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STATE OF WASHINGTON
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Supreme Court No. 92381-7

(Court of Appeals No. 72065-1-1)

SUPREME COURT
OF THE STATE OF WASHINGTON

WILLIAM AND SHALAWN LEAHY,

Plaintiffs-Petitioners ,

v.

QUALITY LOAN SERVICES OF WASHINTON,

Defendant-Respondent.

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2015 OCT 14 PM 2:59

PETITION FOR REVIEW

William Leahy
Shalawn Leahy
2380 - 226th St. SW
Brier, WA 98036 - 8126
(425) 775-4845

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PETITION FOR REVIEW

The primary issues presented are these: (1) Whether, under the factual circumstances of this case, Quality Loan Service Corporation of Washington (“Quality”) was authorized by the Washington Deeds of Trust Act (“DTA”) to record a notice of trustee’s sale (“NOTS”) in the absence of the prior issuance of a notice of default (“NOD”) that met the requirements of RCW 61.24.030(8); and (2) Whether, without issuing a new NOD that met the requirements of RCW 61.24.030(8), Quality was authorized to record a NOTS on September 19, 2012 (“NOTS 3”). Unless the Court provides unambiguous answers to these questions, the issues raised by this case will generate court-clogging amounts of litigation affecting tens of thousands of Washington homeowners over the coming years.

The Court should accept review under RAP 13.4(b)(1) because the Court of Appeals’ decision conflicts with this Court’s decisions requiring that non-judicial foreclosures conducted in violation of any one of the requirements of RCW 61.24.030 are unlawful and must be invalidated. The Court should also accept review under RAP 13.4(b)(4) because the issues presented are of substantial public interest.

Hundreds of Washington homeowners are in the process of having their homes sold pursuant to a non-judicial foreclosure proceeding that began with the issuance of a *so-called* NOD that does not comply with the requirements of RCW 61.24.030(8), or that began without the issuance of

any NOD.

I IDENTITY OF PETITIONERS

Petitioners William and Shalawn Leahy (“Leahys”) were Plaintiffs in King County Superior Court, Cause No. 13-2-02307-5 SEA, and the Appellants in the Court of Appeals, Division One, Cause No. 72065-1-I.

II COURT OF APPEALS DECISION

The Leahys request review of the Court of Appeals' decision filed on June 29, 2015. More specifically the Leahys request that the Court review the Court of Appeals' analysis of RCW 61.24.030(8) as set forth on pages 3 - 13 of the decision. *Leahys* at A-3 through A-13.

Petitioners asserted that, because NOTS 3 set a sale date, January 18, 2013, that was almost 27 months after the original sale date, October 22, 2010, compliance with the requirements of RCW 61.24.030(8) and RCW 61.24.040(6) dictated issuance of a new NOD that met the requirements of RCW 61.24.030(8) prior to recordation of NOTS 3. *Leahy*, No. 72065-1-I at 4.

The Court of Appeals used a “plain language” analysis to determine that “[n]o such requirement exists in the act,”¹ and regardless of the number of foreclosure attempts, or the period of

¹ *Id.* at 3.

time over which those attempts are made, RCW 61.24.030(8) requires only a single, statutorily-compliant NOD to be issued. *Id.* “Here,” the Court of Appeals added, “that requirement was met.” *Id.*

III. ISSUES PRESENTED FOR REVIEW

(1) Whether, under the factual circumstances of this case, Quality was authorized by the DTA to record a NOTS in the absence of the prior issuance of a NOD that met the requirements of RCW 61.24.030(8).

(2) Whether, without issuing a new NOD, Quality was authorized to record a NOTS on September 19, 2012 (“NOTS 3”).

IV STATEMENT OF THE CASE

The Leahys’ mortgage debt fell into default on or about March 1, 2009. *Verbatim Report of Proceedings, December 6, 2013 (“RPI”)*, at 6: 3-4; *CP* at 300. Evidence of the mortgage debt obligation consisted of a promissory note (“Note”) and a Deed of Trust (“DOT”) that secured the obligation.

RCW 61.24.030(8) requires a NOD to be transmitted to the borrower at least 30 days prior to the recording, transmitting, or serving of a notice of trustee’s sale. RCW 61.24.040(1) prohibits the sale of the property until at least ninety days have elapsed following the recording and mailing of the notice of trustee’s sale. And RCW

61.24.040(2) requires the trustee to include a copy of a “notice of foreclosure” with the notice of trustee’s sale that is mailed to the borrower.

In the absence of a bankruptcy or preliminary injunction, RCW 61.24.040(6) prohibits the trustee from continuing the sale of a property, for any reason, for more than 120 days beyond the original sale date.

On or about April 9, 2010, Quality, purporting to act as the “authorized agent” for the WaMu Mortgage Pass-Through Certificates Series 2006-AR15 Trust (“Trust”), commenced a non-judicial foreclosure against the Leahys’ property located at 9745 Phinney Ave N., Seattle, WA 98103 (“Property”) by transmitting a so-called NOD to the Leahys.² *RPI* at 7: 8-10. The so-called NOD did not contain many of the items of information *required* by RCW 61.24.030(8)(a) – (l) to be included in a NOD³: (1) contained the name, but *not* the address, of the Trust;⁴ 2) listed Washington Mutual Bank (“WMB”), a company that had been out of business for 1 year and 8 months by the time the NOD was transmitted to Plaintiffs, as the loan servicer;⁵ 3) provided JPMorgan Chase’s

² The NOD identifies the Trust as the owner of the Note and beneficiary of the DOT.

³ *CP* at 299-302.

⁴ A violation of RCW 61.24.030(8)(l).

(“Chase’s”) Florida address as WMB’s address;⁶ 4) did not provide Chase’s name as the loan servicer;⁷ 5) did not provide a telephone number for Chase, as the actual loan servicer, or WMB, as the alleged loan servicer;⁸ 6) did not provide an exact amount that Plaintiffs must pay to reinstate the Note and DOT;⁹ 7) listed Quality’s address as the Trust’s (beneficiary’s) address;¹⁰ and 8) indicated Quality was the successor trustee, even though Quality was “appointed” the “successor trustee” on July 13, 2010, more than 3 months *after* the NOD was transmitted.¹¹

Additionally, the so-called NOD was never reissued even though: (1) it expired when the original foreclosure proceeding terminated by operation of law on February 20, 2011. And, even without considering the extinguishment by operation of law, Quality voluntarily destroyed the so-called NOD’s legal effectiveness by voluntarily discontinuing the second foreclosure proceeding on September 28, 2012.

On July 21, 2010, Respondent recorded the first Notice of

⁵ A violation of RCW 61.24.030(8)(l)

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ A violation of RCW 61.24.030(8)(f).

¹⁰ A violation of RCW 61.24.030(8)(l).

¹¹ This is a violation of Quality’s RCW 61.24.010(3) legal obligation to avoid incurring a fiduciary duty to any “persons having an interest in the property subject to the deed of trust.” The Trust’s security interest in the property is “an interest in the property.”

Trustee's Sale ("NOTS 1"). *RPI* at 7: 20-22; *CP* at 311. Section VI of NOTS 1 states the April 9, 2010 NOD is NOTS 1's antecedent in the foreclosure process. *CP* at 312. Additionally, NOTS 1 sets October 22, 2010 as the *original sale date*. *CP* at 311. The 120th day after October 22, 2010 was February 19, 2011.

October 22, 2010 came and went without any attempt to publicly auction the Property or to continue the sale to another date. February 19, 2011 came and went without any attempt to publicly auction the Property. On February 20, 2011, pursuant to the provisions of RCW 61.24.040(6), the initial foreclosure proceeding terminated by operation of law.

The second attempt to foreclose the Property commenced on July 12, 2012, *five hundred and eight (508) days after February 19, 2011*. *RPI* at 9: 3-5. On July 12th, Respondent recorded a second notice of trustee's sale ("NOTS 2"). *Id.* The recording of NOTS 2 was not preceded by the issuance of a new NOD. Section VI of NOTS 2, like Section VI of NOTS 1, claims the original so-called NOD as its antecedent (*CP* at 316).

NOTS 2 set November 9, 2012 as the new sale date. *CP* at 315. November 9, 2012 was *749 days after October 22, 2010*, the original sale day, *and 628 days after February 19, 2011*, the last

date upon which the Property could lawfully be sold pursuant to the original foreclosure proceeding. On September 28, 2012, Quality voluntarily discontinued the sale set by NOTS 2.

On September 19, 2012, while the second foreclosure proceeding was still active, Quality attempted to commence a third foreclosure proceeding by recording the third and final NOTS (“NOTS 3”). *CP* at 323. This third attempt to foreclose was not preceded by the issuance of a new NOD. Section VI of NOTS 3, like the Section VIs of NOTSs 1 and 2, claims the original so-called NOD as its antecedent in the foreclosure proceeding (*CP* at 324). NOTS 3 set January 18, 2013 as the new sale date. *CP* at 323.

January 18, 2013 was *819 days after October 22, 2010*, the original sale date, *and 698 days after February 19, 2011*, the last date upon which the Property could lawfully be sold pursuant to the original foreclosure proceeding.

The sale occurred on January 18, 2013.

V. ARGUMENT

In *Albice v. Premier Mortgage Services of Washington, Inc.*, 174 Wn.2d 560 (2012) the Court found that procedural irregularities, such as those that divest a trustee of authority to

conduct a sale, can invalidate a sale. *Albice*, 174 Wn.2d at 565. The Court cited *Udall v. T.D. Escrow Services, Inc.*, 159 Wn.2d 903, 911 (2007) as direct support for this finding.

The *Udall* Court determined that a trustee may not withhold delivery of a trustee's deed "unless the sale itself was void due to a procedural irregularity that defeated the trustee's authority to sale the property." *Udall*, 159 Wn.2d at 911. The *Udall* Court cited *Cox v. Helenius*, 103 Wn.2d 383, 388, 693 P.2d 683 (1985) (suit brought by borrower prevented the trustee's initiation of foreclosure) as the example of a case in which procedural irregularities defeated a trustee's authority to sell a property. As the *Udall* Court pointed out, the sale in *Cox* was a violation of RCW 61.24.030(4), a subsection of RCW 61.24.030. *Id.*

A. RCW 61.24.030 – Requisites to Trustee's Sale

RCW Section 61.24.030 is entitled "Requisites to a Trustee's Sale." Thus, *Albice*, by citing *Udall*, a case that rests on the holding in *Cox*, as authority for the proposition that a sale conducted in violation of RCW 61.24.040(6) exceeds the trustee's authority and must be invalidated, confirmed that the holding in *Albice* applies with equal force to sales conducted in violation of any of the provisions of RCW 61.24.030. The specific subsection of RCW 61.24.030 that was

violated in *Cox* was RCW 61.24.030(4).

More recently, in *Schroeder v. Excelsior Management Group, LLC*, 177 Wn.2d 94, 297 P.3d 677 (2013) a different subsection of RCW 61.24.030 was violated, but the result was the same. Moreover, in that case, this Court made it perfectly clear that a violation of any one of the eight subsections of RCW 61.24.030 would result in invalidation of the sale.

The primary question before the Court in *Schroeder* was whether the parties to a deed of trust could waive the statutory requirement contained in RCW 61.24.030(2) that agricultural land must be foreclosed judicially.¹² *Schroeder*, 297 P.3d at 679. *Schroeder* had signed a settlement agreement and a separate contract, each, waiving the right to claim the land was agricultural land in the event of a subsequent default. Moreover, the deed of trust at issue in *Schroeder* specifically stated that the land had not been used, and would not be used, for agricultural purposes. *Id.*, at 680. Finally, Defendants claimed *Schroeder's* action should be dismissed because *Schroeder failed to*

¹² The Court of Appeals found Petitioners waived their rights. Waiver is the voluntary relinquishment of a known right. There is nothing voluntary about the relinquishment of Petitioners' rights in this case. It is true that the request for preliminary injunction was not filed until 3 days before the sale, but the trustee was notified 11 days before the sale of the basis upon which Petitioners claimed the sale was unlawful. The Trustee sandbagged Petitioners for three days before informing Petitioners that they did not intend to postpone or cancel the sale. It took pro se Petitioners several days thereafter to figure out what to do and do it. Quality's counsel was at the preliminary injunction hearing and chose to argue that he had not gotten sufficient notice. The trial court agreed and dismissed the case. Though Petitioners protested, we were not given the opportunity to argue our position.

give five (5) days' notice of his attempt to enjoin the sale. The Court disposed of these arguments summarily:

We emphasize the obvious. If Schroeder's land was agricultural, then not only did the trustee not have authority to proceed with a nonjudicial foreclosure, but the very statute upon which the trustee relies to support its five-day notice requirement, RCW 61.24.130(2), is inapplicable.

Schroeder, 297 P.3d at 685.

Based on the plain language of RCW 61.24.030(2), the Court held that if the land was “agricultural,” the trustee had no legal authority to foreclose non-judicially, and the parties could not waive the statute. *Id.*, at 686. The Court then reversed the lower court rulings, reinstated Schroeder’s damage claims and ordered the trial court to vacate the foreclosure sale if the trial court determined the property was agricultural land.

Both *Lyons v. U.S. Bank, NA*, No. 89132-0 (2014) and *Trujillo v. Northwest Trustee Services, Inc.* 90509-6 (2015) revolved around the trustees’ violations of yet another subsection of RCW 61.24.030 -- RCW 61.24.030(7). Both cases resulted in reversals of lower court rulings because the trustees, respectively, failed to obtain unambiguous proof that the entity claiming to be the beneficiary of the deed of trust was the “owner” of the obligation secured by the deed of trust.

Additional proof that a trustee’s violation of any one of the subsections of RCW 61.24.030 destroys the viability of a non-judicial

foreclosure proceeding can be found in the suit the Washington Attorney General (“AG”) filed against Quality in February 2014.¹³

On February 18, 2014, the AG sued Quality for violating a provision of RCW 61.24.030 -- RCW 61.24.030(6) (failure of the trustee to maintain a Washington office throughout the foreclosure process).¹⁴ Barely a month later, on March 21, 2014, Quality entered into a consent decree with the AG. Quality made the following concessions under threat of pending litigation: (1) agreed to pay \$250,000 to homeowners whose homes were foreclosed upon between January 1, 2014 and February 27, 2014; (2) agreed to pay \$25,000 in attorney fees to the AG; and (3) postponed all trustee’s sales for six weeks, until April 4, 2014.

The *Cox* Court declared the sale unlawful because of a violation of the requisites to a lawful trustee’s sale contained in RCW 61.24.030(4); the *Schroeder* Court declared the sale unlawful because of a violation of the requisites to a lawful trustee’s sale contained in RCW 61.24.030(2); the *Lyons and Trujillo* Courts, respectively, declared the respective sales unlawful because of violations of requisites to a lawful trustee’s sale contained in RCW 61.24.030(7); and Quality “voluntarily” consented to pay \$275,000 in damages and fees and to forego foreclosing any properties in the State of Washington for a six week period because of multiple violations of the

¹³ *State v. Quality Loan Services of Washington*, No. 14-2-06236-2 SEA (2014)

¹⁴ *Id.*

requisites to a lawful trustee's sale contained in RCW 61.24.030(6).

In other words, in *Cox, Schroeder, Lyons, and Trujillo*, this Court has already ruled that a violation of the requisites to a lawful trustee's sale contained in any one of three of the eight subsections of RCW 61.24.030 -- .030(2), .030(4), and .030(7) – invalidates a sale. And, in *State v. Quality*, Quality has conceded that a violation of a fourth subsection of RCW 61.24.030 -- .030(6) – results in an invalidation of a foreclosure proceeding. There is no logical or legal reason why the result should be different for a violation of .030(1), .030(3), .030(5), or .030(8).

Because of multiple violations of the requirements of RCW 61.24.030(8), Petitioners are asking the Court to accept review, employ the same reasoning that was correctly employed in *Cox, Schroeder, Lyons, and Trujillo*, and reverse the lower court rulings.

1. Waiver

The Court of Appeals references all eight violations cited by Petitioners. *Leahy*, No. 72065-1 at 8-9. It never asserts that any one of the eight alleged violations is not a violation of RCW 61.24.030(8). And it does not claim that in the absence of waiver the violations would be legally insufficient. Instead, the court avoids evaluating the consequences of the violations by holding that, consistent with the holding in *Plein v. Lackey*, 149 Wn.2d 214, 67 P.3d 1061 (2003),

Petitioners *waived* their right to challenge the deficiencies *because they failed to file suit and move to restrain the sale until 3 days before the sale occurred.*¹⁵ *Leahy*, No. 72065-1 at 13.

This Court has already determined that violations of RCW 61.24.030 cannot be waived because the requirements of RCW 61.24.030 are not rights or privileges of the borrower; they are limitations on the authority of the trustee to foreclose. *Cox v. Helenius*, 103 Wn.2d 383, 693 P.2d 683 (1985); and *Schroeder v. Excelsior Management Group, LLC*, 177 Wn.2d 94, 297 P.3d 677 (2013). Petitioners may not have moved as quickly as an experienced foreclosure lawyer would have moved, but Petitioners moved as quickly as they possibly could to protect their rights. Not allowing Petitioners to even be heard was very unfair.

2. Non-Judicial Foreclosure Process

The non-judicial foreclosure process in Washington is one process with three indivisible, statutorily mandated steps: (1) transmission of a NOD (RCW 61.24.030(8)); followed by at least 30 days by (2) recording of a NOTS (RCW 61.24.030(8)); followed by at

¹⁵ If waiver is the intentional relinquishment of a known right, waiver did not occur in this case. Petitioners, acting pro se, delivered a letter to the trustee *eleven days before the sale*. The letter stated, in great detail, each of the violations later raised in the complaint and motion for preliminary injunction. So the trustee had more than five days' of actual notice of the preliminary injunction hearing, just not in the right form. Both the trial court and appellate court have exhorted form over substance. There has never been any intent on the part of Petitioners to waive Petitioners' right to challenge the sale.

least 90 days by (3) the actual sale of the property (RCW 61.24.040(1)(a)). If the property does not sell on the date set by the recorded NOTS, then, pursuant to RCW 61.24.040(6), the trustee can continue the sale for up to 120 days without reissuing the statutory notices.

When the process is terminated, either voluntarily or by operation of law, each of the three steps in the process is terminated. It is one process with three inseparable steps. Not a process consisting of three discrete, unconnected steps. Each step in the process, except the first, depends on the step that comes before it in the process for its validity. If one step is not taken, or is taken in violation of the DTA, the step that follows it in the process may not lawfully be taken. Consequently, when the process is extinguished, voluntarily or by operation of law, of necessity each of the steps in the process is extinguished as well.

The so-called April 9, 2010 NOD did not contain some of the information *required* by RCW 61.24.030(8)(a) – (l) for the creation of a lawful NOD. In the absence of that information the April 9th so-called NOD was not lawful. Under the DTA, an unlawful NOD is no NOD at all. Hence, a lawful NOD has never been issued in this case.

Additionally, on or about April 9, 2010 the April 9th so-called NOD arguably did contain accurate, itemized statements of the amounts in arrears, and other charges, costs, and fees. But the April 9th

so-called NOD did not contain accurate itemized statements of the amounts in arrears and other charges, costs, and fees in July 2012 when Quality made the second attempt to foreclose; or in September 2012 when Quality made the third attempt to foreclose.

In both July and September 2012 the financial information in the April 9th so-called NOD was more than 2 years out of date. Also, because the so-called NOD was never reissued, the 30-day period mandated by RCW 61.24.030(8) during which the borrower has the right to pay-off the amounts in arrears, and other charges, costs, and fees, and thereby prevent the trustee from ever gaining the legal authority to record a notice of trustee's sale was granted to Petitioners during the original foreclosure proceeding, but was not granted during the second or third foreclosure proceedings.

Thirty days before the trustee recorded NOTS 2 (the NOTS recorded on July 21, 2012) the amount necessary to reinstate the note and DOT was a multiple of the amount stated in the April 9, 2010 NOD. The discrepancy was even greater with respect to NOTS 3 (the NOTS recorded on September 19, 2012).

Pursuant to RCW 61.24.030(8), to be considered a lawful NOD, the NOD must contain a statement designated clearly and conspicuously showing the ***current*** total amount necessary to reinstate the note and DOT. The trustee, prior to recording the NOTS, must also provide the borrower with a minimum of 30 days to pay the

outstanding amount, and thereby deny the trustee authority to record a NOTS. Neither one of these requirements of RCW 61.24.030(8) were met in the second or third foreclosure proceeding.

This is the fallacy of the Court of Appeals' position. If the NOD need never be reissued, then no matter how many times the trustee conducts foreclosure proceedings against a property over a span of years, the borrower is entitled to know how much he will have to pay to reinstate the loan prior to the recording of a NOTS only once – during the original foreclosure proceeding. Additionally, no matter how many foreclosure proceedings are conducted over a span of years, the borrower is entitled to know the amount in arrears 30 days in advance of the recording of a NOTS only once – during the original foreclosure proceeding. Even if, as in this case, the current foreclosure proceeding is conducted more than 2 years after the original foreclosure proceeding.

What if ownership of the loan changes hands over the years? Or the owner's address changes? Or the servicer changes? Or the servicer's address or phone number changes? None of these contingencies is unusual.

RCW 61.24.030(8) requires the trustee to provide each of these pieces of information, accurately, to a borrower prior to the recording of a NOTS. If, as the Court of Appeals ruled, the NOD need never be reissued, there will be thousands of cases, and no doubt have already

been thousands of cases, in which the information required to be provided by RCW 61.24.030(8) simply is not provided. The Washington Legislature clearly did not intend such a result.

VI CONCLUSION

The trustee provided an original so-called NOD that did not satisfy the requirements of RCW 61.24.030(8). Neither Quality, nor the trial court, nor the Court of Appeals contested this fact. In addition, even though Quality conducted three foreclosure proceedings over the span of 2½ years, it never issued a new NOD. As a result, during the second and third foreclosure proceedings, Leahys never received advance notice of the commencement of the proceeding, never had the opportunity to pay the amount in arrears prior to the recording of the NOTS and thereby prevent the trustee from gaining lawful authority to record the NOTS, and was never told by the trustee the *current amount* the loan was in arrears.

Pursuant to RAP 13.4(b)(1) and 13.4(b)(4), this Court should accept review and reverse the Court of Appeals.

DATED this 13th day of October, 2015.

RESPECTFULLY SUBMITTED,

WILLIAM AND SHALAWN LEAHY

William Leahy

William Leahy, Appellant Pro se

Shalawn Leahy

Shalawn Leahy, Appellant Pro se

DECLARATION OF SERVICE

I, Shalawn Leahy, certify under penalty of perjury under the laws of the State of Washington that on this day, I caused a copy of the foregoing Petition for Review to be served by email and first-class mail, postage prepaid, upon the following counsel of record:

Mr. Thomas James Moore
McCarthy & Holthus, LLP
108 – 1st Ave. S., Ste. 300
Seattle, WA 98104-2538
tmoore@mccarthyholthus.com

Counsel for Respondent/Defendant
Quality Loan Services

DATED this 14th day of October, 2015.



Shalawn Leahy, Petitioner Pro se

COURT OF APPEALS DIV. 1
STATE OF WASHINGTON
2015 OCT 14 PM 2:59

APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON DIVISION
ONE

WILLIAM LEAHY and SHALAWN)	
LEAHY, husband and wife,)	
)	No. 72065-1-1
Appellants,)	
)	ORDER GRANTING
v.)	MOTION TO PUBLISH
)	OPINION
QUALITY LOAN SERVICE CORPORA-))	
TION OF WASHINGTON;)	
)	
Respondent,)	
)	
BANK OF AMERICA, NA as successors))	
by Merger to LaSalle Bank, NA as))	
trustee for WaMu Mortgage Pass-))	
Through Certificates Series 2006-AR 15))	
Trust,)	
)	
Defendants.)	

Respondent, Quality Loan Service Corporation of Washington, has filed a motion to publish the opinion filed on June 29, 2015. Pro Se Appellants, William and Shalawn Leahy, have filed an answer to respondent's motion to publish. The hearing panel has considered its prior determination and finds that the opinion will be of precedential value; Now, therefore, it is hereby

ORDERED that the written opinion filed on June 29, 2015, shall be published

FOR THE COURT:

FILED
COURT OF APPEALS DIV
STATE OF WASHINGTON
2015 JUN 29 AM 10:19

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

WILLIAM LEAHY and SHALAWN)
LEAHY, husband and wife,)
) No. 72065-1-1
 Appellants,)
) DIVISION ONE
 v.)
)
 QUALITY LOAN SERVICE CORPORA-)
 TION OF WASHINGTON;)
)
 Respondent,)
)
 BANK OF AMERICA, NA as successors) PUBLISHED OPINION
 by Merger to LaSalle Bank, NA as)
 trustee for WaMu Mortgage Pass-) FILED: June 29, 2015
 Through Certificates Series 2006-AR 15)
 Trust,)
)
 Defendants.)
 -- .)

BECKER, J. -Appellants lost their property in a nonjudicial foreclosure that occurred after the trustee's sale had been rescheduled several times. They argue that the trustee's sale must be invalidated on two grounds: that the trustee failed to send out a new notice of default before each new notice of trustee's sale, and that the notice of default omitted several pieces of statutorily required information. We reject both arguments. The trial court did not err in granting summary judgment for the lender.

No. 72065-1-1/2

In September 2006, William and Shalawn Leahy obtained a \$320,000 loan from Washington Mutual Bank. The Leahys executed a promissory note and deed of trust, securing the loan against a residential property located in Seattle, Washington.

In 2008, JP Morgan Chase Bank bought the Leahy loan. On

March 1, 2009, the Leahys fell into default on the loan.

On April 9, 2010, Quality Loan Service Corporation of Washington transmitted to the Leahys a notice of default on behalf of Chase.

On July 14, 2010, Quality Loan issued a notice of trustee's sale. This notice set an October 22, 2010, sale date. The sale did not occur.

On July 11, 2012, Quality Loan issued a second notice of trustee's sale. On September 26, 2012, this sale was discontinued.

On September 18, 2012, Quality Loan issued a third notice of trustee's sale. The sale date was January 18, 2013.

On January 16, 2013, the Leahys filed suit against Quality Loan. Although the Leahy's complaint is not in our record, Quality Loan's motion indicates that the Leahys asserted violations of the Consumer Protection Act, chapter 19.86 RCW, and intentional infliction of emotional distress and that they asked for a temporary restraining order to stop the sale. The Leahys did not obtain an order restraining the sale. Later, the Leahys amended their complaint to add a claim for violation of the deed of trust act, chapter 61.24 RCW.

On January 18, 2013, the property was sold to a third party at the trustee's sale.

On March 18, 2014, Quality Loan moved for summary judgment. On April 28, 2014, the superior court granted the motion.

The Leahys appeal. They ask this court to reverse the order granting summary judgment and to reinstate their claim that violations of the deed of trust act invalidated the sale.

This court reviews an order granting summary judgment de novo, performing the same inquiry as the trial court. Owen v. Burlington N. & Santa Fe R.R. Co., 153 Wn.2d 780, 787, 108 P.3d 1220 (2005). A motion for summary judgment will be granted where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). The nonmoving party may not rely on speculation, argumentative assertions that unresolved factual issues remain, or on having its affidavits considered at face value. Wash. Fed. Sav. v. Klein, 177 Wn. App. 22, 311 P.3d 53 (2013), review denied, 179 Wn.2d 1019 (2014).

REQUIRED NOTICES

The Leahys contend that Quality Loan violated the deed of trust act by failing to send a new notice of default before each new notice of trustee's sale.

No such requirement exists in the act. Prerequisites to a trustee's sale that make an obligation eligible for nonjudicial foreclosure are set forth in RCW 61.24.30. Relevant here is the requirement that a written notice of default containing certain information be transmitted to the borrower at least 30 days before the notice of sale is recorded.

(8) That at least thirty days before notice of sale shall be recorded, transmitted or served, written notice of default shall be

transmitted by the beneficiary or trustee to the borrower and granter at their last known addresses by both first-class and either registered or certified mail, return receipt requested, and the beneficiary or trustee shall cause to be posted in a conspicuous place on the premises, a copy of the notice, or personally served on the borrower and granter.

RCW 61.24.030(8).

After issuing a notice of default, a trustee must record a notice of sale specifying the date, time, and location of the sale, along with other statutorily-outlined information. RCW 61.24.040(1). The trustee may postpone the sale for up to 120 days from the date provided in the notice of sale without issuing a new notice. RCW 61.24.040(6). If the sale is not held within 120 days from the date provided in the notice of sale, a new notice of sale is required. RCW 61.24.040(6); Albice v. Premier Mortg. Servs. of Wash., Inc., 174 Wn.2d 560, 568, 276 P.3d 1277 (2012).

The plain language of RCW 61.24.030(8) requires only that a notice of default be transmitted to the borrower at least 30 days before the notice of sale is recorded. Here, that requirement was met. The notice of default was transmitted to the Leahys on April 9, 2010. All three notices of the trustee's sale were recorded more than 30 days later.

The Leahys contend, however, that when a trustee's sale does not occur within 120 days of the originally scheduled date for the sale, a new sale cannot be scheduled unless the trustee sends out a new notice of default. For this argument, they rely on Albice.

In Albice, the homeowner successfully argued that the trustee lacked statutory authority to sell her home 161 days after the date set forth in its notice of trustee's sale. The Supreme Court declared the sale invalid:

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

Albice, 174 Wn.2d at 568 (emphasis added).

The Leahys rely on the court's use of the plural "notices" in the sentence emphasized above. They assume that the statutory notices that must be reissued include not only the notice of trustee's sale, but also the notice of default. There is no basis for this assumption in either the plain language of the statute or in Albice. There are other statutory notices that the court may have been referring to, such as the notice of foreclosure that must accompany the notice of trustee's sale. RCW 61.24.040(2). And the holding in Albice pertained to the specific statutory limit that requires a scheduled sale to occur within 120 days of the recording of the notice of sale. The court did not announce a new, nonstatutory requirement for reissuing a notice of default.

In light of the function served by the notice of default as compared to the notice of trustee's sale, it would not make sense to interpret the act as requiring reissuance of the notice of default. "The purpose of the notice of default is to

notify the debtor of the amount he owes and that he is in default." Koegel v. Prudential Mut. Sav. Bank, 51 Wn. App. 108, 112, 752 P.2d 385, review denied, 111 Wn.2d 1004 (1988). The original notice serves that purpose. The notice of trustee's sale, by contrast, must be recorded to give notice to the world that a foreclosure sale is scheduled for a specific date. The sale can be continued, but not beyond the 120-day period. Once the 120-day period expires, a new trustee's sale must be scheduled and a new notice of sale must be issued and recorded to ensure that potential buyers are informed of the new sale date.

App. 8, 321 P.3d 262, review denied, 181 Wn.2d 1007 (2014). In Watson, debtors received notice of default on February 5, 2011. A trustee's sale was postponed and then canceled. Meanwhile, the legislature amended the deed of trust act by enacting the Foreclosure Fairness Act. The amendment went into effect on July 22, 2011. It added information that must be included in a notice of default when the property is owner occupied. RCW 61.24.030(k); LAws of 2011, ch. 364, § 3. On November 8, 2011, the trustee recorded a second notice of sale, scheduling the sale for December 23, 2011. The trustee did not send a new notice of default or otherwise contact the debtors before recording the second notice. A third party purchased the property on December 23, 2011. In litigation initiated by the debtor to have the sale invalidated, this court reversed a summary judgment that had been granted to the trustee. We held that scheduling a new sale triggered application of the Foreclosure Fairness Act and

the sale was invalid because it was not preceded by the preforeclosure notices required by the Foreclosure Fairness Act.

The Leahys argue that their case mirrors Watson in every consequential respect. But we did not hold in Watson that a trustee can never issue a subsequent notice of sale without also issuing a new notice of default. The new notice of default was required in that case as a consequence of our application of the Foreclosure Fairness Act. Those requirements apply only to deeds of trust recorded against owner-occupied residential real property. See 18 WILLIAMS B. STOEBCUK & JOHN W. WEAVER, WASHINGTON PRACTICE: REAL ESTATE: TRANSACTIONS, § 20.1A, at 38 (2d ed. Supp. 2014); RCW 61.24.165(1).

Quality Loan's motion for summary judgment catalogued the evidence that the property was not owner occupied, including the Leahys' assertion in their pleadings that they were residents of Snohomish County. In response, Ms. Leahy declared that the subject property was owner occupied at the time the notice of default was issued. She stated that the property was the couple's primary residence from February 2010 to May 2010 while they renovated it in preparation for renting it out.

The superior court concluded that the Leahys had failed to establish a genuine issue of material fact as to whether the home was owner occupied.

The last thing I want to say is, in this Court's view it is not enough to raise a question of fact about whether it was the primary residence and an owner-occupied residence by a declaration in response to a summary judgment action when the pleadings have alleged just the opposite, and where there's no other evidence whatsoever raised that creates an issue of fact.

The Leahys' briefs on appeal do not contend that the trial court erred by concluding Ms. Leahy's declaration was insufficient to raise a genuine issue of material fact. The Leahys do not argue in their briefs that the subject property was owner occupied. And they confirmed at oral argument before this court that they are not taking the position that the property was owner occupied.

Accordingly, we conclude that Watson is not helpful to their argument that the trustee's sale should be invalidated.

Quality Loan complied with the plain language of the deed of trust act by transmitting a notice of default more than 30 days before recording the notice of trustee's sale and by selling the property within 120 days of the date listed in the third recorded notice of trustee's sale.

WAIVER

The Leahys contend the sale was invalid because the notice of default issued on April 9, 2010, did not strictly conform to RCW 61.24.030(8)(a)-(l). The items they claim rendered the notice of default deficient are as follows:

1. The notice of default contained the name, but not the address, of the WaMu Mortgage Pass-Through Certificates Series 2006-AR 15 Trust.
2. The notice listed Washington Mutual Bank, a company that had been out of business for almost two years, as the loan servicer.
3. The notice gave JPMorgan Chase's Florida address as the address for Washington Mutual.
4. The notice did not provide JPMorgan Chase's name as the loan servicer.

5. The notice did not provide a telephone number for JPMorgan Chase as the actual loan servicer, or for Washington Mutual as the alleged loan servicer.

6. The notice did not provide an exact amount that appellants had to pay to reinstate the note and deed of trust.

7. The notice listed Quality Loan's address as the address of the beneficiary.

8. The notice indicated Quality Loan was the successor trustee, even though Quality Loan was not appointed as the successor trustee until more than three months after the notice was transmitted to the Leahys.

Quality Loan responds that the Leahys waived any right to challenge these alleged defects by failing to obtain an order restraining the sale.

A borrower may move to restrain a trustee's sale on any proper legal or equitable ground. RCW 61.24.130(1). Borrowers must give five days' notice to the trustee of the time when, place where, and the judge before whom the application for the restraining order is to be made. RCW 61.24.130(2). This notice must include copies of all pleadings and related documents to be given to the judge. RCW 61.24.130(2). Proof that such notice was served on the trustee must accompany every application to restrain a trustee's sale. RCW 61.24.130(2). The Leahys did not move to restrain the sale within the five-day limit required by the deed of trust act.

The failure to take advantage of the presale remedies under the deed of trust act may result in waiver of the right to object to the sale. Plein v. Lackey, 149 Wn.2d 214, 227, 67 P.3d 1061 (2003), citing RCW 61.24.040(1)(f)(IX); see

also Frizzell v. Murray, 179 Wn.2d 301, 307, 313 P.3d 1171 (2013). Waiver is an equitable doctrine and courts apply it only where it is equitable under the circumstances and where it serves the goals of the act. Albice, 174 Wn.2d at 570.

Waiver of the right to object to a trustee's sale occurs where a party (1) received notice of the right to enjoin the sale, (2) had actual or constructive knowledge of a defense to the foreclosure prior to the sale, and (3) failed to obtain a court order enjoining the sale. Plein, 149 Wn.2d at 227. All three circumstances are present in this case. First, each of the three notices of sale alerted the Leahys of their right to "bring a lawsuit to restrain the sale pursuant to RCW 61.24.130" and that "failure to bring such a lawsuit may result in a waiver of any proper grounds for invalidating the Trustee's sale." Second, the Leahys acknowledge receiving the April 2010 notice of default, which means they had actual or constructive knowledge of the eight alleged defects that they now assert as a basis for invalidating the sale. Third, the Leahys failed to obtain an order restraining the sale, apparently because their motion-filed only three days before the sale-did not comply with the statutory requirement to give at least five days' notice to the trustee.

The Leahys do not dispute that the three conditions upon which the court found waiver in Plein were present in their case. They argue, however, that the right to challenge errors in the notice of default cannot be waived, citing

Schroeder v. Excelsior Management Group, LLC, 177 Wn.2d 94, 297 P.3d 677 (2013).

In Schroeder, a debtor fell into default on a loan secured by a deed of trust on 200 acres of agricultural property. Property used for agricultural purposes is not subject to nonjudicial foreclosure. RCW 61.24.030(2). The debtor in Schroeder negotiated a forbearance agreement with the lender in which he waived his right to claim that the property was used for agricultural purposes.

The debtor defaulted and a nonjudicial foreclosure was set in motion. Four days before the scheduled sale, the debtor filed a complaint for damages and injunctive relief. The trial court initially granted the debtor's motion for a temporary restraining order but then dissolved it for failure to comply with the statutory five-day notice period. After the trustee's sale, the court granted the trustee's motion for summary judgment, dismissing all of Schroeder's claims.

Schroeder appealed.

The Supreme Court held that the debtor could not validly waive his right to judicial foreclosure of agricultural land. This is because RCW 61.24.030 does not list rights held by the debtor; rather it imposes limits on the trustee's power to foreclose without judicial supervision. The lender argued that the debtor's postsale challenge was barred under Plein because of the debtor's failure to bring a timely action to restrain the sale. The court rejected this argument, emphasizing that the trustee simply did not have authority to sell a property that was used for agricultural purposes:

Based on Plein, the defendants argue that Schroeder failed to give the statutory five-day notice required by RCW 61.24.130(2)

and failed to successfully enjoin the sale, and thereby waived his right to contest the sale. We emphasize the obvious. If Schroeder's land was agricultural, then not only did the trustee not have authority to proceed with a nonjudicial foreclosure, but the very statute upon which the trustee relies to support its five-day notice requirement, RCW 61.24.130(2), is inapplicable.

We conclude that the respondents' reliance on Plein is misplaced. It is well settled that the trustee in foreclosure must strictly comply with the statutory requirements. Albice, 174 Wn.2d at 568 (citing Udall, 159 Wn.2d at 915-16). A trustee in a nonjudicial foreclosure may not exceed the authority vested by that statute.

As we have recently held, the borrower may not grant a trustee powers the trustee does not have by contracting around provisions in the deed of trust statute. Bain[v. Metro. Mortg. Grp., Inc.], 175 Wn.2d [83,] 100[, 285 P.3d 34 (2012)].

. . . Nothing in Plein suggests that waiver might cause the deed of trust act to apply to transactions to which the deed of trust act does not apply. If Schroeder's 200 acres were used primarily for agricultural purposes, Plein is inapplicable.

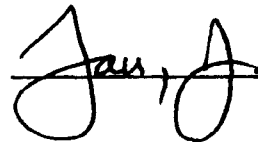
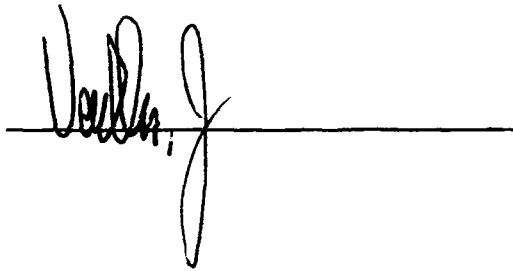
Schroeder, 177 Wn.2d at 111-12.

The Leahys contend that the requirements in RCW 61.24.030(8) for information that must be contained in the notice of default likewise serve as limitations on the trustee's authority to act. They argue accordingly that under Schroeder, there can be no waiver of a claim that a sale is invalid if the notice of default is deficient. Schroeder, however, is not analogous. Schroeder stands for the proposition that the deed of trust act does not apply to land used for agricultural purposes. Here, however, the deed of trust act is applicable to the subject property.

The Leahys have failed to demonstrate—or even assert—that they suffered any prejudice as a result of the alleged omissions or errors in the notice of default. See Koegel v. Prudential Mut. Sav. Bank, 51 Wn. App. 108, 752 P.2d 385, review denied, 111 Wn.2d 1004 (1988). As in Koegel, we conclude that the

omissions and errors alleged by the Leahys with respect to the notice of default do not justify invalidating the sale or granting other relief. The Leahys admit that they defaulted on their loan in March 2009. They admit that they received the notice of default and three separate notices of sale. They had knowledge of the identity of the trustee and beneficiary, and they had no difficulty contacting the trustee to communicate their concerns regarding the foreclosure. Their brief makes no attempt to demonstrate prejudice caused by the allegedly erroneous information in the notice of default. The Leahys have provided us with no basis to hold that the trial court erred in granting summary judgment to Quality Loan. Under Plein, they have waived the right to challenge the deficiencies they now assert.

WE CONCUR:



RCW 61.24.030

Requisites to trustee's sale.

It shall be requisite to a trustee's sale:

(1) That the deed of trust contains a power of sale;

(2) That the deed of trust contains a statement that the real property conveyed is not used principally for agricultural purposes; provided, if the statement is false on the date the deed of trust was granted or amended to include that statement, and false on the date of the trustee's sale, then the deed of trust must be foreclosed judicially. Real property is used for agricultural purposes if it is used in an operation that produces crops, livestock, or aquatic goods;

(3) That a default has occurred in the obligation secured or a covenant of the grantor, which by the terms of the deed of trust makes operative the power to sell;

(4) That no action commenced by the beneficiary of the deed of trust is now pending to seek satisfaction of an obligation secured by the deed of trust in any court by reason of the grantor's default on the obligation secured: PROVIDED, That (a) the seeking of the appointment of a receiver shall not constitute an action for purposes of this chapter; and (b) if a receiver is appointed, the grantor shall be entitled to any rents or profits derived from property subject to a homestead as defined in RCW 6.13.010. If the deed of trust was granted to secure a commercial loan, this subsection shall not apply to actions brought to enforce any other lien or security interest granted to secure the obligation secured by the deed of trust being foreclosed;

(5) That the deed of trust has been recorded in each county in which the land or some part thereof is situated;

(6) That prior to the date of the notice of trustee's sale and continuing thereafter through the date of the trustee's sale, the trustee must maintain a street address in this state where personal service of process may be made, and the trustee must maintain a physical presence and have telephone service at such address;

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

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

(c) This subsection (7) does not apply to association beneficiaries subject to chapter 64.32, 64.34, or 64.38 RCW;

(8) That at least thirty days before notice of sale shall be recorded, transmitted or served, written notice of default shall be transmitted by the beneficiary or trustee to the borrower and grantor at their last known addresses by both first-class and either registered or certified mail, return receipt requested, and the beneficiary or trustee shall cause to be posted in a conspicuous place on the premises, a copy of the notice, or personally served on the borrower and grantor. This notice shall contain the following information:

(a) A description of the property which is then subject to the deed of trust;

(b) A statement identifying each county in which the deed of trust is recorded and the document number given to the deed of trust upon recording by each county auditor or recording officer;

(c) A statement that the beneficiary has declared the borrower or grantor to be in default, and a concise statement of the default alleged;

(d) An itemized account of the amount or amounts in arrears if the default alleged is failure to make payments;

(e) An itemized account of all other specific charges, costs, or fees that the borrower, grantor, or any guarantor is or may be obliged to pay to reinstate the deed of trust before the recording of the notice of sale;

(f) A statement showing the total of (d) and (e) of this subsection, designated clearly and conspicuously as the amount necessary to reinstate the note and deed of trust before the recording of the notice of sale;

(g) A statement that failure to cure the alleged default within thirty days of the date of mailing of the notice, or if personally served, within thirty days of the date of personal service thereof, may lead to recordation, transmittal, and publication of a notice of sale, and that the property described in (a) of this subsection may be sold at public auction at a date no less than one hundred twenty days in the future, or no less than one hundred fifty days in the future if the borrower received a letter under RCW 61.24.031;

(h) A statement that the effect of the recordation, transmittal, and publication of a notice of sale will be to (i) increase the costs and fees and (ii) publicize the default and advertise the grantor's property for sale;

(i) A statement that the effect of the sale of the grantor's property by the trustee will be to deprive the grantor of all their interest in the property described in (a) of this subsection;

(j) A statement that the borrower, grantor, and any guarantor has recourse to the courts pursuant to RCW 61.24.130 to contest the alleged default on any proper ground;

(k) In the event the property secured by the deed of trust is owner-occupied residential real property, a statement, prominently set out at the beginning of the notice, which shall state as follows:

**"THIS NOTICE IS ONE STEP IN A PROCESS THAT COULD RESULT IN YOUR
LOSING YOUR HOME.**

You may be eligible for mediation in front of a neutral third party to help save your home.

CONTACT A HOUSING COUNSELOR OR AN ATTORNEY LICENSED IN WASHINGTON NOW to assess your situation and refer you to mediation if you might benefit. Mediation **MUST** be requested between the time you receive the Notice of Default and no later than twenty days after the Notice of Trustee Sale is recorded.

DO NOT DELAY. If you do nothing, a notice of sale may be issued as soon as 30 days from the date of this notice of default. The notice of sale will provide a minimum of 120 days' notice of the date of the actual foreclosure sale.

BE CAREFUL of people who claim they can help you. There are many individuals and businesses that prey upon borrowers in distress.

REFER TO THE CONTACTS BELOW for sources of assistance.

SEEKING ASSISTANCE

Housing counselors and legal assistance may be available at little or no cost to you. If you would like assistance in determining your rights and opportunities to keep your house, you may contact the following:

The statewide foreclosure hotline for assistance and referral to housing counselors recommended by the Housing Finance Commission

Telephone: Web site:

The United States Department of Housing and Urban Development

Telephone: Web site:

The statewide civil legal aid hotline for assistance and referrals to other housing counselors and attorneys

Telephone: Web site:"

The beneficiary or trustee shall obtain the toll-free numbers and web site information from the department for inclusion in the notice; and

(I) In the event the property secured by the deed of trust is residential real property, the name and address of the owner of any promissory notes or other obligations secured by the deed of trust and the name, address, and telephone number of a party acting as a servicer of the obligations secured by the deed of trust; and

(9) That, for owner-occupied residential real property, before the notice of the trustee's sale is recorded, transmitted, or served, the beneficiary has complied with RCW 61.24.031 and, if applicable, RCW 61.24.163.

RCW 61.24.005

(2) "Beneficiary" means the holder of the instrument or document evidencing the obligations secured by the deed of trust, excluding persons holding the same as security for a different obligation.

RCW 61.24.010

(2) The trustee may resign at its own election or be replaced by the beneficiary. The trustee shall give prompt written notice of its resignation to the beneficiary. The resignation of the trustee shall become effective upon the recording of the notice of resignation in each county in which the deed of trust is recorded. If a

trustee is not appointed in the deed of trust, or upon the resignation, incapacity, disability, absence, or death of the trustee, or the election of the beneficiary to replace the trustee, the beneficiary shall appoint a trustee or a successor trustee. Only upon recording the appointment of a successor trustee in each county in which the deed of trust is recorded, the successor trustee shall be vested with all powers of an original trustee.

RCW 61.24.030

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

(8) That at least thirty days before notice of sale shall be recorded, transmitted or served, written notice of default shall be transmitted by the beneficiary or trustee to the borrower and grantor at their last known addresses by both first-class and either registered or certified mail, return receipt requested, and the beneficiary or trustee shall cause to be posted in a conspicuous place on the premises, a copy of the notice, or personally served on the borrower and grantor. This notice shall contain the following information:

.....

- (1) In the event the property secured by the deed of trust is residential real property, the name and address of the owner of any promissory notes or other obligations secured by the deed of trust and the name, address, and telephone number of a party acting as a servicer of the obligations secured by the deed of trust.

RCW 61.24.040

(6) The trustee has no obligation to, but may, for any cause the trustee deems advantageous, continue the sale for a period or periods not exceeding a total of one hundred twenty days by (a) a public proclamation at the time and place fixed for sale in the notice of sale and if the continuance is beyond the date of sale, by

giving notice of the new time and place of the sale by both first class and either certified or registered mail, return receipt requested, to the persons specified in subsection (1)(b)(i) and (ii) of this section to be deposited in the mail (i) not less than four days before the new date fixed for the sale if the sale is continued for up to seven days; or (ii) not more than three days after the date of the continuance by oral proclamation if the sale is continued for more than seven days, or, alternatively, (b) by giving notice of the time and place of the postponed sale in the manner and to the persons specified in subsection (1)(b), (c), (d), and (e) of this section and publishing a copy of such notice once in the newspaper(s) described in subsection (3) of this section, more than seven days before the date fixed for sale in the notice of sale. No other notice of the postponed sale need be given.

RCW 62A.1-201

(b) Subject to definitions contained in other articles of this title that apply to particular articles or parts thereof:

- (35) "Security interest" means an interest in personal property or fixtures which secures payment or performance of an obligation. "Security interest" includes any interest of a consignor and a buyer of accounts, chattel paper, a payment intangible, or a promissory note in a transaction that is subject to Article 9A of this title.

RCW 62A.3-301

"Person entitled to enforce" an instrument means (i) the holder of the instrument, (ii) a nonholder in possession of the instrument who has the rights of a holder, or (iii) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to RCW 62A.3-309 or 62A.3-418(d). A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument.

RCW 62A.9A-102

- (a) **Article 9A definitions.** In this Article:

- (12) "Collateral" means the property subject to a security interest or agricultural lien. The term includes:
 - (B) Accounts, chattel paper, payment intangibles, and promissory notes that have been sold.

- (28) "Debtor" means:
 - (B) A seller of accounts, chattel paper, payment intangibles, or promissory notes.

- (73) "Secured party" means:
 - (D) A person to which accounts, chattel paper, payment intangibles, or promissory notes have been sold.

RCW 62A.9A-203

- (a) **Attachment.** A security interest attaches to collateral when it becomes enforceable against the debtor with respect to the collateral, unless an agreement expressly postpones the time of attachment.

- (b) **Enforceability.** Except as otherwise provided in subsections (c) through (i) of this section, a security interest is enforceable against the debtor and third parties with respect to the collateral only if:
 - (1) Value has been given;
 - (2) The debtor has rights in the collateral or the power to transfer rights in the collateral to a secured party; and
 - (3) One of the following conditions is met:
 - (A) The debtor has authenticated a security agreement that provides a description of the collateral and, if the security interest covers timber to be cut, a description of the land concerned;

- (B) The collateral is not a certificated security and is in the possession of the secured party under RCW 62A.9A-313 pursuant to the debtor's security agreement;
- (g) **Lien securing right to payment.** The attachment of a security interest in a right to payment or performance secured by a security interest or other lien on personal or real property is also attachment of a security interest in the security interest, mortgage, or other lien.

OFFICIAL COMMENT 9 TO UCC 9-203

- 9. Collateral Follows Right to Payment or Performance. Subsection (g) codifies the common law rule that a transfer of an obligation secured by a security interest or other lien on personal or real property also transfers the security interest or lien. See Restatement (3d), Property (Mortgages) section 5.4(a) (1997). See also section 9-308(e) (analogous rule for perfection).

RCW 62A.9A-313

- (c) **Collateral in possession of person other than debtor.** With respect to collateral other than certificated securities and goods covered by a document, a secured party takes possession of collateral in the possession of a person other than the debtor, the secured party, or a lessee of the collateral from the debtor in the ordinary course of the debtor's business, when:
 - (1) The person in possession authenticates a record acknowledging that it holds possession of the collateral for the secured party's benefit; or
 - (2) The person takes possession of the collateral after having authenticated a record acknowledging that it will hold possession of collateral for the secured party's benefit.
- (h) **Secured party's delivery to person other than debtor.** A secured party having possession of collateral does not relinquish possession by delivering the collateral to a person other than the debtor or a lessee of the collateral from the debtor in the ordinary course of the debtor's

business if the person was instructed before the delivery or is instructed contemporaneously with the delivery:

- (1) To hold possession of the collateral for the secured party's benefit; or
- (2) To redeliver the collateral to the secured party.

RCW 64.04.010

Every conveyance of real estate, or any interest therein, and every contract creating or evidencing any encumbrance upon real estate, shall be by deed: PROVIDED, That when real estate, or any interest therein, is held in trust, the terms and conditions of which trust are of record, and the instrument creating such trust authorizes the issuance of certificates or written evidence of any interest in said real estate under said trust, and authorizes the transfer of such certificates or evidence of interest by assignment by the holder thereof by a simple writing or by endorsement on the back of such certificate or evidence of interest or delivery thereof to the vendee, such transfer shall be valid, and all such assignments or transfers hereby authorized and heretofore made in accordance with the provisions of this section are hereby declared to be legal and valid.

RCW 61.24.130

Restraint of sale by trustee — Conditions — Notice.

(1) Nothing contained in this chapter shall prejudice the right of the borrower, grantor, any guarantor, or any person who has an interest in, lien, or claim of lien against the property or some part thereof, to restrain, on any proper legal or equitable ground, a trustee's sale. The court shall require as a condition of granting the restraining order or injunction that the applicant pay to the clerk of the court the sums that would be due on the obligation secured by the deed of trust if the deed of trust was not being foreclosed:

(a) In the case of default in making the periodic payment of principal, interest, and reserves, such sums shall be the periodic payment of principal, interest, and reserves paid to the clerk of the court every thirty days.

(b) In the case of default in making payment of an obligation then fully payable by its terms, such sums shall be the amount of interest accruing monthly on said obligation at the nondefault rate, paid to the clerk of the court every thirty days.

In the case of default in performance of any nonmonetary obligation secured by the deed of trust, the court shall impose such conditions as it deems just.

In addition, the court may condition granting the restraining order or injunction upon the giving of security by the applicant, in such form and amount as the court deems proper, for the payment of such costs and damages, including attorneys' fees, as may be later found by the court to have been incurred or suffered by any party by reason of the restraining order or injunction. The court may consider, upon proper showing, the grantor's equity in the property in determining the amount of said security.

(2) No court may grant a restraining order or injunction to restrain a trustee's sale unless the person seeking the restraint gives five days notice to the trustee of the time when, place where, and the judge before whom the application for the restraining order or injunction is to be made. This notice shall include copies of all pleadings and related documents to be given to the judge. No judge may act upon such application unless it is accompanied by proof, evidenced by return of a sheriff, the sheriff's deputy, or by any person eighteen years of age or over who is competent to be a witness, that the notice has been served on the trustee.

(3) If the restraining order or injunction is dissolved after the date of the trustee's sale set forth in the notice as provided in RCW 61.24.040(1)(f), the court granting such restraining order or injunction, or before whom the order or injunction is returnable, shall, at the request of the trustee, set a new sale date which shall be not less than forty-five days from the date of the order dissolving the restraining order. The trustee shall:

(a) Comply with the requirements of RCW 61.24.040(1) (a) through (f) at least thirty days before the new sale date; and

(b) Cause a copy of the notice of trustee's sale as provided in RCW 61.24.040(1)(f) to be published in a legal newspaper in each county in which the property or any part thereof is situated once between the thirty-fifth and twenty-eighth day before the sale and once between the fourteenth and seventh day before the sale.

(4) If a trustee's sale has been stayed as a result of the filing of a petition in federal bankruptcy court and an order is entered in federal bankruptcy court granting relief from the stay or closing or dismissing the case, or discharging the debtor with the effect of removing the stay, the trustee may set a new sale date which shall not be less than forty-five days after the date of the bankruptcy court's order. The trustee shall:

(a) Comply with the requirements of RCW 61.24.040(1) (a) through (f) at least thirty days before the new sale date; and

(b) Cause a copy of the notice of trustee's sale as provided in RCW 61.24.040(1)(f) to be published in a legal newspaper in each county in which the property or any part thereof is situated, once between the thirty-fifth and twenty-eighth day before the sale and once between the fourteenth and seventh day before the sale.

(5) Subsections (3) and (4) of this section are permissive only and do not prohibit the trustee from proceeding with a trustee's sale following termination of any injunction or stay on any date to which such sale has been properly continued in accordance with RCW 61.24.040(6).

(6) The issuance of a restraining order or injunction shall not prohibit the trustee from continuing the sale as provided in RCW 61.24.040(6).

RCW 61.24.040

Foreclosure and sale — Notice of sale.

A deed of trust foreclosed under this chapter shall be foreclosed as follows:

(1) At least ninety days before the sale, or if a letter under RCW 61.24.031 is required, at least one hundred twenty days before the sale, the trustee shall:

(a) Record a notice in the form described in (f) of this subsection in the office of the auditor in each county in which the deed of trust is recorded;

(b) To the extent the trustee elects to foreclose its lien or interest, or the beneficiary elects to preserve its right to seek a deficiency judgment against a borrower or grantor under RCW 61.24.100(3)(a), and if their addresses are stated in a recorded instrument evidencing their interest, lien, or claim of lien, or an amendment thereto, or are otherwise known to the trustee, cause a copy of the notice of sale described in (f) of this subsection to be transmitted by both first-class and either certified or registered mail, return receipt requested, to the following persons or their legal representatives, if any, at such address:

(i) The borrower and grantor;

(ii) The beneficiary of any deed of trust or mortgagee of any mortgage, or any person who has a lien or claim of lien against the property, that was recorded subsequent to the recordation of the deed of trust being foreclosed and before the recordation of the notice of sale;

(iii) The vendee in any real estate contract, the lessee in any lease, or the holder of any conveyances of any interest or estate in any portion or all of the property described in such notice, if that contract, lease, or conveyance of such interest or estate, or a memorandum or other notice thereof, was recorded after the recordation of the deed of trust being foreclosed and before the recordation of the notice of sale;

(iv) The last holder of record of any other lien against or interest in the property that is subject to a subordination to the deed of trust being foreclosed that was recorded before the recordation of the notice of sale;

(v) The last holder of record of the lien of any judgment subordinate to the deed of trust being foreclosed; and

(vi) The occupants of property consisting solely of a single-family residence, or a condominium, cooperative, or other dwelling unit in a multiplex or other building containing fewer than five residential

units, whether or not the occupant's rental agreement is recorded, which notice may be a single notice addressed to "occupants" for each unit known to the trustee or beneficiary;

(c) Cause a copy of the notice of sale described in (f) of this subsection to be transmitted by both first-class and either certified or registered mail, return receipt requested, to the plaintiff or the plaintiff's attorney of record, in any court action to foreclose a lien or other encumbrance on all or any part of the property, provided a court action is pending and a lis pendens in connection therewith is recorded in the office of the auditor of any county in which all or part of the property is located on the date the notice is recorded;

(d) Cause a copy of the notice of sale described in (f) of this subsection to be transmitted by both first-class and either certified or registered mail, return receipt requested, to any person who has recorded a request for notice in accordance with RCW 61.24.045, at the address specified in such person's most recently recorded request for notice;

(e) Cause a copy of the notice of sale described in (f) of this subsection to be posted in a conspicuous place on the property, or in lieu of posting, cause a copy of said notice to be served upon any occupant of the property;

(f) The notice shall be in substantially the following form:

NOTICE OF TRUSTEE'S SALE

I.

NOTICE IS HEREBY GIVEN that the undersigned Trustee will on the day of,, at the hour of o'clock M. at [street address and location if inside a building] in the City of, State of Washington, sell at public auction to the highest and best bidder, payable at the time of sale, the following described real property, situated in the County(ies) of, State of Washington, to-wit:

[If any personal property is to be included in the trustee's sale, include a description that reasonably identifies such personal property]

which is subject to that certain Deed of Trust dated,, recorded,, under Auditor's File No., records of County, Washington, from, as Grantor, to, as Trustee, to secure an obligation in favor of, as Beneficiary, the beneficial interest in which was assigned by, under an Assignment recorded under Auditor's File No. [Include recording information for all counties if the Deed of Trust is recorded in more than one county.]

II.

No action commenced by the Beneficiary of the Deed of Trust is now pending to seek satisfaction of the obligation in any Court by reason of the Borrower's or Grantor's default on the obligation secured by the Deed of Trust.

[If there is another action pending to foreclose other security for all or part of the same debt, qualify the statement and identify the action.]

III.

The default(s) for which this foreclosure is made is/are as follows:

[If default is for other than payment of money, set forth the particulars]

Failure to pay when due the following amounts which are now in arrears:

IV.

The sum owing on the obligation secured by the Deed of Trust is: Principal \$, together with interest as provided in the note or other instrument secured from the day of, . . . , and such other costs and fees as are due under the note or other instrument secured, and as are provided by statute.

V.

The above-described real property will be sold to satisfy the expense of sale and the obligation secured by the Deed of Trust as provided by statute. The sale will be made without warranty, express or implied, regarding title, possession, or encumbrances on the day of, The default(s) referred to in paragraph III must be cured by the day of, (11 days before the sale date), to cause a discontinuance of the sale. The sale will be discontinued and terminated if at any time on or before the day of, (11 days before the sale date), the default(s) as set forth in paragraph III is/are cured and the Trustee's fees and costs are paid. The sale may be terminated any time after the day of, (11 days before the sale date), and before the sale by the Borrower, Grantor, any Guarantor, or the holder of any recorded junior lien or encumbrance paying the entire principal and interest secured by the Deed of Trust, plus costs, fees, and advances, if any, made pursuant to the terms of the obligation and/or Deed of Trust, and curing all other defaults.

VI.

A written notice of default was transmitted by the Beneficiary or Trustee to the Borrower and Grantor at the following addresses:

.....
.....
.....

by both first-class and certified mail on the day of, . . . , proof of which is in the possession of the Trustee; and the Borrower and Grantor were personally served on the day of, . . . , with

said written notice of default or the written notice of default was posted in a conspicuous place on the real property described in paragraph I above, and the Trustee has possession of proof of such service or posting.

VII.

The Trustee whose name and address are set forth below will provide in writing to anyone requesting it, a statement of all costs and fees due at any time prior to the sale.

VIII.

The effect of the sale will be to deprive the Grantor and all those who hold by, through or under the Grantor of all their interest in the above-described property.

IX.

Anyone having any objection to the sale on any grounds whatsoever will be afforded an opportunity to be heard as to those objections if they bring a lawsuit to restrain the sale pursuant to RCW 61.24.130. Failure to bring such a lawsuit may result in a waiver of any proper grounds for invalidating the Trustee's sale.

[Add Part X to this notice if applicable under RCW 61.24.040(9)]

.....

....., Trustee

..... |

...

|

..... > Address
...
..... |
... |
..... } Phone
...

[Acknowledgment]

(g) If the borrower received a letter under RCW 61.24.031, the notice specified in subsection (1)(f) of this section shall also include the following additional language:

"THIS NOTICE IS THE FINAL STEP BEFORE THE FORECLOSURE SALE OF YOUR HOME.

You have only 20 DAYS from the recording date on this notice to pursue mediation.

DO NOT DELAY. CONTACT A HOUSING COUNSELOR OR AN ATTORNEY LICENSED IN WASHINGTON NOW to assess your situation and refer you to mediation if you are eligible and it may help you save your home. See below for safe sources of help.

SEEKING ASSISTANCE

Housing counselors and legal assistance may be available at little or no cost to you. If you would like assistance in determining your rights and opportunities to keep your house, you may contact the following:

The statewide foreclosure hotline for assistance and referral to housing counselors recommended by the Housing Finance Commission

Telephone: Web site:

The United States Department of Housing and Urban Development

Telephone: Web site:

The statewide civil legal aid hotline for assistance and referrals to other housing counselors and attorneys

Telephone: Web site:"

The beneficiary or trustee shall obtain the toll-free numbers and web site information from the department for inclusion in the notice;

(2) In addition to providing the borrower and grantor the notice of sale described in subsection (1)(f) of this section, the trustee shall include with the copy of the notice which is mailed to the grantor, a statement to the grantor in substantially the following form:

NOTICE OF FORECLOSURE

Pursuant to the Revised Code of Washington,

Chapter 61.24 RCW

The attached Notice of Trustee's Sale is a consequence of default(s) in the obligation to, the Beneficiary of your Deed of Trust and owner of the obligation secured thereby. Unless the default(s) is/are cured, your property will be sold at auction on the day of, . . .

To cure the default(s), you must bring the payments current, cure any other defaults, and pay accrued late charges and other costs, advances, and attorneys' fees as set forth below by the day of, . . . [11 days before the sale date]. To date, these arrears and costs are as follows:

	Estimated amount	
	Currently due	that will be due
	to reinstate	to reinstate
	on.	on.

		(11 days before the date set for sale)
Delinquent payments		
from.,		
. . . , in the		
amount of		
\$. . . /mo.:	\$. . .	\$. . .
Late charges in		
the total		
amount of:	\$. . .	\$. . .
		Estimated
		Amounts

Attorneys' fees:	\$	\$
Trustee's fee:	\$	\$
Trustee's expenses:		
(Itemization)		
Title report	\$	\$
Recording fees	\$	\$
Service/Posting		
of Notices	\$	\$
Postage/Copying		
expense	\$	\$
Publication	\$	\$
Telephone		\$
charges	\$	
Inspection fees	\$	\$
.....	\$	\$
.....	\$	\$
TOTALS	\$	\$

To pay off the entire obligation secured by your Deed of Trust as of the day of you must pay a total of \$ in principal, \$ in interest, plus other costs and advances estimated to date in the amount of \$ From and after the date of this notice you must submit a written request to the Trustee to obtain the total amount to pay off the entire obligation secured by your Deed of Trust as of the payoff date.

As to the defaults which do not involve payment of money to the Beneficiary of your Deed of Trust,

you must cure each such default. Listed below are the defaults which do not involve payment of money to the Beneficiary of your Deed of Trust. Opposite each such listed default is a brief description of the action necessary to cure the default and a description of the documentation necessary to show that the default has been cured.

Default	Description of Action Required to Cure and Documentation Necessary to Show Cure
.....
...
.....
.....
.....
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.....
.....
.....

You may reinstate your Deed of Trust and the obligation secured thereby at any time up to and including the day of, . . . [11 days before the sale date], by paying the amount set forth or estimated above and by curing any other defaults described above. Of course, as time passes other payments may become due, and any further payments coming due and any additional late charges must be added to your reinstating payment. Any new defaults not involving payment of money that occur after the date of this notice must also be cured in order to effect reinstatement. In addition, because some of the charges can only be estimated at this time, and because the amount necessary to reinstate or to pay off the entire indebtedness may include presently unknown expenditures required to preserve the property or to comply with state or local law, it will be necessary for you to contact the Trustee before the time you tender reinstatement or the payoff amount so that you may be advised of the exact amount you will be required to pay. Tender of payment or performance must be made to:, whose address is, telephone () AFTER THE DAY OF, . . ., YOU MAY NOT REINSTATE YOUR DEED OF TRUST BY PAYING THE BACK PAYMENTS AND COSTS AND FEES AND CURING THE OTHER DEFAULTS AS OUTLINED ABOVE. The Trustee will respond to any written request for current payoff or reinstatement amounts within ten days of receipt of your written request. *IN SUCH A CASE, YOU*

will only be able to stop the sale by paying, before the sale, the total principal balance (\$) plus accrued interest, costs and advances, if any, made pursuant to the terms of the documents and by curing the other defaults as outlined above.

You may contest this default by initiating court action in the Superior Court of the county in which the sale is to be held. In such action, you may raise any legitimate defenses you have to this default. A copy of your Deed of Trust and documents evidencing the obligation secured thereby are enclosed. You may wish to consult a lawyer. Legal action on your part may prevent or restrain the sale, but only if you persuade the court of the merits of your defense. You may contact the Department of Financial Institutions or the statewide civil legal aid hotline for possible assistance or referrals.

The court may grant a restraining order or injunction to restrain a trustee's sale pursuant to RCW 61.24.130 upon five days notice to the trustee of the time when, place where, and the judge before whom the application for the restraining order or injunction is to be made. This notice shall include copies of all pleadings and related documents to be given to the judge. Notice and other process may be served on the trustee at:

NAME:

ADDRESS:
.....

TELEPHONE NUMBER:

If you do not reinstate the secured obligation and your Deed of Trust in the manner set forth above, or if you do not succeed in restraining the sale by court action, your property will be sold. The effect of such sale will be to deprive you and all those who hold by, through or under you of all interest in the property;

(3) In addition, the trustee shall cause a copy of the notice of sale described in subsection (1)(f) of this section (excluding the acknowledgment) to be published in a legal newspaper in each county in which the property or any part thereof is situated, once on or between the thirty-fifth and twenty-eighth day before the date of sale, and once on or between the fourteenth and seventh day before the date of sale;

(4) On the date and at the time designated in the notice of sale, the trustee or its authorized agent

shall sell the property at public auction to the highest bidder. The trustee may sell the property in gross or in parcels as the trustee shall deem most advantageous;

(5) The place of sale shall be at any designated public place within the county where the property is located and if the property is in more than one county, the sale may be in any of the counties where the property is located. The sale shall be on Friday, or if Friday is a legal holiday on the following Monday, and during the hours set by statute for the conduct of sales of real estate at execution;

(6) The trustee has no obligation to, but may, for any cause the trustee deems advantageous, continue the sale for a period or periods not exceeding a total of one hundred twenty days by (a) a public proclamation at the time and place fixed for sale in the notice of sale and if the continuance is beyond the date of sale, by giving notice of the new time and place of the sale by both first class and either certified or registered mail, return receipt requested, to the persons specified in subsection (1)(b)(i) and (ii) of this section to be deposited in the mail (i) not less than four days before the new date fixed for the sale if the sale is continued for up to seven days; or (ii) not more than three days after the date of the continuance by oral proclamation if the sale is continued for more than seven days, or, alternatively, (b) by giving notice of the time and place of the postponed sale in the manner and to the persons specified in subsection (1)(b), (c), (d), and (e) of this section and publishing a copy of such notice once in the newspaper(s) described in subsection (3) of this section, more than seven days before the date fixed for sale in the notice of sale. No other notice of the postponed sale need be given;

(7) The purchaser shall forthwith pay the price bid and on payment the trustee shall execute to the purchaser its deed; the deed shall recite the facts showing that the sale was conducted in compliance with all of the requirements of this chapter and of the deed of trust, which recital shall be prima facie evidence of such compliance and conclusive evidence thereof in favor of bona fide purchasers and encumbrancers for value, except that these recitals shall not affect the lien or interest of any person entitled to notice under subsection (1) of this section, if the trustee fails to give the required notice to such person. In such case, the lien or interest of such omitted person shall not be affected by the sale and such omitted person shall be treated as if such person was the holder of the same lien or interest and was omitted as a party defendant in a judicial foreclosure proceeding;

(8) The sale as authorized under this chapter shall not take place less than one hundred ninety days from the date of default in any of the obligations secured;

(9) If the trustee elects to foreclose the interest of any occupant or tenant of property comprised solely of a single-family residence, or a condominium, cooperative, or other dwelling unit in a multiplex or other building containing fewer than five residential units, the following notice shall be included as Part X of the Notice of Trustee's Sale:

X. NOTICE TO OCCUPANTS OR TENANTS

The purchaser at the trustee's sale is entitled to possession of the property on the 20th day following the sale, as against the grantor under the deed of trust (the owner) and anyone having an interest junior to the deed of trust, including occupants who are not tenants. After the 20th day following the sale the purchaser has the right to evict occupants who are not tenants by summary proceedings under chapter 59.12 RCW. For tenant-occupied property, the purchaser shall provide a tenant with written notice in accordance with RCW 61.24.060;

(10) Only one copy of all notices required by this chapter need be given to a person who is both the borrower and the grantor. All notices required by this chapter that are given to a general partnership are deemed given to each of its general partners, unless otherwise agreed by the parties.