

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON  
Jan 27, 2014, 3:05 pm  
BY RONALD R. CARPENTER  
CLERK

89343-8

RECEIVED BY E-MAIL

SUPREME COURT  
OF THE STATE OF WASHINGTON

FLORENCE R. FRIAS

*Plaintiff,*

v.

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

*Defendants.*

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
JAN 27 5 PM 3:09  
BY RONALD R. CARPENTER  
CLERK

BRIEF OF AMICUS CURIAE

COALITION FOR CIVIL JUSTICE

Richard Llewelyn Jones  
WSBA No. 12904  
2050 – 112<sup>th</sup> Ave., N.E., Suite 230  
Bellevue, WA 98004  
425.462.7322  
[rli@richardjoneslaw.com](mailto:rli@richardjoneslaw.com)

Ha Thu Dao  
WSBA No. 21793  
787 Maynard Ave., South  
Seattle, WA 98104  
727.269.9334  
[hadaojd@gmail.com](mailto:hadaojd@gmail.com)

 ORIGINAL

## TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF CASES AND AUTHORITIES	i
I. Introductory Remarks and Summary of Argument	1
II. Statement of Interest of <i>Amicus Curiae</i>	6
III. Statement of Case	6
IV. Argument	7
A. Existing Statutory Basis for Pre-Sale Causes of Action.	7
B. Pre-sale Damages are Well Grounded in Tort Law.	10
V. CONCLUSION	18

## TABLE OF AUTHORITIES

### Cases

<i>Albice v. Premier Mortgages Services of Washington, Inc.</i> , 174 Wn.2d 560, 567, 276 P.3d 1277 (2012).....	2, 6, 10
<i>Bain v. Metropolitan Mortgage Group, Inc.</i> , 175 Wn.2d 83, 285 P.3d 34 (2012).....	2, 5, 6, 8, 10
<i>Bavand v. OneWest Bank, FSB</i> , 176 Wn.App 475, 309 P.3d 636 (2013).....	2, 6, 7, 8, 10
<i>Bradshaw v. Hilco Receivables, LLC</i> . 765 F.Supp.2d 719 (D.Md. 2011) .....	15
<i>Collins v. Union Fed. Sav. &amp; Loan Assoc</i> , 99 Nev. 284, 662 P.2d 610 (1983).....	11
<i>Cox v. Helenius</i> , 103 Wn.2d 383, 693 P.2d 683 (1985).....	2, 10
<i>Curl v. First Fed. Sav. &amp; Loan Assn. of Gainesville</i> , 243 Ga.App. 842, 257 S.E.2d 264 (1979) .....	12
<i>Davis v. Gibbs</i> , 39 Wn.2d 180, 234 P.2d 1071 (1951) .....	8
<i>Dobson v. Mortgage Electronic Registration Systems, Inc./GMAC Mortg. Corp.</i> , 259 S.W.3d 19 (Mo.Ct. App. E.D. 2008).....	10
<i>Drew v. Rivera</i> , N. 1:12-cv-9-MP-GRJ, 2012 WL 4088943 N.D. Fla. Aug. 6, 2012.....	16
<i>Fields v. Millsap &amp; Singer, P.C.</i> , No. WD 70237, 295 S.W.3d 567, WL 2496461 (Mo.App. W.D. Aug 18, 2009).....	11

<i>Foster v. D.B.S. Collection Agency</i> , 463 F.Supp.2d 783 (S.D. Ohio 2006).....	15
<i>Goss v. Needham Gooperative Bank</i> , 312 Mass. 309, 44 N.E. 2d 690 (1942).....	12
<i>Johnstone v. Bank of Am., N.A.</i> , 173 F, Supp. 2d 809 (N.D. Ill. 2001) .....	13
<i>Klem v. Washington Mutual Bank</i> , 176 Wn.2d 771, 295 P.3d 1179 (2013).....	2, 5, 6, 10
<i>Malone v. Belcher</i> , 216 Mass. 209, 103 N.E. 637 (1913).....	11
<i>Matthews v. Homecomings Fin. Network</i> , 2005 U.S. Dist. LEXIS 21535 (N.D. Ill. 2005) .....	13
<i>Morse v. Mutual Federal Sav. &amp; Loan Ass'n of Whitmore</i> , 536 F.Supp. 1271 (D.C. Mass 1982) .....	11
<i>McCarter v. Bankers Trust Co.</i> , 247 Ga.App. 129, 543 S.E.2d 755 (Ga.App. 2000).....	12
<i>Panag v. Farmers Insurance Co.</i> , 166 Wn.2d 27, 204 P.3d 885 (2009).....	10
<i>Parks v. Wells Fargo Home Mortgage, Inc.</i> 398 F.3d 937 (7 <sup>th</sup> Cir. 2005).....	13
<i>Peeler v. Kingston Mines</i> , 862 F.2d 135, 136 (7th Cir. 1988).....	13
<i>Schroeder v. Excelsior Management Group, LLC</i> , 117 Wn.2d 94, 297 P.3d 677 (2013).....	2, 12

<i>Solis v. Client Servs. Inc.</i> , No. 11-23798-Civ, 2013 WL 28377 (S.D. Fla. Jan. 2, 2013) .....	16
<i>Snyder v. Daniel N. Gordon, P.C.</i> , No.C-11-1379-RAJ, 2012 WL 3643673 (W.D. Wash. Aug. 24, 2012) .....	15
<i>Stafford v. Puro</i> , 63 F.3d 1436, 1442 (7th Cir. 1995).....	13
<i>Teeuwissen v. J.P. Morgan Chase Bank, N.A.</i> , 894 F.Supp.2d 903 (S.D. Miss. 2012).....	12
<i>Udall v. T.D. Escrow Services, Inc.</i> , 159 Wn.2d 903, 154 P.3d 882 (2007).....	10
<i>Vawter v. Quality Loan Service Corp. of Washington</i> , 707 F.Supp.2d 1115 (W.D. Wash. 2010).....	10
<i>Walker v. Quality Loan Service Corp.</i> , 176 Wn.App. 294, 308 P.3d 716 (2013).....	2, 6, 7, 8, 9, 10,17
<b><u>Statutes</u></b>	
<i>RCW 19.86</i> .....	5
<i>RCW 61.24</i> .....	2
<i>RCW 61.24.127</i> .....	7, 9, 10
<i>RCW 61.24.130</i> .....	3, 7, 8, 9, 10
<i>RCW 61.24.163</i> .....	4
<i>15 USC 1692</i> .....	15

Other Authority

Black's Law Dictionary (Rev. 4<sup>th</sup> Ed. 1968).....8

## I. Introductory Remarks and Summary of Argument.

In Washington and in slightly over half the states in the country, non-judicial proceedings are the predominant method of foreclosing lender's interest in residential properties.<sup>1</sup> Non-judicial foreclosure made sense in the past because the lender, who owned, held and serviced his own portfolio of loans, had every incentive to talk directly with the defaulting homeowner about loss mitigation options in order to preserve his or her collateral. However, in this new age, debt collateralization or securitization reigns supreme, and the role of the "lender" with a direct stake in the loan has been rendered irrelevant or obsolete and has been replaced by the non-stakeholders loan servicers and their agents whose profits are based on the speed and volume of processing foreclosures. Time is money and the modern non-judicial foreclosure system is nothing more than a huge financial machine that grinds up family homes and the lives that reside within them. The machinery is operated not by local lenders, who made the loan in the first place, but mortgage backed security lenders and trustees, loan servicers and agents of the servicers, operating simultaneously in various states around the country, including the institutional trustee companies with little or no contact with the State of Washington - none of whom have any interest in preserving the

---

<sup>1</sup> "Over 10 million foreclosures have been initiated in the United States since 2008. In almost half of these, there is no court review. Instead, the only safeguard to ensure that foreclosure is merited is a 'trustee.'" John Campbell, *Can We Trust Trustees? Proposal for Reducing Wrongful Foreclosures*, University of Denver, Sturm College of Law; <http://ssrn.com/abstract=2191738>.

collateral for the benefit of the real owners, who are institutional investors holding fractionalized interests in a pool of mortgages rather than just one loan. As noted in the case of *Cox v. Helenius*, 103 Wn.2d 383, 387, 693 P.2d 683 (1985) (hereinafter “Cox”), the Washington Deed of Trust Act (*RCW 61.24, et seq.*) (hereinafter “DTA”) was enacted to further three major objectives: (1) to facilitate an efficient and inexpensive process that (2) should result in interested parties having an adequate opportunity to prevent wrongful foreclosure as well as (3) promote the stability of land titles. However, these statutory objectives are neither honored nor met by the business model of loan servicers and foreclosing companies, which derive their income and profits on the speed and volume of their foreclosure efforts, without regard to accuracy or due process. This problem has not escaped the attention of Washington courts: *Bain v. Metropolitan Mortgage Group*, 175 Wn.2d 83, 285 P.3d 34 (2012) (hereinafter “Bain”); *Albice v. Preimer Mortgage Services of Washington, Inc.*, 174 Wn.2d 560, 568, 276 P.3d 1277 (2012) (hereinafter “Albice”); *Klem v. Washington Mutual Bank*, 176 Wn.2d 771, 295 P.3d 1179 (2012) (hereinafter “Klem”); *Schroeder v. Excelsior Management Group, LLC.*, 177 Wn.2d 94, 297 P.3d 677 (2013) (hereinafter “Schroeder”); *Walker v. Quality Loan Service Corp, et al.*, 176 Wn.App. 294, 308 P.3d 716 (2013) (hereinafter “Walker”) and *Bavand v. OneWest Bank, FSB, et al.*, 176 Wn.App. 475, 309 P.3d 636 (2013) (hereinafter “Bavand”).

For the very small percentage of homeowners who have the temerity to challenge the foreclosure of their homes and demand those conducting non-judicial foreclosures establish their authority to take action against them, the process inhales the last bit of financial resources they have left, including those assets that could have been spent curing the default. It is important to keep in mind that in or statutory scheme in Washington, challenges to wrongful foreclosure (“irregularities in the proceedings” or “claims of damages arising from DTA violations”), the burden of persuasion is shifted to the borrower, pursuant to *RCW 61.24.130*. It is the borrower (not the purported “lender”, “investor”, servicer or putative trustee who initiate the potentially wrongful foreclosure process at the outset under the DTA) who must hire an attorney, pay the filing fee to file the action in court, bear the burden of proof at trial, and then pay for the attorney fees and costs incurred, simply to ascertain that the foreclosing entity has the authority to do so. Even if the borrower spends no money to hire an attorney (because he or she does not have it), they end up spending hundreds of hours as a *pro se* litigant; hours that could be more profitably devoted to finding good paying gainful and full time employment, family time or other worthwhile and socially meaningful endeavors.

There is a clear power differential in the balance of power between the litigants in the non-judicial foreclosure context that prevents many of

homeowners from ever seeing the inside of a courtroom to preserve their homes. The borrower who is in default is not a match for a multi-million dollar and financially solvent mortgage lending financial conglomerate and its army of well-heeled lawyers. The homeowner's quest for answers to the painfully simple question of "who has authority to negotiate with me regarding my mortgage loan?" is not marked with a clear path or illuminating lights, but marred by obstacles and impediments, lies and misrepresentations. It is well-recognized among those who customarily represent borrowers and homeowners that the foreclosing entities and their agents deliberately create labyrinths which exist solely for the purpose of perplexing, confusing, and finally discouraging discovery of the party with whom the borrower can communicate in a meaningful manner to negotiate a modification of their loan. This is done in a variety of ways, including the utilization of "dead end" phone trees that make it impossible to speak directly with the foreclosing entities, lost modification applications, incongruent time lines that render homeowner's modification documentation stale before it is reviewed and the outright refusal to negotiate in good faith at mediation under *RCW 61.24.163*. Indeed, it has frequently been observed that the mediation process established by the Washington legislature when it enacted *RCW 61.24.163* has become a mere "speed-bump" in the servicer's and trustee's road to foreclosure.

Contrary to the popular belief that homeowners who commence litigation do so simply in order to get a “free house,” most homeowners want only one thing: the ability to negotiate the existing terms of the loan with the owner of the obligation, whose vested interests should include preserving the property and assuring a “performing loan,” because a loan workout presents a win-win situation for both the real lender and the homeowner. Yet, this has become a bridge too far to cross for too many homeowners who are caught in the vise of the financial crisis<sup>2</sup>.

In the context of the Washington Consumer Protection Act (*RCW 19.86, et seq.*) (hereinafter “CPA”), the fact that there is “no limit to human inventiveness” when it comes to unfair or deceptive conduct has not been lost on the courts. This Court has observed that trustees have “considerable financial incentive to keep those appointing them happy and very little financial incentive to show the homeowners the same solicitude.” *Klem*, at pages 786 and 789 (citing *Bain*, at pages 95-97). Thus, to assure that trustee’s comply with their fiduciary duties of good faith, and to inhibit the foreclosing agent’s natural instincts to bend the rules, there has to be sufficiently serious pre-sale consequences to those who commence and prosecute a non-judicial

---

<sup>2</sup> <http://www.providencejournal.com/business/content/20131121-after-long-fight-against-foreclosure-cumberland-homeowners-decide-to-walk-away.ece>.

foreclosure sale without regard for the DTA and its requirements. Without such consequences, the servicers and institutional trustees will continue to process foreclosures mindlessly, robotically assembling the “paper-work” to produce a one-size-fits-all end product, spitting out foreclosures in “conveyor belt” fashion without regard to the underlying loan documentation, the DTA or the interests of the parties to the transaction, because once the sale is complete, their job is done and entitled to their costs and fees.

It is important to provide Washington homeowners pre-sale legal and equitable remedies to curb any attempt by trustees and their employers to circumvent the law or to avoid strict compliance with the provisions of the DTA before they lose their homes. Such remedies are implied in the current provisions of the DTA and recent case law, such as *Bain*, *Albice*, *Klem*, *Walker* and *Bavand*. Accordingly, the *Walker* decision should be affirmed by this Court.

## **II. Statement and Interest of *Amicus Curiae*.**

*Amicus*' interests are set out in their Motion for Leave to file this brief, submitted herewith.

## **III. Statement of the Case.**

*Amicus*' adopts the Appellant Frias' statement of the case.

#### IV. Argument.

*Amicus* urge the Court to adopt the court of appeals' analysis in *Walker* and *Bavand* in favor of pre-sale remedies as it is based on the plain reading of the DTA and its amendment. Nowhere does the DTA require a completed trustee's sale and loss of the borrower's home as a pre-condition to a borrower's right to recover damages. *Walker*, at page 307 (citing *RCW 61.24.127*). Specifically, the *Walker* court found that "when an unlawful beneficiary appoints a successor trustee, the putative trustee lacks the legal authority to record and serve a notice of trustee's sale," but why should a Washington homeowner risk loss of their home to challenge the actions and authority of those who violate the DTA and seek consequential damages for this misconduct? *Walker*, at page 305. Indeed, no reasonable basis exists.

##### A. Existing Statutory Basis for Pre-sale Causes of Action.

The analysis of a homeowner's pre-sale rights to object to foreclosure necessarily starts with *RCW 61.24.130*, which provides, in pertinent part, as follows:

(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:

(Emphasis added)

A careful reading of the provisions of *RCW 61.24.130* confirms three factors:

First, a homeowner's response to a trustee's and "lender's" irregularities in the foreclosure proceedings is a matter of right.

Second, a homeowner's right refers to "any proper legal or equitable" claim. These potential pre-sale claims are not specifically enumerated. However, potential claims a homeowner could lodge against a trustee and "lender" in a wrongful foreclosure action have been outlined in *Bain, Walker* and *Bavand*.

Third, the use of the term "restrain" suggests the action on these "legal or equitable" claims can be brought prior to the sale: "the right of the borrower . . . to restrain . . . a trustee' sale . . . . *RCW 61.24.130(1)*; Black's Law Dictionary 1477 (Rev. 4th ed. 1968)<sup>3</sup>; *Davis v. Gibbs*, 39 Wn.2d 180, 234 P.2d 1071 (1951). It makes no logical sense to "restrain" a trustee's sale that has already occurred. *Walker*, 176 Wn.App. at 307 ("The claims not waived include the '[f]ailure of the trustee to materially comply with the provisions of this chapter.' Nothing in the 2009 amendments to the DTA require that the violation resulted in the wrongful sale of the property. This DTA preserves a cause of action existing at the time a sale could be restrained — in other words, the existence of a claim before a foreclosure sale. This

---

<sup>3</sup> Black's Law Dictionary defines the term "restrain" as follows: "To limit, confine, abridge, narrow down, restrict, obstruct impede, hinder stay, destroy . . . to prohibit from action; to put compulsion upon; to restrict; to hold or press back."

reflects the legislature's understanding of existing law — that a cause of action for damages exists prior to sale based upon a trustee's pre sale failure to comply with the DTA, causing damage to the borrower.

Properly construed, *RCW 61.24.130* clearly contemplates pre-sale remedies for “legal or equitable” claims arising out of a wrongful foreclosure<sup>4</sup>. Additional support for the foregoing construction of *RCW 61.24.130* can be found in recent amendments to the DTA. *RCW 61.24.127*, provides, in pertinent part, as follows:

(1) The failure of the borrower or grantor to bring a civil action to enjoin a foreclosure sale under this chapter may not be deemed a waiver of a claim for damages asserting:

(a) Common law fraud or misrepresentation;

\* \* \*

(c) Failure of the trustee to materially comply with the provisions of this chapter;

Clearly, the foregoing statutory provision affirms the Washington legislature's intent to provide homeowners post-sale relief, in the event they fail to enjoin the trustee's sale before it occurs. However, the key to this court's analysis of *RCW 61.24.127* to the issues now before the Court is the legislature's use of the term “waiver”. Since one can only waive claims that

---

<sup>4</sup> *Amicus* recognizes the hesitation of courts to refer to pre-sale violations as “wrongful foreclosure,” but as the *Walker* court has explained, pre-sale violations are more accurately described as claims “arising from DTA violations.” *Walker* at page 305.

one already has, the Washington legislature's use of the term "waiver" suggests that claims for damages could exist before or after a sale, in accord with *Cox; Bain; Albice; Northwest Land & Investment, Inc. v. New West Federal Savings and Loan Assoc., supra*; and *Udall v. T.D. Escrow Service, Inc., supra*. Those claims that exist prior to trustee's sale have not been enumerated in the statute, but can be the basis of a pre-sale injunction under *RCW 61.24.130*. Those claims that existed pre-sale are not "waived", but are now limited to those enumerated under *RCW 61.24.127* and must be brought within two years. This statutory scheme comports with the goals of *Cox*.

**B. Pre-sale Damages are Well Grounded on Tort Law.**

It is logical for homeowners to recover damages authorized by CPA based on their unfair and deceptive conduct of those prosecuting the foreclosure efforts. *Bain, Klem, Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 204 P.3d 885 (2009). However, these damages are distinct from those recoverable for violations of the DTA. *Walker, Bavand*. As to the type of pre-sale damages that might be recoverable, the homeowner's action is essentially an action at law, which is no different from a typical tort claim<sup>5</sup>. *Dobson v. Mortgage Electronic Registration Systems, Inc./GMAC Mortg.*

---

<sup>5</sup> The *Walker* court disagreed with the Respondent's argument, based on *Yawter v Quality Loan Service Corp of Washington*, 707 F.Supp. 2d 1115 (W.D. Wash. 2010) that Washington does not recognize a pre-sale claim for "wrongful initiation of foreclosure" when the foreclosure sale has been suspended or discontinued and held that it is more accurate to characterize Walker's claim as one "for damages arising from DTA violations." *Walker* at 305.

*Corp.*, 259 S.W.3d 19 (Mo. Ct. App. E.D. 2008), *reh'g and/or transfer denied* (April 21, 2008) *and transfer denied*, (August 26, 2008) (a tort action for damages for wrongful foreclosure lies against a mortgagee only when the mortgagee had no right to foreclose at the time foreclosure proceedings were commenced); *Fields v. Millsap & Singer, P.C.*, No. WD 70237, 295 S.W.3d 567, WL 2496461 at \*2 (Mo.App. W.D. Aug.18, 2009) (pursuant to Missouri law, a tort action for wrongful foreclosure against a mortgagee can be maintained only when the mortgagee had no right to foreclose when the foreclosure proceedings commenced); *Collins v. Union Fed. Sav. & Loan Ass'n*, 99 Nev. 284, 304, 662 P.2d 610, 623 (1983) (citing cases from California, Missouri, and Texas) (An action for the tort of wrongful foreclosure will lie if the trustor or mortgagor can establish that at the time the power of sale was exercised or the foreclosure occurred, no breach of condition or failure of performance existed on the mortgagor's or trustor's part which would have authorized the foreclosure or exercise of power of sale).

Other courts have treated damages resulting from wrongful foreclosure or wrongful initiation of foreclosure exactly as if they sound in tort law. In *Morse v. Mutual Federal Sav. & Loan Ass'n of Whitman*, 536 F.Supp. 1271 (D.C.Mass.1982), the court held that where the lender's and trustee's misconduct and willful misuse of its statutory power of sale that could be expected to humiliate and distress plaintiffs, they may recover compensation for mental suffering, *citing to Malone v. Belcher*, 1913, 216

damages to include defamation and loss of reputation [or else it cannot be found to have awarded any damages for such, in spite of plaintiffs' credible testimony] wrongly advertising a foreclosure can support an award of such damage.”). See also *Goss v. Needham Cooperative Bank*, 1942, 312 Mass. 309, 44 N.E.2d 690.

Under Georgia law, where emotional distress damages are sought for an action for intentional wrongful foreclosure, the courts have held that such are recoverable as tort damages. *McCarter v. Bankers Trust Co.*, 247 Ga.App. 129, 543 S.E.2d 755 (Ga.App. 2000); *Curl v. First Fed. Sav. & Loan Assn. of Gainsville*, 243 Ga. 842, 843-844(2), 257 S.E.2d 264 (1979).

Under Mississippi law, a wrongful foreclosure occurs when the foreclosure is attempted solely for a malicious desire to injure the mortgagor, or the foreclosure is conducted negligently or in bad faith to the mortgagor's detriment. *Teeuwissen v. JP Morgan Chase Bank, N.A.*, 894 F. Supp. 2d 903 (S.D. Miss. 2012).

The most logical remedy for a homeowner who has suffered a foreclosure that has been improperly commenced and prosecuted is a cancellation of that foreclosure proceeding (*Schroeder v. Excelsior Management Group, LLC*, 177 Wash.2d 94, 297 P.3d 677 (2013) (“This Court has explained that the vacation of a foreclosure sale is required where a trustee has conducted the sale without statutory authority.”). Reimbursement

of all costs associated with the borrower's effort to thwart the unlawful activities is logically and reasonably recoverable.

Moreover, if the facts warrant, the aggrieved homeowner should be able to recover emotional distress the servicers and trustees inflicted upon him or her. In a long line of federal cases, foreclosure or the prospect of foreclosure is almost *per se* an emotional harm. *Cf. Parks v. Wells Fargo Home Mortg., Inc.*, 398 F.3d 937, 941 (7th Cir. 2005) (denying emotional distress damages because no independent tort, only a breach of contract, but noting, "We have no doubt that anyone would suffer emotional harm from losing his or her home, or even from facing such a possibility."); *Matthews v. Homecoming Fin. Network*, 2005 U.S. Dist. LEXIS 21535 (N.D. Ill. 2005) (foreclosure without cause sufficient basis for intentional infliction of emotional distress claim); *Johnstone v. Bank of Am., N.A.*, 173 F. Supp. 2d 809 (N.D. Ill. 2001) (possibility of foreclosure sufficient to state emotional distress damages and survive motion to dismiss RESPA claim); *Stafford v. Puro*, 63 F.3d 1436, 1442 (7th Cir. 1995) (\$100,000 in emotional distress damages to wrongfully terminated employee supported by loss of home in foreclosure, ruined credit, as well as physical symptoms including spastic colon and high blood pressure); *Peeler v. Kingston Mines*, 862 F.2d 135, 136 (7th Cir. 1988) (\$50,000 in emotional distress damages in retaliatory discharge supported by homelessness and reliance on charity care to pay bills; physical symptoms included high blood pressure and difficulty sleeping).

The likelihood of foreclosure from these loans and the devastating personal impact of foreclosure should be enough to demonstrate both outrageous conduct and knowledge that severe emotional distress is likely to result.

There is an inexplicable disconnect between highly publicized lawsuits and settlements by banks and loan servicers based on foreclosure misconduct, and the deafening silence in courtrooms concerning the accountability and consequences for persons and entities who engage and participated in the foreclosure misconduct<sup>6</sup>. Perhaps the unwillingness to authorize damages by some courts is based on the natural disdain for, or the perception of, homeowners who resist foreclosure as irresponsible “deadbeats” and thus incapable of being “damaged.” Again, the failure of those prosecuting non-judicial foreclosures to strictly and scrupulously

---

<sup>6</sup> In 2012, the nation’s five largest mortgage servicers entered into a \$25 billion-settlement with a coalition of state attorneys general and federal agencies over “shoddy loan servicing, illegal robo-signing and faulty foreclosure processing.” <http://naag.org/state-attorneys-general-feds-reach-25-billion-settlement-with-five-largest-mortgage-servicers-on-foreclosure-wrongs.php>. In September of 2013, the Consumer Financial Protection Bureau, joined by attorneys general and state banking regulators in 49 states, secured a consent order from Ocwen, Litton Loan Servicing LP, and Homeward Residential Holdings LLC, previously known as American Home Mortgage Servicing, Inc., securing \$2 billion in payments and compliance with the servicing standards set forth in the 2012 National Mortgage Settlement. See <http://www.consumerfinance.gov/newsroom/cfbp-state-authorities-order-ocwen-to-provide-2-billion-in-relief-to-homeowners-for-servicing-wrongs/>. In addition to these settlements, the Department of Justice has sued Bank of America for defrauding investors in connection with sale over \$850 million of residential mortgage-backed securities. <http://www.justice.gov/opa/pr/2013/August/13-ag-886.html>. The U.S. Attorney Office filed a civil mortgage fraud lawsuit accusing Bank of America of defrauding Fannie Mae and Freddie Mac. <http://www.charlotteobserver.com/2013/08/28/4270006/judge-rules-mortgage-fraud-lawsuit.html#.UuC0UrXTnJE>.

comply with the provisions of the DTA should not be offset or vitiated by the homeowner's default because the relief accorded under the DTA is much like that provided for under the Fair Debt Collection Practices Act (*15 USC 1692*) (hereinafter "FDCPA") based on abusive collection practices independent of whether the debt is actually owed. *See, e.g., Snyder v. Daniel N. Gordon, P.C.*, No. C11-1379 RAJ, 2012 WL 3643673, at \*8 (W.D.Wash. Aug.24, 2012) ("[Plaintiff] does not ask this court to invalidate or reject the [state] court's action. She does not deny that she owes American Express a debt, as the [state] court ruled she does. She does not complain of any injury she suffered because of the [state] court's judgment against her. She instead complains of the steps Defendants took in their attempts to collect the debt. The court therefore holds that the [state] court judgment against [Plaintiff] does not preclude her from bringing the claims she made in this case."); *Bradshaw v. Hilco Receivables, LLC*, 765 F.Supp.2d 719, 727 n. 7 (D.Md.2011) ("In the present case, the Rooker-Feldman doctrine is not implicated—Plaintiffs are not attempting to appeal unfavorable state court decisions, and this Court's holdings will not disturb any underlying state actions.... [R]egardless of the legality of any state court collection lawsuits filed by [the defendant], the individual plaintiffs are entitled to damages as a result of [the defendant's] failure to obtain a license under Maryland and federal law"); *Foster v. D.B.S. Collection Agency*, 463 F.Supp.2d 783, 798 (S.D.Ohio 2006) ("Plaintiffs' alleged injuries here are not the result of the

state court judgments themselves, but rather from the allegedly illegal practices Defendants used to obtain those state court judgments. Plaintiffs' claims arose prior to the various entries of default judgment in state court, and . . . they are separate and distinct from those judgments.” (*citation omitted*)). See, e.g., *Solis v. Client Servs., Inc.*, No. 11-23798-Civ, 2013 WL 28377, at \*4 (S.D.Fla. Jan.2, 2013) (“Thus, even where a debtor has incurred a valid debt that a creditor is entitled to collect, a debt collector may violate the FDCPA if its methods in attempting to collect the debt do not comply with the requirements of the FDCPA. Such a violation may occur despite the validity of the debt and in no way is dependent upon the legitimacy of the debt.”); *Drew v. Rivera*, No. 1:12-cv-9-MP-GRJ, 2012 WL 4088943, at \*3 (N.D.Fla. Aug.6, 2012), adopted by, *Drew v. Rivera*, No. 1:12-cv-9-M P-GRJ, 2012 WL 4088871, at \* 1 (N.D.Fla. Sept.27, 2012) (“The fact that a state court judgment was entered recognizing the credit card debt is not mutually exclusive to claims that a debt collector violated the FDCPA in seeking to collect on the indebtedness or violated the FDCPA in attempting to collect on the state court judgment that was entered. Thus, the Court would not be overturning the state court's judgment, which concluded that the debt was enforceable, if it were to find Defendant liable for unfair debt collection practices.”).

Pre-sale damages for wrongful foreclosure practices makes perfect sense because much like the effects of abusive collection practices against

credit card debtor, the effects of a faulty foreclosure are enormous and can be irreversible. Wrongful foreclosure and the threat of loss of home keeps the homeowner in limbo where his home maintenance is neglected, tax payments are ignored, his marriage is vulnerable, his financial resources are drained, his self-confidence is destroyed and finally, and his health is jeopardized.<sup>7</sup>

The *Walker* court already responded to the arguments of the servicers and trustees that allowing for recovery of damages pre-sale would “spawn” litigation. In its opinion the *Walker* court observed: “. . . the lending industry and MERS have already spawned the feared litigation with their institutionalized practices. Holding the lending industry liable for damages caused by its DTA violations should produce greater compliance and a reduction in future litigation. Thus, the availability of a presale cause of action for damages could significantly reduce the long-term system-wide expenses of non-judicial foreclosures under the DTA.” *Walker* at 311- 312. This thoughtful analysis should be affirmed and adopted by this Court as a consistent application of this Court’s decision in *Bain*.

---

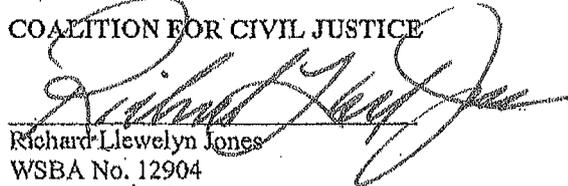
<sup>7</sup> [http://www.huffingtonpost.com/2012/05/17/norman-rousseau-foreclosure-victim-suicide-wells-fargo\\_n\\_1521743.html](http://www.huffingtonpost.com/2012/05/17/norman-rousseau-foreclosure-victim-suicide-wells-fargo_n_1521743.html), [http://www.huffingtonpost.com/anna-cuevas/foreclosure-related-suici\\_b\\_1678163.html](http://www.huffingtonpost.com/anna-cuevas/foreclosure-related-suici_b_1678163.html).

Conclusion.

Based on the foregoing, *Amicus* respectfully requests the Court to answer the first certified question in the affirmative. Washington homeowners should have a pre-sale right to state a claim for damages for breach of duties and violation DTA. Justice demands no less.

RESPECTFULLY SUBMITTED this 27<sup>th</sup> day of January, 2014.

COALITION FOR CIVIL JUSTICE



---

Richard Llewelyn Jones  
WSBA No. 12904  
2050 - 112<sup>th</sup> Ave., N.E., Suite 230  
Bellevue, WA 98004  
425.462.7322  
[rlj@richardjoneslaw.com](mailto:rlj@richardjoneslaw.com)



---

Ha Thu Dao  
WSBA No. 21793  
787 Maynard Ave., South  
Seattle, WA 98104  
727.269.9334  
[hadaoid@gmail.com](mailto:hadaoid@gmail.com)

## OFFICE RECEPTIONIST, CLERK

---

**From:** Susan L. Rodriguez <susan@kovacandjones.com>  
**Sent:** Monday, January 27, 2014 2:58 PM  
**To:** OFFICE RECEPTIONIST, CLERK  
**Cc:** Richard Jones; Marie Parks  
**Subject:** 89343-8\_Frias v Asset Foreclosure Services et al.\_Brief of Amicus Curiae  
**Attachments:** Frias\_Brief of Amicus Curiae\_012714.pdf

Case Title: Frias v Asset Foreclosure Services et al.

WA Supreme Court Case No 89343-8

Document Title: Brief of *Amicus Curiae*

Filed by: Richard Llewelyn Jones  
WSBA No. 12904  
2050 – 112<sup>th</sup> Ave., N.E., Suite 230  
Bellevue, WA 98004  
425.462.7322  
[rlj@richardjoneslaw.com](mailto:rlj@richardjoneslaw.com)

Ha Thu Dao  
WSBA No. 21793  
787 Maynard Ave., South  
Seattle, WA 98104  
727.269.9334  
[hadaoid@gmail.com](mailto:hadaoid@gmail.com)

*Susan L. Rodriguez*

Legal Assistant  
Kovac & Jones, PLLC  
2050 - 112th Ave NE  
Suite 230  
Bellevue, WA 98004  
(Phone) 425.462.7322  
(Fax) 425.450.0249