

NO. 86433-1

(Consolidated with No. 86710-1)

SUPREME COURT
OF THE STATE OF WASHINGTON

STEVEN F. SCHROEDER,
a married man dealing with his sole and separate property,

Petitioner,

vs.

PHILLIP J. HABERTHUR, as trustee;
EXCELSIOR MANAGEMENT GROUP, LLC;
EXCELSIOR MORTGAGE EQUITY FUND II, LLC;
JAMES HANEY; and CLS MORTGAGE, INC;

Respondents.

SUPPLEMENTAL BRIEF OF RESPONDENTS

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I. INTRODUCTION

This appeal involves two consolidated cases. In the first case, Appellant Steven F. Schroeder seeks to vacate a Stipulated Final Order and Judgment of Dismissal. He claims the right to renege on his representations and warranties that the property he offered as security for a commercial loan was not being principally used for agricultural purposes.

In his second appeal, which is the one addressed by this Brief, Schroeder claims he was not required to avail himself of the legal remedies provided under the Deed of Trust Act (the “Act”) to stop the trustee’s sale. He instead claims the right to invoke the court’s inherent equitable powers and argues the remedies provided under the Act are unconstitutional because they encroach upon the court’s authority to issue injunctive relief.

The law is clear: When the legislature has provided a clear and adequate legal remedy, a court will not invoke its equitable powers to provide relief otherwise available through a legislative enactment except in extraordinary circumstances. In this case, Schroeder had every right and opportunity to use the statutory process to stop the trustee’s sale. He chose not to pursue those rights and instead made a failed attempt to invoke the court’s equitable powers. The trial court and Court of Appeals properly found that the statutory remedy was adequate and the Act did not

conflict with any court rules. Accordingly, those courts declined to grant Schroeder an injunction outside the remedies provided under RCW 61.24.130.

Finally, under the Act's waiver doctrine, a borrower that fails to utilize those remedies provided under the Act is barred from seeking any relief once the trustee's sale has occurred, including all claims related to the underlying obligation or the sale procedures. As a result of Schroeder's failed attempt to restrain the sale, all of his claims are barred.

II. ISSUES PRESENTED FOR REVIEW

1. RCW 61.24.130 provides the exclusive means to restrain a trustee's sale. This statute provides that no court may restrain a trustee's sale unless the trustee is provided at least five (5) days notice of the hearing at which the restraining order is sought. Can a borrower invoke the court's inherent equitable powers to stop a trustee's sale if they have failed to utilize the exclusive process under RCW 61.24.130?

2. Under the Waiver Doctrine, if a borrower fails to properly and successfully employ the presale remedies under RCW 61.24.130, they waive the right to contest the trustee's sale and the underlying debt. Because Schroeder failed to comply with the statute, the trial judge ordered the trustee's sale to occur as scheduled. Did Schroeder waive his right to challenge the foreclosure when he failed to properly stop the trustee's sale?

3. The legislature does not violate the separation of powers doctrine when it enacts laws to provide an adequate legal remedy, even if those remedies were once only provided by the courts through its equitable powers. The legislature can also prescribe the procedures for exercising those legal rights, provided those laws do not conflict with court rules. Does RCW 61.24.130's exclusive remedy for stopping a trustee's sale violate the separation of powers doctrine?

III. STATEMENT OF THE CASE

Excelsior largely agrees with the Court of Appeal's recitation of the facts in its opinion and those facts Excelsior supplied in its Response Brief and Answer to the Petition for Review.

IV. ARGUMENT

A. Standard of Review.

Because the trial court and the Court of Appeals resolved this case on summary judgment, this Court's review is *de novo*.¹ However, Schroeder must prove his claim that RCW 61.24.130 is unconstitutional "beyond a reasonable doubt."² If possible, the court must "construe the legislative enactment so as to render it constitutional."³

The Court also reviews a trial court's statutory interpretation *de novo*.⁴ The Court's goal in interpreting a statute is to carry out the legislative intent.⁵ When the statute's words are plain and unambiguous, the Court need only construe the statute as written.⁶

¹ *Ellis v. City of Seattle*, 142 Wn.2d 450, 458, 13 P.3d 1065 (2000).

² A legislative enactment is presumed constitutional, and the parties challenging it must prove it violates the Constitution beyond a reasonable doubt. *State v. Myles*, 127 Wn.2d 807, 812, 903 P.2d 979 (1995). If possible, a court will construe a legislative enactment so as to render it constitutional. *State v. Reyes*, 104 Wn.2d 35, 40, 700 P.2d 1155 (1985).

³ *Myles*, 127 Wn.2d at 812.

⁴ *Nevers v. Fireside, Inc.*, 133 Wn.2d 804, 809, 947 P.2d 721 (1997).

⁵ *Cockle v. Dep't of Labor and Indus.*, 142 Wn.2d 801, 807, 16 P.3d 583 (2001).

⁶ *Leasing Inc. v. City of Tacoma*, 139 Wn.2d 546, 552, 988 P.2d 961 (1999) (internal citations omitted).

Finally, the question of whether the trial court should have invoked its equitable powers to override the clear legal remedy provided under RCW 61.24.130 is reviewed under an abuse of discretion standard.⁷

B. The Deed of Trust Act Provides the Exclusive Means to Stop a Trustee's Sale Because it Affords the Borrower an Adequate Remedy at Law.

This Court has held on many occasions that the Act provides the “only means by which a grantor may preclude a non-judicial foreclosure sale once foreclosure has begun.”⁸ Under the Act, a party cannot contest the foreclosure, or the underlying obligations of a commercial deed of trust, unless they have successfully restrained the trustee from conducting the trustee’s sale under RCW 61.24.130.⁹

This statute requires a person seeking to restrain a foreclosure sale to personally “serve” the trustee with at least five (5) days notice of the “time when, place where, and the judge before whom the application for the restraining order or injunction is to be made.”¹⁰ In this case, and without any excuse, Schroder waited until three (3) days before the

⁷ *Alderwood Assocs. v. Washington Envtl. Council*, 96 Wn.2d 230, 233, 635 P.2d 108 (1981); *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

⁸ *Plein v. Lackey*, 149 Wn.2d 214, 225-226, 67 P.3d 1061 (2003); *CHD, Inc. v. Boyles*, 138 Wn. App. 131, 137, 157 P.3d 415 (2007).

⁹ *Id.*

¹⁰ RCW 61.24.130(2) (“No court may grant a restraining order or injunction to restrain a Trustee’s Sale” unless these requirements are met).

scheduled trustee's sale to seek an ex-parte Temporary Restraining Order under CR 65(b), and then he failed to post the required bond.

Schroeder now wants this court to declare that the 47 year old Act (RCW 61.24.130) is unconstitutional. Schroeder's alleged basis for restraining the sale, that the property was being used principally for agricultural purposes, was a fact known to him well in advance of the trustee's sale. He failed, without excuse, to restrain the sale. This Court should refuse the invitation to overrule prior cases being followed by Washington and federal courts and hold that all claims are waived if injunctive relief is not sought, regardless of whether the claim relates to a sale irregularity.

1. Purposes of the Act

Washington's Deed of Trust Act was first enacted in 1965 to provide a time and cost efficient alternative to judicial mortgage foreclosures.¹¹ A proper foreclosure action extinguishes the debt and transfers title to the property to the beneficiary of the deed or to the successful bidder at a foreclosure sale.¹²

As this Court noted, the Act should be construed to further three

¹¹ *Glidden v. Municipal Auth. of Tacoma*, 111 Wn.2d 341, 346, 758 P.2d 487 (1988).

¹² *In re Marriage of Kaseburg*, 126 Wn. App. 546, 558, 108 P.2d 1278 (2005).

basic objectives.¹³ First, the non-judicial foreclosure process should remain efficient and inexpensive.¹⁴ Second, the process should provide an adequate opportunity for interested parties to prevent wrongful foreclosure.¹⁵ Third, the process should promote the stability of land titles.¹⁶

2. The Act provides the only means for restraining a trustee's sale

This Court has made clear that RCW 61.24.130 sets forth “the *only* means by which a grantor may preclude a sale once foreclosure has begun with receipt of the notice of sale and foreclosure.”¹⁷ The other option is to cure the defaults, a remedy available to Schroeder during the entire foreclosure process. The failure to take advantage of this statutory remedy constitutes a waiver of the right to contest the underlying foreclosure proceeding, including whether the trustee's sale was lawful.¹⁸

Under this doctrine, a waiver occurs when a party (1) receives notice of the right to enjoin the sale; (2) has actual or constructive

¹³ *Plein v. Lackey*, 149 Wn.2d 214, 225, 647 P.3d 1061 (2003) and *Cox v. Helenius*, 103 Wn.2d 383, 387, 693 P.2d 683 (1985).

¹⁴ *Plein*, 149 Wn.2d at 225.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Cox v. Helenius*, 103 Wn.2d 383, 693 P.2d 682 (1985) (emphasis added).

¹⁸ *Plein*, 149 Wn.2d at 227; *CHD, Inc. v. Boyles*, 138 Wn. App. 131, 134, 157 P.3d 415 (2007); *Beaver-Jackson v. Std. Tr. Co. of Washington*, 2008 WL 5100308 (W. D. Wash. 2008) (failure to enjoin foreclosure sale results in waiver of debtor's right to contest the underlying foreclosure proceeding).

knowledge of a defense to foreclosure before the sale; and, (3) fails to bring an action to enjoin the sale.¹⁹ The statutory notices inform a party of the right to enjoin the sale.²⁰

RCW 61.24.040 contains the procedural requirements for a non-judicial foreclosure, including the requirements for inserting contents into the sale notices. In particular, this statute provides that:

Anyone having an 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.²¹

Schroeder does not dispute that he received all presale notices of the sale and foreclosure, that the notices conformed to the requirements of RCW 61.24.040, or that the notices informed him of his right to enjoin the sale.

Schroeder has alleged in the first appeal that the property was improperly foreclosed because it was being used principally for agricultural purposes at the time of the foreclosure. Schroeder appears to argue that the trustee's sale was "illegal" or void because the trustee

¹⁹ *Plein v. Lackey*, 149 Wn.2d 214, 227, 67 P.3d 1061 (2003).

²⁰ RCW 61.24.040; *Country Express Stores, Inc. v. Sims*, 87 Wn. App. 741, 751, 943 P.2d 374 (1997).

²¹ RCW 61.24.040(1)(f)(IX).

lacked the authority to conduct the sale in the first place. This type of challenge must have been brought *before* the sale in order to avoid having the claims waived.

In *Hallas v. Ameriquest Mortgage Company*, the court held that Washington's waiver doctrine applies to bar post sale challenges to both the foreclosure process and the underlying obligation.²² In *Plein v. Lackey*, this Court held that the failure to obtain injunctive relief restraining a sale bars all claims, even those claims that the borrower was not in default at the time of the sale.²³ On this point, the Washington Land Title Association filed an amicus brief in *Plein* arguing that if a trustee's deed can be challenged after the fact, "title insurers will not insure, secured lenders will not lend on and buyers will not purchase real property with title tracing to a trustee's deed."²⁴

Brown v. Household Realty Corporation from Division II followed *Plein*, and relied upon its holding when it held that the waiver doctrine waived the right to bring *any* claims relating to obligations secured by the foreclosed deed of trust, including claims for legal or equitable relief.²⁵ Unlike the loan in *Plein*, the loan and property at issue in *Brown* involved

²² 406 F. Supp. 2d 1176, 1182 (D. Or. 2005).

²³ *Plein*, 149 Wn.2d at 227.

²⁴ *Id.*, n.5.

²⁵ 146 Wn. App. 157, 189 P.3d 233 (2008).

owner-occupied residential property.

The Legislature passed RCW 61.24.127 after the *Brown* decision was issued.²⁶ Notably, RCW 61.24.127 permits post-sale claims for damages arising from certain claims, including failure of the trustee to comply with the Deed of Trust Act.²⁷ However, **RCW 61.24.127 only applies to owner-occupied residential real property and not to commercial loans.** With regard to commercial loans, such as the one at issue here, the Legislature has made it abundantly clear that the waiver doctrine applies with full force and effect to bar Schroeder's claims. The Legislature is presumed to be aware of existing Washington case law on the subjects about which it is legislating.²⁸ As such, the Legislature has not reversed any of the cases related to commercial loans, such as the one at issue in this case. Schroeder's claims are barred by the Waiver Doctrine.

C. The Waiver Doctrine Applies If Sale Notices Are Properly Provided to the Borrower/Grantor.

The Waiver Doctrine evidences the Legislature's intent to create a reasonable statute of limitations on claims related to both the trustee's sale and underlying obligation. This is not a foreign concept to Washington

²⁶ March 23, 2009 WA H.R.B. An., 2009 Reg. Sess. SB 5810 (explaining non-waiver of claims) (attached as **Appendix A**).

²⁷ RCW 61.24.127.

²⁸ *Woodson v. State*, 95 Wn.2d 257, 623 P.2d 683 (1980).

courts as the Legislature routinely provides a statute of limitations that prescribes when a claim must be filed or waived.²⁹ If the Waiver Doctrine does not apply, then what statute of limitations for post-sale challenges would this Court impose? Six years from the date of the sale? Ten years? What would happen to the lender's lien that was purportedly foreclosed if the property has been sold to third, fourth, or even fifth owners? And would such an interpretation further the third purpose of the Act (promote stability of land titles)?

As long as the sale notices were provided to the borrower/grantor informing them of their rights and the requirements to restrain the sale, and the sale was not restrained through injunctive relief, applying the Waiver Doctrine to bar all post-sale challenges, including those related to the sale itself, is fair to all the parties.

D. RCW 61.24.130 is Not Unconstitutional.

Schroeder claims that RCW 61.24.130 violates the separation of powers doctrine because it infringes upon the court's authority. But this very argument has been tried and rejected by this Court on several occasions.

As this court recognized in *Putman v. Wenatchee Valley Medical*

²⁹ See RCW 4.16.020; RCW 4.16.040; RCW 4.16.070; RCW 4.16.080. *Earle v. Froedtert Grain and Malting Co.*, 197 Wash 341, 85 P.2d 264 (1938) (the time provided for the commencement of an action relates only to the remedy and therefore may be abridged at the pleasure of the legislature); *Rodriguez v. Niemeyer*, 23 Wn. App 398, 595 P.2d 952 (1979) (creation of limitation periods is primarily a legislative function, and legislature has constitutional power to enact statute of limitations to fix precise time beyond which no remedy will be available).

Center:

The Washington State Constitution does not contain a formal separation of powers clause, but ‘the very division of our government into different branches has been presumed throughout our state’s history to give rise to a vital separation of powers doctrine.’

* * * *

Some fundamental functions are within the inherent power of the judicial branch, including the power to promulgate rules for its practice. If a statute appears to conflict with a court rule, this court will first attempt to harmonize them and give effect to both, but if they cannot be harmonized, the court rule will prevail in procedural matters and the statute will prevail in substantive matters (internal citations omitted).³⁰

As this Court indicated, the crux of a separation of powers analysis is for the court to determine whether the legislative enactment at issue is in conflict with a court rule. As quoted above, the court must attempt to “harmonize” the statute with the court rules to determine if in fact there is a conflict.

In this case, Schroeder does not articulate how the statute violates a court rule, or even identify which of the court rules are at issue.³¹ He instead makes the general argument that the statute deprives the court of

³⁰ 166 Wn.2d 974, 216 P3d 374 (2009).

³¹ Instead of seeking to stop the Trustee’s Sale under RCW 61.24.130, Schroeder filed for a preliminary injunction under CR 65. But there is nothing in the statute that conflicts with CR 65. Indeed, CR 65(a)(1) expressly provides that no injunction will be issued without notice. Section (c) states that “Except as provided by statute”, no injunction shall be issued without the posting of security. And finally, subsection (e) states that “These rules are intended to supplement and not to modify any statute prescribing the basis for obtaining injunctive relief. Therefore, not only does the statute not conflict with the court rules, the rules expressly defer to those statutes that provide injunctive relief.

its inherent authority to grant equitable relief. But in circumstances similar to the one at hand, this Court has considered and soundly rejected this argument.

In *Roon v. King County*, a property owner sought to set aside a tax foreclosure sale because King County had “wrongfully, arbitrarily, willfully, unconscionably, capriciously, tyrannically and fraudulently overvalued and assessed her property.”³² Prior to 1931, the courts permitted aggrieved parties to set aside a tax foreclosure when there was evidence of fraud or excessive tax assessments. But this stopped when the legislature adopted a statute that limited when and how an injunction could be issued.

Roon argued that, because this new statute impaired or lessened the court’s inherent equitable powers, the law was unconstitutional. This Court rejected the argument and held:

We do not construe the 1931 act as an encroachment upon the constitutional power of the court in the exercise of its inherent equity functions, nor would we accede to such attempt if it were so intended. We accept it simply and *solely* as a legislative undertaking to provide an adequate legal remedy in cases wherein, if a legal remedy existed before, it was a doubtful or inadequate one. Provision for a speedy, adequate remedy having thus been specifically made, the courts, *while retaining to the full all of the equitable powers inherent in them*, have only *lessened occasion* for the exercise of such powers³³

³² 24 Wn.2d 519, 166 P.2d 165 (1946).

³³ *Roon v. King County* 24 Wn.2d 519, 166 P.2d 165 (1946); *see also Casco Cò. v.*

This Court went further and held that when the legislature has provided an adequate legal remedy, the courts will not, except in extraordinary circumstances, invoke its equitable powers:

The remedy afforded by the 1931 act is indeed a new one, and will be considered “exclusive” in the sense that if the court, in a given instance, considers the remedy adequate and sufficient, under the circumstances of the particular case, it will not exercise its equity powers by injunction, or otherwise. This does not mean, however, that the remedy is ‘exclusive’ in the sense that the legislature has deprived the courts of any of their constitutional equity powers.... [S]ince the passage of the 1931 act there is ‘lessened occasion’ for the exercise of such equity powers by the courts, and although such occasion may indeed be infrequent, nevertheless the courts *retain* all the equitable powers inherent in them, and may still exercise them when the occasion demands it.³⁴

Based on this, the court ruled that *Roon* had failed to avail herself of the legislatively provided remedy and therefore was barred from seeking any relief. This court has long denied relief to parties that have failed to utilize a statutory remedy.³⁵

Thurston County, 163 Wn. 666, 2 P.2d 677 (1931) (“We can see here no encroachment upon the constitutional power of the courts, but simply and solely a legislative attempt to provide an adequate legal remedy where, that the courts, while retaining to the full all of the equitable powers inherent in them, will find only lessened occasions for the use of such powers.”).

³⁴ *Roon*, 24 Wn.2d at 527.

³⁵ *Longview Fiber Co. v. Cowlitz County*, 114 Wash. Wnd 691, 790 P2nd 149 (1990) (even though the result was “harsh”, the Court declined to grant equitable relief when the tax payer failed to comply with statutory process for obtaining relief); see also

Schroeder admits he failed to follow the procedures set forth in RCW 61.24.130. He admits he was provided the statutory notice of the trustee's sale, including a description of what he needed to do to stop the sale. In fact, he filed the lawsuit in time and even filed a timely and procedurally proper motion to try and stop the sale, although he withdrew the motion later because his attorney realized that it lacked merit. Why should the court invoke its inherent but extraordinary equitable powers when Schroeder failed, without any justification, to exercise his rights under the statute? By failing to avail himself of those legal remedies, Schroeder waived the right to invoke the court's equitable jurisdiction.

Schroeder may also argue that Division III's decision in *Bowcutt v. Delta North Star Corporation* stands for the proposition that RCW 61.24.130 is not the only way to stop a foreclosure sale.³⁶ For the following reasons, the *Bowcutt* case does not apply, or at least should not be followed because the *Bowcutt* court found that the case demanded the exercise of the broad, equitable powers discussed above.

The legislative amendments to the Act passed in 2008 and 2009 make clear that it intended for RCW 61.24.130 to provide the exclusive

Department of Labor and Industries v. Dillon, 28 Wash App 853, 855, 626 and 1804 (1981) (equitable principles cannot be asserted to establish equitable relief in derogations of statutory mandates".

³⁶ 95 Wn. App. 311, 976 P.2d 643 (1999).

means for challenging a foreclosure sale. By adding a section to the Act (RCW 61.24.135) that expressly incorporates the Consumer Protection Act and inserting the words “legal or equitable” between “proper” and “ground” in RCW 61.24.130(1), the legislature clearly intended for all claims to be raised through a pre-sale challenge using RCW 61.24.130.

Second, *Bowcutt* was decided several years before *Plein* where this Court unequivocally held that RCW 61.24.130 “is the only means by which a grantor may preclude a sale once foreclosure has begun with receipt of the notice of sale and foreclosure.”³⁷

Third, there is no evidence as to why Schroeder was not able to comply with RCW 61.24.130. Unlike the plaintiffs in *Bowcutt*—who were unable to raise the required sums of money to stop the sale and therefore would have been unable to proceed with their RICO claims, Schroeder has failed to offer any reason why he could not have brought his Motion to Restrain the Sale on time, or why he could not have served the Trustee with at least 5-days notice or post the required “default” amount with the court.

Fourth, unlike the plaintiffs in the *Bowcutt* case who filed for discretionary review before the trustee’s sale occurred, Schroeder failed to appeal the trial court’s order dissolving the injunction. Thus, the property

³⁷ *Plein* 149 Wn.2d at 226; quoting *Cox*, 103 Wn.2d at 388.

was sold, rendering the case moot.

Finally, unlike the residential borrowers in *Bowcutt*, this case involves a commercial loan that does not implicate owner-occupied residential property. As stated above, in 2009 the Legislature created an exception to the waiver rule for borrowers who live in their home (RCW 61.24.127). Had the legislature wanted to create a similar exception for commercial loans, it would have so provided.

E. Excelsior Is Entitled To Its Reasonable Legal Costs.

The Promissory Note and Deed of Trust permit the prevailing party to recover their legal fees.³⁸ Therefore, if Schroeder does not prevail in this appeal, Excelsior is entitled to its reasonable fees and costs.

V. CONCLUSION

The legislature intended to provide an exclusive means for a borrower to stop a trustee's sale, and once that sale has occurred, the parties cannot bring a collateral attack. Because Schroeder failed, without

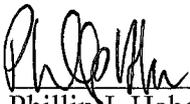
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³⁸ CP 171; 192.

legitimate excuse, to avail himself of those remedies provided by statute, he is barred from challenging the finality of the trustee's sale. The trial court and the Court of Appeals' decision should therefore be affirmed.

Dated: April 5, 2012.

SCHWABE, WILLIAMSON & WYATT, P.C.

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Appendix A

Judiciary Committee

ESB 5810

Title: An act relating to foreclosures on deeds of trust.

Brief Description: Concerning foreclosures on deeds of trust.

Sponsors: Senators Kauffman, Berkey, Shin, Franklin, Keiser, Tom and Kohl-Welles; by request of Governor Gregoire.

Brief Summary of Engrossed Bill

- Requires a beneficiary, before issuing a notice of default, to contact the borrower and explore options for the borrower to avoid foreclosure.
- Provides that a tenant of property that has been sold in foreclosure receive 60 days written notice before the tenant can be removed.
- Provides that a borrower's failure to enjoin a foreclosure does not constitute a waiver of certain claims.
- Requires that before a notice of sale may be recorded, the trustee must have proof that the beneficiary is the actual holder of the promissory note secured by the deed of trust.

Hearing Date: 3/23/09

Staff: Trudes Tango (786-7384)

Background:

Unlike mortgages, which require judicial foreclosure, deeds of trust may be nonjudicially foreclosed if the borrower defaults on the loan obligation. The deeds of trust statutes establish procedures that must be followed by beneficiaries, trustees, and borrowers. The trustee must act impartially between the borrower, grantor, and beneficiary.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

A foreclosure sale cannot occur until at least 190 days from the date of default on the loan. Within that time, the trustee or beneficiary must comply with specific notice provisions. The beneficiary or trustee must send a notice of default to the grantor. After 30 days from the date the notice of default is sent, the trustee may record a notice of the foreclosure sale. The foreclosure sale may not occur until after 90 days from the time the notice of foreclosure sale is recorded, mailed, and served. Within certain time frames, the borrower may cure the default and discontinue the sale. The trustee's sale is automatically stayed if the borrower files for bankruptcy.

The borrower may file an action in court to enjoin the sale on any proper ground, such as an assertion that the borrower is not in default on the loan or that the borrower did not receive the required notices. The action to enjoin the sale can be filed anytime before the scheduled trustee sale, but five days notice of the action must be given to the trustee and the beneficiary.

In *Brown v. Household Realty Corp.* (2008), the Washington Court of Appeals held that a party waives the right to post-foreclosure sale remedies where the party failed to bring an action to enjoin the sale. The court stated that applying the waiver doctrine furthers the three goals of the Deeds of Trust Act: (1) that the nonjudicial foreclosure process should be efficient and inexpensive; (2) that the process should result in interested parties having an adequate opportunity to prevent wrongful foreclosure; and (3) that the process should promote stability of land titles.

Once the property is sold, the purchaser has the right to possession of the property on the 20th day following the sale.

Summary of Bill:

Changes are made to the procedures for foreclosure on deeds of trust. The trustee has a duty of good faith to the borrower, beneficiary, grantor, and other persons with an interest in the property.

Requirement to contact the borrower

A notice of default may not be issued to the borrower until 30 days after the beneficiary contacts, or exercises due diligence to contact, the borrower to explore options to avoid foreclosure. During the initial contact, the beneficiary must advise the borrower that he or she has the right to request a subsequent meeting, which if requested, the beneficiary must schedule within 14 days. The borrower must be provided with contact information for a HUD-certified counseling agency.

A notice of default must include a declaration by the beneficiary that it has contacted, or tried with due diligence to contact, the borrower. A trustee is not liable for the beneficiary's failure to satisfy the contact requirements.

Due diligence includes mailing the borrower a letter, calling the borrower at various times, providing the beneficiary's toll-free number for the borrower to call, and if the beneficiary has a website, posting a link on the website with information specifically for borrowers in default.

The contact requirement does not apply in specified circumstances, such as if the borrower has surrendered the property. The contact requirement does not apply to: deeds of trust securing a debt incurred primarily for commercial purposes; securing a guarantor's obligations under a guaranty; or seller-financed sales.

The contact requirement applies to deeds of trust for owner-occupied residential real property made from January 1, 2003, to December 31, 2007. The contact requirement expires on December 31, 2012.

Tenants in possession of property sold at foreclosure

Upon posting a notice of trustee sale, the trustee must also post on nonowner-occupied residential real property a notice that states: the property may be sold at foreclosure; and the tenant may enter a new lease with the new owner or may be given a 60-day notice to vacate. The trustee or beneficiary must also mail the notice to the address of the property subject to foreclosure.

If the property is sold, the new owner must give the tenant 60 days written notice before the tenant may be removed. The new owner may negotiate a new lease with the tenant or offer to pay the tenant to vacate sooner.

The 60-day notice provisions for tenants expire on December 31, 2007.

Nonwaiver of claims

The failure of a borrower or grantor to enjoin a foreclosure sale does not constitute a waiver of the following claims: common law fraud, misrepresentation or breach of contract; unlawful lending under the mortgage lending laws; and failure of the trustee to materially comply with the provisions of the deeds of trust statutes.

A nonwaived claim may be brought in an unlawful detainer action if the borrower or grantor asserting the claim is a defendant in an unlawful detainer action brought by the lender. A borrower or grantor may assert a nonwaived claim independently against a lender or trustee regardless of whether a third party was a successful bidder at the foreclosure sale.

The nonwaived claims must be asserted within two years from the date of the foreclosure sale. The claim may not seek any remedy other than money damages unless the property is owned by the beneficiary at the time the action is filed. If the borrower or grantor brings in the same civil action a Consumer Protection Act (CPA) claim arising out of the same alleged facts, relief is limited to actual damages, treble damages as allowed under the CPA, and a reasonable attorney's fee.

The claim may not otherwise affect the validity or finality of the foreclosure sale to a bona fide purchaser.

Requirement before notice of sale is recorded

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of April, 2012, I caused to be served the foregoing **SUPPLEMENTAL BRIEF OF RESPONDENTS** on the following parties at the following addresses:

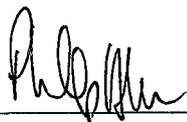
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by:

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| <input type="checkbox"/> | U.S. Postal Service, certified or registered mail, |
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| <input type="checkbox"/> | facsimile |
| <input checked="" type="checkbox"/> | electronic service (per written agreement) |



Phillip J. Haberthur