

72065-1

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**IN THE COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON**

**No. 72065-1-1**

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WILLIAM AND SHALAWN LEAHY, a married couple, as their community  
property,

Appellants,

vs.

QUALITY LOAN SERVICES OF WASHINGTON,

Respondent.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF KING

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**RESPONSE BRIEF OF APPELLANTS**

*Reply*

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### WASHINGTON CASES

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5.	<i>Watson v. Northwest Trustee Services, Inc.</i> , No. 69352-2-1 (2014).	8, 9, 10

### STATUTORY PROVISIONS

#### **RCW Chapter 61.24 (Washington Deeds of Trust Act)**

1.	RCW 61.24.030(8)	4, 5, 12
2.	RCW 61.24.031(1)(a) and (5)	4, 12
3.	RCW 61.24.031(7)(a)	12
4.	RCW 61.24.040(1).	4
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- 6. RCW 61.24.040(6) 5, 6, 8, 11
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## ARGUMENT

### A. **WDTA requirements for non-judicial foreclosure.**

Under the Washington Deeds of Trust Act (WDTA), unless specifically exempted, *a lawful* non-judicial foreclosure sale of *non-owner-occupied*, residential real property requires the foreclosure trustee to provide two statutory notices prior to the actual sale: (1) a notice of default (“NOD”) (RCW 61.24.031(1)(a) and (5)); and (2) a notice of trustee’s sale (“NOTS”) (RCW 61.24.030(8)). These notices are mandatory, and the requirement that they be provided must be strictly adhered to. *Udall v. T.D. Escrow Services, Inc.*, 159 Wn.2d 903, 915-16 (2007); *See also Bain v. Metropolitan Mortgage Group, Inc.*, 175 Wn.2d 83 (2012); and *Schroeder v. Excelsior Management Group, LLC*, 177 Wn.2d 94 (2013).

The trustee must wait a minimum of 30 days after the NOD is issued before recording a NOTS. *RCW 61.24.030(8)*. The NOTS contains a provision that sets the date of sale. And unless the facts of a case fit a specific statutory exemption, the sale must be set for a date that is at least 90 days after the date upon which the NOTS is recorded. *RCW 61.24.040(1)*.

**B. The trustee may not conduct a foreclosure sale more than 120 days after the originally-scheduled foreclosure sale date without re-issuing the statutory notices.**

After the sale date is lawfully set, the trustee is authorized to continue the sale for a maximum of 120 days. RCW 61.24.040(6). If the sale does not occur within 120 days of the originally-scheduled sale date, the sale is discontinued by operation of law. As the Washington Supreme Court stated in *Albice v. Premier Mortgage Services of Washington, Inc.* 174 Wn.3d 560, 568 (2012):

When a party's authority to act is prescribed by a statute and the statute includes time limits, as under RCW 61.24.040(6), ***failure to act within that time violates the statute and divests the party of statutory authority. Without statutory authority, any action taken is invalid.*** As we have already mentioned and held, *under this statute, strict compliance is required. Udall*, 159 Wn.2d at 915-16. Therefore, strictly applying the statute as required, we agree with the Court of Appeals and *hold that under RCW 61.24.040(6), a trustee is not authorized, at least not without reissuing the statutory notices, to conduct a sale after 120 days from the original sale date, and such a sale is invalid.*

Here, Premier issued the notice of trustee's sale listing the sale date as September 8, 2006. Premier held the actual sale on February 16, 2007, **161 days** from the original sale date in violation of the statute and divesting its statutory authority to sell. The sale was invalid.

**C. The sale of Appellant's residence violated RCW 61.24.030(8) because it occurred more than 120 days after the original sale date and because the trustee cancelled the statutorily-mandated NOD twice before the sale occurred.**

Pursuant to RCW 61.24.030(8) the trustee is *required* to issue a notice of default (“NOD”) at least 30days *before* a NOTS is recorded. Between July 21, 2010 and September 19, 2012 three NOTS’s were recorded. Each of the three NOTS’s relied on the same antecedent NOD; the NOD issued on April 9, 2010. Thus, NOTS2 and NOTS3 were attempts to extend the sale date originally set by NOTS1.

NOTS1 set the original sale date as October 22, 2010. Accordingly, the last date on which Appellant’s property could be sold lawfully as part of the NOTS1 foreclosure proceeding was February 19, 2011 -- the 120<sup>th</sup> day after the original sale date. *See RCW 61.24.040(6)*.

NOTS2 set a November 9, 2012 sale date. November 9, 2012 was **748 days after the original October 22, 2010 sale date**; more than 4 times as many days after the original sale date as the number of days after the original sale date – 161 – the sale occurred in *Albice*. If a sale **161 days** after the original sale date was sufficient to invalidate the sale in *Albice*, then surely a sale **748 days** after the original sale date in this case would have been sufficient to invalid a November 9, 2012 sale. But the sale in this case did not occur on November 9, 2012.

NOTS3 set January 18, 2013 – the date on which the property actually sold -- as the sale date. January 18, 2013 was **818 days after the**

**original sale date.** Eight hundred and eighteen days is more than five times as many days after the original sale date as the **161 days** that were sufficient to invalidate the sale in *Albice*.

Moreover, in addition to being discontinued by operation of law because of the failure to sell the property within 120 days of the original sale date, the sales set by both NOTS1 and NOTS2 were *voluntarily* discontinued by the trustee before the January 18, 2013 sale occurred.

On January 17, 2013, Quality discontinued the sale set by NOTS1; and on September 28, 2012 Quality discontinued the sale set by NOTS2. By discontinuing the sale associated with NOTS1, the trustee discontinued each step in the process that led to the recording of NOTS1. One of those steps was the issuance of the April 9, 2010 NOD. Similarly, by discontinuing the sale associated with NOTS2, the trustee discontinued each step in the process that led to the recording of NOTS2. One of those steps was the issuance of the April 9, 2010 NOD. Consequently, the April 9, 2010 NOD, in addition to being cancelled by operation of law on February 20, 2011, was voluntarily cancelled **twice** by the trustee before the sale occurred on January 18, 2013.



**D. Under *Watson v. Northwest Trustee Services, Inc.* the trustee was required to issue a new NOD prior to recording NOTS3.**

Like Quality in this case, the foreclosure trustee in *Watson v. Northwest Trustee Services, Inc.*, No. 69352-2-1 (2014) voluntarily discontinued a foreclosure sale. In that case, the original sale was scheduled for June 24, 2011 and was eventually discontinued. *Watson*, No. 69352-2-1 at 7.

In analyzing the *Watson* case, this Court first determined that RCW 61.24.040(6) allowed continuance of a sale “for no more than 120 days, or until October 22, 2011.” *Id.* Then the Court made the following observation: “After that date, the DTA required a ***new notice***. Therefore, although NWTS labeled its second notice an ‘amended’ notice of trustee’s sale, this notice necessarily scheduled ***a new sale***. Because NWTS recorded the ‘amended’ notice in November 2011, ***the notice requirements of the FFA applied.***” *Id.* (Bolding and italics added).

In pertinent part, the facts in this case are virtually identical to the facts in *Watson*. Like the trustee in *Watson*, Quality set an original sale date and then failed to sale Appellant’s property within 120 days following that original sale date. And Quality argues that there is never a need to re-issue a NOD. The trustee in *Watson* made the same argument. Northwest Trustee Services, Inc. maintained there was no need to issue the

statutory notices required by the Foreclosure Fairness Act (“FFA”) because the NOD was issued before the FFA became law, and the second NOTS – which was recorded after the FFA became law -- was tied to the original NOD.

The *Watson* Court rejected the argument because the trustee recorded the second NOTS more than 120 days after the original sale date. Because the second NOTS was recorded more than 120 days after the original sale date, the second NOTS was not a continuation of the original attempt to foreclose. The same flaw exists in Respondent’s argument herein.

Respondent recorded two NOTS’s after recording NOTS1. Each subsequent NOTS – NOTS2 and NOTS3 – was recorded more than 120 days after the original sale date. As a result, just as in the *Watson* case, new notices were required.

**E. *Watson* establishes the notices that must be re-issued if the sale occurs more than 120 days after the original sale date.**

On page 6 of the opinion, the *Watson Court* states the FFA’s notice requirements:

Under the FFA it ‘shall be requisite to a trustee’s sale’ that a **written notice of default** containing specific information set forth in the statute first be transmitted by the beneficiary or the trustee to the borrower. A trustee,

beneficiary, or authorized agent may not issue this *notice of default* until 30 days after satisfying certain due diligence requirements. The beneficiary or agent first must *send a letter* that includes information such as the borrower's right to meet with a HUD-approved housing counselor or attorney who can help with mediation, assist in arranging a meeting with the lender or work toward a resolution such as a loan modification.

*Watson*, No. No. 69352-2-1 at 6.

The *Watson* Court then made it exceedingly clear – as had the Supreme Court in *Albice* -- that all of the notice requirements of the FFA (including the issuance of a new NOD) must be re-met if a new sale date is set that is more than 120 days after the original sale date:

Because NWTS failed to comply with the *FFA's notice requirements before recording its November 2011 notice of trustee's sale*, the Watsons have demonstrated issues of material fact regarding the lawfulness of NWTS's nonjudicial sale of the Watsons' property. NWTS has failed to establish grounds for discretionary review. We dismiss the petition for review.

*Id.* at 7. (Emphasis added).

In other words, in an *owner-occupied* context, the foreclosing entity must issue a new “pre-foreclosure letter” and NOD *before* recording the NOTS if a sale is set to occur more than 120 days after the originally-scheduled sale date. And in a *non-owner-occupied* context, the foreclosing entity must issue only a new NOD before recording the NOTS because the WDTA requires “pre-foreclosure letters” to be sent only to borrowers who reside in the foreclosed upon residential real property.

**F. Summary dismissal was not warranted.**

At the trial level, to avoid summary dismissal, Appellants needed to show there were one or more material facts in dispute. The arguments contained herein, and in Appellants' Opening Brief, clearly establish that facts material to the outcome of the case are in dispute. Summary judgment should have been denied.

Moreover, Appellants have done more than establish merely that facts material to the outcome of the case are in dispute. Appellants have established that their property was sold in violation of the WDTA's non-waivable requirement that a new NOD be issued prior to the recording of NOTS3. Accordingly, Appellants are entitled to a reversal of the lower court's summary dismissal of their case. Appellants are also entitled to have this Court instruct the lower court to enter judgment in favor of Appellants on Appellants' FFA claim and to reinstate the CPA claim.

**G. The NOD expires with the foreclosure proceeding of which it is a part.**

Respondent argues Appellant can point to no provision in the WDTA that places an expiration date on a NOD. Respondent is wrong. In the owner-occupied context, RCW 61.24.040(6) places an expiration date on the pre-foreclosure letter, the NOD, and the NOTS. And in the *non-*

*owner-occupied* context, the same statutory provision places an expiration date on the NOD and the NOTS. That date is the 121<sup>st</sup> day after the originally-scheduled sale date.

On the 121<sup>st</sup> day after the originally-scheduled sale date, the legal effectiveness of each of the mandatory steps in the foreclosure proceeding terminates because those steps are integral parts of a terminated foreclosure proceeding. Thereafter, if the trustee wishes to conduct a new foreclosure proceeding, the WDTA tells the trustee precisely what procedure must be followed.

In an *owner-occupied* context, the trustee must: (1) send a “pre-foreclosure letter (RCW 61.24.031(1)(a) and (5));” (2) wait at least 30 days (if borrower does not request mediation) and issue a NOD (*Id.*); (3) wait at least an additional 30 days before recording a NOTS (RCW 61.24.030(8)); and (4) wait at least 120 additional days before selling the property (RCW 61.24.040(1)(a)). In a *non-owner-occupied* context, the trustee must follow precisely the same steps in the same order except a “pre-foreclosure letter” need not be sent (RCW 61.24.031(7)(a)); and, after recording the NOTS, the trustee need wait only 90 days before selling the property (RCW 61.24.040(1) and 61.24.031(7)(a)).

The WDTA authorizes a single foreclosure procedure that applies to all, new non-judicial foreclosures that are not specifically exempted from compliance. The procedure has three or, alternatively, four steps depending on the homeowner's residence status. In any *new* foreclosure<sup>1</sup> the issuance of a NOD is one of those steps. Since any non-judicial foreclosure that takes place more than 120 days after the originally-scheduled sale date is a *new* foreclosure, any foreclosure that takes place more than 120 days after the originally-scheduled sale date requires the issuance of a new NOD before the trustee is authorized to record a NOTS.

**H. *Meyers Way v. University Savings Bank* does not apply to this case.**

In its Reply Brief, Respondent cites *Meyers Way v. University Savings Bank*, 80 Wa. App. 655, 910 P.2d 1308 (1996), in support of its assertion that a new NOD is not required. *Meyers Way* does not apply to this case. *Meyers Way* was a bankruptcy case. As such, the trustee was exempted by RCW 61.24.130(4) from complying with the general non-judicial foreclosure procedures. Instead, the specialized procedure recited in 61.24.130(4) is the appropriate procedure.

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<sup>1</sup> We are not talking about the situation in which a trustee continues the sale for less than 120 days and then reschedules the sale for a date that is within 120 days of the original sale date. We also are not talking about the factual situations that are made exemptions to the general rule by RCW 61.24.130(3) and (4). The exemptions in RCW 61.24.130(3) and (4) do not touch the facts in this case, and the sale did not occur within 120 days of the original sale date.

The case before this Court is not a bankruptcy case. Hence, the procedures set out in RCW 61.24.130(4) do not apply to this case.

As for *US Bank National Ass'n v. Woods*, I2012 US Dist. LEXIS 78676 (W.D. Wash. June 6, 2012), the Federal District Court for the Western District of Washington has had great difficulty interpreting the WDTA over the past few years. See *Bain v. Metropolitan Mortgage Group, Inc.*, 175 Wn.2d 83 (2012). In *US Bank National Ass'n* the district court simply misinterpreted yet another provision of the WDTA.

**I. *Schroeder v. Excelsior Management Group, LLC*, 177 Wn.2d 94(2012) establishes complained against acts are non-waivable.**

The requirement that a new NOD be issued to borrower if the sale is set to occur more than 120 days after the original sale date is non-waivable. As the Washington Supreme Court eloquently explained in *Schroeder v. Excelsior Management Group, LLC*, 177 Wn.2d 94 (2012), because the NOD requirement contained in RCW 61.24.030(8) is not a *right* or *privilege* of the borrower, the borrower has no right to waive that requirement. The NOD requirement is a *limitation on the trustee's authority to act under the WDTA*. Thus, Appellant's inability to get the Ex-parte commissioner to hear Appellant's Motion for Preliminary Injunction, despite an extensive effort to do so, did not waive Appellants' right to challenge the foreclosure.


This issue is addressed in greater detail in Appellant's Opening Brief.

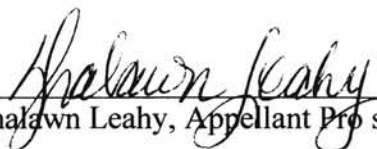
### CONCLUSION

The foreclosure proceeding represented by NOTS3 was a *new* foreclosure proceeding because it was scheduled more than 120 days after the originally-scheduled sale date. Therefore, the trustee was required to issue a new NOD before it recorded NOTS3. It didn't issue a new NOD before it recorded NOTS3. Since the NOD is a requisite of a lawful non-judicial foreclosure, the January 18, 2013 sale was unlawful and should be invalidated.

Dated: November 19, 2014

Respectfully submitted

  
\_\_\_\_\_  
William Leahy, Appellant Pro se

  
\_\_\_\_\_  
Shalawn Leahy, Appellant Pro se