificing Ms. Halstien’s equity, Ms Halstien’s house would not have been sold for \$83,087.67, and Ms. Halstien would not have suffered \$151,912.33 of damages.

All five elements of the CPA were thus satisfied, and since Quality’s unfair practices are continuing, the entry of an injunction would be consistent with the purpose of the CPA, which is “to protect the public.” *Hockley v. Hargitt*, 82 Wn.2d 337, 350, 510 P.2d 1123 (1973). To that end, the Court in *Hockley* stated that the Act “shall be liberally construed that its beneficial purposes may be served.” *Id.*

D. The trial court abused its discretion when it denied issuing an injunction.

A trial court generally exercises considerable discretion in deciding whether to issue injunctive relief. Nevertheless, Klem argues that the trial court abused that discretion because proper discretion requires the issuance of an injunction where all the prerequisites for a statutorily authorized injunction have been satisfied, and the defendants have not shown any interest in voluntarily terminating their unfair or deceptive practices. *See, e.g. State v. Ralph Williams*, 87 Wn. 2d 298, 312, 553 P.2d 423 (1976); and *United States v. Buttorff*, 761 F.2d 1056 (5th Cir 1985).

E. The basis for the injunction claim is the Consumer Protection Act.

In RCW 7.40.020 – a statute that predates the founding of our state and was most recently amended in 1881 – the legislature codified the equitable requirements for an injunction. The legislature subsequently provided alternative bases for injunctions, such as those delineated in the CPA. In particular, the CPA states that “[a]ny person who is injured ... by a violation of RCW 19.86.020 [which prohibits unfair practices in any trade or commerce] . . . may bring a civil action in Superior Court to enjoin further violations.” RCW 19.86.090.

In its reply brief, Quality accurately paraphrases the elements required for the issuance of an injunction pursuant to RCW 7.40.020:

A petition seeking an injunction must show (1) a clear legal or equitable right, (2) a well-grounded fear of immediate invasion of that right, and (3) that the acts complained of either are resulting in or will result in actual and substantive injury to the plaintiff.

(Reply Br. of Appellants/Cross-Respondents at p. 33 (citations omitted).)

However, an injunction under the CPA is not directly subject to the same requirements. *See Dix v. ICT Group, Inc.*, 160 Wn.2d 826, 837, 161 P.3d 1016 (2007) (citing *Hockley*, 82 Wn.2d at 349-50); *Scott v. Cingular Wireless*, 160 Wn.2d 843, 853, 161 P.3d 1000 (2007) (citing *Hangman Ridge Training Stables, Inc. vs. Safeco Title Ins. Co.*, 105 Wn.2d 778, 790, 719 P.2d 531(1986); and *Hockley*, 82 Wn.2d at 349-50).

In *Dix*, this Court explained that since the CPA is to be “liberally construed that its beneficial purposes may be served,”

[t]he private right of action to enforce RCW 19.86.020 is more than a means for vindicating the rights of the individual plaintiff. In order to prevail in a private action under the CPA, the plaintiff must show that the challenged acts or practices affect the public interest. That the private right of action is for the purpose of enforcement for the public as a whole is also demonstrated by **the fact that a private consumer can obtain injunctive relief even if that injunction would not affect that particular consumer’s private interests.**

160 Wn.2d at 836,837 (citations omitted and emphasis added).

Similarly, in the *Scott* case, this Court explained that, “[c]onsumers bringing actions under the CPA do not merely vindicate their own rights; they represent the public interest and may seek injunctive relief even when the injunction would not directly affect their own private interests.” 160

Wn.2d at 853 (citations omitted).

By holding that, pursuant to the CPA, an injunction does not require the party seeking it to be facing further threat of personal injury, this Court has implicitly held that the requirements for an injunction under RCW 7.40.020 are not directly applicable to one sought under the CPA in RCW 19.86.090. Pursuant to the CPA, if a party can be made whole by money damages alone, they cannot meet the second and third element of RCW 7.40.020. Nevertheless, as set forth in *Dix* and *Scott*, that party can still obtain an injunction if it establishes the elements of a CPA claim. 160 Wn.2d at 837; 160 Wn.2d at 853.

Because in the instant case all elements of the CPA damage claim were established, and Quality's unfair practices (that provided the basis for that damage claim) persist, an injunction should issue.

F. RCW 61.24.040(6) can be read in harmony with RCW 61.24.010(4).

In considering the recent changes to the Deed of Trust Act which were made in 2008 and 2009, the Court should review them together, because statutes should be read in harmony "so as to give force and effect to each." *Harman v. Building Department*, 106 Wn.2d 32, 36, 720 P.2d 433 (1986). Moreover, if the plain meaning of the statutes is to be followed, they have to be read together, because the 2009 amendments changed sections of the Act that were first added by the 2008

amendments.⁸

In 2008, the “fiduciary” standard was changed to one of impartiality. *See* RCW 61.24.010(3) and (4). The legislature in 2008 also added text to the section that states that a trustee has discretion to postpone foreclosure sales. In addition to the trustee’s ability to postpone a sale “for any cause the trustee deems advantageous,” RCW 61.24.040(6) has provided, since July 12, 2008, that the trustee has “no obligation” to continue a sale.

While the timing of the recent addition of the “no obligation” language makes that addition irrelevant to the plaintiff’s damage claims in this case, the current law is relevant to the scope of the proposed injunction. However, the 2008 amendment does not mean that trustees are now excused from acting in good faith when it comes to avoiding the sacrifice of a borrower’s equity.

In 2009, in the first legislative session following the change to RCW 61.24.040(6), RCW 61.24.010(4) was amended to reflect that the duty of a trustee involves more than just being impartial. The legislature made clear that the trustee “has a duty of good faith to the borrower, beneficiary, and grantor.” RCW 61.24.010(4). Accordingly, while

⁸*See* Laws of 2008, ch. 153 § 1, effective June 12, 2008, which modified RCW 61.24.010 by adding subsections (3) and (4); and Laws of 2009, ch. 292 § 7, effective July 26, 2009, which stated that the duty owed by a trustee to a borrower is a duty of good faith, as opposed to a fiduciary duty.

trustees are given great discretion in conducting foreclosure sales, including whether to postpone a sale, the trustees must exercise that discretion in “good faith.”

In the instant case, the plaintiff is seeking to enjoin Quality’s behavior not because of *how* Quality exercises its discretion, but because it *refuses* to exercise discretion. Rather than treating the borrower in good faith, Quality has acted in bad faith by delegating its discretion to the banks, thereby unreasonably causing homeowners like Ms. Halstien to suffer a substantial loss of equity.⁹

Even if RCW 61.24.010(4), which requires the trustee to act in good faith, was determined to be inconsistent with the discretion that RCW 61.24.040(6) provides with respect to postponing a foreclosure sale, the trustee’s duty of good faith still controls for at least four reasons.

First, the legislature was aware that this Court reviewed the Deed of Trust Act in 1985 and concluded that a trustee must “take reasonable and appropriate steps to avoid sacrifice of the debtor’s property.” *See Cox v. Helenius*, 103 Wn.2d 383, 389, 693 P.2d 683 (1985). However, since 1985, the legislature has never changed the law in a way that would eliminate the trustee’s obligation to take reasonable and appropriate steps

⁹ When the Deed of Trust Act was adopted in 1965, the independent oversight of a judge was replaced with that of a trustee. If a trustee thus chooses to listen to only one of the parties, as Quality has chosen to do, the resulting situation is analogous to a trial judge listening only to the plaintiff or the defendant, but not both.

to protect homeowner's equity. As explained above, the legislature changed the description of the trustee's duty from "fiduciary" to "good faith," but it did not change this Court's directive that in exercising its duty, the trustee must "take reasonable and appropriate steps to avoid sacrifice of the debtor's property." *Id.*

Thus, pursuant to the applicable law at the time of the Halstien foreclosure, the trustee had a fiduciary duty to avoid sacrifice of the debtor's property. Under the current law, the trustee has a duty of good faith to avoid the sacrifice of the debtor's property. Pursuant to either standard, Quality's actions are improper.

Second, independently making the decision to postpone the sale is not the only thing Quality could have done to protect Ms. Halstien's interests. For example, Quality had direct lines of communication with WaMu and could have contacted the bank and explained that selling the house at foreclosure on February 29, 2008 was not a good idea; there is no evidence that Quality ever made such contact after learning of the \$235,000 sale agreement. Moreover, Quality's Chief Operation's Officer testified that Quality never had any problems communicating with WaMu and that when Quality asked the bank for permission to postpone a sale, the request was granted. (RP 270.) This testimony supports the conclusion that it was unreasonable for Quality's representative to do nothing and to tell Ms. Halstien's guardian something to the effect of "don't talk to us." (RP 300.)

Third, the “good faith” requirement was the most recent change to the Act. Therefore, if this requirement is inconsistent with RCW 61.24.040(6), it must be presumed to be the intent of the legislature because it is the more recent law. It is a general rule of statutory construction that the later-adopted statute is given preference. *E.g., Bailey v. Allstate Insurance Co.* 73 Wn. App. 442, 446, 869 P.2d 1110 (1994).

Fourth, construing the statutes in a way that gives effect to the legislature’s directive that trustees treat homeowners in good faith is consistent with the specific rule of construction that this Court has established for the Deed of Trust Act. As noted above, this Court has held:

The [Deed of Trust] Act must be construed in favor of borrowers because of the relative ease with which lenders can forfeit borrowers’ interest and the lack of judicial oversight in conducting nonjudicial foreclosure sales.

Udall v. T.D. Escrow Servs., Inc., 159 Wn.2d 903, 915-16, 154 P.3d 882 (2007).

G. An injunction can issue against the California defendant and its Washington agent.

Washington courts have jurisdiction to enter the injunction against Quality Loan Service Corporation, a California corporation, and Quality Loan Service Corporation of Washington, a Washington corporation, because the Washington corporation does business in this state as the agent of the California corporation. (CP 1488.)

The jury reviewed the facts, was instructed on the law of agency, and then found that an agency relationship existed between the California corporation and the Washington corporation.¹⁰ Therefore, under Washington law, Washington courts have jurisdiction over both defendants. In particular, RCW 4.28.185(1) provides, in pertinent part, that any person who transacts business in this state through an agent “...thereby submits to the jurisdiction of the courts of this state to any cause of action arising from the doing of any said acts.”

H. The Respondent/Cross Appellant is entitled to attorney fees incurred on appeal.

In the last section of its response to the Cross Appeal, Quality argues that Klem’s additional attorney fee award should be limited to 10% of the value of the services performed on appeal because, in Quality’s opinion, only 10% of the Respondent/Cross Appellant’s initial brief was related to the CPA claims. Quality has no support for its page counting argument, and even if it did, it incorrectly counted the pages.

Most of the facts and law cited by the Respondent/Cross Appellant are in support of the argument that Quality’s unfair acts and practices are in violation of the CPA and therefore give rise to the viable claims for damages and an injunction. In fact, only three and one-half pages of the Respondent/Cross Appellant’s 50-page brief, which are the pages that deal

¹⁰ The substantial body of facts, which support the agency finding made by the jury, is summarized at pages 9 and 10 of the Brief of the Respondent/Cross Appellant.

with the plaintiff's successful breach of contract claim, are arguably independent from the CPA-based claims. Moreover, if the attorney fees clause in the deed of trust was reciprocally applied for the benefit of the borrower, the Respondent/Cross Appellant would be entitled to attorney fees based on the breach of contract claim as well. *See* Ex. 9 at ¶ 26.

In sum, it was the plaintiff who prevailed at trial, and if the plaintiff can preserve the judgment on appeal, the plaintiff (who is now the Respondent/Cross Appellant) is entitled to an additional award equal to the full value of the attorney services provided in connection with the appeal. *See* RCW 19.86.090 and RAP 18.1.

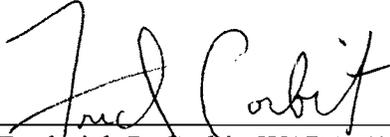
IV. CONCLUSION

For the reasons set forth above, and as set forth in the Respondent/Cross Appellant's initial brief, the administrator of Ms. Halstien's estate respectfully requests that this Court: (i) affirm the trial court's entry of the Judgment against both Quality Loan Service Corporation and Quality Loan Service Corporation of Washington; and (ii) reverse the trial court's decision to deny the injunction.

RESPECTFULLY SUBMITTED this 22nd day of November, 2010.

NORTHWEST JUSTICE PROJECT

By


Frederick P. Corbit, WSBA #10999
On behalf of Halstien's Representative,
the Respondent/Cross Appellant