

RECEIVED VSC
SUPREME COURT
STATE OF WASHINGTON
May 02, 2014, 3:55 pm
BY RONALD R. CARPENTER
CLERK

bjh
RECEIVED BY E-MAIL

Supreme Court No. 89343-8

IN THE 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.

PLAINTIFF FLORENCE R. FRIAS' SUPPLEMENTAL
AUTHORITY

Melissa A. Huelsman, WSBA #30935
Law Offices of Melissa A. Huelsman, P.S.
705 Second Avenue, Suite 601
Seattle, WA 98104
(206) 447-0103

Attorney for Plaintiff Florence R. Fria

 ORIGINAL

Pursuant to RAP 10.8, Appellant Florence R. Frias respectfully submits the following additional authorities:

1. *In re Meyer*, 506 B.R. 533, 540 & 546-47 (Bkrctcy. W.D. Wash. 2014) (discussing trustee's violation of RCW 61.24.030(7) and (8)(1), one of the violations alleged by Ms. Frias).

2. David A. Leen, *Wrongful Foreclosures in Washington*, 49 *Gonzaga Law Review*, 331, 336-347, 360-371 and 371-378 (April 2014) (discussing defenses to non-judicial foreclosures, before and after the auction, use of tort analysis in wrongful foreclosure cases and violations of the Deed of Trust Act).

DATED this 2nd day of May, 2014.

/s/ Melissa A. Huelsman
Melissa A. Huelsman, WSBA #30935
Law Offices Of Melissa A. Huelsman, P.S.
705 Second Avenue, Suite 601
Seattle, WA 98104
(206) 447 0103

Attorneys for Plaintiff Florence R. Frias

DECLARATION OF SERVICE

I, Pamela Hamilton, Paralegal at the Law Offices of Melissa A. Huelsman, P.S., certify under penalty of perjury under the laws of the State of Washington, that on the day I signed this declaration of service, I caused a copy of Plaintiff Florence R. Frias' Supplemental Authority with cases to be electronically mailed and mailed (via first class, postage prepaid), to the following counsel of record:

Kathleen M. O'Sullivan
Frederick B. Rivera
Catherine S. Simonsen
Perkins Coie LLP
1201 Third Ave., Suite 4900
Seattle, WA 98101

Mr. Brian L. Lewis
Ms. Lauren E. Sanken
Mr. David J. Lenci
K&L Gates LLP
925 Fourth Ave., Suite 2900
Seattle, WA 98104

Mr. Fred Burnside
Mr. Steve Rummage
Ms. Rebecca Francis
Davis Wright Tremaine, LLP
1201 Third Ave., Suite 2200
Seattle, WA 98101

Mr. Andrew H. Salter
Ms. Lisa Franklin
Veris Law Group, PLLC
1809 Seventh Ave, Suite 1400
Seattle, WA 98101

Ms. Katrina Eve Glogowski
Ms. Kimberly M. Hood
Glogowski Law Firm, PLLC
506 Second Ave.
Seattle, WA 98104

Shannon E. Smith
Benjamin J. Roesch
Office of the Washington Attorney General
800 Fifth Ave., Suite 2000
Seattle, WA 98104

Matthew Geyman, WSBA #17544
COLUMBIA LEGAL SERVICES
101 Yesler Way, Suite 300
Seattle, WA 98104
(206) 464-5936

Eulalia Sotelo, WSBA #41407
Lisa von Biela, WSBA #42142
NORTHWEST JUSTICE PROJECT
401 Second Ave. South, Suite 407
Seattle, WA 98104
(206) 464-1519

Sheila M. O'Sullivan, WSBA #28656
NORTHWEST CONSUMER LAW CENTER
520 E. Denny Way
Seattle, WA 98122
(206) 805-0989

Signed at Seattle, Washington, this 2nd day of May, 2014.

LAW OFFICES OF MELISSA A. HUELSMAN, P.S.

/s/ Pamela Hamilton
Pamela Hamilton, Paralegal

--- B.R. ---, 2014 WL 640981 (Bkrcty.W.D.Wash.)
(Cite as: 2014 WL 640981 (Bkrcty.W.D.Wash.))

C

Only the Westlaw citation is currently available.

United States Bankruptcy Court,
W.D. Washington.

In re Peter James MEYER and Sharee Lynn Meyer,
Debtor(s).

Peter James Meyer and Sharee Lynn Meyer, Plaintiffs,
v.

U.S. Bank N.A., as Trustee for Structured Asset Securities Corporation Mortgage Pass-Through Certificates, 2006-GEL2, a National Bank; America's Servicing Company, a division of Wells Fargo Bank N.A. dba Wells Fargo Home Mortgage, a National Bank; Wells Fargo Bank NA, a National Bank; Mortgage Electronic Registration Systems, Inc., a Delaware Corporation; and Northwest Trustee Services, Inc., a Washington Corporation, Defendants.

Bankruptcy No. 10-23914.

Adversary No. 12-01630.

Feb. 18, 2014.

Background: Chapter 13 debtor-borrowers brought adversary proceeding against, among others, successor trustee under deed of trust, asserting various foreclosure-related causes of action, including violation of the Washington State Deeds of Trust Act (DOTA), the Washington State Consumer Protection Act (WACPA), and the Fair Debt Collection Practices Act (FDCPA). Trial was held.

Holdings: The Bankruptcy Court, Karen A. Overstreet, J., held that:

- (1) the DOTA recognizes a pre-sale cause of action for damages for the wrongful initiation of foreclosure proceedings;
- (2) successor trustee failed to materially comply with its duties under the DOTA;

- (3) successor trustee's multiple violations of the DOTA also violated the WACPA; and
- (4) borrowers failed to prove entitlement to relief under the FDCPA.

Ordered accordingly.

West Headnotes

[1] Bankruptcy 51

51 Bankruptcy

Bankruptcy court may take judicial notice of its pleadings and files. Fed.Rules Evid.Rule 201, 28 U.S.C.A.

[2] Mortgages 266

266 Mortgages

Washington's Deeds of Trust Act (DOTA) should be construed to further three basic objectives: first, the nonjudicial foreclosure process should remain efficient and inexpensive, second, the process should provide an adequate opportunity for interested parties to prevent wrongful foreclosure, and third, the process should promote the stability of land titles. West's RCWA 61.24.005 et seq.

[3] Mortgages 266

266 Mortgages

Under Washington's Deeds of Trust Act (DOTA), a borrower has an actionable claim against a trustee who, by acting without lawful authority or in material violation of the DOTA, injures the borrower, even if

--- B.R. ---, 2014 WL 640981 (Bkrcty.W.D.Wash.)
(Cite as: 2014 WL 640981 (Bkrcty.W.D.Wash.))

no foreclosure sale occurred. West's RCWA 61.24.005 et seq.

[4] Bankruptcy 51

51 Bankruptcy

Bankruptcy courts routinely follow state courts when addressing legal issues under state law, particularly with respect to questions involving real property.

[5] Mortgages 266

266 Mortgages

Under Washington law, in a nonjudicial foreclosure, the trustee of a deed of trust undertakes the role of the judge as an impartial third party who owes a duty to both parties to ensure that the rights of both the beneficiary and the debtor are protected. West's RCWA 61.24.010, 61.24.010(4).

[6] Mortgages 266

266 Mortgages

Successor trustee under deed of trust failed to materially comply with its duties under the Washington State Deeds of Trust Act (DOTA); misrepresenting itself in the notice of default as the authorized agent of the beneficiary, successor trustee declared a default under the note, commenced a nonjudicial foreclosure against borrowers' residence without verifying in any way the authority of beneficiary or its purported attorney-in-fact to maintain such foreclosure, and failed to provide borrowers with the most basic contact information required by statute about the current holder and owner of their loan. West's RCWA 61.24.030, 61.24.030(8), 61.24.030(9); RCW 61.24.031.

[7] Antitrust and Trade Regulation 29T

29T Antitrust and Trade Regulation

Under Washington law, a per se unfair trade practice exists when a statute which has been declared by the legislature to constitute an unfair or deceptive act in trade or commerce has been violated. West's RCWA 19.86.020, 19.86.090.

[8] Antitrust and Trade Regulation 29T

29T Antitrust and Trade Regulation

Plaintiff must prove the following elements to recover under the Washington State Consumer Protection Act (WACPA): (1) an unfair or deceptive act or practice, (2) the act or practice occurred in trade or commerce, (3) the act or practice impacts the public interest, (4) the act or practice caused injury to the plaintiff in his business or property, and (5) the injury is causally linked to the unfair or deceptive act. West's RCWA 19.86.090.

[9] Antitrust and Trade Regulation 29T

29T Antitrust and Trade Regulation

Claim under the Washington State Consumer Protection Act (WACPA) may be predicated upon a per se violation of statute, an act or practice that has the capacity to deceive substantial portions of the public, or an unfair or deceptive act or practice not regulated by statute but in violation of public interest. West's RCWA 19.86.090.

[10] Antitrust and Trade Regulation 29T

29T Antitrust and Trade Regulation

--- B.R. ---, 2014 WL 640981 (Bkrcty.W.D.Wash.)
(Cite as: 2014 WL 640981 (Bkrcty.W.D.Wash.))

Successor trustee under deed of trust, which failed to materially comply with its duties under the Washington State Deeds of Trust Act (DOTA) by misrepresenting itself in the notice of default as the authorized agent of the beneficiary, declaring a default under the note, commencing a nonjudicial foreclosure against borrowers' residence without verifying in any way the authority of beneficiary or its purported attorney-in-fact to maintain such foreclosure, and failing to provide borrowers with the most basic contact information required by statute about the current holder and owner of their loan, thereby abdicated its duty to act impartially toward both sides and committed unfair and deceptive acts, in violation of the Washington State Consumer Protection Act (WACPA). West's RCWA 19.86.090, 61.24.030.

[11] Mortgages 266

266 Mortgages

Under Washington law, while a foreclosure trustee is not required to be an attorney, it must be capable of assembling enough information about the lender, servicer, and others involved in the lending chain to be able to objectively satisfy the homeowner that the correct party is initiating the action to take their home. West's RCWA 19.86.020, 61.24.030.

[12] Mortgages 266

266 Mortgages

Under Washington law, a foreclosure trustee must be more than a typing service for the lending community. West's RCWA 19.86.020, 61.24.030.

[13] Mortgages 266

266 Mortgages

Under Washington law, homeowners have a right to a trustee under a deed of trust who acts in good faith toward them in the exercise of its foreclosure duties, as well as a right to accurate information and conduct by the trustee which complies with state law. West's RCWA 19.86.020, 61.24.030.

[14] Antitrust and Trade Regulation 29T

29T Antitrust and Trade Regulation

Before a violation of the Washington State Consumer Protection Act (WACPA) may be found, an injury to the claimant's business or property must be established. West's RCWA 19.86.090.

[15] Antitrust and Trade Regulation 29T

29T Antitrust and Trade Regulation

Under the Washington State Consumer Protection Act (WACPA), the injury to the claimant's business or property need not be great, and no monetary damages need be proven. West's RCWA 19.86.090.

[16] Antitrust and Trade Regulation 29T

29T Antitrust and Trade Regulation

Under the Washington State Consumer Protection Act (WACPA), nonquantifiable injuries, such as loss of goodwill, suffice to prove injury, but mental distress alone does not establish injury. West's RCWA 19.86.090.

[17] Antitrust and Trade Regulation 29T

29T Antitrust and Trade Regulation

Under the Washington State Consumer Protection Act (WACPA), incurring time and money to prosecute

--- B.R. ---, 2014 WL 640981 (Bkrcty.W.D.Wash.)
(Cite as: 2014 WL 640981 (Bkrcty.W.D.Wash.))

a WACPA claim does not suffice as an injury to business or property, though consulting an attorney to dispel uncertainty regarding the nature of an alleged debt is distinct from consulting an attorney to institute a WACPA claim. West's RCWA 19.86.090.

[18] Antitrust and Trade Regulation 29T 

29T Antitrust and Trade Regulation

Under the Washington State Consumer Protection Act (WACPA), whether an “injury” has been sustained so as to support an award of attorney fees and costs is a different inquiry than whether treble damages are appropriately awarded; an injury cognizable under the Act will sustain an award of attorney fees, while treble damages are based upon “actual” damages awarded. West's RCWA 19.86.090.

[19] Antitrust and Trade Regulation 29T 

29T Antitrust and Trade Regulation

Under the Washington State Consumer Protection Act (WACPA), if investigative expense would have been incurred regardless of whether a violation existed, causation cannot be established. West's RCWA 19.86.090.

[20] Antitrust and Trade Regulation 29T 

29T Antitrust and Trade Regulation

Under the Washington State Consumer Protection Act (WACPA), consumers are entitled to actual damages, together with the costs of suit, including reasonable attorney fees. West's RCWA 19.86.090.

[21] Antitrust and Trade Regulation 29T 

29T Antitrust and Trade Regulation

Under the Washington State Consumer Protection Act (WACPA), the court may increase the damages award to three times the amount of actual damages, provided the award does not exceed \$25,000. West's RCWA 19.86.090.

[22] Antitrust and Trade Regulation 29T 

29T Antitrust and Trade Regulation

Fair Debt Collection Practices Act (FDCPA) was enacted to protect consumers from a host of unfair, harassing, and deceptive collection practices without imposing unnecessary restrictions on ethical debt collectors. Consumer Credit Protection Act, § 802 et seq., as amended, 15 U.S.C.A. § 1692 et seq.

[23] Antitrust and Trade Regulation 29T 

29T Antitrust and Trade Regulation

As long as a foreclosure trustee confines itself to actions necessary to effectuate a foreclosure, its liability under the Fair Debt Collection Practices Act (FDCPA) will be solely under the section of the statute prohibiting a debt collector's use of unfair or unconscionable means to collect or attempt to collect a debt, rather than under the section prohibiting the use of any false, deceptive, or misleading representations or means in connection with the collection of any debt. Consumer Credit Protection Act, §§ 807-808, 15 U.S.C.A. §§ 1692e-1692f.

[24] Antitrust and Trade Regulation 29T 

29T Antitrust and Trade Regulation

Borrowers, in their action against successor trustee under deed of trust, failed to prove entitlement to relief under the Fair Debt Collection Practices Act

--- B.R. ---, 2014 WL 640981 (Bkrcty.W.D.Wash.)
(Cite as: 2014 WL 640981 (Bkrcty.W.D.Wash.))

(FDCPA); there was no evidence that trustee took any action other than that which was necessary to effectuate a nonjudicial foreclosure against borrowers' residence, and there was a present right of possession of the property through an enforceable security interest, even though the procedure initiating the enforcement of that security interest was defective. Consumer Credit Protection Act, § 808, 15 U.S.C.A. § 1692f.

Larry B. Feinstein, Vortman & Feinstein, Seattle, WA, for Plaintiffs.

K. Michael Fitzgerald, Seattle, WA, for Defendants.

MEMORANDUM DECISION

KAREN A. OVERSTREET, Bankruptcy Judge.

*1 The trial of this matter commenced on October 8, 2013 and concluded on November 5, 2013. The Court has considered the evidence presented at trial, the records and files in the case, and the parties' post trial submissions. This Memorandum Decision contains the Court's findings of fact and conclusions of law for purposes of Bankruptcy Rule 7052.^{FN1}

I. BACKGROUND

Plaintiffs, Peter and Sharee Meyer, commenced this action against Northwest Trustee Services Inc. ("NWTS") and other defendants, asserting various causes of action against the defendants related to foreclosure proceedings against their home located at 12412—84th St. S.E., Snohomish, WA (the "Residence"). After summary judgment proceedings, the Meyers' claims remaining for trial included violation of the Washington State Deeds of Trust Act, RCW 61.24 et seq. (the "DOTA"), the Washington State Consumer Protection Act, RCW 19.86 et seq. (the "WACPA"), and the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692–1692p (the "FDCPA"). By the time of trial, all of the defendants had been dismissed from the case except NWTS, so the case proceeded to trial on these claims only against NWTS.

II. FACTS

On November 10, 2005, the Meyers executed a promissory note in favor of Finance America LLC. (the "Note"). Ex. P–1. To secure payment of the Note, they executed a Deed of Trust on the same date (the "Deed of Trust") against their Residence. Ocwen Loan Servicing was identified as the servicer in the Deed of Trust, although the Deed of Trust provides both that the servicer might change and that the Note can be transferred. *See* Ex. P–2. The Deed of Trust named DCBL, Inc. as trustee, Finance America LLC as lender, and Mortgage Electronic Registration Systems ("MERS") as nominee of the lender and beneficiary under the Deed of Trust. The Deed of Trust was recorded on November 18, 2005. *Id.* The Meyers moved into the Residence with their three children and began making their payments under the Note in January of 2006.

A. The Transfer of the Loan.

Unbeknownst to the Meyers, after the closing of their loan transaction, the Note was transferred into a so-called securitized trust. When and to whom the Note was transferred was highly contested at the trial. After reviewing all of the evidence and testimony, the Court is persuaded that in or around April of 2006, the Meyers' loan became part of a securitized trust entitled Structured Asset Securities Corporation Mortgage Pass-Through Certificates Series 2006–GEL2 ("GEL2"). At some point prior to April 1, 2006, the Note was indorsed in blank via a separate Allonge, which is undated (the "Allonge"), but which is signed by a Loan Administration Supervisor for Finance America. *See* Ex. D–1. Although the path of the Note into GEL2 is not clear, the Court finds it more probable than not that possession of the Note, after its indorsement in blank, was first obtained by Lehman Brothers Holdings, Inc. ("Lehman") and then deposited by Lehman into GEL2 pursuant to the terms of a Trust Agreement dated April 1, 2006 (the "Trust Agreement"), among Structured Asset Securities Corp, as Depositor, Aurora Loan Services LLC, as

--- B.R. ---, 2014 WL 640981 (Bkrcty.W.D.Wash.)
(Cite as: 2014 WL 640981 (Bkrcty.W.D.Wash.))

Master Servicer, Clayton Fixed Income Services, Inc., as Credit Risk Manager, and U.S. Bank National Association, as Trustee (“U.S.Bank”). The Deed of Trust has never been assigned by Finance America.

*2 According to the Trust Agreement, Lehman acquired various loans, sold them to Structured Asset Securities Corp., which in turn “deposited” the loans into GEL2. Ex. D-3, pp. 1, 46. Under the Trust Agreement, individual investors could acquire differing types of interests in GEL2 by purchasing the certificates described in the Trust Agreement.

John Richards, a vice president of U.S. Bank, testified concerning the Trust Agreement. According to his testimony, GEL2, as a trust, is not an operating entity. It has no employees, no office, and acts solely through its trustee, U.S. Bank. According to Mr. Richards, U.S. Bank's duties as trustee were primarily to address the needs of the investor certificate holders, with the Trust Agreement placing responsibility for the management of the loans with one or more servicers. Under the Trust Agreement, U.S. Bank also stands as the title holder of the loans, by its possession of the loan notes or possession through one or more custodians.

By separate agreement, Wells Fargo Bank, N.A. (“Wells Fargo”) acted as an independent contractor and servicer of the loans which were part of GEL2 for the “seller,” defined under the agreement as “Lehman Brothers Holdings Inc. or its successor in interest or assigns.” Ex. D-4, Securitization Subservicing Agreement, dated April 1, 2006 (the “Servicing Agreement”), Art. 1, Art. III §§ 3.01. U.S. Bank is not a party to that agreement, and only acknowledged it as the trustee. *Id.* Mr. Richards testified that Wells Fargo also acted as a custodian for GEL2. Under the Servicing Agreement, Wells Fargo was to maintain possession of loan files on behalf of U.S. Bank, as trustee for GEL2. Ex. D-4, p. 13. Under the Trust Agreement, U.S. Bank was authorized to execute powers of attorney in favor of any servicer to permit the servicer to

foreclose against any mortgaged property in GEL2 [Ex. D-3, p. 123], but all actions in pursuit of foreclosure were delegated to the servicer under the Servicing Agreement. Brock Wiggins, a vice president for loan documentation for Wells Fargo, identified three separate Limited Power of Attorney documents, each executed by U.S. Bank and recorded in Snohomish County in 2007, pursuant to which he testified Wells Fargo acted as attorney-in-fact for U.S. Bank under the Servicing Agreement. Ex. D-6, D-7, D-8.

The Meyers sought to show at trial that their loan was not part of GEL2 and that neither GEL2 nor U.S. Bank had possession of the Note. NWTS submitted a redacted schedule of loans, which included the Meyers' loan, and which Brock Wiggins testified was the schedule of loans which were part of GEL2 and being serviced by Wells Fargo under the Servicing Agreement. Ex. D-5. The Court ordered an *in camera* submission of an unredacted version of the schedule of loans, and the Court verified that the Meyers' loan was referenced on line 858 of the schedule of loans. *See* Declaration of Brock Wiggins, Dkt. 136. A column in that spreadsheet states that information concerning the Meyer loan was shown as of April 1, 2006, indicating that the loan had become part of GEL2 on or before that date. Mr. Wiggins testified that according to Wells Fargo's records, Wells Fargo took possession of the Note and the Allonge on March 1, 2006, and that those documents and the other documents related to the Meyer loan had been maintained initially in Wells Fargo's document vault in San Bernadino, but subsequently moved to Wells Fargo's vault in Minnesota. Ex. P-13. The original Note, which Mr. Wiggins testified had been in Wells Fargo's continuous possession pursuant to the terms of the Servicing Agreement, was produced at trial for the Court's examination. Based upon the evidence, the Court concludes that the holder of the Note is Wells Fargo, as custodian for U.S. Bank, as trustee for GEL2.

B. Foreclosure.

--- B.R. ---, 2014 WL 640981 (Bkrtcy.W.D.Wash.)
 (Cite as: 2014 WL 640981 (Bkrtcy.W.D.Wash.))

*3 The Meyers continued to make their payments under the Note until they started to experience financial problems toward the end of 2008. It is not clear from the evidence when the Meyers initially defaulted in their payments under the Note. There is no evidence that any lender ever issued a formal notice of default.^{FN2} On March 9, 2009, NWTS received its first referral to foreclose the Deed of Trust, which referral was in the form of a Case Information Report (the "2009 CIR") that NWTS pulled from a third party website called Vendorscape. Ex. D-9.

Jeff Stenman, the Foreclosure Manager and Director of Operations for NWTS, testified that NWTS has used Vendorscape to access foreclosure assignments for 10 years. NWTS has no procedures to verify the accuracy of the information contained in Vendorscape, even though Mr. Stenman admitted that he does not know how the information is generated within Vendorscape or who prepares it. He described Vendorscape as a secure website which NWTS can access using a password. If a NWTS employee has any question about the foreclosure process or any documentation, they may leave a message in Vendorscape and await a response. Mr. Stenman affirmed that NWTS employees do not contact servicers or lenders in any other way, and are instead trained to rely on the information provided through Vendorscape.

Consistent with NWTS's customary practice, it used the information from Vendorscape and the 2009 CIR, without any verification, to initiate the foreclosure against the Meyers' Residence. The 2009 CIR is a table collection of data and does not contain any instructions. The 2009 CIR lists the Meyers as the obligors under the Note, it includes the Residence address and the Meyers' social security numbers, and it shows U.S. Bank as the trustee for GEL2 as the "beneficiary." The report mistakenly lists the interest rate on the Note as not being adjustable, when in fact it was adjustable. The interest rate is listed as 9.6050% with the last payment made on September 1, 2008. Mr.

Stenman testified that he assumed the information in this report came from America's Servicing Company ("ASC"), which is listed in the report as the servicer, and he testified that he thought (but did not say for sure) that ASC was a division of Wells Fargo.

Based upon the information in the 2009 CIR, Mr. Stenman executed an Assignment of Deed of Trust from MERS to "U.S. Bank National Association as Trustee for Structured Asset Securities Corporation Mortgage Pass-Through Certificates 2006 GEL2, as beneficiary" on March 10, 2009, the day after receiving the referral. Ex. P-3. Although Mr. Stenman was an employee of NWTS, he prepared and signed the assignment as a Vice President of MERS pursuant to what he described as a tri-party agreement between himself, Wells Fargo and MERS. Although NWTS repeatedly relied at trial on the authority of this so-called tri-party agreement, the agreement was never produced in evidence. The Assignment of Deed of Trust was recorded on July 1, 2009.

*4 On March 26, 2009, Anne Neely signed an appointment of successor trustee, appointing NWTS as successor trustee. *See* Ex. P-4. Ms. Neely is identified in the document as a vice president of loan "doc" Wells Fargo, acting as attorney-in-fact for U.S. Bank, trustee for Structured Asset Securities Corporation Mortgage Pass-Through Certificates 2006 GEL2. The appointment of successor trustee was recorded July 1, 2009. It incorrectly refers to MERS as the beneficiary.^{FN3}

For reasons that were not disclosed during the trial, the 2009 foreclosure proceeding against the Meyers was discontinued and a new proceeding started in 2010. The 2010 foreclosure was based upon a case information report which NWTS accessed in Vendorscape on June 23, 2010 (the "2010 CIR"). Ex. P-15. With the report was a separate set of instructions with an express request to commence foreclosure, but it is not clear from whom those instructions originated. Ex. P-16. The 2010 CIR carried over the

--- B.R. ---, 2014 WL 640981 (Bkrcty.W.D.Wash.)
(Cite as: 2014 WL 640981 (Bkrcty.W.D.Wash.))

incorrect reference to the Note as not adjustable, it showed a lower principal balance than the 2009 CIR, and a higher interest rate of 9.6250%. It also showed the last payment made on February 1, 2009.

Heather Smith of NWTS prepared the Notice of Default dated July 9, 2010 (the "Notice of Default") based on the information contained in the 2010 CIR, Ex. P-5. At the time, Ms. Smith was a foreclosure assistant with NWTS. Paragraph (K) of the Notice of Default provides:

K) Contact Information for Beneficiary (Note Owner) and Loan Servicer

The beneficiary of the deed of trust is U.S. Bank National Association, as Trustee for Structured Asset Securities Corporation Mortgage Pass-Through Certificates, 2006-GEL2, whose address and telephone number are:

c/o America's Servicing Company

MAC X7801-02T, 3476 Stateview Blvd

Fort Mill, SC 29715

855-248-5719

The loan servicer for this loan is America's Servicing Company, whose address and telephone number are:

MAC X7801-02T

3476 Stateview Blvd

Fort Mill, SC

29715

800-662-5014

In paragraph L of the notice, under "Notice pursuant to the Federal Fair Debt Collection Practices Act" it states "[t]he creditor to whom the debt is owed [sic] U.S. Bank National Association, as Trustee for Structured Asset Securities Corporation Mortgage Pass-Through Certificates 2006-GEL2/America's Servicing Company." The Notice of Default incorrectly referred to NWTS as the "authorized agent" for U.S. Bank. As of the date of the notice, there is no evidence that NWTS was an authorized agent for any of Wells Fargo, U.S. Bank, or GEL2; instead, by that time NWTS was already the trustee under the Deed of Trust with statutory duties to the Meyers. The Notice of Default also states "[t]he beneficiary declares you in default for failing to make payments as required by your note and deed of trust." *Id.*, ¶ C. However, there is no evidence that GEL2, U.S. Bank, or Wells Fargo/ASC ever formally declared the Meyers in default and no evidence that NWTS was the beneficiary or was authorized to declare such a default.

*5 In connection with the preparation of the Notice of Default, NWTS received a Foreclosure Loss Mitigation Form declaration (the "Loss Mitigation Form") and a Beneficiary Declaration (the "Beneficiary Declaration") as required by RCW 61.24, each dated June 24, 2010. The Loss Mitigation Form was signed under penalty of perjury by John Kennerty, "VP of Loan Documentation" for ASC. *See* ExP-5. The declaration states that "[t]he Beneficiary or Beneficiary's authorized agent has contacted the borrower under, and has complied with, Section 2 of Chapter 292, Laws of 2009 (contact provision to 'assess the borrower's financial ability to pay the debt secured by the deed of trust, and explore options for the borrower to avoid foreclosure')." There is no evidence that any employee or representative of ASC, U.S. Bank, or GEL2 contacted the Meyers before the foreclosure was commenced. Mr. Kennerty also signed the Beneficiary Declaration, signing that document as a "VP Loan Documentation" for Wells Fargo as attor-

--- B.R. ---, 2014 WL 640981 (Bkrcty.W.D.Wash.)
(Cite as: 2014 WL 640981 (Bkrcty.W.D.Wash.))

ney-in-fact for U.S. Bank. *See also*, Exhibit D6, 7 and 8, Limited Power of Attorney. The Beneficiary Declaration, which is also under penalty of perjury, states that U.S. Bank, as trustee for GEL2, was the holder of the Note. Ex. P-5. Mr. Kennerty testified at a deposition that he routinely signed documents of this type despite the fact that he had no personal knowledge of any of the factual statements therein, but that he merely received these forms from other departments at Wells Fargo and signed them. Ex. P-17, pp. 59-67.^{FN4}

No one at NWTS took any action to verify any of the information used in the Notice of Default or referenced in the Loss Mitigation Form or Beneficiary Declaration. The information in the Notice of Default was merely pulled mechanically from the 2010 CIR. Ms. Smith testified that she had been trained not to make any inquiries concerning these documents, but instead to rely on them. In fact, when asked repeatedly by counsel for the Meyers whether she had verified information she received, her consistent response was "I have been trained to rely on the referral information in Vendorscape" or "I have been trained to rely on the Beneficiary Declaration." As to Mr. Kennerty's authority, Ms. Smith testified that she knew he worked for Wells Fargo and/or ASC. She further testified that in her experience, Wells Fargo routinely executed documents for U.S. Bank.

The Meyers found the Notice of Default taped to the door of their Residence. They were not familiar with any of the entities identified in the notice except for ASC, to which they had been making mortgage payments. The notice stated that in order to avoid foreclosure, the Meyers would have to pay \$82,035.65. When Mr. Meyer called the phone number for ASC listed in the notice, the individual who answered the phone identified themselves as an employee of Wells Fargo. No one explained to him what the relationship was between these two entities. When he contacted NWTS, he was referred to "a local law firm."

*6 Mr. Meyer did not agree with the information contained in the notice. He believed that the arrears listed were incorrect because he believed the interest rate listed in the Notice of Default of 9.6% was incorrect. He contended that their monthly payment was only \$3200, whereas the payment shown in the Notice of default was \$4,066.50. The Meyers did not believe they owed any money to U.S. Bank or GEL2. Mr. Meyer attempted to contact Wells Fargo, ASC and NWTS with his concerns, but was unable to resolve the issues. Mr. Meyer also attempted to locate Finance America, the original lender.

On August 13, 2010, NWTS executed a notice of trustee's sale (the "Notice of Trustee's Sale"). Ex. P-6. The notice recited that the Residence would be sold on the steps of the Snohomish County Courthouse on November 19, 2010, unless the Meyers paid \$82,431.77 by November 8, 2010. Ms. Smith signed the Notice of Trustee's Sale for NWTS.

C. The Bankruptcy Proceedings.

[1] Failing to resolve the situation on their own, the Meyers hired attorney **Richard Jones** to represent them in July of 2010. *See* Standard Retainer Agreement attached to the Declaration of **Richard L. Jones**, Case No. 10-23914, Dkt. 51.^{FN5} The Meyers also retained attorney Larry Feinstein to assist them with the filing of a chapter 13 bankruptcy proceeding on November 18, 2010, the day before the scheduled trustee's sale of their Residence. Mr. Meyer testified that but for the foreclosure, he would not have filed bankruptcy and that the sole reason for the filing was to find a way to save their home from foreclosure.

Through Mr. Jones, by letter dated December 17, 2010, the Meyers issued a Qualified Written Request under the Truth in Lending Act, directed at ASC, in order to determine the holder and owner of the Note. Ex. P-7. ASC sent a response to Mr. Feinstein on January 12, 2011. Ex. P-14. The letter advised that the Meyers' loan was in a "pool of loans" managed by U.S. Bank, but it provided no detailed information

--- B.R. ---, 2014 WL 640981 (Bkrtcy.W.D.Wash.)
(Cite as: 2014 WL 640981 (Bkrtcy.W.D.Wash.))

about how or when that had occurred, or even the name of the fund. The letter did, however, contain a contact address for U.S. Bank.

On December 21, 2010, U.S. Bank, as trustee for GEL2, filed a proof of claim in the Meyers' bankruptcy proceeding listing a total amount due under the Deed of Trust as \$502,190.76. In the proof of claim, unpaid interest is calculated at the rate of 9.625% (the rate shown in the 2010 CIR) from January 1, 2009. The claim shows a payment amount of \$4,066.50 per month for the period February 1, 2009, to June 2009, but then reduced payments of \$3,448.30 per month as of December 1, 2010. The Meyers' first proposed chapter 13 plan provided only for payments of \$2,000 per month on their mortgage; their plan stated that they were working on a loan modification with the lender. Case No. 10-23914, Dkt. 6. U.S. Bank opposed confirmation of the plan on the grounds that it did not provide for payment of the current mortgage payment of \$3,448.30 per month or provide for the cure of the prepetition arrears totaling \$86,020.02. *Id.*, Dkt. 19.

*7 The Meyers and U.S. Bank were unable to resolve their disputes over plan confirmation. On June 1, 2011, the Meyers stipulated that U.S. Bank could have relief from the automatic stay effective June 22, 2011. Case No. 10-23914, Dkt. 30. They removed their home mortgage from their plan and their plan was confirmed on August 19, 2011. *Id.*, Dkt. 40.

On June 29, 2011, NWTS restarted the foreclosure process with the issuance of an Amended Notice of Trustee's Sale with a sale date of August 12, 2011. Ex. P-8. Despite having agreed in the bankruptcy case to relief from stay, the Meyers then commenced this adversary proceeding on July 23, 2012, and sought a temporary restraining order enjoining the scheduled foreclosure sale. U.S. Bank did not appear at the hearing on August 1, 2012, nor did it file any opposition to the entry of the temporary restraining order. Heidi Buck appeared for NWTS at the hearing as

NWTS was also a named defendant in the action. On August 2, 2012, a temporary restraining order was entered, which required the Meyers to deposit \$3,616.03 into the Registry of the Court by August 6, 2012, pursuant to RCW 61.24.130. A hearing on the entry of a preliminary injunction was scheduled for August 10, 2012. U.S. Bank and ASC, through the same counsel, filed a joint non-opposition to the request for a preliminary injunction, provided the Meyers would continue to make monthly payments of \$3,616.03 pursuant to the terms of the temporary restraining order. Dkt. 19. The non-opposition recited that the parties had engaged in three failed mediation attempts. This Court entered the preliminary injunction on August 20, 2012, requiring the Meyers to continue to make monthly payments into the Registry of the Court. Dkt. 22.

Multiple motions were filed in this case, including various discovery motions. On March 29, 2013, U.S. Bank and MERS filed a motion to compel the Meyers' responses to interrogatories and request for production of documents. The Meyers responded and at a hearing on April 19, 2013, the Court gave the Meyers until April 30, 2013 to fully respond to the discovery requests. In addition, the Court awarded discovery sanctions of \$1,200 to U.S. Bank and MERS. *See* Order at Dkt. 76. U.S. Bank and Wells Fargo then moved on May 17, 2013 to dissolve the preliminary injunction entered by the Court on the ground that the Meyers had failed to make the monthly payments into the court registry since September 10, 2012. These defendants also filed their second motion to compel discovery responses from the Meyers, complaining that the Meyers had failed to comply with the Court's prior order to compel. The Meyers did not respond to either motion, and on June 5, 2013, the Court entered orders granting the defendants' motion to dissolve the preliminary injunction (Dkt.90), and dismissing all claims against U.S. Bank and MERS as a discovery sanction (Dkt.91). The motion to dissolve the injunction also sought an order allowing the trustee's sale to be reset. On June 13, 2013, the Court

--- B.R. ---, 2014 WL 640981 (Bkrcty.W.D.Wash.)
(Cite as: 2014 WL 640981 (Bkrcty.W.D.Wash.))

entered an order providing that the trustee's sale could be reset pursuant to applicable nonbankruptcy law. As of the date of trial, however, the Meyers' Residence had not been sold at trustee's sale.

*8 The Meyers contend that NWTs violated its duties as a foreclosure trustee under Washington state law. They contend that they have been damaged as a consequence of NWTs's unlawful acts by having to (1) hire Mr. Jones to issue a Qualified Written Request to determine the name and contact information for the holder and owner of their loan, (2) file a bankruptcy proceeding in order to stop what they believed was an unlawful foreclosure action against their Residence, (3) incur attorney's fees in connection with the foreclosure and the bankruptcy, and (4) incur expenses moving to a rental house to avoid the uncertainty associated with the multiple notices of trustee's sale.

Between the time the Meyers hired Mr. Jones and the time ASC responded to their Qualified Written request, Mr. Jones incurred fees of \$980. Case No. 10-23914, Dkt. 54, p. 3. Mr. Feinstein charged the Meyers \$3,500 for the filing and preparation of their bankruptcy case, and the Meyers paid the bankruptcy filing fee of \$274.

Mr. and Mrs. Meyer also testified to the emotional effects of the foreclosure proceedings on them. Mr. Meyer described it as "four years of hardship." Although he took full responsibility for his financial problems and default in payments under the Note, he testified that the stress of foreclosure and the attempts to get back on track with his mortgage resulted in severe stress affecting his work, his marriage, and his parenting, for which he ultimately sought professional help. Given the stress, he and his wife made the decision to move into a rental house in July of 2013. Their monthly rent under the lease is \$2,595, which they had paid from July through October as of the time of trial (\$10,380).^{FNG} The Meyers were also required to pay a security deposit of \$2,245 and a pet deposit of \$300. In addition, Mr. Meyer testified to moving expenses

incurred of \$2,625, which included the time that he and his wife were off work in order to handle the move themselves. Mr. Meyer also calculated his and his wife's time off from work in order to attend multiple mediations and hearings, which he estimated cost him \$3,200 in total, including travel expenses. Their damages, according to the evidence, amount to \$23,504. Mr. Meyer testified that he has also incurred attorney's fees and costs in this litigation.

III. JURISDICTION

The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334 and this is a core proceeding under 28 U.S.C. § 157(b)(2)(B), (K).

IV. DISCUSSION

A. Violation of the Washington Deeds of Trust Act.

[2] Washington permits the foreclosure of deeds of trust nonjudicially under the DOTA. The statute offers a convenient and relatively inexpensive method for foreclosing deeds of trust, provided the lender complies with the terms of the statute.

Washington's deed of trust act should be construed to further three basic objectives. *See Comment, Court Actions Contesting the Nonjudicial Foreclosure of Deeds of Trust in Washington*, 59 Wash.L.Rev. 323, 330 (1984). First, the nonjudicial foreclosure process should remain efficient and inexpensive. *Peoples Nat'l Bank v. Ostrander*, 6 Wash.App. 28, 491 P.2d 1058 (1971). Second, the process should provide an adequate opportunity for interested parties to prevent wrongful foreclosure. Third, the process should promote the stability of land titles.

*9 *Cox v. Helenius*, 103 Wash.2d 383, 387, 693 P.2d 683 (1985).

1. The Changing Legal Landscape of the DOTA.

The Meyers contend that NWTs violated the DOTA by commencing a foreclosure against their

--- B.R. ---, 2014 WL 640981 (Bkrcty.W.D.Wash.)
(Cite as: 2014 WL 640981 (Bkrcty.W.D.Wash.))

Residence without the proper authority under Washington State law and that NWTS failed to comply with its duties to them as trustee under RCW 61.24.010(3).

[3] As is typical in a number of similar cases asserting claims under the DOTA, NWTS argues that because the Residence has not been sold, the Meyers cannot, as a matter of law, establish damages. As is also typical in these cases, NWTS argues that in Washington, there is no cause of action for wrongful initiation of foreclosure. Federal judges in the Western District of Washington addressing these issues have generally followed the case of *Yawter v. Quality Loan Service Corp.*, 707 F.Supp.2d 1115, 1123 (W.D.Wash.2010). In that case, addressing a motion to dismiss by the lender and MERS, the court held that under Washington state law “the DTA does not authorize a cause of action for damages for the wrongful initiation of nonjudicial foreclosure proceedings where no trustee's sale occurs.” However, recent state court cases have undermined the validity of this statement of the law. In *Walker v. Quality Loan Service Corp.*, 176 Wash.App. 294, 308 P.3d 716 (Wash.Ct.App.2013), the Washington State Court of Appeals stated its disagreement with the holding in *Yawter*, concluding that *Yawter* relied on cases which were decided before the legislature enacted the current version of RCW 61.24.127 and before the Washington Supreme Court decided *Bain v. Metropolitan Mortgage Group, Inc.*, 175 Wash.2d 83, 10, 285 P.3d 34 (2012). The court in *Walker* held:

Because the legislature recognized a presale cause of action for damages in RCW 61.24.127(1)(c), we hold that a borrower has an actionable claim against a trustee who, by acting without lawful authority or in material violation of the DTA, injures the borrower, even if no foreclosure sale occurred. Additionally, where a beneficiary, lawful or otherwise, so controls the trustee so as to make the trustee a mere agent of the beneficiary, then, as principal, it may have vicarious liability.”

176 Wash.App. at 313, 308 P.3d 716. *See also Bavand v. OneWest Bank, F.S.B.*, 176 Wash.App. 475, 309 P.3d 636 (Wash.Ct.App.2013)(rejecting *Yawter*).

NWTS urges the Court to decline to follow *Walker*, arguing that as an intermediate appellate decision, it is not binding on this Court, and further, that the question addressed by *Walker* was certified to the Washington Supreme Court for review by District Judge Marsha Pechman in *Frias v. Asset Foreclosures Services, Inc.*, Case no. C13-760-MJP, by order entered September 25, 2013. In addition, NWTS offers the additional authority from the Ninth Circuit Bankruptcy Appellate Panel, *Brown v. Bank of America, et al.*, BAP No. WW-12-1534, in which the panel followed *Yawter*, without any citation to *Walker* or *Bavand*.

*10 [4] As far as this Court is concerned, the Washington courts have spoken: *Walker* and *Bavand* reject the holding in *Yawter* that there is no cause of action for violation of the DOTA. Bankruptcy courts routinely follow state courts when addressing legal issues under state law, particularly with respect to questions involving real property. *Butner v. U.S.*, 440 U.S. 48, 99 S.Ct. 914, 59 L.Ed.2d 136 (1979). In following state court cases, this Court has never distinguished between state appellate and supreme court cases. Moreover, the Court finds the *Walker* case particularly thoughtful and on point. Following *Walker*, the Court must determine whether the Meyers proved that NWTS violated some provision of the DOTA.

2. NWTS's Duties Under the DOTA.

In 2008, the legislature amended the DOTA to provide that a trustee has no fiduciary duty to either the lender or the homeowner in a foreclosure action. Specifically, subsections (3) and (4) were added to RCW 61.24.010, and they provide:

(3) The trustee or successor trustee shall have *no*

--- B.R. ---, 2014 WL 640981 (Bkrcty.W.D.Wash.)
 (Cite as: 2014 WL 640981 (Bkrcty.W.D.Wash.))

fiduciary duty or fiduciary obligation to the grantor or other persons having an interest in the property subject to the deed of trust.

(4) The trustee or successor trustee shall *act impartially* between the borrower, grantor, and beneficiary.

Laws of 2008, ch. 153, § 1, codified in part as RCW 61.24.010(3) and (4)(emphasis added). In 2009, the statute was revised again, and RCW 61.24.010(4) was rewritten to read: “(4) The trustee or successor trustee has a duty of *good faith* to the borrower, beneficiary, and grantor.” Laws of 2009, ch. 292, § 7, codified in part as RCW 61.24.010(4)(emphasis added).

[5] In *Klem v. Washington Mutual Bank*, 176 Wash.2d 771, 295 P.3d 1179 (2013), the Washington Supreme Court reviewed the history of the DOTA and issued a strong statement with particular reference to the duty of a trustee under that statute. Squarely at issue in the case was the trustee's failure to exercise independent discretion to postpone a trustee's sale. Recognizing the “tremendous power” given a trustee to sell a borrower's family home, and the need to construe the DOTA in favor of borrowers “because of the relative ease with which lenders can forfeit borrowers' interests,” the court concluded that “[i]n a nonjudicial foreclosure, the trustee undertakes the role of the judge as an impartial third party who owes a duty to both parties to ensure that the rights of both the beneficiary and the debtor are protected.” *Id.* at 789–790, 295 P.3d 1179. “If the trustee acts only at the direction of the beneficiary, then the trustee is a mere agent of the beneficiary and a deed of trust no longer embodies a three party transaction.” *Id.* The *Klem* court rejected the trustee's argument that “no competent Trustee would fail to respect its Beneficiary's instructions not to postpone a sale without first seeking the Beneficiary's permission” and held that in failing to exercise its independent judgment as to whether the sale should be postponed, the trustee

violated its duty to the borrowers. *Id.* at 791, 295 P.3d 1179.^{FN7}

*11 Nonjudicial foreclosure in Washington is initiated by the issuance of a notice of default to the borrower. Under RCW 61.24.030, the notice of default must be transmitted “by the beneficiary or trustee” 30 days before the notice of sale is recorded, transmitted or served. The “beneficiary” under the DOTA is 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 61.24.005(2).

[6] In this case, NWTS referred to itself in the Notice of Default as the authorized agent for the beneficiary even though the evidence established that it was not an authorized agent for U.S. Bank. Furthermore, at the time the Notice of Default was issued, NWTS was already the successor trustee under the DOTA with duties to both the Meyers and U.S. Bank. Ms. Smith testified that the misreference to its role as agent was just a mistake. The appearance to the Meyers, however, was that a lender they had never heard of, through an agent they had never heard of, was declaring them in default under their Note and attempting to take away their home.

At the time the Notice of Default was issued, NWTS was required to include additional and specific information in the notice pursuant to RCW 61.24.030(8), which was added to the DOTA effective July 26, 2009. Laws of 2009, Ch. 292, § 2. Of relevance here is the requirement in subsection (l) that NWTS include in the Notice of Default “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.” According to the statute, inclusion of this information is mandatory “in the event the property secured by the deed of trust is residential real property.”

--- B.R. ---, 2014 WL 640981 (Bkrcty.W.D.Wash.)
 (Cite as: 2014 WL 640981 (Bkrcty.W.D.Wash.))

At trial, NWTS successfully proved, by resort to many complicated and lengthy exhibits, that as of the commencement of the foreclosure, U.S. Bank, as trustee for GEL2, was the holder of the Note and that GEL2 was the owner of the Note.^{FN8} Despite the simple direction of the statute, however, NWTS failed to include an address and phone number for either U.S. Bank or GEL2. Instead, NWTS merely listed the address for the servicer, ASC, for both the beneficiary and the servicer, with two different phone numbers for ASC. Accurate information identifying the beneficiary and owner of the obligation is important to homeowners like the Meyers, who learn for the first time in a notice of default that their mortgage obligation is owned by someone with whom they never did any business or to whom they have never made any payment, because they have no idea if it is real or a potential scam. In this case, the failure of NWTS to include accurate information in the Notice of Default eventually caused the Meyers to hire an attorney and file bankruptcy in order to verify the true owner of their home loan.

*12 Also by amendment in 2009, the Washington legislature added a new requirement enacted as subsection (7)(a) to RCW 61.24.030 as follows:

(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.

In this case, NWTS had a declaration from Wells Fargo, the purported attorney-in-fact for U.S. Bank. Although NWTS submitted into evidence three separate powers of attorney issued by U.S. Bank to Wells Fargo in 2007 which, if still in effect in 2010 when the Meyers' foreclosure was commenced, would have given Wells Fargo broad powers to sign documents related to foreclosures on behalf of U.S. Bank, NWTS had no notice or knowledge of any of these powers of attorney or any other agreement substantiating the authority of Wells Fargo to act on behalf of U.S. Bank. Further, Ms. Smith, as the foreclosing NWTS officer, was specifically trained not to seek out that information. Instead, NWTS merely accepted without question the purported authority of these entities.^{FN9}

The Meyers argue that a trustee may not rely on a beneficiary declaration executed by anyone other than the beneficiary. Further, they argue that the trustee must have proof, in the words of the statute, that the beneficiary is the "owner" of the note as opposed to the holder of the note. It is not necessary to address either of these arguments, however, because the Court concludes that NWTS could not rely on the Beneficiary Declaration because it had no proof that Wells Fargo had authority to execute that declaration on behalf of U.S. Bank.

In this case, NWTS also failed to comply with the requirements of RCW 61.24.030(9). Under that section, before a notice of trustee's sale may be recorded, in the case of owneroccupied residential real property, the beneficiary must have complied with RCW 61.24.031. RCW 61.24.031(1)(a) provides that a trustee, beneficiary, or its authorized agent may not issue the notice of default until 30 days after satisfying the due diligence requirements described in subsection (5) if the borrower has not responded, or 90 days after contact was initiated if the borrower does respond. Under RCW 61.24.031(9), the beneficiary or authorized agent must prepare a "Foreclosure Loss Mitiga-

--- B.R. ---, 2014 WL 640981 (Bkrcty.W.D.Wash.)
(Cite as: 2014 WL 640981 (Bkrcty.W.D.Wash.))

tion Form” the contents of which are set out in the statute. The purpose of the foreclosure loss mitigation form is to confirm for the trustee that the due diligence required under the statute has been completed as required.

*13 In this case, NWTS accepted the Loss Mitigation Form from ASC signed by John Kennerty. The form stated that “[t]he beneficiary, or their authorized agent has contacted the borrower under, and has complied with, Section 2 of Chapter 292, Laws of 2009...” This is in reference to the requirement of RCW 61.24.031(b) that the “beneficiary or its authorized agent” contact the borrower in writing or by telephone to assess their financial ability to pay the debt and to explore options for the borrower to avoid foreclosure. The statute contains specific requirements for the content of the communication between the beneficiary and the borrower. ASC was not the beneficiary, nor was it an authorized agent of the beneficiary. Wells Fargo was an independent contractor under the Servicing Agreement, and not an authorized agent of U.S. Bank. Thus, any communication by ASC to the Meyers (assuming there was some communication initiated by ASC; there was no evidence of same) would not have satisfied the statute. Moreover, Mr. Kennerty testified in his deposition that he had no personal knowledge of the statements in these declarations, and that he relied completely on his collections and foreclosure departments to provide the information to him. NWTS had no evidence that ASC was the authorized agent of U.S. Bank for the purpose of executing this document.

The Court concludes that NWTS failed to materially comply with its duties under the DOTA. RCW 61.24.127(1)(c). Misrepresenting itself in the Notice of Default as the authorized agent of U.S. Bank, NWTS declared a default under the Note, commenced a foreclosure against the Residence without verifying in any way the authority of Wells Fargo or U.S. Bank to maintain such foreclosure, and failed to provide the Meyers with the most basic information required by

statute about the current holder and owner of their loan. The Notice of Default, which did not meet the requirements of the DOTA, tainted the entire foreclosure process.

B. Violation of the Washington Consumer Protection Act.

[7] The WACPA, RCW 19.86 et seq., prohibits unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce. RCW 19.86.020. The Meyers base their WACPA claim on the failure of NWTS to comply with the DOTA. Because NWTS's violation of the DOTA is not a *per se* violation of the WACPA under the facts of this case, the Court must examine whether the Meyers have proved each element required under the WACPA.^{FN10}

[8][9] Case law in Washington mandates that a plaintiff prove the following elements to recover under the WACPA: (1) an unfair or deceptive act or practice; (2) the act or practice occurred in trade or commerce; (3) the act or practice impacts the public interest; (4) the act or practice caused injury to the plaintiff in his business or property; and (5) the injury is causally linked to the unfair or deceptive act. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wash.2d 778, 780, 719 P.2d 531 (1986). To clear up any confusion about these elements, the court in *Klem* held “that a claim under the Washington CPA may be predicated upon a *per se* violation of statute, an act or practice that has the capacity to deceive substantial portions of the public, or an unfair or deceptive act or practice not regulated by statute but in violation of public interest.” *Klem*, 176 Wash.2d at 787, 295 P.3d 1179.

*14 The statutory definitions of “trade” and “commerce” require that the act directly or indirectly affect the people of the State of Washington. The act permits any “person who is injured in his or her business or property” to bring a civil suit for injunctive relief, damages, attorneys' fees and costs, and treble

--- B.R. ---, 2014 WL 640981 (Bkrcty.W.D.Wash.)
(Cite as: 2014 WL 640981 (Bkrcty.W.D.Wash.))

damages. RCW 19.86.090.

1. Unfair and Deceptive Act.

[10] After the decision of the Washington Supreme Court in *Klem v. Washington Mutual*, there is no uncertainty as to how to apply the WACPA elements in a case like this one. The court in *Klem* held that the practice of a trustee in a nonjudicial foreclosure deferring to the lender on whether to postpone a foreclosure sale and thereby failing to exercise its independent discretion as an impartial third party with duties to both parties is an unfair or deceptive act or practice and satisfies the first element of the WACPA. Like the record before the court in *Klem*, the record in this case supports the conclusion that NWTs abdicated its duty to act impartially toward both sides. For the following reasons, the Court finds that NWTs's multiple violations of the DOTA, as detailed in the preceding section, also constitute violations of the WACPA.

The standard practices of NWTs ignore the importance of a foreclosure trustee's duties to the consumer borrower. The requirements for a notice of default under RCW 61.24.030 and 031 are straightforward and unambiguous. The trustee is required to provide the name and address of the owner of the homeowner's loan. RCW 61.24.030(8)(1). All NWTs provided to the Meyers was the address and two phone numbers for ASC. When Mr. Meyer called the phone numbers, a representative of Wells Fargo answered. Counsel for NWTs argued that everyone knows that ASC is a "dba" of Wells Fargo. In fact, everyone does not know that—most, if not all, homeowners do not know that. Most, if not all, homeowners would be completely perplexed by a reference to their home loan lender as "U.S. Bank National Association, as Trustee for Structured Asset Securities Corporation, Mortgage Pass-Through Certificates, 2006-GEL2." And while there is no law against maintaining a lender's name in that form, common sense dictates that if a foreclosure trustee is going to put that in a notice of default, some additional explanation will likely be

necessary to the average homeowner. Because NWTs provided no contact information for U.S. Bank as the trustee for GEL2, or for GEL2, the Meyers had no way to contact either to verify the information in the Notice of Default except through the servicer ASC. The statute specifically requires the Notice of Default to include contact information for both the owner of the note and the servicer.

The Notice of Default purports to be a formal declaration that the Meyers were in default under their Note, in that it states "[t]he beneficiary *declares* you in default for failing to make payments as required by your note and deed of trust." (Emphasis added). Yet, there is no evidence that U.S. Bank ever declared the Meyers in default. NWTs's misrepresentation of itself as the "authorized agent" of U.S. Bank made it appear that the Notice of Default did suffice as a declaration of default by the beneficiary. In fact, RCW 61.24.030(8)(c), in effect at the time the Notice of Default was issued, required "[a] statement that the beneficiary *has declared* the borrower or grantor to be in default..." (Emphasis added). The Meyers were insistent in their testimony that they had not received any formal notice of default from their lender prior to their receipt of the Notice of Default issued by NWTs.

*15 In order to obtain contact information for their new lender, the Meyers were forced to hire an attorney to prepare a Qualified Written Request for them under the Truth in Lending Act. It wasn't until ASC responded to that request on January 12, 2011, six months after the foreclosure was commenced, that contact information for U.S. Bank was provided, with, of course, the admonition by ASC that "[a]lthough we are providing this information, the Trustee will more than likely refer you back to us [ASC] to answer any questions about the loan or the servicing of the loan." Ex. P-14.

Finally, as noted above, foreclosure against owner-occupied real property may not be commenced unless the due diligence requirements of RCW

--- B.R. ---, 2014 WL 640981 (Bkrcty.W.D.Wash.)
(Cite as: 2014 WL 640981 (Bkrcty.W.D.Wash.))

61.24.031(5) have been completed by the beneficiary or an authorized agent, and unless the trustee has proof that the beneficiary is the owner of the promissory note. NWTS, because of its standard policy of accepting whatever is contained in a Loss Mitigation Form and Beneficiary Declaration without question, moved forward with foreclosure against the Meyers' Residence without exercising any diligence of its own to confirm the authority of U.S. Bank and Wells Fargo to initiate foreclosure.

[11][12] While a foreclosure trustee is not required to be an attorney, they must be capable of assembling enough information about the lender, servicer and others involved in the lending chain to be able to objectively satisfy the homeowner that the correct party is initiating the action to take their home. The foreclosure trustee should be able to accurately state minimal information required by the DOTA to be included in the notice of default, which is, from the perspective of the homeowner, the frightening first step to the loss of their home. A homeowner should not be required to hire an attorney to draft a Qualified Written Request under the Truth in Lending Act just to get the name and address of their home loan lender. In short, NWTS must be more than a typing service for the lending community. The Court therefore concludes that the failures of NWTS under the DOTA in this case are both unfair and deceptive acts within the meaning of the WACPA.

2. Occurring in Trade or Commerce.

There can be no serious question that the actions of NWTS relative to the Meyers' foreclosure action and the other foreclosures handled by NWTS in the State of Washington occurred in trade or commerce.

3. Public Interest Impact.

[13] Whether NWTS complies with its duties under the DOTA has a significant impact on the public interest. Homeowners have a right to a trustee who acts in good faith toward them in the exercise of its foreclosure duties. Homeowners have a right to ac-

curate information and conduct by the trustee which complies with state law. The testimony demonstrated that NWTS, as a matter of practice, accepts all information provided to it through its Vendorscape portal without verification or question, without any knowledge concerning the source or accuracy of that information, and without exercising any discretion relative to the interests of the borrower. Mr. Meyer summed up the sentiment of the thousands of Washington homeowners who have lost their homes to foreclosure in the recent economic downturn: the threat of foreclosure of his family's home was the worst event of his life. The Court concludes that the Meyers have proved the public interest element of their WACPA claim.

4. Causation and Injury.

*16 [14][15][16][17][18][19] Before a violation of the WACPA may be found, an injury to the claimant's business or property must be established. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wash.2d at 792, 719 P.2d 531. The injury "need not be great" and no monetary damages need be proven. *Mason v. Mortgage America, Inc.*, 114 Wash.2d 842, 854, 792 P.2d 142 (1990); *Sign-O-Lite Signs, Inc. v. DeLaurenti Florists, Inc.*, 64 Wash.App. 553, 563, 825 P.2d 714 (1992). Non-quantifiable injuries, such as loss of goodwill, suffice to prove injury, *Nordstrom, Inc. v. Tampourlos*, 107 Wash.2d 735, 733 P.2d 208 (1987), but mental distress alone does not establish injury. *Stephens v. Omni Ins. Co.*, 138 Wash.App. 151, 180, 159 P.3d 10 (Wash.Ct.App.2007). Incurring time and money to prosecute a WACPA claim does not suffice as an injury to business or property. *Sign-O-Lite*, 64 Wash.App. at 564, 825 P.2d 714. On the other hand, "[c]onsulting an attorney to dispel uncertainty regarding the nature of an alleged debt is distinct from consulting an attorney to institute a CPA claim." *Panag v. Farmers Ins. Co. of Washington*, 166 Wash.2d 27, 62, 204 P.3d 885 (2009). As for damages, as opposed to injury, the court in *Mason* stated:

--- B.R. ---, 2014 WL 640981 (Bkrcty.W.D.Wash.)
(Cite as: 2014 WL 640981 (Bkrcty.W.D.Wash.))

[W]hether an “injury” has been sustained so as to support an award of attorneys' fees and costs under the Consumer Protection Act is a different inquiry than whether treble damages are appropriately awarded. An injury cognizable under the Act will sustain an award of attorneys' fees while treble damages are based upon “actual” damages awarded.

Mason, 114 Wash.2d at 855, 792 P.2d 142. Finally, on causation, the Washington Supreme Court instructs that “[i]f investigative expense would have been incurred regardless of whether a violation existed, causation cannot be established.” *Panag*, 166 Wash.2d at 64, 204 P.3d 885.

In this case, NWTs had a simple task: provide the Meyers with an address and telephone number for the owner of the Note and exercise independent judgment to confirm the authority of the entities requesting foreclosure of the Residence. But for the failure of NWTs to provide that information in the Notice of Default as required by the DOTA and to exercise independent judgment, the Meyers would not have been forced to incur the expense of retaining Mr. Jones to pursue additional information concerning their loan and Mr. Feinstein to file a bankruptcy proceeding in order to stop a foreclosure which was improperly instituted as to their Residence.

5. Damages.

[20][21] Under the WACPA, the Meyers are entitled to actual damages, together with the costs of suit, including a reasonable attorney's fee. RCW 19.86.090. The Court may increase the award to three times the amount of actual damages, provided the award does not exceed \$25,000.

Because the Notice of Default issued by NWTs was completely defective, the Meyers are entitled to all of the damages they suffered which flowed from the unlawful foreclosure activities of NWTs. In short, they should not have been displaced from their home

based upon the Notice of Default. As detailed in the facts above, those damages total \$23,504. The Court further finds that trebling under RCW 19.86.090 is also warranted up to the statutory maximum of \$25,000. The Meyers are also entitled to seek recovery of the costs of this suit, including a reasonable attorney's fee.

C. Fair Debt Collection Practices Act.

*17 [22] The Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692–1692p (“FDCPA”) was enacted “to protect consumers from a host of unfair, harassing, and deceptive collection practices without imposing unnecessary restrictions on ethical debt collectors.” *FTC v. Check Investors, Inc.*, 502 F.3d 159, 165 (3rd Cir.2007) *cert. denied Check Investors, Inc. v. F.T.C.*, 555 U.S. 1011, 129 S.Ct. 569, 172 L.Ed. 429 (2008) (quoting *Staub v. Harris*, 626 F.2d 275, 276–77 (3rd Cir.1980) (internal quotations omitted)). Under the act, a debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt (15 U.S.C. § 1692f), nor may a debt collector use any “false, deceptive, or misleading representation or means in connection with the collection of any debt” (15 U.S.C. § 1692e). In *Walker, supra*, the Washington appellate court addressed the potential liability of foreclosure trustees under these two sections and discussed developing federal law on the issues, concluding that as long as a trustee confines itself to actions necessary to effectuate a foreclosure, its liability will be solely under Section 1692f rather than Section 1692e. 308 P.3d at 725–26.^{FN11}

[23] In analyzing liability under Section 1692, *Walker* relied on *McDonald v. One West Bank*, 2012 WL 555147 (W.D.Wash. Feb.21, 2012). In *McDonald*, the court noted the current trend among federal district courts in the Ninth Circuit to limit a trustee's liability to Section 1692f if they confine their activities to foreclosure, citing *Jara v. Aurora Loan Services, LLC*, 2011 WL 6217308, at * 5 (N.D.Cal.Dec.14, 2011); *Pizan v. HSBC Bank USA, N.A.*, 2011 WL 2531104, at *3 (W.D.Wash. June 23, 2011); *Let-*

--- B.R. ---, 2014 WL 640981 (Bkrcty.W.D.Wash.)
(Cite as: 2014 WL 640981 (Bkrcty.W.D.Wash.))

tenmaier v. Fed. Home Loan Mortg. Corp., 2011 WL 1938166, at *11–12 (D.Or. May 20, 2011); *Armacost v. HSBC Bank USA*, 2011 WL 825151, at * 5–6 (D.Idaho Feb.9, 2011); *Long v. Nat'l Default Servicing Corp.*, 2010 WL 3199933 at *4 (D.Nev. Aug.11, 2010). In the absence of any Ninth Circuit law, the Court sees no reason to depart from this trend.

[24] In this case, there is no evidence that NWTS took any action other than that which was necessary to effectuate a nonjudicial foreclosure against the Residence. Accordingly, NWTS could be liable only under Section 1692f if it commenced the foreclosure against the Residence when (A) there was no present right to possession of the property claimed as collateral through an enforceable security interest; (B) there was no present intention to take possession of the property; or (C) the property was exempt by law from such dispossession or disablement. 15 U.S.C. § 1692f(6). In *Walker*, the court noted that the trustee there could be liable under Section 1692f(6)(A) if it commenced foreclosure without a valid appointment as trustee. 176 Wash.App. 294, 308 P.3d 716, 726. In this case, however, NWTS had been appointed successor trustee when it issued the Notice of Default, and it proved at trial that U.S. Bank was the holder of the Note with a right to foreclose against the Residence. Accordingly, the Court finds there was a present right of possession of the property through an enforceable security interest, although the procedure initiating the enforcement of that security interest was defective. Accordingly, the Court finds that the Meyers have failed to prove entitlement to relief under the FDCPA.

CONCLUSION

*18 For the foregoing reasons, the Court finds in favor of the Meyers in the amount of \$48,504, consisting of actual damages of \$23,504, plus treble damages under the WACPA of \$25,000. The Meyers may request costs of suit and a reasonable attorney's fee under the WACPA by separate motion and submit an order and judgment in conformance with this Memorandum Decision.

FN1. Unless otherwise indicated, all Code, Chapter, Section and Rule references are to the Bankruptcy Code, 11 U.S.C. § § 101 et seq. and to the Federal Rules of Bankruptcy Procedure, Rules 1001 et seq.

FN2. Mr. Richards testified that it was the servicer's responsibility under the Servicing Agreement to declare a default under a loan which was part of GEL2, and not the duty of U.S. Bank as trustee.

FN3. On March 10, 2009, Mr. Stenman had assigned MERS' interest in the Deed of Trust to U.S. Bank.

FN4. Mr. Kennerty's deposition was taken in the case of *Geline v. NWTS* on May 20, 2010, so it would be directly relevant to the procedures used by him at or around the time the Meyers' home foreclosure was commenced. Over the objection of NWTS, the Court admitted Mr. Kennerty's deposition pursuant to Rules 804(a)(5)(A) and 804(b)(1), and gave NWTS the opportunity to object to particular parts of the deposition. NWTS raised no objections to any part of the deposition.

FN5. The Court may take judicial notice of its pleadings and files. Fed.R.Evid. 201.

FN6. The Meyers were required to pay \$3,616.03 into the registry of the court pursuant to the Court's preliminary injunction, thus the move reduced their monthly housing expense by just over \$1,000.

FN7. The court went on to hold that the trustee's failure to exercise independent judgment in continuing the trustee's sale was an unfair or deceptive act or practice under

--- B.R. ----, 2014 WL 640981 (Bkrcty.W.D.Wash.)
 (Cite as: 2014 WL 640981 (Bkrcty.W.D.Wash.))

the WACPA.

FN8. RCW 61.24.030 refers in different places to the “beneficiary of the deed of trust,” the “beneficiary” and the “owner” of the note or obligation secured by the deed of trust. The Court must assume those references are intentional. RCW 61.24.005(2) defines “beneficiary” as the “holder of the instrument or document evidencing the obligations secured by the deed of trust....” Under Article 3 of Washington’s version of the Uniform Commercial Code, the “owner” and “beneficiary” of a note can be different persons. A person entitled to enforce an instrument means (i) the holder of the instrument or (ii) a nonholder in possession of the instrument who has the rights of the holder. RCW 62A.3–301. A person may be entitled to enforce a negotiable instrument even though the person is not the owner of the instrument. RCW 62A.3–301. Mr. Wiggins testified that although U.S. Bank was the holder of the Note, GEL2 was the owner of the Note.

FN9. The 2010 CIR listed ASC as the servicer of the Meyers’ loan. Nowhere in that report, however, does it refer to Wells Fargo as attorney in fact for U.S. Bank. Because the powers of attorney were recorded in Snohomish County, presumably NWTS could have located them in a title search. Ms. Smith, however, testified that she did not see the powers of attorney prior to issuing the Notice of Default. Instead, she relied on the Beneficiary Declaration and on her knowledge that Mr. Kennerty worked for ASC/Wells Fargo.

FN10. See RCW 61.24.135. “A *per se* unfair trade practice exists when a statute which has been declared by the Legislature to constitute

an unfair or deceptive act in trade or commerce has been violated.” *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wash.2d 778, 786, 719 P.2d 531 (1986).

FN11. For purposes of Section 1692f(6), a “debt collector” includes a “person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests.” 15 U.S.C. § 1692a(6).

Bkrcty.W.D.Wash.,2014.

In re Meyer

--- B.R. ----, 2014 WL 640981 (Bkrcty.W.D.Wash.)

END OF DOCUMENT

Wrongful Foreclosures in Washington

David A. Leen*

TABLE OF CONTENTS

I.	INTRODUCTION	332
II.	WASHINGTON FORECLOSURE PROCEDURES	334
	A. <i>Judicial Foreclosure in Washington</i>	334
	B. <i>Non-Judicial Foreclosures in Washington</i>	336
III.	DEFENSES TO NON-JUDICIAL FORECLOSURES	341
	A. <i>Evaluating a Case</i>	341
	B. <i>Common Causes of Action</i>	343
	1. Initiation or Completing a Wrongful Foreclosure Is a Tort ...	343
	2. Attempted or Completed Wrongful Foreclosure Is a Consumer Protection Act Violation Because It Is an Unfair or Deceptive Act or Practice.....	345
	3. Other Causes of Action (Infliction, Trespass, Slander of Title, FDCPA, Etc.)	347
	4. Federal Loan Modification Program Violations May Be Enforced During a Foreclosure	347
	5. Defenses Available in the Context of a Non-Judicial Foreclosure of Government Owned Loans	350
IV.	OBSTACLES FOR HOMEOWNERS CHALLENGING THEIR NON- JUDICIAL FORECLOSURE	352
	A. <i>Injunctive Relief Is a Necessity</i>	352
	B. <i>Post Sale Challenges and Waiver of Claims</i>	356
V.	ADVOCATING FOR THE USE OF TORT ANALYSIS IN WRONGFUL FORECLOSURE CASES	360
	A. <i>Recent Decisions Denying a Claim for Wrongful Initiation of Foreclosure</i>	360
	B. <i>A Cause of Action for Wrongful Commencement of a Non- Judicial Foreclosure</i>	365
	1. Cases That Do Not Support a Cause of Action for Wrongful Commencement of a Non-Judicial Foreclosure	365
	2. Cases That Support a Cause of Action for Wrongful Commencement of a Non-Judicial Foreclosure.....	369
	C. <i>Violations of the Deed of Trust Act</i>	371
	D. <i>Defending a Wrongful Foreclosure at the Eviction Hearing</i>	378
VI.	CONCLUSION.....	380

I. INTRODUCTION

As the nation faces an onslaught of foreclosures following a catastrophic crisis of predatory and improvident lending, current homeowners seek relief in a variety of ways. For example, homeowners can attempt to avoid foreclosure by qualifying for government loan modification programs to prevent the loss of their homes, the loss of their business properties, and mounting deficiency judgments.¹ These modifications are difficult to get, provide only limited and short-term relief, and frequently leave the homeowner owing much more than the home is worth. Once the temporary reduction in the payment amount has ended, the home is again unaffordable, and the homeowner will not qualify for a refinance because the value is below the debt. Courts are often, therefore, the only place where a homeowner, facing a wrongful non-judicial foreclosure, can turn for help.²

In 2002 several large lenders, including Countrywide and Washington Mutual, lost quality control of their lending business.³ These lenders generated loans to almost any applicant regardless of qualification, on homes regardless of value, and with deferred teaser rates that allowed people surviving only on Social Security payments, or even less, to acquire homes “valued” by the lenders’ “in-house” appraisers at greatly inflated prices.⁴ Lenders were happy to make a loan to purchase a home with the customary down payment coming from the same lender secured by a second mortgage on the same property.⁵

* Mr. Leen has been a member of the Washington Bar Association since 1971. His practice focuses on consumer protection and foreclosure defense. He is also the litigation director of the Northwest Consumer Law Center. Special thanks for research help from Nathan Quigley and Audrey Udashen, Staff Attorneys, Northwest Consumer Law Center.

1. Hedrick Smith, *WHO STOLE THE AMERICAN DREAM* 209 (2012); Elizabeth Renuart, *Toward a More Equitable Balance: Homeowner and Purchaser Tensions in Non-Judicial Foreclosure States*, 24 *LOY. CONSUMER L. REV.* 562, 583 (2012); see James Charles Smith, *The Structural Causes of Mortgage Fraud*, 60 *SYRACUSE L. REV.* 473, 474 (2012).

2. Joseph L. Hoffmann, *Court Actions Contesting the Nonjudicial Foreclosure of Deeds of Trust in Washington*, 59 *WASH. L. REV.* 323, 330 (1984).

3. See Smith, *supra* note 1, at 223.

4. See generally Smith, *supra* note 1, at 223.

5. See generally Chris Amisano, *What Is an 80/20 Mortgage Loan?*, SFGATE, <http://homeguides.sfgate.com/80-20-mortgage-loan-7591.html> (last visited Mar. 22, 2014) (stating that these were commonly called “80/20” loans. The first lien was 80 percent of the purchase price, and, of course, the 20 percent was the down payment. Today these second liens are all but unsecured by any equity, and are sold off to collection agencies or discharged in ever increasing consumer bankruptcies). See also Elizabeth Renuart, *Uneasy Intersections: The Right to Foreclose and the U.C.C.*, 48 *WAKE FORREST L. REV.* (forthcoming Issue 5 2013) (manuscript at 1210-11) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2316152.

When monthly payments on most of these loans exceeded the borrower's monthly net income, this expanding balloon became visible to everyone. As a result, values in real estate dropped twenty-five percent in 2008, in part due to having been over-valued by lenders' in-house appraisers; homeowners had no equity and could not qualify for a refinance at the attractive rates offered once the crisis was in full bloom. By 2010, foreclosures in America topped two million and have not seen a significant decline since.⁶ The largest foreclosure frenzy in history had begun. Large numbers of homeowners across the nation defaulted on their loans, but only after depleting their retirement accounts, their savings, their equity in the home, and finally, their sanity.⁷

In Washington, lawyers seeking to help clients in foreclosure are faced with two major obstacles. First, lawsuits to stop a wrongful foreclosure are often defeated by judge-made rules holding that there is no such cause of action unless the foreclosure is actually completed.⁸ Even worse is the obstacle to lawsuits filed *after* a wrongful foreclosure; in these cases, courts often find that homeowners have waived their claims by not raising them prior to foreclosure.⁹ This somewhat enviable position allows lenders and foreclosing trustees to ignore basic protections of law and places homeowners in the proverbial "damned if you do and damned if you don't" position.¹⁰ Moreover, hiring a lawyer to raise defenses is expensive and beyond the reach of many homeowners who already cannot make their mortgage payments. Courts, with the urging of lawyers for the largest lenders, have placed many roadblocks in the path of the homeowner who seeks merely to resume reasonable payments on a home that may someday have equity.¹¹

This article explores this difficult and expensive process of retaining home ownership in the face of unaffordable loans. It identifies areas where courts impose unnecessary roadblocks to the vindication of homeowners' rights and analyzes the legal basis for a number of causes of action that may be brought to enforce rights in the foreclosure process. Additionally, this article proposes legislative reforms to the Deed of Trust Act that would give courts more

6. *National Real Estate Trends & Market Info*, REALTY TRAC (Feb. 2014) <http://www.realtytrac.com/statsandrends/foreclosuretrends>; (showing that during 2009-2013 an average of two million foreclosures were completed in this country each year).

7. Smith, *supra* note 1, at 193-94.

8. *Vawter v. Quality Loan Serv. Corp. of Wash.*, 707 F. Supp. 2d 1115, 1123 (W.D. Wash. 2010).

9. *Brown v. Household Realty Corp.*, 189 P.3d 233, 240 (Wash. Ct. App. 2008).

10. Compare *id.* at 233 (case filed too late), with *Vawter*, 707 F. Supp. 2d at 1124 (case filed too soon).

11. See *Vawter*, 707 F. Supp. 2d at 1124.

flexibility to dispense justice without unduly burdening secured lenders, while favoring home retention over a quick foreclosure.

This article surveys the various causes of action available to challenge wrongful foreclosures, examines where courts have strayed from the true path, and urges proper and sensible methods for homeowners to seek redress from improper foreclosures. More importantly, because the primary method of foreclosure is outside of court supervision, when litigation is brought to raise defenses, courts should not impose roadblocks such as waiver of defenses or, worse yet, not allowing any compensable claims when no sale occurs. Finally, as foreclosure laws are all state specific and statute based, and trustees are unregulated and unlicensed, this article will focus on Washington cases addressing non-judicial foreclosures, noting trends in other jurisdictions, and common law remedies, sometimes of ancient origin, which provide handy solutions to modern problems.

This article describes the various methods of foreclosure, discusses substantive defenses that might be raised in both judicial and non-judicial foreclosures, and concludes with argument that wrongful foreclosure should be recognized as a tort to protect homeowners from improperly initiated foreclosures.

II. WASHINGTON FORECLOSURE PROCEDURES

This section outlines the procedures in Washington statutes that provide for foreclosure, either by non-judicial procedures or judicial foreclosure, which are both available to a creditor when the homeowner defaults.

A. *Judicial Foreclosure in Washington*

Every state in the country has a judicial foreclosure statute that spells out the procedures necessary for the mortgagee, typically the lender, to realize in a civil lawsuit against the collateral pledged to secure repayment of the loan.¹² Generally, the Uniform Commercial Code (UCC) applies to the acceleration and collection of promissory notes (a precondition to foreclosure) and the loan agreement and mortgage ("Deed of Trust").¹³ The UCC also provides more specific terms and conditions to be followed, while the court rules define the judicial procedures.

12. See Grant S. Nelson & Dale A. Whitman, REAL ESTATE FINANCE LAW § 7.11 (5th ed. 2007).

13. See generally Elizabeth Renuart, *Uneasy Intersections: The Right to Foreclose and the U.C.C.*, 48 WAKE FOREST L. REV. (forthcoming Issue 5 2013) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2316152.

Many states have enacted mitigation statutes limiting the harsh effects of deficiency judgments¹⁴ and allowing for redemption;¹⁵ federal bankruptcy laws have provided some measure of protection against aggressive foreclosures, such as the automatic stay of creditor's actions until approved by the bankruptcy court.¹⁶ Washington allows an "upset price" to be set by the court in cases where the economic forces have depressed the value of property and a deficiency judgment is sought.¹⁷ An upset price can be set by the court, upon motion of the homeowner, to establish the value of the property that must be credited to the debt at a foreclosure sale, regardless of the actual price paid.¹⁸ This is an important protection when market forces deflate the value of the home, ultimately reducing the deficiency judgment against a homeowner that is foreclosed upon.¹⁹

There are, however, many other defenses to a foreclosure based upon predatory lending, usury, breach of contract of the loan agreement or deed of trust/mortgage, and improper credit of payments made are all defenses that may be easily raised in judicial foreclosures as a counter claim or set off; these defenses may even be raised after the statute of limitations have run during recoupment.²⁰ Homestead rights often allow for redemption of the property during a post-sale period,²¹ such as the one-year period allowed in Washington,²² during which time the debtor can remain in possession and redeem the property by either a sale or payoff of the loan in full.²³

14. *Id.* § 8.1. In a judicial foreclosure, the lender seeks a judgment, then has the property sold to credit the sale price against the debt. If the sale price is not sufficient, a deficiency remains and is entered as a judgment against the homeowners.

15. 11 U.S.C. § 362(a) (2000) (showing, in the automatic stay provision, that redemption is allowed for homeowners who can sell the property after a foreclosure sale for enough to pay the judgment).

16. *Id.* (automatic stay of all proceedings against debtor's property).

17. WASH. REV. CODE § 61.12.060 (2013); *see also*, Nat'l Bank of Wash. v. Equity Investors, 506 P.2d 20, 44 (Wash. 1973) (the upset price statute "calls not for what the court would determine to be the *minimum* value, but rather its *fair value*"); WASH. REV. CODE § 61.12.093-94 (Stating if the owner abandoned the property for more than 6 months, the mortgagee has no right to a deficiency, nor is there a redemption right).

18. WASH. REV. CODE § 61.12.060.

19. *Lee v. Barnes*, 379 P.2d 362, 365 (Wash. 1963).

20. *Felthouse & Co. v. Bresnahan*, 260 P. 1075, 1076 (Wash. 1927) (stating that the statute of limitation "never runs" on a set-off); *Seattle First Nat'l Bank v. Siebol*, 824 P.2d 1252, 1255 (Wash. Ct. App. 1992).

21. WASH. REV. CODE § 6.23.080 (2013).

22. WASH. REV. CODE § 6.23.020; WASH. REV. CODE § 61.12.093 (stating that if the property is abandoned for six months, there is no redemption right or corresponding right to a deficiency).

23. WASH. REV. CODE § 61.12.060.

Wrongful judicial foreclosures are preventable since the statutory framework for the requirements necessary to foreclosure are provided in the foreclosure statute and the general rules of pleading and evidence ensure that an unfounded foreclosure will not be successful in court. Moreover, Federal Rule of Civil Procedure 11 discourages institution of civil litigation that is not well founded in both fact and law.

B. *Non-Judicial Foreclosures in Washington*

Slightly more than half of the states, including Washington, have enacted non-judicial foreclosure statutes using deeds of trust with a *power of sale*, which allows a trustee to sell the homeowner's, or grantor's, property at a public auction for the beneficiary, or lender, after adequate notice and opportunity to cure.²⁴ This process has many advantages over a judicial foreclosure, such as shortening the time to complete a foreclosure, discouraging defenses, reducing the cost of foreclosure, and eliminating the redemption rights of the homeowner and other judgment creditors.²⁵ Not surprisingly, virtually all of the residential foreclosures in Washington are now completed using this non-judicial process.²⁶

Because these foreclosures are largely undertaken by trustees outside the purview of the courts, and conducted by trustees²⁷ appointed by the lender,²⁸

24. WASH. REV. CODE § 61.24.030.

25. John A. Gose, *The Trust Deed Act in Washington*, 41 WASH. L. REV. 94, 96-97 (1966); John A. Gose & Aleana W. Harris, *Deed of Trust: Its Origin, History and Development in the United States and in the State of Washington*, 32 REAL PROP., PROBATE, & TRUST J., 10-11 (2005); John Rao & Geoff Walsh, *Foreclosing a Dream: State Laws Deprive Homeowners of Basic Protections*, NAT'L CONSUMER LAW CENTER 14 (2009), available at http://www.nclc.org/images/pdf/foreclosure_mortgage/state_laws/foreclosing-dream-report.pdf.

26. Kenneth Harney, *A Key to Housing Recovery? Out-of-Court Foreclosures*, THE SEATTLE TIMES, Nov. 30, 2013, http://seattletimes.com/html/business/technology/2022333977_bizharney01.xml.html (arguing that states where non-judicial procedures are used for foreclosure, resulted in quicker economic recovery because foreclosed homes get into the hands of new owners faster).

27. See WASH. REV. CODE § 61.24.010 (showing that trustees have considerable power over the foreclosure process and that the duty of the trustee must be exercised fairly toward both lender and homeowner); see also *Klem v. Washington Mut. Bank*, 295 P.3d 1179, 1188 (Wash. 2013); John Campbell, *Can We Trust Trustees? Proposals for Reducing Wrongful Foreclosures*, 63 CATHOLIC UNIV. L. REV. (forthcoming 2014) (manuscript at 69-70) (citing history of the duty in Washington and application of the Consumer Protection Act) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2191738.

28. 15 U.S.C. § 1692(a)(6) (1982) (showing that trustees, who conduct foreclosures on a regular basis, are debt collectors under the Fair Debt Collection Practices Act); *McDonald v. OneWest Bank*, 929 F.Supp. 1079, 1087 n.6 (W.D. Wash. 2013) (citing

there are strict compliance requirements regarding notice and opportunities to reinstate the loan contract.²⁹ There is also an emerging body of case law regarding trustee misconduct that has resulted in courts invalidating defective or wrongful foreclosures.³⁰ Trustees have enormous power: they are responsible for sending out all of the notices, postings, publications; verifying the authenticity of debt instruments;³¹ mediating disputes between lenders and borrowers; conducting auctions; and executing and recording the trustee's deed accomplishing the final transfer.³² Because of the vast power that trustees possess, courts exact strict compliance with the procedures and liberally construe the non-judicial statute in favor of homeowners and against creditors.³³ Courts have held that a trustee may not have conflicting roles in these various contexts.³⁴ In *Cox v. Helenius*, the court held that because the trustee, Helenius, was also the attorney for the beneficiary there existed a conflict of interest that provided an additional basis upon which to invalidate that foreclosure.³⁵ The Washington Bar Association issued an opinion precluding lawyers from representing both sides of a foreclosure controversy.³⁶ Because the processing of non-judicial foreclosures is being consolidated into large companies such as Quality Loan Services, Northwest Trustee, Regional Trustee, and others, the in-house attorneys for these companies have begun to advise and represent both the trustees and lenders, creating considerable conflicts of interest, which short homeowners. Typically, in-house counsel advise the trustees on continuances, represent the trustees and lenders in requesting relief from stay motions in bankruptcy court, represent lenders in mediations when their client-trustees are foreclosing, and represent trustees in litigation when they are sued, a bankruptcy is filed, or the debtor has claims

numerous district court cases in the Ninth Circuit); *Beaton v. Chase*, No. C11-0872-RAJ at 8 (W.D. Wash. Mar. 26, 2013) (court order).

29. See *Udall v. T.D. Escrow Servs., Inc.*, 154 P.3d 882, 885 (Wash. 2007).

30. See WASH. REV. CODE § 61.24; see also *Gose & Harris*, *supra* note 25, at 10-11; William B. Stoebeck & John W. Weaver, *Washington Practice*, 18 Real Estate: Transactions § 20.1 (2013); David A. Leen et al., *Due Process and Deeds of Trust—Strange Bedfellows?*, 48 Wash. Law Rev. 763, 766-767 (1973); *Klem*, 295 P.3d at 1192; *Walker v. Quality Loan Serv. Corp.*, 308 P.3d 716, 722 (Wash. Ct. App. 2013).

31. *Campbell*, *supra* note 27, at 40.

32. WASH. REV. CODE § 61.24.030-40.

33. *Cox v. Helenius*, 693 P.2d 683, 686 (Wash. 1985); see WASHINGTON APPLESEED, FORECLOSURE MANUAL FOR JUDGES 202 (2013), available at <http://www.scribd.com/doc/139844990/Foreclosure-Manual-for-Judges-Wa-Appleseed-1> [hereinafter APPLESEED].

34. *Cox*, 693 P.2d at 687.

35. *Id.*

36. *Trustee; Deed of Trust; Client Conflict*, 926 Op. WSBA at 3 (1987).

against a lender.³⁷ In one case, *Barrus v. ReconTrust*, a bankruptcy court held that a debtor did not have standing to challenge the opposing party's counsel,³⁸ and effectively avoided the ethical issue. In another case, *FMC Technologies v. Edwards*, a federal district court disqualified an attorney on a motion to disqualify a conflicted opposing counsel.³⁹ More recently, the Washington Supreme Court expressed substantial concern when counsel for the lender and the trustee were representing both entities at the foreclosure stage, in litigation, and before that supreme court.⁴⁰ This is a bad practice, given the duties that trustees have to all parties in a foreclosure; the trustee must have unfettered discretion to follow the applicable laws and procedures.⁴¹

In addition to concerns surrounding conflicts of interest, another legal problem for trustees in the discharge of their duties is the growing use of subcontractors or other companies to expedite the process and save money for

37. See, e.g., *Schroeder v. Excelsior Mgmt. Grp.*, 297 P.3d 667, 680-81 n.3 (Wash. 2013).

38. *Barrus v. ReconTrust*, No. C11-618-RSM, 2011 WL 2360206, at *1 (W.D. Wash. June 9, 2011); see Ethics Opinion of Professor Dave Beorner, Professor, Seattle University of Law, to David Leen (August 11, 2001) (on file with author).

39. *FMC Techs., Inc. v. Edwards*, 420 F. Supp. 2d 1153, 1162-63 (W.D. Wash. 2006).

40. *Schroeder*, 297 P.3d at 680-81 n.3 (“The issue has not been briefed. It is not before us, and we do not mean to imply any finding of improper action by the trustee. However, we are uncomfortable reciting these facts without making an observation concerning the multiple roles played by Haberthur lest we seem to be tacitly approving of an attorney for a party acting as the trustee. The deed of trust act does not specifically permit or prohibit an attorney for a party acting as a trustee but imposes a duty of good faith on the trustee that may, at least in contested foreclosure actions, be difficult for a party’s attorney to execute. RCW 61.24.010(4). We note the act specifically states that the trustee ‘shall have no fiduciary duty or fiduciary obligation to the grantor or other persons having an interest in the property subject to the deed of trust.’ RCW 61.24.010(3). However, we also note this court has stated that to prevent property from being wrongfully appropriated through non-judicial means and to avoid constitutional and equitable concerns, at a minimum, a foreclosure trustee must be independent and ‘owes a duty to act in good faith to exercise a fiduciary duty to act impartially to fairly respect the interests of both the lender and debtor.’ *Klem v. Wash. Mutual Bank*, No. 87105-1, slip op. at 20 (Wash. Feb. 28, 2013) . . . ‘[A]ttorneys owe an undivided duty of loyalty to the client.’ *Mazon v. Krafchick*, 158 Wn.2d 440, 448-49, 144 P.3d 1168 (2006). At the very least, on review, it makes it difficult to determine which of Haberthur’s acts were made in his capacity as trustee and which as counsel for the beneficiary.”)

41. John Campbell, *Can We Trust Trustees? Proposals for Reducing Wrongful Foreclosures*; 63 CATH. U. L. REV. (forthcoming 2014), available at <http://papers.ssrn.com/sol3/papers.cfm?abstract-id=2191738>.

the lenders.⁴² The result is that the trustees delegate and often eliminate important responsibilities.⁴³ For example, Lender Processing Service, Inc. (LPS) is involved in over half of the foreclosures in the United States,⁴⁴ acting to streamline the process for lenders through the use of databases that largely eliminate direct trustee contact with beneficiaries.⁴⁵ As a former Fidelity subsidiary, LPS is used by the top thirty-nine banks in the United States for mortgage processing (MPS) of half of the mortgage loans in the United States by dollar volume.⁴⁶ LPS's "default management service," Newtrak, is used in the same magnitude for foreclosures and bankruptcy.⁴⁷ Washington trustees are doled out foreclosures from participating lenders by LPS based upon only one criterion: speed of completion.⁴⁸ All communications between lenders and trustees are "facilitated" by LPS and its subsidiaries (such as DocX) in turn, which in the experience of the author, contribute to many of the wrongful foreclosures.⁴⁹ In these cases, trustees may not be aware that modifications are pending and may foreclose anyway, in order to keep their speed rating with LPS high.⁵⁰ Most of the time, the trustees never communicate with the client.

42. See *State v. Lender Processing Servs.*, King County Superior Court No. 13-2-04196-5 entered February 13, 2013 (a subcontractor entered into a consent decree admitting fault and agreeing to pay a judgment of over \$4 million).

43. *In re Taylor*, 407 B.R. 618 (Bankr. E.D. Pa. 2009) *rev'd* 90-CV-2479-JF, 2010 WL 624909 (E.D. Pa. Feb. 18, 2010) *aff'd in part, vacated in part, rev'd in part*, 655 F.3d 274 (3d Cir. 2011); *The Mortgage Industry's Best Servicing Solutions*, LPS, <http://www.lpsvcs.com/Products/Mortgage/Servicing/Pages/default.aspx> (last visited Mar. 22, 2014) ("MSP and our other related technologies are the top mortgage loan servicing technologies in the industry. LPS' dynamic and innovative Loan Servicing Platform, or MSP – pioneered more than 45 years ago – today processes more mortgages in the U.S. by dollar volume than any other servicing system. MSP's technology helps manage millions of loans with total balances exceeding \$4 trillion.").

44. *About Us*, LPS, <http://www.lpsvcs.com/LPSCorporateInformation/AboutUs/Pages/default.aspx> (last visited Mar. 22, 2014).

45. *The Mortgage Industry's Best Servicing Solutions*, LPS, <http://www.lpsvcs.com/Products/Mortgage/Servicing/Pages/default.aspx> (last visited Feb. 22, 2014).

46. *In re Taylor*, 407 B.R. at 622 n.2.

47. See *id.* at 623. For background on the reach of LPS impacting foreclosures and relief from stay motions in bankruptcy proceedings see *In re Parsley*, 384 B.R. 138, 183 (Bankr. S.D. Tex. 2008) (Countrywide's cost savings process "fostered a corrosive 'assembly line' culture of practicing law.").

48. *Tsutsumi v. Regional Trustee Services*, King County Superior Court No. 13-2-24705-4 SEA (Declaration of Gutierrez, dated October 10, 2013) [hereinafter Declaration of Gutierrez].

49. *Id.*

50. See e.g., *In re Taylor*, 407 B.R. at 638. In Washington, LPS rates foreclosure mills by "green, yellow, and red, with the green ranking" getting the most foreclosures. See Declaration of Gutierrez, *supra* note 48 at 3.

The Washington Attorney General confronted these practices and obtained a consent decree, four million dollars, and injunctive relief in *State of Washington v. Lender Processing Service*.⁵¹

This use of NewTrak has been described by one court as a “barrier that obstruct[s] [] client/attorney communications [which] is contrary to the Model Rules of Professional Conduct, Rule 1.4.”⁵² Recently, the unsupervised conduct of LPS became public when a senior executive was convicted and sentenced to up to twenty years in federal prison for forging over one million foreclosure documents for courts and trustees in the United States.⁵³ Lenders and attorneys were sanctioned for this wholesale abdication of their professional responsibilities.⁵⁴

In 2011 the Washington State Legislature enacted (and amended in 2012) the Foreclosure Fairness Act (FFA), thus formalizing the requirement that the trustee “meet and confer” with the homeowner prior to commencement of foreclosure to ensure that the homeowner is maximizing their chances of qualifying for and receiving loan modifications under various governmental or lender in-house programs.⁵⁵ The meet-and-confer rule allows qualified borrowers to have a face-to-face meeting prior to mediation.⁵⁶ In 2012 the time period for the meet and confer was extended from thirty days to ninety days if the borrower responded within the initial thirty days from the notice of pre-foreclosure options.⁵⁷ The initial contact letter, known as the Notice of Pre-Foreclosure Options (NOPFO), initiates this option. If the borrower does not

51. *State of Washington v. Lender Processing Services*, No. 13-2-04106-5 (King County Superior Court Consent Decree and Judgment) (February 19, 2013).

52. *In re Taylor*, 407 B.R. at 645.

53. Plea Agreement, at 5, *United States v. Brown* (M. D. Fla. 2012) (No. 3:12-cr-198-J-25-MCR), 2012 WL 5869994.

54. *In re Taylor*, 407 B.R. at 645.

55. See, e.g., H.R. 1362, 62nd Leg., Reg. Sess., at § 1(a) (Wash. 2011) (establishing state’s Foreclosure Fairness Mediation program); H.R. 2614, 62nd Leg., Reg. Sess., at § 1 (Wash. 2012) (enacting various provisions effective June 7, 2012 related to short sales and the mediation program).

56. See WASH. REV. CODE §§ 61.24.030-031 (for prerequisites to sale). “Meet and confer” requires the beneficiary in all residential loans to actually meet with the homeowner to discuss a solution. WASH. REV. CODE § 61.24.031. This rarely occurs, and when it does, the lender has a low-level agent telephone the homeowner, and that agent has no authority to solve any problems. It is, however, an important requirement of the Deed of Trust Act if invoked. A sale would be void if a beneficiary refuses to participate. See *Bagley v. Wells Fargo Bank*, 2013 WL 350527 (E.D. Va. 2013) (“the face-to-face meeting requirement of 24 C.F.R. 203.604(b) [of the National Housing Act] is a condition precedent to the accrual of the right of acceleration and foreclosure incorporated into the Deed of Trust.”); see also *Mathews v. PHH Mortg. Corp.*, 724 S.E.2d 196, 202 (Va. 2012).

57. WASH. REV. CODE § 61.24.031-33.

respond to this initial contact, the Notice of Default (NOD) can be issued after the initial thirty days.⁵⁸ The purpose of this legislation is to allow additional time prior to commencing a foreclosure for consideration of potential loan modifications under various programs, such as the Home Affordable Modification Program (HAMP).

III. DEFENSES TO NON-JUDICIAL FORECLOSURES

In a non-judicial foreclosure, by definition, there is no court proceeding where a homeowner can file a counterclaim, go before a judge, and complain about an illegal foreclosure or improper commencement of foreclosure. In this situation, a lawsuit must be commenced to present opportunities for courts to evaluate a defense to the foreclosure. Thus, the lawsuit must first enjoin the non-judicial proceeding and subsequently raise defenses or affirmative claims in court to defeat the foreclosure or to obtain damages or set-offs against the debt being foreclosed.⁵⁹ There are many defenses to foreclosure, just as there are defenses to many lawsuits. The following section will outline various approaches to defending foreclosures in the non-judicial context.

A. *Evaluating a Case*

There are many defenses to a wrongful foreclosure that an attorney can identify and use to improve the homeowner's position. A good practitioner should (1) determine the loan specifics, (2) determine the value of the property, (3) determine the extent of default, (4) explore opportunities available to the homeowner, (5) identify the creditor's rights, and (6) identify long-term solutions available to the homeowner.

First, the attorney must investigate and determine the specifics of a particular loan, including the nature of the security for the loan(s), the proper recording, and assignment, if any. Additionally, all parties involved in the loan must be identified, including the loan servicer responsible for collecting the payments and the owner of the loan who is entitled to foreclose. There are very few lost notes and fewer free houses.

Second, it is imperative to determine the value of the property compared to the amount of the debt(s), even if the calculation is simply a rough estimate at first. Often, a homeowner is concerned about a second lien and is inclined to walk away from a property that is worth considerably less than the secured debt(s).

58. WASH. REV. CODE § 61.42.031(1)(a)(i) (2012).

59. WASH. REV. CODE § 61.24.130 (2008) sets forth the procedure for enjoining the sale to raise defenses.

Next, the attorney must determine the nature and extent of default by the homeowner and the amount of total debt that is secured by the property. The default may not be a monetary default, but it is nevertheless important to evaluate the total default.

Once the attorney has an understanding of the loan and the homeowner's circumstances, it is necessary to explore all possible loan workout opportunities, such as those created in various federal programs such as HAMP.⁶⁰ The attorney should consider deeds in lieu of foreclosure. The Deed in Lieu transfers the property back to the secured lender and, generally releases the homeowner from all or part of the debt. The lender will want to get a title search to identify any intervening liens, which will not be eliminated unless a foreclosure is completed. The attorney should also consider a *short sale*, because the lender might allow sale of the property for below the debt, release its lien, and possibly forgive the remaining debt that might otherwise be uncollectable. A short sale is where the lender releases its lien to allow an arm's length sale below the amount of the debt. Beware of tax consequences of debt forgiveness which can be treated as taxable income. A *short refinance* allows reducing the balance and interest rate, while retaining the home. A good practitioner should also advise homeowners considering either of these options to get tax advice on the tax implications of the debt that is forgiven.

Next, it is important that the attorney hold the creditor narrowly to its rights by considering all defenses to the debt, such as liability of the lender for predatory lending, violations of consumer protection laws, and rescission of the loan contract under Truth-in-Lending Act. If the statute of limitations has run on these affirmative claims, a good practitioner should consider asserting a set-off or, in the non-judicial context, arguing for recoupment of a time-barred claim against the debt.⁶¹

Finally, the attorney must look for long-term solutions by evaluating all avenues. In pursuing the homeowner's best interests, it is imperative that a good practitioner consider all options including selling the property, refinancing, renting a portion of the property to increase income, or leveraging the benefits of a foreclosure, such as the anti-deficiency rule⁶² and "free rent"⁶³ during the period of time it takes to complete a foreclosure.

60. See APPLESEED, *supra* note 33.

61. See *Seattle First Nat'l Bank v. Siebol*, 824 P.2d 1252, 1255 (Wash. Ct. App. 1992) (the statute of limitations does not run on a set-off); see also John Rao et al., NATIONAL CONSUMER LAW CENTER, *Foreclosures: Mortgage Servicing, Mortgage Modifications, and Foreclosure Defense*, § 4.2.3 (4th ed. 2012).

62. WASH. REV. CODE § 61.24.100 precludes a deficiency or judgment on the primary debt after a non-judicial foreclosure.

B. *Common Causes of Action*

1. Initiation or Completing a Wrongful Foreclosure Is a Tort

“[C]ommon law tort causes of action remain the [best] vehicle” for recovery of damages for breach of the trustee’s common law or statutory duties set forth in the Deed of Trust Act.⁶⁴ Lower courts in Washington have not readily embraced using tort analysis in wrongful foreclosure cases, but recent cases have moved in this direction.⁶⁵ This issue is coming to a head before the Washington Supreme Court, having accepted a certified question⁶⁶ as to whether, under Washington law, a plaintiff may “state a claim for damages relating to a breach of duties under the Deed of Trust Act and/or failure to adhere to the statutory requirements of the Deed of Trust Act in the absence of a completed trustee’s sale of real property?”⁶⁷ In this analysis, the Supreme Court will likely adhere to the three-prong test in *Bennett v. Hardy* where a “new” tort must be (1) for the benefit of a class of plaintiffs protected, generally, under the Deed of Trust Act (or common law decisions); (2) whether legislative intent exists to support protection with a remedy; and (3) whether implying a new tort remedy is consistent with the underlying purpose of the Deed of Trust Act.⁶⁸

Clearly, the Deed of Trust Act provides protections for homeowners as well as lenders. Cases decided by the Washington Supreme Court interpreting the statute make it clear that the statute is to be strictly construed for the benefit of homeowners because non-judicial procedure is utilized without the benefit of court oversight.⁶⁹ The Deed of Trust Act was recently amended to provide for additional homeowner protections including a mediation program designed to mitigate the harshness of the current foreclosure crisis.⁷⁰ Finally, these

63. The non-judicial foreclosure process from the initial notice to completed sale takes at least 190 days, as set forth in WASH. REV. CODE § 61.24.040.

64. *Jackowski v. Borchelt*, 278 P.3d 1100, 1108 (Wash. 2012); *Bennett v. Hardy*, 784 P.2d 1258, 1260 (Wash. 1990).

65. *Walker v. Quality Loan Serv. Corp.*, 308 P.3d 716, 720 (Wash. Ct. App. 2013).

66. WASH. REV. CODE § 2.60.020 sets forth the procedure for federal courts to seek determination of state law issues not clearly resolved in cases pending in federal courts under diversity jurisdiction, or otherwise involving issues of state law.

67. *Frias v. Asset Foreclosures Servs.*, 2013 WL 6440205, at *2 (W.D. Wash. 2013).

68. *Bennett*, 784 P.2d at 1261-62.

69. *Cox v. Helenius*, 693 P.2d 683, 685-86 (Wash. 1985); *Klem v. Wash. Mut. Bank*, 295 P.3d 1179, 1188 (Wash. 2013); *Schroeder v. Exelsior Mgmt. Grp.*, 297 P.3d 677, 682 (Wash. 2013).

70. WASH. REV. CODE § 61.24.163 (2012). The legislature made specific findings, which were set forth at the end of RCW § 61.24.005 about the need to

legislative findings make it clear that a damage claim for failure to properly conduct a foreclosure is consistent with the articulated legislative purposes. The only reported case following this test and finding a tort cause of action is

protect homeowners from the increase in foreclosures. 2011 Wash. Leg. Serv. Ch. 58 (S.S.H.B. 1362) Sec. 1(1)(a)-(2)(c)(2013):

(1) The legislature finds and declares that:

(a) The rate of home foreclosures continues to rise to unprecedented levels, both for prime and subprime loans, and a new wave of foreclosures has occurred due to rising unemployment, job loss, and higher adjustable loan payments;

(b) Prolonged foreclosures contribute to the decline in the state's housing market, loss of property values, and other loss of revenue to the state;

(c) In recent years, the legislature has enacted procedures to help encourage and strengthen the communication between homeowners and lenders and to assist homeowners in navigating through the foreclosure process; however, Washington's nonjudicial foreclosure process does not have a mechanism for homeowners to readily access a neutral third party to assist them in a fair and timely way; and

(d) Several jurisdictions across the nation have foreclosure mediation programs that provide a cost-effective process for the homeowner and lender, with the assistance of a trained mediator, to reach a mutually acceptable resolution that avoids foreclosure.

(2) Therefore, the legislature intends to:

(a) Encourage homeowners to utilize the skills and professional judgment of housing counselors as early as possible in the foreclosure process;

(b) Create a framework for homeowners and beneficiaries to communicate with each other to reach a resolution and avoid foreclosure whenever possible; and

(c) Provide a process for foreclosure mediation when a housing counselor or attorney determines that mediation is appropriate. For mediation to be effective, the parties should attend the mediation (in person, telephonically, through an agent, or otherwise), provide the necessary documentation in a timely manner, willingly share information, actively present, discuss, and explore options to avoid foreclosure, negotiate willingly and cooperatively, maintain a professional and cooperative demeanor, cooperate with the mediator, and keep any agreements made in mediation.

Walker v. Quality Loan Services Corp.,⁷¹ decided recently by Division I of the Washington Court of Appeals. The Washington courts have, however, readily found breaches of the foreclosure process to violate the Consumer Protection Act,⁷² as discussed in the next section.

2. Attempted or Completed Wrongful Foreclosure Is a Consumer Protection Act Violation Because It Is an Unfair or Deceptive Act or Practice

One of the most positive developments for homeowners in Washington foreclosure law is the application of the Consumer Protection Act (CPA) to wrongful foreclosures.⁷³

To prevail on a Consumer Protection Act case in Washington, the plaintiff must show: (1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, (3) public interest impact, (4) causation, and (5) injury or damage to business or property.⁷⁴ A CPA claim may also be based upon an *unfair* act, independent of a *deceptive* act, or both.⁷⁵ In *Panag v. Farmers Ins.*,⁷⁶ the court held, "The universe of 'unfair' business practices is broader than, and encompasses, the universe of 'deceptive' business practices."⁷⁷ Thus, even if an act is not deceptive, it can still be unfair.⁷⁸

Several recent cases have clearly approved findings of a violation of the CPA in the context of wrongful foreclosure. First, in *Bain v. Metropolitan Mortgage*,⁷⁹ a case answering questions certified from a federal district court, the Washington Supreme Court ruled that using Mortgage Electronic Registration System (MERS)⁸⁰ as a beneficiary, while hiding the true

71. See generally *Walker v. Quality Loan Serv. Corp.*, 308 P.3d 716, 720 (Wash. Ct. App. 2013).

72. WASH. REV. CODE § 19.86 et seq.

73. See *Bain v. Metro. Mortg. Grp. Inc.*, 285 P.3d 34, 49-50 (Wash. 2012); *Klem*, 295 P.3d at 1187-89; *Schroeder*, 297 P.3d at 286-87.

74. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 719 P.2d 531, 533 (Wash. 1986).

75. *Panag v. Farmers Ins. Co. of Wash.*, 204 P.3d 885, 896 (Wash. 2009).

76. *Id.*

77. *Id.* The Federal Trade Commission (FTC) has defined what constitutes an unfair act or practice as one that causes or "is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and is not outweighed by counter-vailing benefits to consumers or to competition." 15 U.S.C. § 45(n) (2012).

78. *Panag*, 204 P.3d at 896 (Wash. 2009).

79. *Bain v. Metro. Mortg. Grp. Inc.*, 285 P.3d 34, 52 (Wash. 2012).

80. *Id.* at 36 (Mortgage Electronic Registration System is a private company allowing lenders to "privately" record and keep track of assigned mortgages).

ownership of the debt, violated the Washington Deed of Trust Act and “could be” an unfair or deceptive practice, violating the Consumer Protection Act.⁸¹

Shortly after *Bain*, in *Klem v. Washington Mutual Bank*, Justice Chambers again authored a comprehensive opinion reviewing the prior case law on trustee duty, and held that the trustee’s duty was closer to “fiduciary” than mere equal treatment of both homeowner and lender.⁸² The court also found a violation of the Consumer Protection Act for lack of trustee neutrality:

We hold that the practice of a trustee in a nonjudicial foreclosure deferring to the lender on whether to postpone a foreclosure sale and thereby failing to exercise its independent discretion as an impartial third party with duties to both parties is an unfair or deceptive act or practice and satisfies the first element of the CPA. *Quality failed to act in good faith to exercise its fiduciary duty to both sides and merely honored an agency relationship with one.*⁸³

Finally, in *Schroeder v. Excelsior Management Group*, the court voided a completed sale and reinstated a CPA claim because the property was agricultural land and did not qualify for a non-judicial foreclosure.⁸⁴ Most other courts have ruled in a similar fashion.⁸⁵ The relief allowed under the CPA is broad and the damages recoverable can be considerable.⁸⁶

81. *Id.* at 51.

82. *Klem*, 295 P.3d at 1189.

83. *Id.* at 1190 (emphasis added).

84. *Schroeder*, 297 P.3d at 687.

85. See Arielle L. Katzman, *Round Peg for a Square Hole: The Mismatch between Subprime Borrowers and Federal Mortgage Remedies*, 31 CARDOZO LAW REV. 497, 540-41 (2009); see also, *Morse v. Mut. Fed. Savs. & Loan Ass’n of Whitman*, 536 F. Supp. 1271, 1277 (Mass. Dist. Ct. 1982) (holding that attempted wrongful foreclosure is a CPA violation under the “unfair” prong: “The jury warrantably found that defendant was wilfully or knowingly unfair”).

86. See, e.g., *Keyes v. Bollinger*, 640 P.2d 1077, 1084 (Wash. 1982) (holding that embarrassment and inconvenience damages recoverable under CPA if entail pecuniary loss); Washington Distressed Property Act, WASH. REV. CODE § 61.34.040 (2008) (allowing for double or triple damages under the CPA, plus, when bad faith exists, up to \$100,000 may be further awarded); *Sherwood v. Bellevue Dodge*, 669 P.2d 1258, 1263 (Wash. 1983) (holding CPA damages for emotional distress in wrongful repossession); *Schmidt v. Cornerstone Invs.*, 795 P.2d 1143, 1146 (Wash.1990) (CPA violation to inflate appraisals, civil conspiracy).

3. Other Causes of Action (Infliction, Trespass, Slander of Title, FDCPA, Etc.)

Stand-alone torts, such as outrageous conduct and infliction of emotional distress⁸⁷ may also be raised in defense to a wrongful attempted foreclosure. Additionally, statutory violations of laws regulating collection of debts, such as the Equal Credit Opportunity Act (ECOA) and Fair Debt Collection Practices Act (FDCPA) can be violated in non-judicial foreclosures.⁸⁸ The above list is certainly not exhaustive, but these breaches are all subject to redress by the courts upon a timely action and are competent proof.⁸⁹

4. Federal Loan Modification Program Violations May Be Enforced During a Foreclosure

A number of federal programs were enacted to mitigate the large number of predatory loans made during the past decade.⁹⁰ Unfortunately, many lenders and servicers are slow to process requests⁹¹ for loan modification, yet the lenders are often quick to initiate foreclosure.⁹¹ Worse yet, the servicer frequently forgets to advise the foreclosing trustee to discontinue a sale or to move a sale to allow for processing of a loan modification.⁹² Both the Home Affordable Modification Program (HAMP) and the Attorney General National Mortgage Settlement require large servicers to promptly send a final modification agreement to borrowers who have enrolled in a trial period plan under the current HAMP guidelines and who have made the required number of trial period payments.⁹³

The HAMP manual makes this clear:

87. See, e.g., *In re Keahey*, 414 F.App'x 919, 921 (9th Cir. 2011); *Theis v. Fed. Fin. Co.*, 480 P.2d 244, 247 (Wash. Ct. App. 1971).

88. *Schlegel v. Wells Fargo Bank*, 720 F.3d 1204, 1207-08 (9th Cir. 2013).

89. Rao et al. *supra* note 61, at ch. 6.

90. These programs include, Home Affordable Modification Program (HAMP), Principal Reduction (PRA), Second Lien Modification (2MP), FHA Hamp, USDA-HAMP, VA-HAMP, HAFA (short sales), HARP (affordable refinances), and HAMP Tier 2 (expansion of HAMP). These programs have been extended until 2015. See generally APPLESEED, *supra* note 33 at 121.

91. See generally Diane E. Thompson, *Foreclosing Modifications: How Servicer Incentives Discourage Loan Modifications*, 86 WASH. L. REV. 755, 759-61 (2011).

92. Rao et al., *supra* note 61, § 2.9.4 (4th ed. 2012) (Restrictions on the Dual Tracking Foreclosure Proceedings).

93. See MAKING HOME AFFORDABLE, *Handbook for Servicers of Non-GSE Mortgages*, 118 (Version 4.1 2012), available at https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/mhahandbook_41.pdf.

Following underwriting, NPV evaluation and a determination, based on verified income, that a borrower qualifies for HAMP, servicers will place the borrower in a trial period plan (TPP). The trial period is three months in duration (or longer if necessary to comply with applicable contractual obligations) and governed by terms set forth in the TPP Notice. *Borrowers who make all trial period payments timely and who satisfy all other trial period requirements will be offered a permanent modification.* (emphasis added).

Servicers should service mortgage loans during the TPP in the same manner as they would service a loan in forbearance.⁹⁴

The HAMP manual is binding on most loan servicers. As a part of the nationwide consent decree reached in settlement between the five largest lenders and the attorneys general of several states, the manual clearly requires servicers to finalize loan modifications approved on a temporary basis.⁹⁵ For the lender or servicer to commence a foreclosure during consideration of a loan modification also violates its own contract with the Department of Treasury⁹⁶ Additionally, it is consistent with emerging cases grappling with enforcement of the programs to help homeowners through this crisis.⁹⁷

In affirmative actions, a breach of contract claim should be pled in the alternative as promissory estoppel, so the court could, under proper proof, adopt either theory. Usually, servicers promise to send homeowners a written loan modification⁹⁸ if the homeowner (1) stops making normal payments for three months; (2) pays a specified payment for three more months; and (3) verifies their financial circumstances with appropriate documentation.

Moreover, under the HAMP program regulations agreed to by the large servicers in contracts with the federal government, the modification, called a Trial Period Plan (TPP), should be in writing so that it may be signed by the

94. *Id.* at 118.

95. *Id.*

96. *Id.*

97. *See generally*, Corvello v. Wells Fargo Bank, 728 F.3d 878 (9th Cir. 2013). The other federal circuit weighing in on this issue has affirmed a right to seek court enforcement of promised modifications. *See* Wigod v. Wells Fargo Bank, 673 F.3d 547, 555 (7th Cir. 2012).

98. This was never required, but servicers nevertheless, caused many homeowners to ruin their credit before attempting to negotiate for a loan modification. All the while, servicers reported negative credit information to reporting agencies. *See generally* MAKING HOME AFFORDABLE, *supra* note 93, at 63.

parties and enforceable.⁹⁹ Failing to do so is a breach of that promise and actionable¹⁰⁰ under Washington law:

The defense of the statute of frauds may not be asserted by a party who has breached his promise to reduce a contract to writing when the other party relied the promise to his detriment.¹⁰¹

Although Washington has adopted a version of the Uniform Bank Protection Act,¹⁰² which codifies the common law statute of frauds, which exempts oral contracts to performed in under one year, in equity, courts may enforce these promises, especially if the TPP is to be completed within one year, which is usually the case.¹⁰³

Enforcement of promised loan modifications are currently litigated nationwide. The prevailing trend is to allow enforcement of the modifications under a number of theories, including breach of contract,¹⁰⁴ breach of covenant of good faith and fair dealing,¹⁰⁵ consumer protection,¹⁰⁶ specific performance,¹⁰⁷ promissory estoppel as to offers of forbearance and temporary modification,¹⁰⁸ and fraud.¹⁰⁹

99. MAKING HOME AFFORDABLE, *supra* note 93.

100. *Corvello*, 728 F.3d at 880-81.

101. *In re Estate of Nelson*, 537 P.2d 765, 771 (1975).

102. WASH. REV. CODE § 19.36 (2013).

103. See WASH. REV. CODE § 19.36.010(1); *see also, e.g.*, *Lyons v. Bank of Am.*, No. C11-1232 CW., 22011 WL 6303390 (N.D. Cal. Dec. 16, 2011); *Ansanelli v. JP Morgan Chase Bank*, No. C10-03892 WHA., 2011 WL 1134451 (N.D. Cal. Mar. 28, 2013);

104. *See, e.g. Corvello*, 728 F.3d at 882; *Sutcliffe v. Wells Fargo Bank*, 283 F.R.D. 533, 549, 553 (N.D. Cal. 2012); *Gaudin v. Saxon Mortg. Servs.*, 820 F. Supp. 2d 1051, 1053-54 (N.D. Cal. 2011); *Mendez v. Bank of Am. Home Loans Serv.*, 840 F. Supp. 2d 639, 651 (E.D.N.Y. 2012); *Picini v. Chase Home Fin.*, 854 F. Supp. 2d 266, 273 (E.D.N.Y. 2012).

105. *See, e.g. Bosque v. Wells Fargo Bank*, 762 F. Supp. 2d 342, 353 (D. Mass. 2011); *Plastino v. Wells Fargo Bank*, 873 F. Supp. 2d 1179, 1192 (N.D. Cal. 2012).

106. *See, e.g., Okoye v. Bank of N.Y. Mellon*, No. 10-11563-DPW, 2011 WL 3269686, at *3 (Mass. Dist. Ct. 2011); *In re Ulberg*, No. 10-53637-E-13, 2011 WL 6016131, at *3 (Bankr. E.D. Cal. Nov. 29, 2011); *Parker v. Bank of Am.*, 29 Mass. L. Rptr. 194 (Mass. Sup. Ct. 2011).

107. *See, e.g., Crafts v. Pitts*, 162 P.3d 382 (Wash. 2007).

108. *See, e.g., Lucia v. Wells Fargo Bank*, 798 F. Supp. 2d 1059, 1069 (Cal. Dist. Ct. 2011); *Nicdao v. Chase Home Fin.*, 839 F. Supp. 2d 1051, 1076 (D. Alaska 2012); *Harvey v. Bank of Am.*, 906 F. Supp. 2d 982, 993 (N.D. Cal. 2012).

109. *See, e.g., Singh v. Wells Fargo Bank*, No. 1:10-CV-1659 AWI SMS, 2011 WL 66167, at *5 (Cal. Dist. Ct. App. 2011); *Slowey v. Flagstar Mortg. Corp.*, No. 10-11891-RGS, 2011 WL 1118470, at *2 (Mass. Dist. Ct. 2011); *Parker*, 29 Mass. L. Rptr. at *4; *Picini v. Chase Home Fin.*, 854 F. Supp. 2d 266, 275-76 (E.D.N.Y. 2012).

5. Defenses Available in the Context of a Non-Judicial Foreclosure of Government Owned Loans

May the federal government use a state non-judicial foreclosure process and ignore state law defenses such as anti-deficiencies? In the event that state law is used by the federal agency to conduct a foreclosure, it is reasonable to believe that the full statutory framework should apply, including a prohibition against a deficiency in the event that non-judicial procedures are used.¹¹⁰

Unfortunately this was not the case in *Carter v. Derwinski*,¹¹¹ where the Veteran's Administration (VA) guaranteed a loan in a non-judicial foreclosure, and the VA asserted a deficiency in contravention to state law.¹¹² There are a number of reasons why that case may be decided differently today, including changes made to the VA program in 1989.¹¹³

Many authorities support the proposition that federal interests can be subjected to state laws which limit or even bar federal claims.¹¹⁴ The Ninth Circuit has confused "rights," which are conceded, and "remedies," which Congress has declared are to be pursued in state foreclosure actions.¹¹⁵

In the area of real estate financing, there is an even stronger presumption that state law should be adopted, since there is no federal foreclosure statute.¹¹⁶ All state foreclosure laws have some effect upon the VA's claims. For example, the length of time necessary to foreclose is a feature of state law that results in direct losses to the lender and ultimately the VA, because of the time value of the mortgage debt.¹¹⁷ In Washington, the non-judicial foreclosure sale cannot occur sooner than 190 days from default, in contrast to California where the home can be recovered in 90 days.¹¹⁸ The VA must not ignore this aspect of state law.¹¹⁹ In *Carter v. Derwinski*, the district court, and the dissent in the Ninth Circuit

110. See generally Frank S. Alexander, *Federal Intervention in Real Estate Finance: Preemption and Federal Common Law*, 71 N.C. L. REV. 293, 306 (1993).

111. *Carter v. Derwinski*, 987 F.2d 611, 612 (9th Cir. 1993).

112. In this case, IDAHO CODE ANN. §§ 45-1512, 6-101 (2014) were violated.

113. Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 8032, 104 Stat. 1388 (1990).

114. *United States v. Yazell*, 382 U.S. 341, 358 (1966); *United States v. Kimbell Foods*, 440 U.S. 715, 740 (1979); *Kamen v. Kemper Fin. Servs.*, 500 U.S. 90, 108 (1991); see generally Alexander, *supra* note 110, at 370.

115. 38 U.S.C. § 3720(a)(6) (2012).

116. See generally, *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 673 (1979); *Kamen*, 500 U.S. at 99.

117. See generally, Alexander, *supra* note 110, at 305-06.

118. WASH. REV. CODE § 61.24.040 (2012); for California foreclosure procedure see, Bernhardt, CALIFORNIA MORTGAGES AND DEEDS OF TRUST (4th Ed. —California State Bar).

119. Alexander, *supra* note 110, at 304.

decision, properly limited the application of *U.S. v. Shimer*, because of developments in preemption law.¹²⁰ VA regulations now reflect congressional intent that state law minimum bid requirements control the VA's ultimate liability.¹²¹ Limitations on deficiencies, redemption rights, upset price protections, and other aspects of state law are functional equivalents.¹²²

In *Whitehead v. Derwinski*, the Ninth Circuit properly analyzed the VA's indemnity rights vis-à-vis integral remedies in state foreclosure law. In *Whitehead*, the court did not find that the VA indemnity right was "second fiddle" to the subrogation right, but rather used the *Kimbell Foods* test to avoid creating a conflict between state and federal law.¹²³ The holding in *Whitehead* required the VA to use appropriate state law remedies that are available by subrogation before resorting to indemnity. Indemnity would violate important portions of state law, and are not necessary to the accomplishment of VA program objectives.¹²⁴

The Ninth Circuit, in *Carter*, rejected well-developed state rules that create loss of predictability and do not create federal uniformity.¹²⁵ Under the Ninth Circuit's *Carter* rule, a homeowner in Washington would lose redemption rights, homestead rights, and judicial due process for the sole purpose of giving the VA a right to collect more money from a veteran who has already lost his or her home.¹²⁶ In judicial foreclosure states, however, veterans would presumably also have redemption rights when a deficiency is obtained, because they are part of the process.¹²⁷ Veterans are now, ironically, better off in the twenty-five states where non-judicial remedies are unavailable, because they remain in possession of their homes longer and have judicial supervision. Finally, the VA acts as a market participant, rather than a market regulator, and should therefore fare no better or worse than private creditors.¹²⁸

Another defense to a federal loan foreclosure is that non-judicial foreclosures are a violation of due process rights.¹²⁹ Indeed, in the recent case

120. *Carter v. Derwinski*, 987 F.2d 611, 612, 617 (9th Cir. 1993).

121. 38 C.F.R. 36.4320 (2010).

122. Alexander, *supra* note 110, at 365.

123. *Whitehead v. Derwinski*, 904 F.2d 1362, 1369 (1990).

124. *Id.*

125. *Carter*, 987 F.2d at 616-17.

126. *Id.* at 614.

127. WASH. REV. CODE § 6.23.010 (2013).

128. Alexander, *supra* note 110, at 321.

129. The due process clause of the Fifth Amendment applies to the federal government and the Fourteenth Amendment applies to the state. Rao et al., *supra* note 61, § 3.1.2.1; *Boley v. Brown*, 10 F.3d 218, 222 (4th Cir. 1993); *Vail v. Derwinski*, 946 F.2d 589, 593 (8th Cir. 1991); Leen, *supra* note 30, at 780; *cf.*, *Kennebec v. Bank of the West*, 565

of *Klem v. Quality Loan Services*,¹³⁰ the court left open a door for a due process challenge to the non-judicial process under article I, section 3, of the Washington State Constitution, which states that “[n]o person shall be deprived of life, liberty, or property, without due process of law.”¹³¹

In the non-judicial foreclosure process, it is not simple to assert a defense; first a lawsuit must be initiated to stop the non-judicial process, then a defense raised, and finally litigated while keeping the foreclosure at bay.

IV. OBSTACLES FOR HOMEOWNERS CHALLENGING THEIR NON-JUDICIAL FORECLOSURE

Once a suit is filed to raise a defense to a non-judicial foreclosure, there are many roadblocks facing the homeowner. This section illustrates these roadblocks by discussing the necessity for injunctive relief to stop non-judicial foreclosure sales, post-sale challenges, and waiver of claims.

A. *Injunctive Relief Is a Necessity*

The basic objectives of foreclosure are best met when foreclosure sales are enjoined so that litigation can resolve the issues.¹³² Damages flowing from wrongful foreclosure or repossession proceedings are compensable under numerous common law theories of liability.¹³³ Washington courts have recognized the importance of avoiding wrongful foreclosures.¹³⁴ In the first case laying out the rules for trustees, the court in *Cox v. Helenius*¹³⁵ held that Washington’s Deed of Trust Act should be construed to further three basic

P.2d 812, 816 (Wash. 1977) (holding no state action to trigger due process as to a non-judicial foreclosure).

130. *Klem v. Washington Mutual Bank*, 295 P.3d 1179, 1188-89 (Wash. 2013).

131. *See id.* at 1189 n.11; *Kennebec*, 565 P.2d at 816.

132. Hoffmann, *supra* note 2 at 326. It should be noted that even though that the Washington Deed of Trust Act has a procedure in place to enjoin a non-judicial sale, the attorney fees are still costly. WASH. REV. CODE § 61.24.130. The cost remains high because the lawsuit must be filed complete with defenses properly pled, together with a motion to enjoin the sale. Additionally, the suit must be argued with supporting evidence and the homeowner must also begin making the normal monthly payments that were even initially unaffordable. There also could be an additional, costly bond. WASH. REV. CODE § 61.24.130.

133. *Albice v. Premier Mortg. Servs. of Wash., Inc.*, 276 P.3d 1277, 1284 (Wash. 2012); *Walker v. Quality Loan Servs. Corp.*, 308 P.3d 716, 722 (Wash. 2013); *In re Keahey*, BAP No. WW-08-1151-PaJuKa, 2008 WL 8444817, at *6 (B.A.P. 9th Cir. Nov. 3, 2008) *aff’d*, 414 F. App’x 919 (9th Cir. 2011).

134. *Cox v. Helenius*, 693 P.2d 683, 686 (Wash. 1985).

135. *Id.* at 685.

objectives: (1) the non-judicial foreclosure process should remain efficient and inexpensive; (2) the integrity and stability of titles should be promoted; and (3) the process should provide an adequate opportunity for interested parties to prevent wrongful foreclosure.¹³⁶

Because a vast majority of Washington's residential foreclosures leverage a non-judicial process and trustees have a duty to grantors, courts actively guard against wrongful foreclosure by allowing the recovery of damages for its unlawful institution.¹³⁷ In order to raise defenses to a wrongful foreclosure, however, the homeowner must first file a lawsuit alleging the defenses and then enjoin the sale so there is time to litigate.¹³⁸

Court rules generally allow for an injunction against a wrongful foreclosure.¹³⁹ A movant must show that there is a meritorious defense, immediate likelihood of irreparable harm, and no adequate remedy at law.¹⁴⁰ The Deed of Trust Act, however, has its own provisions allowing a court to enjoin a non-judicial sale;¹⁴¹ any interested party in the property can seek an injunction against a foreclosure on any proper ground, including any defenses to a judicial foreclosure, such as amount due, usurious interest, illegal loan fees, etc.¹⁴² Specifically, the Act requires: (1) that a trustee have at least five days' notice¹⁴³ of the injunctions hearing;¹⁴⁴ (2) conditional payment of the monthly

136. *Id.* at 685-86; *Savings Bank of Puget Sound v. Mink*, 741 P.2d 1043 (Wash. Ct. App. 1987); *Theis v. Fed. Fin. Co.*, 480 P.2d 244, 246-47 (Wash. Ct. App. 1971) (emotional distress damages for wrongful foreclosure of Chattel Mortgage).

137. *Theis*, 480 P.2d at 247; *Walker v. Quality Loan Serv. Corp.*, 308 P.3d 716, 724 (2013).

138. *See* WASH. REV. CODE § 61.24.130 (2012) (outlining the procedure for obtaining an injunction).

139. *See* WASH. R. CIV. P. 65; *See also*, FED. R. CIV. P. 65.

140. *See* FED. R. CIV. P. 65(b).

141. WASH. REV. CODE § 61.24 (2013).

142. WASH. R. CIV. P. 65, CR 65 is generally the guide for an injunction that most courts use when granting injunctive relief. However, the Deed of Trust Act provides for a more relaxed standard because most disputes, if a judicial foreclosure had been commenced, would be resolved in court with considerable protections against a wrongful foreclosure. WASH. REV. CODE § 61.24.130. The Notice of Sale, Section IX provides "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"; *see also*, APPLESEED, *supra* note 33 at 107-121.

143. The reason that the Trustee gets this notice is because the real party in interest, the owner of the Promissory Note, is not always known. WASH. REV. CODE § 61.24.040 (2012). However, the Trustee should know how to find the owner since the owner of the note likely hired the Trustee. The Trustee, however, should never participate in the injunction hearing because of the required neutrality imposed by the Deed of Trust Act and subsequent case law. WASH. REV. CODE § 61.24.020 (2012).

interest and reserves due on the loan to be registered by the court; and in some instances, (3) a conditional injunction on posting a bond to indemnify the lender for damages and attorney fees. Additionally, the statute allows the court to consider, in lieu of a bond, equity, which a borrower may have in the property.¹⁴⁵

There are a number of problems with an injunction hearing, including the amount of the bond, the temporary or preliminary nature of the injunctions, inadequate notice, conflicts of interest, and the burden of proof.¹⁴⁶

First, courts have inherent equitable powers and can waive a bond if the equities permit.¹⁴⁷ Courts should consider that in a judicial foreclosure, the creditor receives no bond and a trial date for a minimum of two years.¹⁴⁸ Courts should not prevent a plausible defense by imposing a bond that is beyond the reach of the homeowners. In the absence of these considerations, the homeowner may be forced to declare bankruptcy when an injunction against a creditor's actions is automatic and free.¹⁴⁹ Recently, an appellate court held that the inability of a homeowner to pay a bond could be raised post-sale, without a waiver of defenses, because the lender was on notice of the claims and the homeowner was not, essentially, sitting on their hands.¹⁵⁰

Secondly, to comply with the stated purpose of efficiency, the Deed of Trust Act requires a preliminary hearing with full notice and copies of pleadings provided to the trustee within five days.¹⁵¹ The statute does not require notice to the lender because lenders and holders of the debt are likely to be out of state and not readily available to the borrower. Additionally, because

144. The trustee is notified because often the owner of the loan is not identified or known. Because the lender (beneficiary) appoints the trustee, that trustee, in turn, can get notice of the hearing to the lender, who needs to respond to the motion. Typically, the lender will agree to put off the sale for a few weeks to schedule a hearing on the injunction. There should be the need for only one hearing, not a TRO and then a preliminary injunction. A trustee should *never* oppose an injunction or participate in the argument, since the trustee's duty is equally to both lender and homeowner. WASH. REV. CODE § 61.24.040 (2012).

145. WASH. REV. CODE § 61.24.130(b) (2012).

146. See generally Hoffmann, *supra* note 2; see also APPLESEED, *supra* note 33.

147. See Bowcutt v. Delta N. Star Corp., 976 P.2d 643, 647 (Wash. Ct. App. 1999); Blanchard v. Golden Age Brewing Co., 63 P.2d 397, 405 (Wash. 1936).

148. King County, Washington. Local Civil Rule (LCR) 4. Judicial foreclosures proceed on the normal civil track in most Washington counties.

149. 11 U.S.C § 362(a) (2012).

150. See Albice v. Premier Mortg. Servs. of Wash., Inc., 276 P.3d 1277, 1282 (Wash. 2012); but see Frizzell v. Murray, 313 P.3d 1171, 1174 (Wash. Dec. 5, 2013) (private loan foreclosure where court held failure to maintain bond limited debtor's rights).

151. The statute is silent as to whether the five days are "court days" or calendar days. To be safe, use "court days", or see if opposing counsel will agree on a later date, continuing the sale as needed.

lenders usually hire the trustee to conduct the foreclosure, lenders are easily notified by the trustee.¹⁵² In the event that inadequate notice is given, the court may issue a temporary show cause order and grant a return date for consideration of preliminary relief.¹⁵³

In the event that the debtor is unable to give the trustee adequate notice, the court may also consider temporary equitable relief and issue a show cause type order to provide the affected parties with more notice, under its inherent equitable powers.¹⁵⁴ The courts are also free to modify such orders as circumstances may warrant.¹⁵⁵ The difficulty of vacating an improperly conducted foreclosure encourages courts to favor an injunction to maintain the status quo.

Conflicts of interest are another flaw in injunction hearings.¹⁵⁶ An attorney cannot ethically represent both the trustee and the lender in a motion to enjoin the sale.¹⁵⁷ The trustee's requirement of neutrality should prevent it from ever having the opportunity to oppose a motion to enjoin a foreclosure.¹⁵⁸ This is of particular concern when the trustee has an elevated duty of good faith to both the borrower and the lender, and thus cannot act in an adversarial position to either, as would be required if the trustee sought to seek relief from a bankruptcy stay.¹⁵⁹

Finally, as the injunction motion is conducted in court, the lender has the burden to prove the validity of the debt being foreclosed in addition to showing both procedural compliance with, and the basis for, the foreclosure.¹⁶⁰ However, the homeowner merely needs to demonstrate a reason to delay the sale.¹⁶¹ Once a suit is in place and an injunction is obtained, however, many obstacles must be overcome to stop a foreclosure. These obstacles include the cost of attorneys' fees, the need to bring the mortgage loan current, and success in a claim to offset the mortgage debt.

152. WASH. REV. CODE § 61.24.130(2) (2012) (only requiring notice to the trustee, not lender, of an injunction motion).

153. That is the common practice, at least, in King County, Washington. Local Civil Rule (LCR) 65(b)(2).

154. Hoffmann, *supra* note 2 at 332.

155. *See* Blanchard v. Golden Age Brewing Co., 63 P.2d 397, 407 (Wash. 1936).

156. Schroeder v. Excelsior Mgmt., 297 P.3d 677, 679 (Wash. 2013) (note the court's concern about the role of the attorney who represented the lender and acted as trustee).

157. Trustee; Deed of Trust; Client Conflict, 926 Op. WSBA at 1 (1987).

158. *See id.* at 3.

159. WASH. REV. CODE § 61.24.010(4) (2012); MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(2), 1.7(b) (2011).

160. WASH. REV. CODE § 61.24.020.

161. WASH. REV. CODE § 61.24.130(1) (allowing an injunction on "any proper legal or equitable ground").

B. *Post Sale Challenges and Waiver of Claims*

Post-sale challenges cut against the grain of promoting stability of titles and keeping the non-judicial process economical.¹⁶² Nevertheless, courts will vacate a void sale and, in equity, vacate a sale at an unconscionable price when coupled with procedural defects.¹⁶³ An important distinction to determine at the outset is whether the sale is *void* or *voidable*. These standards, which allow a void sale to be vacated, are much easier than trying to invalidate a voidable sale.¹⁶⁴

A void sale passes no legal or equitable title to a purchaser or subsequent owner, except occasionally by adverse possession of ten years, and can be nullified by proper proof.¹⁶⁵ A forged deed of trust is the best example of a void sale, but other material violations may also render a sale void: a trustee that lacks authority to act because there has been no default on the loan by the homeowner,¹⁶⁶ the failure to properly record an appointment authorizing the trustee to act,¹⁶⁷ a sale conducted on the wrong date or at the wrong location, or a sale without proper notice and publication.¹⁶⁸ In the event that a potential bidder was misled about the date, or location, or the grantor was not properly notified, there is a clear basis to vacate the sale.¹⁶⁹ A sale conducted without all statutory prerequisites is void.¹⁷⁰

162. *See Cox v. Helenius*, 693 P.2d 683, 686 (Wash. 1985).

163. Fred Fuchs, *Defending Nonjudicial Residential Foreclosure Actions*, 47 TX. BAR J. 1196, 1198 (1984).

164. Nelson & Whitman, *supra* note 12, §7.20.

165. *See Fid. & Deposit Co. of Md. v. Tigor Title Ins. Co.*, 943 P.2d 710, 713 (Wash. Ct. App. 1997); *see also Anderson v. Cnty. Props., Inc.*, 543 P.2d 653, 654 (Wash. Ct. App. 1975); *Koster v. Wingard*, 314 P.2d 928 (Wash. 1957); *George v. Butler*, 67 P. 263, 267 (Wash. 1901); *Lewis v. Kujawa*, 291 P. 1105, 1109 (Wash. 1930); Nelson & Whitman, *supra* note 12.

166. *Albice v. Premier Mortg. Servs. of Wash., Inc.*, 276 P.3d 1277, 1285 (Wash. 2012); *Staffordshire Invs., Inc. v. Cal-Western Reconveyance Corp.*, 149 P.3d 150, 156 (Or. Ct. App. 2006); *Taylor v. Just*, 59 P.3d 308, 313 (Idaho 2002); *Diversified, Inc. v. Walker*, 702 S.W.2d 717, 721 (Tex. App. 1985); *Dimock v. Emerald Props.*, 97 Cal. Rptr. 2d 255 (Ct. App. 2000).

167. *Albice*, 276 P.3d at 1281; *Graham v. Oliver*, 659 S.W.2d 601, 603 (Mo. Ct. App. 1983).

168. *Schroeder*, 297 P.3d at 682-83 (characterizing a void sale as one where the requisites in the Deed of Trust Act have not been met).

169. *See Cox*, 693 P.2d at 686.

170. *Schroeder*, 297 P.3d at 685-86; *Albice*, 276 P.3d at 1281-1282.

When there is an inadequate sale price¹⁷¹ and a material or significant defect in the process, a sale may be invalidated at the discretion of a court in equity as a voidable sale.¹⁷² To be considered voidable, the sale price must “shock the conscience,”¹⁷³ thus supporting the claim that the grantor would have recovered equity if the sale had not occurred, if the sale had not occurred properly, or if the property had been sold in an arms-length transaction to a willing purchaser.¹⁷⁴ For a sale to be voidable due to defect, a defect must be significant.¹⁷⁵ In the event that bona fide purchaser acquires the property, it is unlikely that a court would vacate a sale that was voidable.¹⁷⁶ Typically, the greater the inadequacy of the sale price, the fewer defects that will suffice.¹⁷⁷

A substantial body of law allows for a post-sale challenge to a defective sale.¹⁷⁸ For example, “Washington courts have a long tradition of guarding property from being wrongfully appropriated through judicial process. When ‘a jury . . . returned a verdict which displeased [Territorial Judge J.E. Wyche] in a suit over 160 acres of land,’ he threatened to set aside their verdict and remarked, ‘While I am judge it takes thirteen men to steal a ranch.’”¹⁷⁹ Such challenges are usually generally described as *wrongful foreclosure*, which is a tort consisting of a breach of a duty owed to the grantor by the foreclosing trustee (or lender), causation, and resulting damage.¹⁸⁰

171. “Inadequate” can be less than twenty percent of fair market value. RESTATEMENT (THIRD) OF PROP.: MORTGAGES § 8.3 (1997); *but see, Cox*, 693 P.2d at 685 (where an inadequate sale price (\$1 over the \$11,783 second deed of trust) was based upon the second lien being foreclosed, junior to a \$250,000 first).

172. *Nelson & Whitman*, *supra* note 12, §7.20.

173. *Id.* §7.21.

174. *Id.* §7.20.

175. *Id.* §7.20.

176. *See* WASH. REV. CODE § 61.24.040(7) (2012) (provides that the trustee’s deed recitals can be given a presumption of validity as to the Trustee’s statutory compliance with the foreclosure procedures); *but see, Albice*, 276 P.3d at 1284-85.

177. *Cox*, 693 P.2d at 686.

178. *See, e.g., Albice*, 276 P.3d at 1284; *Schroeder*, 297 P.3d at 687.

179. *Klem v. Wash. Mut. Bank*, 295 P.3d 1179, 1189 n.10 (2013) (quoting Wilfred J. Airey, *A History of the Constitution and Government of Washington Territory* (1945) (unpublished Ph.D. thesis, University of Washington) (on file with Gallagher Law Library, University of Washington)).

180. *See Rao et al.*, *supra* note 61, at § 8.10.10 (“While initially the claim was meant to address improprieties in the sale itself or in the notice, in recent years it has been used to deal with servicer improprieties that lead to foreclosure.”); *see also Walker v. Quality Loan Service*, 308 P.3d 716, 721 (Wash. 2013) (explaining that the legislature recognized a cause of damages for “a trustee’s presale failure to comply” with the Deeds of Trust Act).

The major obstacle to filing a successful claim after the sale of a foreclosed property is the doctrine of waiver.¹⁸¹ A party's failure to seek the restraint of a sale may constitute a waiver of all rights to later challenge the sale for defects.¹⁸² Often, the party who received notice of the right to enjoin the trustee's sale had actual or constructive knowledge of a defense to foreclosure prior to the sale, and failed to bring an action to enjoin the sale.¹⁸³ The doctrine of waiver precludes a challenge to a completed sale.¹⁸⁴

For example, in *Koegel*, the homeowner was aware of several minor defects in the notice well before the sale of the home, which were corrected with continuances by the trustee.¹⁸⁵ After several continuances, and without any action by the homeowner, the sale was upheld.¹⁸⁶ Although Koegel and his attorney appeared at the sale, they did not object when the sale was conducted; a third party bidder acquired the property.¹⁸⁷ The court noted that Koegel could have prevented the loss of the property by: restraining the sale, filing bankruptcy, filing a *lis pendens*, curing the monetary default, or protesting at the sale.¹⁸⁸ Rather, Koegel "appeared at the sale and said nothing."¹⁸⁹ As previously discussed, the practitioner should take all appropriate steps to effectuate a remedy prior to the sale to avoid this trap. Recently, however, the Washington Supreme Court held that none of the statutory prerequisites, including notices, publication, venue, and sale, are subject to waiver, such as using a non-judicial foreclosure of agricultural land.¹⁹⁰

The Act helps borrowers avoid large bonds by allowing the court to factor in the grantor's equity when it establishes the security amount.¹⁹¹ A court can find that a lender is protected when an analysis finds equity in the property.

181. See, e.g., *Brown v. Household Realty Corp.*, 189 P.3d 233, 236 (Wash. Ct. App. 2008).

182. See *id.* at 239; see also WASH. REV. CODE § 61.24.127 (2004) (omitting the applicable tort from a list of claims that cannot be waived).

183. See, e.g., *Koegel v. Prudential Mut. Sav. Bank*, 752 P.2d 385, 389 (Wash. Ct. App. 1988).

184. See, e.g., *id.* Following a decision in *Brown v. Household Realty Corp.*, 189 P.3d 233 (2008), the legislature placed limitations on waivers of post-sale damage and deceptive practices claims. See WASH. REV. CODE § 61.24.127 (2013). A "void" sale can always be vacated, however, on a proper ground. See, e.g., *Albice*, 276 P.3d at 1282.

185. *Koegel*, 752 P.2d at 388.

186. *Id.* at 386.

187. *Id.*

188. *Id.* at 389.

189. *Id.* at 389.

190. *Schroeder*, 297 P.3d at 685-86 (holding that notice could not be waived, because agricultural land must be foreclosed judicially).

191. WASH. REV. CODE § 61.24.130(1)(b) (2013).

Because there is no bond in a judicial foreclosure, the lender relies on getting the property back at the end of a yearlong redemption period.

Laches may bar the action when a party that should have been aware that it had a cause of action unreasonably sits on its claim long enough to have damaged the defendant.¹⁹²

Two recent cases, *Albice v. Premier Mortgage Services of Washington, Inc.*,¹⁹³ and *Schroeder v. Excelsior Management Group, LLC*,¹⁹⁴ limit waiver arguments as an equitable doctrine that may be supported by appropriate facts.¹⁹⁵ In *Albice*, the court vacated a void sale for non-compliance with the Deed of Trust Act and rejected the purchaser's claim that he was a *bona fide* purchaser, thus protecting the conclusive presumption of a valid sale in favor of a *bona fide* purchaser.¹⁹⁶

Further advancing consumer rights, *Schroeder* emphasized that the Deed of Trust Act set forth conditions that are mandatory for a foreclosure to be valid.¹⁹⁷ Despite a written waiver, the court held that a waiver of statutory preconditions went against legislative intent.¹⁹⁸ The court remanded to determine whether the proper procedure had been observed.¹⁹⁹ The waiver doctrine is now relegated to an equitable doctrine that may apply after a proper sale to a *bona fide* purchaser is completed, as was the case in *Koegel*.

In a somewhat countervailing doctrine, the court in *Udall v. TD Services*²⁰⁰ approved a bidding process in a non-judicial foreclosure sale in favor of a bidder, who was involved in and profited from a notable price irregularity at the sale.²⁰¹ Here, Udall purchased property at a non-judicial sale from an auctioneer-agent of the trustee for exactly \$100,000 below the amount of the debt, the opening bid set by the lender.²⁰² When the trustee discovered this, it "refused to deliver the deed to Udall."²⁰³ Udall brought a lawsuit to enforce the contract.²⁰⁴ The trial court, on summary judgment, upheld the contract in favor

192. See, e.g., *Carlson v. Gibraltar Sav. of Wash.*, 749 P.2d 697, 700 (Wash. Ct. App. 1988); but see WASH. REV. CODE § 61.24.127 (2013).

193. *Albice*, 239 P.3d at 1148.

194. *Schroeder*, 297 P.3d at 677.

195. *Schroeder*, 297 P.3d at 683-84; *Albice*, 239 P.3d at 1158.

196. *Albice*, 239 P.3d at 1158-59.

197. *Schroeder*, 297 P.3d at 683.

198. *Id.* at 683 (quoting *Bain v. Metro. Mortg. Grp.*, 285 P.3d 34, 46 (Wash. 2012)).

199. *Id.* at 687 ("The requirement of the act may not be waived by the parties . . .").

200. *Udall v. T.D. Escrow Servs., Inc.*, 154 P.3d 882, 885-86, 890 (Wash. 2007).

201. *Id.*

202. *Id.* at 885.

203. *Id.* at 885.

204. *Id.* at 886.

of Udall.²⁰⁵ On appeal, however, the court properly adopted the general rule throughout the country; the court held that there was no contract between Udall and the trustee, and that the statutory framework of the Deed of Trust Act allowed a trustee to withhold the deed if a serious irregularity existed.²⁰⁶

The Washington Supreme Court granted discretionary review and reversed the decision, holding that Udall was entitled to the property at the discounted price from the sale.²⁰⁷ The Washington State Legislature subsequently revised the Deed of Trust Act to allow a trustee to withhold a deed under these circumstances.²⁰⁸

V. ADVOCATING FOR THE USE OF TORT ANALYSIS IN WRONGFUL FORECLOSURE CASES

First, this section advocates for the courts' use of tort analysis when evaluating a cause of action for wrongful foreclosure. Second, this section explains why recent decisions denying claims for wrongful initiation of foreclosure proceedings are unsound. Third, this section explains why courts should recognize that a wrongful commencement of a non-judicial foreclosure is tortious, and how courts across the country have considered this issue. Finally, this section discusses Deed of Trust Act violations that support the use of tort claims to enforce and protect the rights of homeowners.

A. *Recent Decisions Denying a Claim for Wrongful Initiation of Foreclosure*

The cases highlighted below were dismissed because the trial courts found that the claimant did not have any compensable damages until a foreclosure sale actually occurs. Under traditional tort analysis, however, a cause of action is implied by a breach of duty, whether the duty is set forth in a statute or by common law decision.²⁰⁹ It is illogical for advocates to consider foreclosure as

205. *Id.*

206. Udall v. T.D. Escrow Servs., Inc., 130 P.3d 908, 913-14 (Wash. Ct. App. 2006); accord Moeller v. Lien, 30 Cal. Rptr. 2d 777, 784 (Ct. App. 1994) (“[A]n irregularity in the nonjudicial foreclosure sale coupled with a gross inadequacy of price may be sufficient to set aside the sale, where the conclusive presumption does not come into effect because the trust deed has not yet been delivered.” (citation omitted)).

207. Udall, 154 P.3d at 890.

208. 2012 Wash. Sess. Laws c. 185 § 14 (codified at WASH. REV. CODE § 61.24.050(2) (2013)).

209. Restatement (Second) of Torts § 874A; see, e.g., Bennett v. Hardy, 784 P.2d 1258, 1261 (Wash. 1990) (discussing state and federal standards for implying a cause of action upon breach).

a single event consisting only of the sale of the home. Rather, foreclosure is a yearlong, multi-faceted process in which damages begin to accrue upon the date of the first notice of pre-foreclosure options, and continue well beyond the actual sale.²¹⁰

Examples of *pre-sale* misconduct causing considerable damages to homeowners abound. For example, former attorney Norman Maas instituted a collusive foreclosure against his former clients, known as “the R’s”, and other lien holders.²¹¹ The action was a judicial foreclosure, but the plaintiff could have just as easily used the non-judicial procedure. Lien holder “Mr. H” challenged the validity of the foreclosure contending that when he advanced money to the Ross’s, he paid off their debt to Mr. Maas, so it had been satisfied.²¹² Because of the lapse of time, little evidence of the payment could be produced.²¹³ Nevertheless, the hearing officer found that “Mr. H” had indeed paid off the lien and the foreclosure was collusive.²¹⁴ Mr. Maas fabricated the claim to get the property free and clear for himself and had destroyed records that would prove otherwise.²¹⁵ The Washington Supreme Court, after Mr. Hope’s counsel filed a bar complaint against Mr. Mass, *disbarred* Mr. Maas²¹⁶ on January 3, 2002, concluding that the foreclosure was based on a fabricated claim.

In another instance of improvident lawyer conduct, the trial court faced a claim that a self-proclaimed loan shark was attempting to foreclose on a residence of a woman who borrowed money to stave off a foreclosure at the rate of seventy-five percent.²¹⁷ Mr. Kandi initiated a foreclosure by sidestepping the foreclosure procedures by shortening the notice period, scheduling the sale well before the time allowed, and only halting when a lawsuit was initiated.²¹⁸ The court awarded a usury penalty of \$240,000 (to be set off against the debt) and an additional penalty for punitive damages of

210. See generally, THOMPSON WEST, AMERICAN JURISPRUDENCE PROOF OF FACTS, 123 §24 (3d ed. 2003) (“Some states recognize a cause of action for attempted wrongful mortgage foreclosure.”).

211. Washington State Bar Association, *Discipline Notice – Norman Bradford Maas*, WSBA.ORG (January 3, 2002), <https://www.mywsba.org/DisciplineNotice/DisciplineDetail.aspx?dID=188>.

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. Complaint at 2-3, *Provost v. Kandi*, No. 09-2-25191-6 SEA (Wash. Sup. Ct. King Ctny. May 10, 2010).

218. Decl. of David Leen, March 16, 2010, *Provost v. Kandi*, No. 09-2-25191-6 SEA (Wash. Sup. Ct. King Ctny. May 10, 2010).

\$100,000 plus attorney fees and costs.²¹⁹ As the damages exceeded the deed of trust debt, the title was quieted in favor of the plaintiff, thus nullifying the deed of trust.²²⁰ Although many pre-sale cases may not have significant damages, there are at least attorney fees coupled with considerable anguish about the prospect of losing their home. Other states have readily accepted such pre-sale claims.

A Georgia court sums up the rule that a lender's last minute cancellation of the foreclosure sale does not bar a homeowner from pursuing a claim of damages for humiliation and emotional distress, from the attempted wrongful foreclosure by the lender:

It strains credulity to insist that the recovery of appellant's wrongfully foreclosed residence has made her whole, and we find no bar in law or in logic to a recovery of damages for her humiliation and emotional distress should evidence at trial establish the truth of the allegation in her pleadings that the foreclosure was instituted intentionally and without basis. Accordingly, we do not agree that because the foreclosure sale had been cancelled, appellant could not pursue her separate claim for damages.²²¹

Additionally, the Georgia court specifically found liability for attempted wrongful foreclosure in the common law of tort liability:

We do not agree with the trial court that a wrongful foreclosure action sounds only in contract. There exists a statutory duty upon a mortgagee to exercise fairly and in good faith the power of sale in a deed to secure debt. Although arising from a contractual right, breach of this duty is a tort compensable at law.²²²

Judge Karen Overstreet, Chief Bankruptcy Judge in the Western District of Washington, has rejected the proposition that a foreclosure must be completed in order to give rise to a legal remedy. Judge Overstreet argues, "[A] plaintiff who actually stops the foreclosure should not be in a *worse* position than someone who doesn't stop the foreclosure," and "a plaintiff who stops

219. Judgment and Findings for Damages and Quiet Title at 3, *Provost v. Kandi*, No. 09-2-25191-6 SEA (Wash. Sup. Ct. King Ctny. May 10, 2010)

220. *Id.* at 4.

221. *Clark v. West*, 395 S.E.2d 884, 885 (Ga. Ct. App. 1990).

222. *Clark*, 395 S.E.2d at 886 (internal citations omitted).

foreclosure has as many rights, at least as many rights if not more than someone who fails to stop the foreclosure.”²²³

Many jurisdictions have found that attempted wrongful foreclosure gives rise to a common law cause of action, if under the rubric of other claims.²²⁴ For example, Georgia courts have found liability for attempted wrongful foreclosure in common law theories of damage to compensate a grantor’s damaged reputation, invasion of privacy, and libel arising from the illegal foreclosure.²²⁵ These courts allow plaintiffs to assert a claim for attempted wrongful foreclosure when a defendant breaches their duty by knowingly and intentionally publicizing “untrue and derogatory” information concerning the debtor’s financial condition and the debtor sustains damages as a direct result of this publication.²²⁶

Attempted wrongful foreclosure can be characterized by a number of different labels, including the intentional or negligent infliction of emotional distress or outrage, both of which are well-established common law causes of action.²²⁷ However, it is the allegation of fact, not the label that determines the cause of action and the appropriate relief. “In a wrongful foreclosure action, an injured party may seek damages for mental anguish in addition to cancellation of the foreclosure.”²²⁸ Initiating a foreclosure where the homeowner is not in default, may cause the servicer or lender to be in violation of the Fair Debt Collection Practices Act.²²⁹

“In some cases, an award of damages for intentional infliction of emotional distress may be supported by the evidence of an intentional wrongful

223. Amicus Curiae Brief of Nw. Justice Project, Nw. Consumer Law Ctr., & Columbia Legal Services as Counsel for Wa. Homeowners at 14, *Frias v. Asset Foreclosure Services, Inc.*, 2014 WL 583078 (No. 89343-8) (Wash. 2014) (internal citation omitted).

224. *See, e.g., In re Pullen*, 451 B.R. 206, 2010-11 (Bankr. N.D. Ga. 2011) (finding borrower stated a claim for attempted wrongful foreclosure after lender wrote letters threatening borrower with immediate foreclosure, even though the lender had not complied with the notice provisions of the deed to secure the debt).

225. *See Aetna Fin. Co. v. Culpepper*, 315 S.E. 2d 228, 232 (Ga. Ct. App. 1984); *Jenkins v. McCalla Ravmer LLC*, 492 Fed. Appx. 968, 972 (11th Cir. 2012); *Sale City Peanut Co. v. Planters & Citizens Bank*, 130 S.E. 2d 518, 520 (Ga. Ct. App. 1963); *Hodson v. Whitworth*, 266 S.E. 2d 561, 565 (Ga. Ct. App. 1980); *Mayo v. Bank of Carroll County*, 276 S.E.2d 660 (Ga. Ct. App. 1981).

226. *See Jenkins*, 492 Fed. Appx. at 972.

227. *E.g., Sherwood v. Bellevue Dodge*, 669 P.2d 1258 (Wash. Ct. App. 1983).

228. 52 C.O.A. 2D 119 *Causes of Action in Tort for Wrongful Foreclosure of Residential Mortgage* § 37 (2012).

229. *See McDonald v. One West Bank, FSB.*, 929 F. Supp. 2d 1079, 1096 (W.D. Wash. 2013); *Glazer v. Chase Home Fin.*, 704 F.3d 453 (6th Cir. 2013).

foreclosure,” if it would be foreseeable that such damages would be suffered.²³⁰ Washington has well-established case law regarding the tort of outrage/emotional distress lodged in the foreclosure context. A person who intentionally or recklessly causes emotional distress to another by extreme and outrageous conduct is liable for severe emotional distress resulting from such conduct.²³¹ The torts of intentional infliction of emotional distress and outrage are nearly identical.²³² Foreclosure, repossession, and other forms of wrongful debt collection may give rise to a claim for emotional damages and/or outrage under Washington law.²³³

In their comprehensive and widely cited treatise, Grant Nelson and Dale Whitman describe the starting point for determining what remedies are available to address a defective non-judicial foreclosure:

The nature and scope of the remedy will depend on several factors. Among these are whether the defect is discovered before or after sale, the nature of the defect, and, importantly, if the sale has already been completed, whether the sale purchaser or any subsequent grantee is a *bona fide* purchaser.²³⁴

In general, judicial foreclosures can be stopped by payment of the debt.²³⁵ However, because a well-settled maxim of Washington law holds that “[e]quity abhors forfeitures,”²³⁶ courts have frequent occasion to review both judicial and non-judicial foreclosures.²³⁷

230. 123 AM. JUR. PROOF OF FACTS 3D 419 *Proof of Wrongful Mortgage Foreclosure* § 18 (2011).

231. *Grimsby v. Samson*, 530 P.2d 291, 295-96 (Wash. 1975).

232. *See Kloepfel v. Bokor*, 66 P.3d 630, 631 n.1 (Wash. 2003) (the two causes of action are “synonyms for the same tort”); *Robel v. Roundup Corp.*, 59 P.3d 611, 619 n.7 (Wash. 2002) (“outrage encompasses causes of action based on reckless and intentional conduct”).

233. *Thies v. Federal*, 480 P.2d 244 (Wash. Ct. App. 1971) (emotional distress damages for wrongful foreclosure).

234. Nelson & Whitman, *supra* note 12, § 7.22. Next to the Gose articles, *see* articles cited *supra* note 25, Nelson & Whitman is considered the foreclosure “bible.”

235. Both judicial and non-judicial foreclosure statutes allow this. WASH. REV. CODE § 61.12.060 (2013); WASH. REV. CODE § 61.24.090 (2013).

236. *Jacobson v. McClanahan*, 264 P.2d 253, 254 (Wash. 1953).

237. *See Hoffmann supra* note 2, at 328-29 (“[R]emedies available to grantor include bringing an action to set aside the sale [and] bringing an action for damages for *wrongful foreclosure* against the beneficiary or the trustee. . . .” (emphasis added) (footnote omitted)).

B. *A Cause of Action for Wrongful Commencement of a Non-Judicial Foreclosure*

Despite Washington's historical recognition of various causes of action for wrongful foreclosure, a number of recent trial court opinions have severely misconstrued the common law underpinnings of tort claims associated with the initiation of defective or wrongful foreclosure.²³⁸ Unfortunately, these claims often turn on how the cause of action is labeled rather than the factual allegations showing that relief may be appropriate.²³⁹ For this reason, courts must focus on the specific allegations, not the labels, in determining if a proper claim has been asserted.²⁴⁰

Courts often, at the urging of the lender's counsel, or in the absence of argument by the *pro se* homeowner, find complete waiver of defenses if the homeowner failed to get an injunction prior to the foreclosure sale.²⁴¹ Conversely, if a suit is brought prior to the sale, there is no cause of action and no harm.²⁴²

The historic cause of action against interference with real property by a wrongful foreclosure is trespass on the case, a tort that has deep support in the common law.²⁴³

1. Cases That Do Not Support a Cause of Action for Wrongful Commencement of a Non-Judicial Foreclosure

In cases rejecting all claims for wrongful initiation of foreclosure, this narrow view is best illustrated by *Vawter v. Quality Loan Service Corp. of Washington*²⁴⁴ and its growing progeny.²⁴⁵ These cases are predominantly

238. See, e.g., *Vawter v. Quality Loan Serv. Corp. of Wash.*, 707 F. Supp. 2d 1115, 1123-24 (W.D. Wash. 2010) (finding no cause of action for wrongful foreclosure when the trustee's sale is halted).

239. See *id.* at 1122-23 (the court's focus rests with the foreclosure ending, rather than the damage actually done to the plaintiffs).

240. Pleadings generally are to be construed liberally, and if factual allegations show entitlement to some kind of relief, "it is immaterial by what name the action is called." *Simpson v. State*, 615 P.2d 1297, 1299 (Wash. Ct. App. 1980) (citing *Christensen v. Swedish Hosp.*, 368 P.2d 897 (Wash. 1962)).

241. See, e.g., *Brown v. Household Realty Corp.*, 189 P.3d 233, 234 (Wash. Ct. App. 2008) ("[A] borrower waives [wrongful foreclosure] claims by failing to timely request this relief before the foreclosure sale.").

242. See *Vawter*, 707 F. Supp. 2d at 1127. .

243. David K. DeWolf and Keller W. Allen, 16 WASHINGTON PRACTICE SERIES, TORT LAW AND PRACTICE § 3:8, (4th ed. 2013).

244. *Vawter v. Quality Loan Serv. Corp. of Wash.*, 707 F. Supp. 2d 1115 (W.D. Wash., 2010).

federal district court opinions, and most derive support from the unpublished opinion in *Krienke v. Chase Home Finance*, holding that, absent a trustee's sale of the property, there is no claim for wrongful foreclosure and the action must be dismissed as a matter of law.²⁴⁶ If the sale had occurred, the lender's counsel could argue *renvoi*²⁴⁷ because the sale had occurred without the homeowner obtaining an injunction, the homeowner has *waived* all of their claims.²⁴⁸

In *Vawter*, the U.S. District Court of Washington concluded that there was no cause of action for wrongful foreclosure, because the Washington Deed of Trust Act does not specifically provide for a statutory cause of action for damages for the wrongful institution of non-judicial foreclosure proceedings where no trustee's sale occurs.²⁴⁹ However, *Vawter* relies largely upon two unpublished opinions for this proposition—*Pfau v. Washington Mutual, Inc.*²⁵⁰ and *Krienke v. Chase Home Financial, LLC*²⁵¹—and was decided before a Washington appellate court, which held that a homeowner had a cause of action for initiating a foreclosure in violation of the provisions of the Washington Deed of Trust Act.²⁵² The conflict between these cases has been recognized, and the question has been certified to the Washington Supreme Court.²⁵³

245. See, e.g., *Mikhay v. Bank of Am., N.A.*, No. 2:10-cv-1464-RAJ, 2011 WL 167064 at *3 (W.D. Wash. Jan. 12, 2011) (“Plaintiffs have not cited any authority supporting their ability to raise such a claim where no trustee’s sale has occurred and a number of courts have recently found that such a cause of action does not exist.” (citing *Vawter*, 707 F. Supp. 2d at 1123-24)); *Thein v. Recontrust Co., N.A.*, No. C11-5939BHS, 2012 WL 527530 at *2 (W.D. Wash. Feb. 16, 2012) (citing *Vawter*, 707 F. Supp. 2d at 1123-24); *accord* *Spenser v. Deutsche Bank Nat. Trust Co. NA.*, No. 11-5599-BHS, 2011 WL 6816343 at *2 (W.D. Wash. Dec. 28, 2011) (citing *Vawter*, 707 F. Supp. 2d at 1123-24); *Ronzzone v. Aurora Loan Serv., LLC*, No. C11-05025BHS, 2011 WL 4074715 at *3 (W.D. Wash. Sept. 13, 2011). These federal trial court opinions all rely on *Vawter* to hold that absent a trustee’s sale of property, a claim for wrongful foreclosure must be dismissed as a matter of law. *Vawter* took this proposition from *Krienke v. Chase Home Fin., LLC*, 140 Wash. App. 1032, No. 35098-0-II, 2007 WL 2713737 at *5 (Wash. Ct. App. Sept. 18 2007) (unpublished).

246. *Krienke*, 2007 WL 2713737 at *5.

247. Or is Heller’s “Catch 22” a more apt description?

248. See, e.g., *Brown v. Household Realty*, 189 P.3d 233, 239 (Wash. Ct. App. 2008). Brown’s strict waiver language has been limited by the Legislature shortly after Brown was decided. See WASH. REV. CODE § 61.24.127 (2013).

249. See *Vawter*, 707 F. Supp at 1124.

250. *Pfau v. Wash. Mutual, Inc.*, No. CV-08-00142-JLQ, 2009 WL 484448, at *12 (E.D. Wash. Feb. 24, 2009).

251. *Krienke*, 2007 WL 2713737 at *1.

252. *Walker v. Quality Loan Servs.*, 308 P.3d 716, 724 (Wash. Ct. App. 2013).

253. See *Frias v. Asset Foreclosures Servs., Inc.*, No. C13-760-MJP, 2013 WL 6440205, at *2 (W.D. Wash. Sep. 25, 2013).

Reliance on *Krienke* is particularly troublesome in this case, because the homeowners in *Krienke* were not represented by an attorney when arguing the motion for summary judgment in either the trial²⁵⁴ or appellate courts.²⁵⁵ In these circumstances, courts wisely issue unpublished opinions, as one party of the case is typically not thoroughly briefed.²⁵⁶ These cases may be decided unfairly because a pro se litigant has failed to raise important and persuasive issues that would allow an appellate court to decide a case fully on the merits. For this reason, unpublished appellate opinions may not be cited to as authority in state proceedings,²⁵⁷ but may be cited in federal court.²⁵⁸ Should there be any doubt how Washington law should be interpreted, federal courts may invoke certification of questions to the Washington Supreme Court.²⁵⁹ *Vawter* does not identify any published—and therefore binding—precedent which states that Washington does *not* recognize attempted wrongful foreclosure as a cause of action, but relies instead upon *Krienke*.²⁶⁰ Moreover, the only legal basis for the *Vawter* court's rejection of the plaintiffs' claims for damages for the wrongful institution of non-judicial foreclosure proceedings was that the Washington Deed of Trust Act does not specifically provide for a cause of action for wrongful institution of foreclosure proceedings.²⁶¹ Yet many jurisdictions have recognized causes of action at least incidentally derived from wrongful

254. *Krienke v. Chase Home Fin., LLC*, No. 05-2-10102-0 at *2 (Wash. Sup. Ct. filed Feb. 10, 2006).

255. See *Krienke*, 2007 WL 2713737 at *1 (see headnote).

256. See MCKENNA, JUDITH A., ET AL, CASE MANAGEMENT PROCEDURES IN THE FEDERAL COURTS OF APPEALS 19 (Federal Judicial Center 2000) (highlighting low number of published federal court opinions when litigant is pro se).

257. Wash. Ct. G.R. 14.1(a) (2014) (“A party may not cite as an authority an unpublished opinion of the Court of Appeals.”).

258. See Fed. R. App. P. 32.1(a) (allowing citation of unpublished cases). The practice of citing an unpublished opinion approaches unethical conduct, under rules regarding candor to the tribunal and dealing with unrepresented persons. See *Thul v. OneWest Bank*, No. 12 C 6380, 2013 WL 212926 at *1 (N.D. Ill. January 18, 2013) (defendant lawyers were ordered to show cause why they should avoid sanctions for citing law that had clearly been overruled by the Seventh Circuit).

259. See WASH. REV. CODE § 2.60.020 (2013).

260. *Vawter v. Quality Loan Serv. Corp. of Wash.*, 707 F. Supp. 2d 1115, 1123 (W.D. Wash. 2010).

261. *Id.* at 1123. Note that the remedies for Deed of Trust Act violations may be provided by the Washington Consumer Protection Act. See WASH. REV. CODE § 19.86.090 (2013). However, pre-sale remedies, such as injunctive relief, are specifically allowed under the Deed of Trust Act. WASH. REV. CODE § 61.24.130(1) (2013). When taken with the recently added WASH. REV. CODE § 61.24.127, this implies that there are some claims to waive if injunctive relief is not sought. See, e.g., *Walker v. Quality Loan Servs. Corp.*, 308 P.3d 716, 721 (Wash. Ct. App. 2013) (holding that the homeowner had a proper cause of action for the trustee's violation of the provisions of the Deed of Trust Act).

foreclosures,²⁶² and Washington state courts have recently begun to explicitly reject the *Vawter* court's analysis due to subsequent legislative action.²⁶³ The *Vawter* reasoning is faulty, because the basis for the tort of wrongful initiation of foreclosure or attempted wrongful foreclosure is found in the common law and not, almost by definition, in statutes.²⁶⁴ The Washington Supreme Court has recently pointed out that denial of a tort claim solely because there is a statutory remedy available is unnecessary and "would unsettle . . . tort law."²⁶⁵

Even the rarely used implied cause of action doctrine would encompass homeowners as a class of persons under the Deed of Trust Act, as intended, to benefit from the protections in that statute.²⁶⁶ This common law doctrine does

262. See *Curl v. First Federal Savings & Loan Assn.*, 257 S.E.2d 264, 265-66 (Ga. 1979) (affirming the award of damages for mental pain and aggravation and punitive damages in an action for wrongful foreclosure); *Countrywide Home Loans, Inc. v. Thitchener*, 192 P.3d 243 (Nev. 2008) (allowing evidence of wrongful foreclosure to establish punitive damages); *McCarter v. Bankers Trust*, 543 S.E. 2d 755, 758 (Ga. Ct. App. 2000) ("Further, where emotional damages are sought for an action for intentional wrongful foreclosure, such are recoverable as tort damages." (citing *Curl*, 257 S.E.2d at 265-66)); *Nat'l Mortg. Co. v. Williams*, 357 So. 2d 934, 935-36 (Miss. 1978); *Matthews v. Homecoming Fin. Network*, No. 03 C 3115, 2005 WL 2387688 at *7 (N.D. Ill. 2005) (foreclosure without cause sufficient basis for intentional infliction of emotional distress claim); see also *Stafford v. Puro*, 63 F.3d 1436, 1442 (7th Cir. 1995) (finding that emotional distress damages to wrongfully terminated employee were supported by loss of home in foreclosure, ruined credit, as well as physical symptoms including spastic colon and high blood pressure); *Johnstone v. Bank of Am., N.A.*, 173 F.Supp. 2d 809, 816 (N.D. Ill. 2011) (ongoing foreclosure sufficient to state emotional distress damages and survive motion to dismiss RESPA claim).

263. *Walker*, 308 P.3d at 722 (Wash. Ct. App. 2013) (rejecting *Vawter*). Another Division I case, although unpublished, also follows *Walker* and recognizes a damage claim for violations of the Deed of Trust Act even when a sale has not occurred. See *Leipheimer v. ReconTrust, N.A.*, 175 Wash. App. 1065 (2013) (unpublished opinion).

264. "The word 'tortious' is appropriate to describe not only an act which is intended to cause an invasion of an interest legally protected against intentional invasion, or conduct which is negligent as creating an unreasonable risk of invasion of such an interest, but also conduct which is carried on at the risk that the actor shall be subject to liability for harm caused thereby, although no such harm is intended and the harm cannot be prevented by any precautions or care which it is practicable to require." RESTATEMENT (SECOND) OF TORTS § 6 cmt. a (1965); see also *In re Keahey*, No. WW-08-1151, 2008 WL 8444817 (B.A.P. 9th Cir. Nov. 3 2008) (unpublished decision), *aff'd in part, vacated in part*, 414 F.App'x 919 (9th Cir. 2011) (unpublished decision) (court awarded substantial damages for emotional distress).

265. *Piel v. City of Federal Way*, 306 P.3d 879, 883 (Wash. 2013) ("Declaring a wrongful termination tort claim dead on arrival in the face of administrative remedies would unsettle body of [tort] law this court has developed . . .").

266. See *Bennett v. Hardy*, 784 P.2d 1258, 1261-62 (Wash. 1990) (The three-part test for an implied cause of action is: "first, whether the plaintiff is within the class for whose 'especial' benefit the statute was enacted; second, whether the legislative intent, explicitly or

not provide a cause of action directly, but the factual allegations, demonstrating either legal or equitable entitlement to relief, may justify the protection.²⁶⁷

2. Cases That Support a Cause of Action for Wrongful Commencement of a Non-Judicial Foreclosure

In *Cox v. Helenius*,²⁶⁸ the paradigmatic case that establishes the rules on vacating defective non-judicial foreclosure sales, the court specifically declared that one of the three goals of the Deed of Trust Act is to “prevent wrongful foreclosure.”²⁶⁹ This strongly demonstrates that there are, or should be, judicial remedies or a cause of action that prevents a wrongful foreclosure from being completed. Recently, Division I of the Washington Court of Appeals held that a violation of the Deed of Trust Act is a tort, but elected not to characterize it as “wrongful foreclosure.”²⁷⁰ Moreover, a certified question was issued to the Washington Supreme Court by the U.S. District Court for the Western District of Washington that would answer whether there is a cause of action in Washington for damages for wrongful foreclosure where no sale has been conducted.²⁷¹

Most jurisdictions recognize the tort of wrongful foreclosure, or a variation thereof.²⁷² As some courts have held, “[t]he degree of misconduct that will support an action for wrongful foreclosure may range from mere negligence to outright maliciousness.”²⁷³ A homeowner is entitled to recover damages if “the

implicitly, supports creating or denying a remedy; and third, whether implying a remedy is consistent with the underlying purpose of the legislation.” (citation omitted)).

267. See *State v. Adams*, 732 P.2d 149, 155 (1987) (implication of cause of action allowed in face of administrative remedies); see also *Yeager v. Dunnavan*, 174 P.2d 755, 757 (Wash. 1946) (whether claim is tort or contract depends on the factual allegations).

268. *Cox v. Helenius*, 693 P.2d 683 (Wash. 1985).

269. *Id.* at 686.

270. *Walker v. Quality Loan Servs. Corp.*, 308 P.3d 716, 720 (Wash. Ct. App. 2013) (instead labeling it “as a claim for damages arising from [Deed of Trust Act] violations”).

271. See *Frias v. Asset Foreclosure Services*, No. C13-760-MJP, 2013 WL 6440205 (W.D. Wash. Sept. 25, 2013).

272. 123 AM. JUR. PROOF OF FACTS 3D *Proof of Wrongful Mortgage Foreclosure* § 6 (2011); 59 C.J.S. *Mortgages* § 650 (2013); 52 C.O.A. 2D 119 *Causes of Action in Tort for Wrongful Foreclosure of Residential Mortgage* § 5 (2013); William M. Howard, *Recognition of Action for Damages for Wrongful Foreclosure—General Views*, 81 A.L.R.6th 161 (2013).

273. 52 C.O.A. 2D 119 *Causes of Action in Tort for Wrongful Foreclosure of Residential Mortgage* § 4 (2013) (citing *Nat'l Mortg. Co. v. Williams*, 357 So. 2d 934 (Miss. 1978)).

foreclosure is conducted negligently or in bad faith to his or her detriment,"²⁷⁴ and causes damage.²⁷⁴

In addition, attempted wrongful foreclosure—the wrongful institution or advancement of the foreclosure process—has been widely recognized as a valid cause of action.²⁷⁵ Attempted wrongful foreclosure causes damage similar to the completion of a wrongful foreclosure; including emotional damage, damage to a homeowner's credit score, invasion of privacy through notice of foreclosure, slander of title, loss of value, and the costs and attorney fees incurred to enjoin a wrongful foreclosure.²⁷⁶ The only difference between wrongful foreclosure and attempted wrongful foreclosure is the quantum of total damages, and accounting for the ultimate loss of the equity in the home at the time of sale.²⁷⁷ Therefore, wrongful foreclosure and attempted wrongful foreclosure should not be bifurcated into two separate tort causes of action. Denying recovery unless and until a sale occurs ignores the considerable effort and money required to stall a wrongful or defective foreclosure, which is in addition to the anguish and distress experienced by the homeowner, the moving expenses incurred, and the attorney fees.²⁷⁸ Bankruptcy protection is also used

274. See *Dabney v. Countrywide Home Loans, Inc.*, 428 Fed. Appx. 474, 476 (5th Cir. 2011) (unpublished decision) (quoting *Nat'l Mortg. Co.*, 357 So. 2d at 935-36); see also 52 C.O.A. 2D 119 *Causes of Action in Tort for Wrongful Foreclosure of Residential Mortgage* § 4 (2013) (citing *Nat'l Mortg. Co.*, 357 So. 2d at 934).

275. See *supra* note 223 and accompanying text.

276. Numerous other jurisdictions recognize that wrongful foreclosure can cause the intentional infliction of emotional distress or outrage. An award of damages for intentional infliction of emotional distress may be supported by intentional wrongful foreclosure. See, e.g., *Clark v. West*, 395 S.E.2d 884, 885 (Ga. Ct. App. 1990) (Mortgagor, who succeeded in having foreclosure sale set aside as wrongful, stated cause of action against mortgagees for mental pain and suffering and attorney fees allegedly incurred by her as a result of foreclosure.). Many jurisdictions award punitive damages for a wrongful foreclosure. See, e.g., *Nat'l Mortg. Co.* 357 So. 2d at 938 (Miss. 1978) (punitive damages award upheld where mortgagee's failing to credit mortgagor's account with payments resulted in mortgagor being delinquent on her loan); accord *Countrywide Home Loans, Inc. v. Thitchener*, 124 Nev. 725, 729-30 192 P.3d 243, 246 (2008) (Punitive damages award upheld in case brought against mortgage company arising from company's mistaken identification of owners' unit as one subject to foreclosure and disposal of owners' personal property to prepare units for sale while owners were temporarily out of state); see also WASH. REV. CODE § 19.86.090 (2013) (damages under Consumer Protection Act limited to treble damages).

277. See *Nguyen v. JP Morgan Chase*, No. 12-CV-04183, 2013 WL 2146606, at *4 (N.D. Cal. May 15, 2013) ("If the foreclosure is indeed wrongful, it seems artificial and counter to the rules of equity to require Plaintiffs to wait for the inevitable to take place—the sale of their property.").

278. *Id.*

to stop the sale of a home, but the bankruptcy process impairs the homeowner's credit and requires the expenditure of substantial attorney fees.²⁷⁹

Non-judicial foreclosures may be stopped at least eleven days before the foreclosure sale date, by a statutory right to reinstate, or "de-accelerate," the debt.²⁸⁰ Many other affirmative defenses to a non-judicial foreclosure are available, but a suit must first be filed to enjoin the sale, thus giving a court the opportunity to evaluate the validity of the defenses, and either reinstate the loan, or award or set-off any damages.²⁸¹

The *Walker* case²⁸² should be approved by the Washington Supreme Court in answering the question certified by the U.S. district court in *Frias*²⁸³ and broadly hold that there is a cause of action in the State of Washington for wrongful foreclosure, regardless of whether the tortious conduct occurred before or after a wrongful sale. Such a holding is consistent with recent cases from that court protecting the rights of homeowners in the face of a defective or wrongful non-judicial foreclosure.²⁸⁴

C. Violations of the Deed of Trust Act

There are, of course, specific sections of the Deed of Trust Act that provide for remedies. This includes a breach of one of several specified duties that trustees owe the grantor and other individuals involved in the loan process, such as junior lien holders and bidders, giving proper statutory notices,²⁸⁵ such as notices of pre-foreclosure options and notice of default,²⁸⁶ notices of sale,²⁸⁷ and proper conduct of the sale.²⁸⁸ A trustee must be impartial and not controlled by or owned by the beneficiary.²⁸⁹ One of the possible statutory qualifications is that a corporate trustee be an actual Washington corporation, and therefore a

279. *See id.*

280. WASH. REV. CODE § 61.24.090(1) (2013).

281. Hoffmann, *supra* note 2 at 328-29 ("[R]emedies available to grantor after a sale is a suit to set aside the sale, and bringing an action for damages for wrongful foreclosure against the beneficiary or trustee . . ." (footnotes omitted)).

282. *Walker v. Quality Loan Serv. Corp.*, 176 Wash. App. 294, 308 P.3d 716 (2013).

283. *Frias v. Asset Foreclosures Servs., Inc.*, No. C13-760-MJP, 2013 WL 6440205 (W.D. Wash. Sep. 25, 2013).

284. *See, e.g., Bain v. Metro. Mortg. Grp. Inc.*, 285 P.3d 34 (Wash. 2012); *see also Klem v. Washington Mut. Bank*, 295 P.3d 1179 (2013).

285. *See* WASH. REV. CODE § 61.24.040(1)(b) (2013) (notice of sale must be sent to junior lienholders).

286. WASH. REV. CODE § 61.24.030(8).

287. WASH. REV. CODE § 61.24.040(1)(b).

288. *See* WASH. REV. CODE § 61.24.040 (3)-(8).

289. *See Walker*, 308 P.3d at 724; *accord Klem*, 295 P.3d at 1188.

Washington resident, with an officer who is a Washington resident.²⁹⁰ Additionally, the trustee must maintain a “physical presence and have telephone service” at an office in Washington from prior to the sale until the sale has concluded.²⁹¹

A trustee may continue the sale so long as the sale will benefit either the grantor or beneficiary; additionally, the trustee may continue the sale in the event that a junior lien holder or bidders may benefit from the sale and possibly generate a surplus for the grantor’s benefit.²⁹² The trustee must be empowered to act;²⁹³ if the beneficiary appoints a new trustee, it will not have the powers of the original trustee until the recording of the appointment.²⁹⁴ The trustee must also act for the true owner as the real party in interest of the note, and not as a nominee for an agent, acting as an attorney-in-fact.²⁹⁵ The owner of the debt needs to be specifically identified as the beneficiary in the foreclosure notices.²⁹⁶ More importantly, if the trustee does not have authority to foreclosure because there has not been a default on the loan, appointment by a proper holder of the promissory note, expiration of sale date, or other statutory prerequisite, would still render any sale of the property void.²⁹⁷

Additional violations that are considered wrongful foreclosure include the practice of *dual tracking*, which involves moving the sale date just beyond a mediation date.²⁹⁸ Under dual tracking, a sale could be conducted on a Friday if the mediation fails on Thursday, which gives the hapless homeowner no time to enjoin the sale or otherwise discuss loan modification or settlement.²⁹⁹ Dual tracking also includes circumstances when a sale is scheduled alongside efforts of the homeowner to obtain a modification of the loan under HAMP or other

290. WASH REV. CODE § 61.24.010.

291. WASH REV. CODE § 61.24.040(6).

292. See WASH REV. CODE § 61.24.040(6) (2012) (allowing a sale to be continued for up to 120 days).

293. See *Albice v. Premier Mortg Servs. of Wash., Inc.*, 239 P.3d 1148, 1156 (Wash. Ct. App. 2010) (finding sale invalid because trustee lost power to act as trustee), *aff’d*, 276 P.3d 1277 (Wash. 2012); see also *Bain v. Metro. Mortg. Grp. Inc.*, 285 P.3d 34, 36 (Wash. 2012) (“The deed of trust protects the lender by giving the lender the power to nominate a trustee and giving that trustee the power to sell the home if the homeowner’s debt is not paid.”).

294. WASH REV. CODE § 61.24.010(2).

295. *Bain*, 285 P.3d at 36.

296. See WASH REV. CODE § 61.24.040(2).

297. See *Schroeder v. Excelsior Mgmt. Grp.*, 297 P.3d, at 686 (2013) (ultimately vacating a sale because a beneficiary “could not vest the trustee with authority the statute did not.”).

298. Rao et al., *supra* note 61, at § 2.9.4.

299. See *id.*

programs designed to eliminate harsh loan terms.³⁰⁰ Often, homeowners are told by beneficiaries “not to worry” about scheduled foreclosures while a modification is being processed, only to find themselves in foreclosure because the beneficiary failed to keep the trustee at bay.³⁰¹ Treasury regulations under the HAMP program, and cases interpreting those regulations, forbid initiating or advancing a foreclosure while the homeowner has a pending application for modification.³⁰²

Enforcement of promised loan modifications are currently being litigated all over the country; the overriding trend is to allow enforcement under a number of theories, including specific performance, promissory estoppel, and breach of contract.³⁰³ The Seventh Circuit recently upheld a borrower’s breach of contract claim on the merits when the plaintiff alleged that the servicer “agreed to permanently modify her loan, deliberately misled her into believing it would do so, and then refused to make good on its promise.”³⁰⁴ The borrower made several timely payments on a TPP and the servicer then threatened foreclosure.³⁰⁵ The court found that the facts of this case “support garden-variety claims for breach of contract or promissory estoppel.”³⁰⁶ The Ninth Circuit has upheld the trend, allowing breach of contract claims based on TPPs to survive at the pleading stage.³⁰⁷

The foreclosure sale must be held in the county where the property is located or at least on the parcel, and in a public place designated in the notice of sale.³⁰⁸ Additionally, auctioneers cannot make materially misleading statements about the sale,³⁰⁹ and the deed of trust must be properly recorded and executed.³¹⁰ Finally, the trustee must not have a conflict of interest between

300. *Id.*

301. *See id.*

302. *See* APPLESEED, *supra* note 33 at 51.

303. *See* Corvello v. Wells Fargo Bank, NA, 728 F.3d 880 (9th Cir. 2013) (plaintiff argued promissory estoppel); Dixon v. Wells Fargo Bank, NA, 798 F. Supp. 2d 336 (D. Mass. 2011) (specific performance, promissory estoppel); *In re* Bank of Am. Home Affordable Modification Program (HAMP) Contract Litigation, No. 10-md-02193-RWZ, 2011 WL 2637222 (D. Mass. July 6, 2011) (multi district class action including Oregon); Aceves v. U.S. Bank, 192 Cal. App. 4th 218 (2011) (breach of contract, promissory estoppel).

304. Wigod v. Wells Fargo Bank, 673 F.3d 547, 555 (7th Cir. 2012).

305. *Id.* at 558.

306. *Id.* at 555.

307. *Corvello*, 728 F.3d at 880.

308. WASH. REV. CODE § 61.24.040 (2013).

309. McPherson v. Purdue, 585 P.2d 830, 831-32 (Wash. Ct. App. 1978).

310. WASH. REV. CODE § 61.24.030(7).

his or her relationship with the beneficiary and the duty owed to the grantor.³¹¹ A lawyer acting as trustee cannot continue to act in this role if any conflicts arise regarding the property at issue in a non-judicial foreclosure; the lawyer must transfer the authority to another attorney.³¹² No party “may be both a trustee and beneficiary under the same deed of trust.”³¹³

Other defenses are unique to non-judicial foreclosure of deeds of trust because of the particular obligations imposed upon trustees who conduct the sale of the real property.³¹⁴ A trustee selling property at a non-judicial foreclosure sale has strict obligations imposed by law.³¹⁵ In most states, “[A] trustee is treated as a fiduciary for both the borrower and the lender.”³¹⁶ In an earlier Washington case regarding the duty of a trustee, the court of appeals approved the following statement describing the duties of a trustee: “[a]mong those duties is that of bringing ‘the property to the hammer under every possible advantage to his *cestui que trusts*,’ using all reasonable diligence to obtain the best price.”³¹⁷

In *Cox v. Helenius*, the supreme court adopted the following view that “[b]ecause the deed of trust foreclosure process is conducted without review or confrontation by a court, the fiduciary duty imposed upon the trustee is exceedingly high.”³¹⁸ The court highlighted four duties of the trustee, including (1) the duty to use diligence in presenting the sale of the property with “every possible advantage to the debtor as well as the creditor;” (2) the duty to “take reasonable and appropriate steps to avoid sacrifice of the debtor’s property and his interest;” (3) the duty to ensure that conduct undertaken is “reasonably calculated to instill a sense of reliance . . . by the grantor, that the course of conduct may not be abandoned without notice to the grantor;” and (4) the duty to prevent a breach of fiduciary duty by ensuring that the attorney withdraws when an actual conflict of interest arises between the roles of attorney for the beneficiary and trustee.³¹⁹

311. *Cox v. Helenius*, 693 P.2d 683, 687 (Wash. 1985).

312. *Meyers Way v. Univ. Savings*, 910 P.2d 1308, 1315-16 (Wash. Ct. App. 1996).

313. WASH. REV. CODE § 61.24.020.

314. *See generally*, *Cox*, 693 P.2d at 683.

315. *See, e.g.*, WASH. REV. CODE § 61.24.040 (detailing the many notice and sale requirements).

316. *Klem v. Washington Mut. Bank*, 295 P3d 1179, 1188 (Wash. 2013) (internal quotation marks omitted) (quoting *Cox*, 693 P.2d at 686); *see also* Baxter Dunaway, *THE LAW OF DISTRESSED REAL ESTATE* § 17.3 (Clark Boardman Co., Ltd., 1990); *Spires v. Edgar*, 513 S.W.2d 372, 378 (Mo. 1974).

317. *McPherson v. Purdue*, 585 P.2d 830, 831 (Wash. Ct. App. 1978).

318. *Cox*, 693 P.2d at 686.

319. *Id.* at 686-87 (internal citation omitted).

Since *Cox*, the legislature has distinguished a trustee from a true fiduciary by requiring a trustee to act with a duty of “good faith” to all parties.³²⁰ However, more recently in *Klem v. Quality Loan Services*,³²¹ the Washington Supreme Court elevated the duty of a trustee. The court held trustees to the general standard in all non-judicial foreclosure states, placing “fiduciary” in its proper context of independent discretion:

We hold that the practice of a trustee in a non-judicial foreclosure deferring to the lender on whether to postpone a foreclosure sale and thereby failing to exercise its independent discretion as an impartial third party with duties to both parties is an unfair or deceptive act or practice and satisfies the first element of the CPA. *Quality failed to act in good faith to exercise its fiduciary duty to both sides and merely honored an agency relationship with one.*³²²

Scholarly commentators have summarized the duty of a trustee as “a fiduciary for both the mortgagor and mortgagee and [acting] impartially between them.”³²³

The trustee for sale is bound by his office to bring the estate to a sale under every possible advantage to the debtor as well as to the creditor, and he is bound to use not only good faith but also every requisite degree of diligence in conducting the sale and to attend equally to the interest of debtor and creditor alike, apprising both of the intention of selling, that each may take the means to procure an advantageous sale.³²⁴

320. WASH. REV. CODE § 61.24.010(3)-(4) (2013).

321. *Klem v. Quality Loan Serv.*, 295 P.3d 1179, 1190 (2013).

322. *Id.* at 1190 (emphasis added); *see also*, *Blodgett v. Martsch*, 590 P.2d 298, 302 (Utah 1978) (“[T]he duty of the trustee under a trust deed is greater than the mere obligation to sell the pledged property; it is a duty to treat the trustor fairly and in accordance with a high punctilio of honor.”). The Utah Supreme Court in *Blodgett* went even further and found that the breach of this duty may be regarded as constructive fraud. *See Blodgett*, 590 P.2d at 302.

323. *Nelson & Whitman*, *supra* note 12, at § 7.21.

324. *Mills v. Mut. Bldg. & Loan Ass’n*, 6 S.E.2d 549, 552 (N.C. 1940) (internal citations omitted). *But see Monterey S.P. Part v. W.L. Bangham*, 777 P.2d 623, 628 (Cal. 1989) (“The similarities between a trustee of an express trust and a trustee under a deed of trust end with the name. ‘Just as a panda is not a true bear, a trustee of a deed of trust is not a true trustee. . . . [T]he trustee under a deed of trust does not have a true trustee’s interest in, and control over, the trust property. Nor is it bound by the fiduciary duties that characterize a true trustee.’ (internal citation omitted)).

Generally, a trustee may not purchase the property it is selling without express permission from the grantor.³²⁵ If necessary, courts have historically required additional duties of the trustee.³²⁶ Washington law allows a trustee to extend a sale for up to 120 days for “any cause he deems advantageous.”³²⁷ Continuing a sale beyond this point results in a void sale.³²⁸

Alternatively, a trustee does not need to use due diligence in notifying interested parties of a coming sale,³²⁹ and in most cases, a trustee is usually not required to disclose interests, such as liens, that the purchaser’s own investigation should have uncovered.³³⁰ In Washington, the duty to disclose only once the party “ma[kes] representations or answer[s] questions concerning the title.”³³¹

A trustee must stay the sale if it is aware of defects. In *Cox v. Helenius*, the court found that the trustee ought to have told the grantor’s attorney that it had failed to halt the sale when it knew that that its ability to foreclose was contended.³³² The sale was voided because of this failure.³³³ Similar to the loan modification problem with dual tracking, discussed earlier, *Cox* suggests it is a breach of fiduciary duty to tell a homeowner “not to worry” about a foreclosure while neglecting to have the trustee cancel the sale. The homeowner has a much more difficult time (and burden of proof) vacating a sale than electing a pre-sale remedy.

Trustees are prohibited from “chilling” the sale through suggestions that would decrease interest in the sale.³³⁴ Such suggestions may be enough to cause the sale to be vacated.³³⁵ Further, a trustee must not overcharge for their

325. See *Smith v. Credico Indus. Loan Co.*, 362 S.E.2d 735, 737 (Va. 1987); *Whitlow v. Mountain Trust Bank*, 207 S.E.2d 837, 840 (Va. 1974).

326. See *West v. Axtell*, 17 S.W.2d 328, 334 (Mo. 1929).

327. WASH. REV. CODE § 61.24.040(6) (2013).

328. *Albice v. Premiere Mortg.*, 276 P.3d 1277, 1281 (Wash. 2012).

329. *Morrell v. Arctic Trading Co.*, 584 P.2d 983, 985 (Wash. Ct. App. 1978).

330. *Ivrey v. Karr*, 34 A.2d 847, 852 (Md. 1942).

331. *McPherson v. Purdue*, 585 P.2d 830, 832 (Wash. App. 1978).

332. *Cox v. Helenius*, 693 P.2d 683, 687 (Wash. 1985).

333. *Id.* at 385.

334. See, Larry D. Dingus, *Mortgages-Redemption After Foreclosure Sale in Missouri*, 25 MO. L. REV. 261, 274 (1960), available at <http://scholarship.law.missouri.edu/cgi/viewcontent.cgi?article=1658&context=mlr>; see also, Nelson & Whitman, *supra* note 12, § 7.21, at 648-50.

335. *Sullivan v. Fed. Farm Mortg. Corp.*, 8 S.E.2d 126, 128 (Ga. Ct. App. 1940) (bank suggested it would be the property to discourage other bids, sale found invalid).

services, nor are they permitted to profit from the associated costs of the foreclosure.³³⁶

Because these breaches of duty constitute wrongful foreclosure by a trustee (and possibly the lender), a number of defenses to wrongful foreclosure are directed almost exclusively at the lender and subject the lender or servicer to possible liability.³³⁷ These defenses include attempting to foreclose on a usurious loan;³³⁸ foreclosing when the Deed of Trust has been properly rescinded;³³⁹ foreclosing on a forged instrument, such as the Deed of Trust or Note; or predatory, unconscionable, improvident,³⁴⁰ and extortionate loans,³⁴¹ which can be reformed or eliminated. HAMP modifications offered or improperly denied can be enforced.³⁴²

Fraudulent liens or invalid filings that cloud title can be enjoined and the title quieted or cleared.³⁴³ Defective notaries can also be a major problem and can be a violation of the Consumer Protection Act (CPA).³⁴⁴

Although logic suggests that wrongful or illegal attempts to take one's home would be actionable, some courts focus too narrowly on the labels given to these causes, actions, or claims, and give short shrift to efforts to stop foreclosures and recover damages.³⁴⁵ Whether these claims are tort claims, statutory violations,³⁴⁶ or fall under more broad consumer protection laws,³⁴⁷ courts have a duty to resolve proper claims, invoke appropriate equitable powers, and facilitate just resolution of claims. Foreclosures are equitable in

336. Marking up the posting charges by one hundred percent resulted in a one year suspension for a lawyer acting as a trustee. *In re David Fennel*, No. 01#00061 (Wash. Bar. Assoc. Disciplinary Bd. Feb. 3, 2004). Fennel was found to have violated several of the Washington Rules of Professional Conduct. *Id.*

337. An example would be a usurious loan in violation of WASH. REV. CODE § 19.52.

338. *See supra* notes 217-219 and accompanying text.

339. *See, e.g.,* Gilbert v. Residential Funding, 678 F.3d 271, 277 (4th Cir. 2012); *see also* Sherzer v. Homestar Mortg. Serv., 707 F.3d 255, 258 (3rd Cir. 2013).

340. Washington State Bar Association, *Discipline Notice – Norman Bradford Maas*, WSBA.ORG (January 3, 2002), <https://www.mywsba.org/DisciplineNotice/DisciplineDetail.aspx?dID=188>.

341. *See* WASH. REV. CODE § 9A.82.030 (2001); Bowcutt v. Delta N. Star Corp., 976 P.2d 643 (Wash. Ct. App. 1999).

342. *See, e.g.,* Corvello v. Wells Fargo Bank, 728 F.3d 878, 885 (9th Cir. 2013).

343. *See supra* note 219 and accompanying text.

344. Klem v. Washington Mut. Bank, 295 P.3d 1179, 1190 (Wash. 2013).

345. *See supra* Part IV.1.

346. Walker v. Quality Loan Service, 308 P.3d 716, 722 (Wash. Ct. App. 2013) (finding claims arose from statutory violations).

347. Klem, 295 P.3d at 1187 (finding that a claim under the CPA could be based on “an unfair or deceptive act or practice not regulated by statute but in violation of public interest”).

nature and can be denied for lack of “doing equity” or delayed on equitable grounds.³⁴⁸

Courts prefer, of course, that presale remedies, such as injunctions, be used rather than attempting to resolve loan problems after a foreclosure sale,³⁴⁹ which presents more complicated title issues and waiver defenses. However, a void sale is a nullity and can be set aside within the appropriate statute of limitation, even against a bona fide purchaser.³⁵⁰

There is a significant difference whether the claims are brought before sale, after sale, in a bankruptcy adversary, or in state or federal court. In order to be heard in court, a lawsuit needs to be filed and the sale enjoined.³⁵¹

D. *Defending a Wrongful Foreclosure at the Eviction Hearing*

The eviction proceeding is the final step in the foreclosure process and the last line of defense for a homeowner. The unlawful detainer hearing is an expedited proceeding before a court commissioner, and is often held on seven days notice.³⁵² The commissioner determines if a writ of restitution³⁵³ is to be summarily issued, or whether an evidentiary trial should be conducted on the material facts in dispute.³⁵⁴

In Washington, “[t]he purchaser at a trustee’s sale shall be entitled to possession of the property on the twentieth day following the sale”³⁵⁵ The purchaser may bring an unlawful detainer action to remove the grantor or

348. See generally *Crummer v. Whitehead*, 230 Cal. App. 2d 264, 268 (1964); see also *Hoffmann*, *supra* note 2, at 337. A general discussion of equitable principles in contexts other than trustee’s sale can be found in *Eastlake Cmty. Council v. Roanoake Assoc.’s*, 513 P.2d 36 (Wash. 1973) and *Arnold v. Melani*, 449 P.2d 800 (1968).

349. *Hoffmann*, *supra* note 2, at 328–29 (“[R]emedies available to the grantor include bringing an action to set aside the sale, [and] bringing an action for damages for *wrongful foreclosure* against the beneficiary or the trustee.” (emphasis added)); see also *supra* Part III.

350. See e.g., *Albice v. Premier Mortg. Servs. of Wash.*, 276 P.3d 1277, 1284–85 (Wash. 2012) (knowledgeable bona fide purchaser was stripped of that protection because procedural irregularities should have alerted him to problems with the same).

351. This is a truism, as the non-judicial foreclosure is just that. In a civil lawsuit, a litigant can challenge a wrongful foreclosure on any proper ground. WASH. REV. CODE § 61.24.130 (2013).

352. WASH. REV. CODE § 59.12.070 (2013).

353. A writ of restitution directs the Sherriff to physically remove a tenant or foreclosed upon homeowner from the property and place their belongings on the street. WASH. REV. CODE § 59.18.132 (2013) (residential tenants) or WASH. REV. CODE § 59.12.090 (2013) (all others).

354. WASH. REV. CODE § 59.12.380 (2013); WASH. REV. CODE § 59.18.130 (2013).

355. WASH. REV. CODE § 61.24.030 (2013).

person deriving their rights from the grantor.³⁵⁶ Certain defenses are not allowed in an unlawful detainer action.³⁵⁷ As in Washington, most states restrict the defenses available in an eviction action.³⁵⁸ In *Cox*, the court allowed a defense based on defects in the foreclosure process in an unlawful detainer action.³⁵⁹ In *Savings Bank of Puget Sound v. Mink*,³⁶⁰ the Washington state court of appeals found several defenses were unable to be raised in an unlawful detainer action, but rather, a defective foreclosure may be a proper defense:

[In *Cox*], the Supreme Court recognized that there may be circumstances surrounding the foreclosure process that will void the sale and thus destroy any right to possession in the purchaser at the sale.

[The Court also recognized] two bases for post-sale relief: defects in the foreclosure process itself, i.e., failure to observe the statutory prescriptions and the existence of an actual conflict of interest on the part of the trustee³⁶¹

When defending a foreclosure in an eviction proceeding, it is advisable to file a companion civil action and move to consolidate and join all other defenses when attempting to raise a defense to the foreclosure at the eviction stage.³⁶² This is because the eviction proceeding is limited to issues relating to the right of possession of the property, not deciding formal title questions.

Lawyers should keep in mind that a commissioner ruling in an eviction case could be brought before a superior court judge for revision, essentially a *de novo* proceeding from the record below.³⁶³ Most important, however, is to raise claims before the property is sold at sale and an eviction commenced.

356. See WASH. REV. CODE § 59.12 (2013).

357. See *People's Nat'l Bank v. Ostrander*, 491 P.2d 1058, 1060 (Wash. Ct. App. 1971) ("set-offs or counterclaims have not been allowed" (internal citations omitted)).

358. *Id.* at 1060-61.

359. *Cox v. Helenius*, 693 P.2d 683, 684 (Wash. 1985).

360. *Savings Bank of Puget Sound v. Mink*, 741 P.2d 1043 (Wash. Ct. App. 1987).

361. *Id.* at 1046. A void sale is a proper defense to an eviction action. *Albice v. Premier Mortg. Servs. of Wash.*, 276 P.3d 1277, 1286 (Wash. 2012).

362. Because evictions deal only with right to possession, the courts are limited in issues raised. Compare *Ostrander*, 491 P.2d at 1060, with *Mink*, 741 P.2d at 1046. Therefore, to be safe, file a separate civil action, and move to consolidate.

363. WASH. REV. CODE § 2.24.050 (2013) (The revision statute arguable has a provision tolling the effectiveness of a Commissioner ruling, "unless a demand for revision is made within ten days from the entry of the order or judgment of the court commissioner, the orders and judgments shall be and become the orders and judgments of the superior

VI. CONCLUSION

Washington must enact stronger legislation to control actions of trustees who prosecute non-judicial foreclosures. First, trustees should be licensed by the Washington Department of Financial Institutions similar to escrows. The work of trustees is the practice of law, where deeds are prepared and recorded, priorities evaluated, legal notices filed and served, and debts collected.³⁶⁴ Many out-of-state corporations process Washington foreclosures and do not have in-state offices,³⁶⁵ despite a statutory requirement that the trustee maintain an office in this state.³⁶⁶ Trustees operating from out-of-state are often hard to communicate with and unaware of the requirements of Washington law. This difficulty was demonstrated in *Douglas*, with ReconTrust, a California corporation and a subsidiary of Bank of America, meeting the minimum statutory requirements of “physical presence.”³⁶⁷ A simple registration and monitoring system for statutory compliance would have prevented this, strengthening the plaintiff’s case. Additionally, licensing disclosures would help to remedy the conflict that arises currently when many trustees are owned or controlled by the lenders conducting the foreclosures.³⁶⁸ Moreover, these mass foreclosures by large foreclosure mills are largely co-opted by Lender Processing Service, a large corporation “managing” foreclosure processing by trustee companies.³⁶⁹ This largely eliminates direct contact between trustees and servicers, a main concern in *Klem*.

court.”). However, in practice, one should anticipate that a revision may not automatically toll the lower ruling.

364. See *Perkins v. CTX Mortg. Co.*, 969 P.2d 93 (Wash. 1999) (“selection and preparation of promissory notes and deeds of trust is the practice of law” (internal citation omitted)); see also *Washington State Bar Ass’n v. Great W. Union Fed. Sav. & Loan Ass’n*, 586 P.2d 870, 875 (Wash. 1978).

365. *Douglas v. Recontrust Co.*, No. C11-1475RAJ, 2012 WL 5470360 (W.D. Wash. Nov. 9, 2012).

366. WASH. REV. CODE § 61.24.030(6).

367. See *Douglas*, No. C11-1475RAJ, 2012 WL 5470360, at *1 .

368. See *U.S. Department of Justice, Former Executive at Florida -Based Lender Processing Services Inc. Sentenced to Five Years in Prison for Role in Mortgage-Related Document Fraud Scheme*, FBI PRESS RELEASE, June 25, 2013, available at <http://www.fbi.gov/jacksonville/press-releases/2013/former-executive-at-florida-based-lender-processing-services-inc.-sentenced-to-five-years-in-prison-for-role-in-mortgage-related-document-fraud-scheme>. Lender Processing Services, Inc. doled out foreclosures to processing mills who demonstrate only speed in completing a foreclosure. *Id.* One effort to increase speed in the process by forging necessary foreclosure documents used in court proceedings during a six year period. *Id.* The senior executive, Loraine Brown, age “56, of Alfaretta, Georgia, was sentenced” to five years in federal prison on June 25, 2013. *Id.*

369. See *id.*

Second, Washington should require trustees to be licensed attorneys.³⁷⁰ Attorneys who are licensed and insured are typically readily available to address and evaluate problems in the process, bound by rules of professional conduct, and more likely to understand the importance of complying strictly with the applicable statutes and court precedents in the non-judicial process. Lawyers would be reluctant to delegate their responsibilities to others, whereas trustees take the place of judges who adjudicate judicial foreclosures. There is no fundamental difference in the two procedures when considering what is at stake during a foreclosure; entrusting an out-of-state shell corporation to adequately ensure that the rights of all parties are protected is a stretch and has resulted in considerable litigation.³⁷¹ Most trustee companies are linked to law firms and lawyers who readily participate in the process; thus, this requirement would not present a hardship to the trustee or the lender, nor would it require any re-engineering of the foreclosure process.

Third, the Deed of Trust Act should not unduly restrict courts, as it does in its present form, by rigidly requiring five days notice of an application for an injunction, mandating bonds and payments into court, and limiting claims brought after sale. Courts are empowered with equitable powers that cannot be limited by a legislature.³⁷² Courts are better able to evaluate equities and appellate courts provide a further safety net for the homeowner in a non-judicial foreclosure.

Fourth, because of the considerable confusion among lower courts, the legislature should specifically indicate in the Deed of Trust Act that no limitation is intended as a cause of action for a violation of the Act, either post sale or pre-sale. The normal three-year tort claim statute and four-year CPA limitation is proper.

Fifth, before a non-judicial foreclosure can be instituted, all assignments of promissory notes should be required to be recorded in the county recorder's system. This protects priority of the loan from competing creditors or illegal transfers and allows homeowners to identify the owner of the obligation so it can be readily determined what programs are available to avoid foreclosure. Bankruptcy trustees assume rights to debtor assets when bankruptcy actions are filed and they need to know what entity is entitled to notice.

Sixth, Washington statute, section 61.24.127, was an ill-fated effort to avoid waiver of claims in a foreclosure and a poor compromise between

370. Gose & Harris, *supra* note 25, at 8.

371. See John E. Campbell, *Can We Trust Trustees? Proposals for Reducing Wrongful Foreclosures*; 63 CATH. U. L. REV. (forthcoming 2014) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2191738.

372. See *Bowcutt v. Delta N. Star. Corp.*, 976 P.2d 643, 647 (Wash. Ct. App. 1999); *Blanchard v. Golden Age Brewing*, 63 P.2d 397, 407 (Wash. 1936).

creditors and homeowners, ultimately achieving neither party's objectives and leaving confusion for the courts to sort out. The law should simply be eliminated. Waiver is an equitable doctrine and a court can properly apply this doctrine in the context of specific facts and equities.³⁷³ This blanket attempt by the legislature to fix the foreclosure process falls short of its goals.

Finally, any material violation of section 61.24.127 should be a per se violation of the CPA, and the Deed of Trust Act should make this clear. This per se violation is the best way to ensure private enforcement of the CPA and the protections in the Deed of Trust Act. Based upon the last three supreme court cases in this area, all of which support enforcement of wrongful foreclosure claims using the CPA, Washington courts are strongly leaning in this direction.³⁷⁴

Most lenders lose considerable money in the foreclosure process and would benefit from a performing loan, fully secured by real property. Large amounts of money are wasted on judicial actions to stop foreclosures and in bankruptcy court. Lenders should take advantage of the various government programs, such as HAMP, that provide incentives to lenders for a reduction of the interest rate, reduction of principle, and easing of the foreclosure crisis, which was largely created by these same large lenders, servicers, and the regulators who failed to protect the American economy from corporate greed.

Transfers and ownership of loans should be accessible in the public record, and not hidden from borrowers through private companies such as Mortgage Electronic Registration System.³⁷⁵ Trustees should be licensed and strictly required to comply with Washington law regarding residence, neutrality, and competence, rather than operating as another profit center for lenders. Courts should be the last resort for homeowners seeking protection of their rights under the various consumer protection laws that discourage misconduct. Compensation for victims should be made available by broadening rights to litigate pre-sale abuses for all tortious conduct during the foreclosure process.

A reasonable accommodation on a loan modification for the qualified homeowner saves money for the lender, for the homeowner, for the community, and for the justice system. Foreclosures, on the other hand, displace homeowners (often onto the public welfare system), reduce tax revenues, increase crime, and only rarely facilitate repayment in full to the lenders.

373. See *Schroeder v. Excelsior Mgmt. Grp.*, 297 P.3d 667, 683 (Wash. 2013); *Albice v. Premier Mortg.*, 276 P.3d 1277, 1282 (Wash. 2012).

374. See *Klem v. Wash. Mut. Bank*, 295 P.3d 1179, 1192 (Wash. 2013); *Schroeder*, 297 P.3d at 687; *Albice*, 276 P.3d at 1285.

375. See, e.g., *Bain v. Metro Mortg. Grp., Inc.*, 285 P.3d 34 (2012).

OFFICE RECEPTIONIST, CLERK

To: Pamela Hamilton
Cc: Andy@verislawgroup.com; katrina@glogowskilawfirm.com; Kimberly@glogowskilawfirm.com; Lauren.Sancken@klgates.com; david.lenci@klgates.com; brian.lewis@klgates.com; FredBurnside@dwt.com; SteveRummage@dwt.com; RebeccaFrancis@dwt.com; Melissa Huelsman; Frivera@perkinscoie.com; Kosullivan@perkinscoie.com; csimonsen@perkinscoie.com; Roesch, Benjamin (ATG); shannonS@atg.wa.gov; Matt Geyman; Lili Sotelo; Lisa von Biela; Sheila O'Sullivan-NWCLC
Subject: RE: Frias v. Asset Foreclosure, et al.; Case No. 89343-8: Frias' Supplemental Authority

Rec'd 5/2/2014

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Pamela Hamilton [mailto:paralegal@predatorylendinglaw.com]
Sent: Friday, May 02, 2014 3:25 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Andy@verislawgroup.com; katrina@glogowskilawfirm.com; Kimberly@glogowskilawfirm.com; Lauren.Sancken@klgates.com; david.lenci@klgates.com; brian.lewis@klgates.com; FredBurnside@dwt.com; SteveRummage@dwt.com; RebeccaFrancis@dwt.com; Melissa Huelsman; Frivera@perkinscoie.com; Kosullivan@perkinscoie.com; csimonsen@perkinscoie.com; Roesch, Benjamin (ATG); shannonS@atg.wa.gov; Matt Geyman; Lili Sotelo; Lisa von Biela; Sheila O'Sullivan-NWCLC
Subject: Frias v. Asset Foreclosure, et al.; Case No. 89343-8: Frias' Supplemental Authority

Good afternoon:

Attached please find Plaintiff Frias' Supplemental Authority with cases. Hard copies are also being delivered to all counsel of record via regular USPS mail, postage prepaid.

This pleading is being filed by attorney Melissa A. Huelsman, WSBA 30935, whose phone number is 206-447-0103 and email address is mhuelsman@predatorylendinglaw.com.

Please call or email with any questions or comments. Thank you! - Pamela

Pamela Hamilton
Paralegal
LAW OFFICES OF MELISSA A. HUELSMAN, P.S.
705 2nd Avenue, Suite 601
Seattle, Washington 98104
Telephone (206) 447-0103
Facsimile (206) 673-8220
paralegal@predatorylendinglaw.com
***Please note suite number change**