

DEC 04 2015

Ronald R. Carpenter
Clerk

No. 92081-8

**SUPREME COURT
OF THE STATE OF WASHINGTON**

**CERTIFICATION FROM UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF WASHINGTON**

LAURA ZAMORA JORDAN, as her separate estate, and on behalf of
others similarly situated,

Plaintiff

v.

NATIONSTAR MORTGAGE, LLC, a Delaware limited liability
company,

Defendant

FILED
Washington State Supreme Court
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**AMICUS BRIEF OF FEDERAL HOME LOAN MORTGAGE
CORPORATION**

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I. INTRODUCTION

Pursuant to RAP 10.6(b), amicus curiae Federal Home Loan Mortgage Corporation (“Freddie Mac”) files this amicus brief contemporaneously with its motion for permission to file an amicus brief.

This case concerns the enforceability under Washington law of contractual “Entry Provisions” contained in mortgage instruments that allow a lender to enter and secure abandoned, in-default properties. This brief presents Freddie Mac’s position on the compelling need for enforceable entry provisions such as those at issue here. Upholding the enforceability of these provisions does not prejudice borrowers, it protects lenders, and it protects the communities where in-foreclosure homes are located.

As such, the Entry Provisions are consistent with the goals of the Washington Deed of Trust Act and are therefore enforceable.

II. STATEMENT OF THE CASE

Freddie Mac joins the factual recitation submitted by Defendant Nationstar Mortgage, LLC and incorporates herein the background information about Freddie Mac set forth in Freddie Mac’s motion for permission to file this amicus brief.

III. SPECIFIC ISSUES TO BE ADDRESSED

Freddie Mac's amicus brief addresses the policy and fairness considerations raised by Plaintiff's challenge to the enforceability of the Entry Provisions.

IV. ARGUMENT

A. Freddie Mac's Background and Interest in the Case

Amicus curiae Federal Home Loan Mortgage Corporation ("Freddie Mac") is a Government-Sponsored Enterprise ("GSE"), which, along with Federal National Mortgage Association ("Fannie Mae"), is the largest owner of residential mortgages in the United States. Both are critical to the Nation's housing market.

Congress chartered Freddie Mac in 1970 to "provide ongoing assistance to the secondary market for residential mortgages" and "to promote access to mortgage credit throughout the Nation." 12 U.S.C. § 1451. Congress also directed Freddie Mac to focus on making homeownership more accessible to "low- and moderate-income families," as well as individuals living in "central cities, rural areas, and underserved areas." *Id.* Like Fannie Mae, Freddie Mac carries out its federal mission by participating in the secondary mortgage market by purchasing and guaranteeing qualifying mortgage loans and issuing mortgage-backed securities in global capital markets.

As a participant in the secondary mortgage market, Freddie Mac does not lend money directly to homeowners. Rather, Freddie Mac infuses billions of dollars into the primary mortgage market by purchasing mortgage loans from lenders. During 2014, Freddie Mac purchased (or otherwise guaranteed) \$255.3 billion in unpaid principal balance (“UPB”) on single-family mortgage loans, representing approximately 1.2 million homes. *See* Federal Home Loan Mortgage Corporation Form 10-K, at 2 (Dec. 31, 2014). During the first nine months of 2015, Freddie Mac purchased or otherwise guaranteed \$274.9 billion in UPB of single-family mortgage loans, representing approximately another 1.2 million homes. *See* Federal Home Loan Mortgage Corporation Form 10-Q, at 2 (September 30, 2015). Freddie Mac estimates that Fannie Mae, Freddie Mac, and the Government National Mortgage Association (“Ginnie Mae”) collectively guaranteed more than 90% of the single-family conforming mortgages originated in 2014. As of September 30, 2015, Freddie Mac owns or guarantees 292,218 loans secured by single-family homes in Washington, which amount to a total UPB of over \$55 billion dollars. Of these loans, 6,537 – totaling a UPB of approximately \$1.2 billion – are delinquent.

Freddie Mac and Fannie Mae’s roles in the secondary mortgage market are critical to ensuring that sufficient capital exists across the

Nation for lenders to make mortgage loans to prospective homeowners in Washington and elsewhere. Indeed, Freddie Mac's core business function is to purchase or otherwise guarantee mortgage loans. Like Fannie Mae, Freddie Mac does not service the loans it owns. Rather, it depends on lenders and loan servicers in the primary mortgage market, such as Defendant Nationstar Mortgage, to service the loans that it buys. Loan servicing includes interfacing with the borrower, invoicing and collecting mortgage payments, and otherwise managing the mortgage loan relationship with the borrower.

An unfortunate but necessary component of the mortgage business is the management of non-performing loans. When a borrower is unable to make payments and defaults on his or her mortgage, servicers must act to protect Freddie Mac's interest in the mortgage loan. For example, upon default Freddie Mac encourages its servicers to intervene early to evaluate alternatives to foreclosure, such as loan modifications, repayment or forbearance options, or other workout opportunities. Contemporaneously with these efforts, servicers must work to ensure that the property securing a particular mortgage loan does not deteriorate to such an extent that its collateral value is impaired. Foreclosure is always a last resort, but the unfortunate reality is that suitable solutions may not be found in every instance to help homeowners stay in their homes. Foreclosures therefore

must occur efficiently to ensure that Freddie Mac recovers as much of its investment as possible and as quickly as possible so that Freddie Mac's ability to continue to provide capital to lenders for originating loans is not impaired. Freddie Mac's servicing provisions, as set forth in the Freddie Mac Single-Family Seller/Servicer Guide ("Guide"),¹ operate in furtherance of this statutory mission. An integral part of this framework is Freddie Mac's property preservation requirements, which are enabled by the Entry Provisions at issue in this case.

B. The Entry Provisions are Uniform Covenants in Freddie Mac and Fannie Mae's Form Mortgage Instruments.

This case relates to provisions in a deed of trust that allow a lender to enter and secure abandoned property to protect its interest where a borrower is in default on a mortgage loan secured by such property. *See* Order Certifying Questions pp. 5-6. These Entry Provisions are in fact uniform covenants in Freddie Mac and Fannie Mae's uniform mortgage security instruments ("uniform instruments"), including the deed of trust at issue in this case. This means that these provisions appear in uniform instruments used for all States and United States territories, and as its name suggests, the language in these instruments do not vary from state to

¹ Freddie Mac's Guide sets forth, among other things, the terms and conditions under which its lenders and servicers service Freddie Mac-owned or -guaranteed loans. A full electronic copy of the Guide can be accessed at by visiting

state. See Guide Uniform Instruments at <http://www.freddiemac.com/uniform>; see also Julia Patterson Forrester, *Fannie Mae/Freddie Mac Uniform Mortgage Instruments: The Forgotten Benefit to Homeowners*, 72 Mo. L. Rev. 1077, 1083-84 (2007).

Freddie Mac requires lenders to use the uniform instruments for loans that it purchases. However, lenders may also use the forms for loans that are not ultimately sold to one of the GSE's. Thus, the uniform instruments, including the deed of trust at issue in this case, have much broader application in the mortgage industry and have, in fact, become the standard for loans sold on the secondary market. Forrester, *supra* at 1077, 1085-86; Guide Exhibit 4 ("Freddie Mac encourages originators to use the . . . [u]niform [i]nstruments whenever possible").

The uniform instruments are beneficial to consumers, most notably because of their fair terms, particularly in comparison to other consumer agreements. The original standard forms were developed in the 1970s in cooperation with consumer groups and advocates, including Ralph Nader, to revise the pro-lender forms that the mortgage industry commonly used. *Id.* at 1084. Although the two GSEs initially disagreed on some small

<http://www.freddiemac.com/singlefamily/guide/> and clicking the link "AllRegs" under the "Access the Guide" heading.

points in the forms, by the mid-1970s a single, standard form was in use for both Fannie Mae and Freddie Mac loans. *Id.* at 1085.

Since the 1970s, the Fannie and Freddie forms have maintained their consumer-friendly character, especially when compared to other form consumer credit agreements such as credit card agreements, car rental agreements, shrink-wrap agreements, and click-wrap agreements. *Id.* at 1095. The pro-consumer terms in the forms include, but are not limited to: (1) the 30-year fixed mortgage, (2) the right to prepayment without penalty, (3) pre-acceleration notices, (4) the right to reinstate, and (5) relatively lenient late fee provisions. *Id.* at 1088-94.

C. **The Purpose of the Entry Provisions is to Preserve Property Securing Delinquent Loans in Furtherance of Freddie Mac's Mission.**

As stated previously, servicers are required to remediate delinquent loans with loss mitigation and other remedial efforts, and must ensure underlying properties that secure loans are preserved and protected from *inter alia*, disrepair, deterioration or hazard. The property preservation requirements set forth in the Guide and enabled by the Entry Provisions merely operate to protect the value of the property for the benefit of all parties involved without, as Jordan contends, imposing a burden or otherwise usurping a borrower's rights. For example, upon default, a servicer must make every effort to achieve quality right party contact –

that is, contact with the personal actually responsible repaying the loan – and ascertain whether the borrower has vacated or plans to vacate the property and explore foreclosure alternatives. Guide § 64.4. Within 45 days of default, the servicer must obtain a property inspection to determine the property’s physical condition and occupancy status. Guide § 64.7. In most circumstances:

[A] property inspection is merely an exterior inspection of the property to determine:

1. The condition of the property
2. If there is any waste, deterioration or vandalism
3. The occupancy status
4. If the property has been abandoned
5. If the property is listed for sale
6. If there are obvious environmental hazards
7. If there is deferred maintenance or there are health and safety problems
8. If visible asset preservation is needed[.]

Guide § 65.30.

When a property inspection reveals that a property has been abandoned², additional requirements are imposed. *Id.* at ¶ (d).

² The Guide provides that an abandoned property is:

Specifically, servicers are required to:

1. Attempt to locate the Borrower and determine the reason for abandonment
2. Protect the property from waste, damage and vandalism, and ensure the continuation of utilities where necessary.

....

4. Ensure that property insurance is maintained....
5. Obtain interior and exterior inspections....

Guide § 67.28.

Thus, the Guide's provisions protect against Jordan's apparent concern that servicers will simply barge in to in-default owner-occupied properties. *See* Reply Brief. p. 5 (arguing that Entry Provisions may be exercised when property is abandoned or borrower is in default).

The Guide also sets forth basic security and maintenance procedures that the servicer may perform in order to preserve the property, including securing locks, doors, screens, and windows, removing trash and

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1. A property to which the owner has voluntarily and intentionally relinquished ownership, claim and control, or
 2. As otherwise defined under local laws. Factors evidencing abandonment include vacancy, waste, deterioration and lack of utilities.

Guide § 65.35.

debris, basic routine landscaping and snow removal, securing any swimming pools, winterization, and capping water, sewer, chimney, dryer vent, electric, gas, and oil. Guide Ex. 57.

Finally, as expressly provided in the Entry Provisions themselves, all actions taken by a lender or servicer must be “reasonable and appropriate” to protect Freddie Mac’s interest. *See* Jordan Deed of Trust ¶ 9 (setting forth non-exclusive list of actions a lender may take, all of which must be “reasonable and appropriate”). Contrary to Jordan’s assertions, “reasonable and appropriate” does not “limit a party’s conduct to ‘whatever’ it thinks is reasonable or appropriate.” *See* Reply Brief p. 6. It is axiomatic that all Washington contracts carry with them a duty of good faith and fair dealing:

There is in every contract an implied duty of good faith and fair dealing. This duty obligates the parties to cooperate with each other so that each may obtain the full benefit of performance. However, the duty of good faith does not extend to obligate a party to accept a material change in the terms of its contract. Nor does it “inject substantive terms into the parties’ contract”. Rather, it requires only that the parties perform in good faith the obligations imposed by their agreement. Thus, the duty arises only in connection with terms agreed to by the parties.

Badgett v. Sec. State Bank, 116 Wn. 2d 563, 569, 807 P.2d 356, 360 (1991) (citing references omitted).

Here, any lender is required to exercise its rights under the Entry Provisions reasonably and in good faith. This means that, as a matter of pure contractual law, that the Entry Provisions would ***not*** allow a lender to “forcibly enter and change the locks on a home after the borrower misses a single payment” because that would not be reasonable, appropriate, or a good faith exercise of the contractual terms. *See* Reply Brief p. 5 (making the “miss one payment” argument). Jordan’s argument to the contrary is simply a straw man and ignores the larger contractual principles that guide the parties’ relationship.

The Entry Provision and the Guide do not evidence an attempt to take possession of in-default properties or to otherwise circumvent a borrower’s right to a particular property prior to foreclosure proceedings. Rather, their purpose is to protect Freddie Mac’s interest in a loan secured by the property, all in furtherance of Freddie Mac’s mission to continue to infuse money into the primary mortgage market.

D. The Entry Provisions Further the Goals of the Deed of Trust Act.

The goals of the Washington Deed of Trust Act are threefold:

(1) that the nonjudicial foreclosure process should be efficient and inexpensive; (2) that the process should result in interested parties having an adequate opportunity to prevent wrongful foreclosure; and (3) that the process should promote stability of land titles.

Plein v. Lackey, 149 Wn. 2d 214, 225, 67 P.3d 1061, 1065 (2003), as amended on denial of reconsideration (June 6, 2003).

The Entry Provisions either support each of these goals or else do not conflict with the goals at all.

1. **The Entry Provisions Promote an Efficient and Inexpensive Foreclosure Process by Allowing Freddie Mac to Secure and Protect In-Default Properties.**

The Entry Provisions promote an efficient and inexpensive foreclosure process by contractually allowing Freddie Mac's servicers to secure and protect abandoned, in-default properties without further recourse to the judicial process. According to Jordan, servicers should be required to institute receivership proceedings or otherwise obtain additional borrower consent before exercising the Entry Provisions. Both require the expenditure of time, money, and court costs, conflicting with the cost-saving goals of the DTA as well as its fundamentally non-judicial nature.

Plaintiff's receivership solution would increase the cost of foreclosure and decrease the value of the collateral that Freddie Mac ultimately would recover through foreclosure. Where Freddie Mac expends additional sums to institute receivership proceedings or if Freddie Mac sustains losses because of damaged collateral before a receiver is appointed – the result is simply less money that Freddie Mac has to turn

around and lend to new borrowers. *Brown v. Washington State Dep't of Commerce*, No. 90652-1, 2015 WL 6388153, at *5 (Wn. Oct. 22, 2015) (describing mission and practices of Freddie Mac).

Plaintiff's solution that lenders obtain post-default consent from borrowers before engaging in property preservation is also unrealistic. As seen above, Freddie Mac already has extensive procedures in place designed to ensure contact with an in-default borrower. Requiring post-default consent to enter abandoned property would place additional requirements on top of these already borrower-friendly procedures. It is simply not plausible that borrowers who have defaulted and abandoned would regularly provide consent for their properties to be entered and secured. A borrower's refusal to provide consent would effectively bar Freddie Mac from securing or preserving an in-default property until after the minimum 120-day non-judicial foreclosure process is completed. Indeed, in the case of true abandonment, the borrower may be difficult to find, making the task of obtaining additional consent even less realistic.

Freddie Mac and other lenders need effective and inexpensive ways to protect abandoned and derelict properties over which they have security interests. The Entry Provisions provide exactly that mechanism. As seen below, not only do the Entry Provisions further the first goal of

the Deed of Trust Act, they also protect the stability of land titles and provide an opportunity to prevent wrongful foreclosure.

2. **The Entry Provisions Protect Neighboring Homeowners and the Communities in Which Delinquent Properties are Located.**

The Entry Provisions promote the stability of land titles in Washington by securing the value of neighborhoods and communities where in-default properties are located.

The Entry Provisions have a significant impact beyond individual borrowers because the Provisions protect the communities in which those homes are located by helping prevent dilapidated, unsafe, and unsightly homes from littering communities as a result of pending foreclosures. Foreclosed homes undoubtedly have a negative impact on the communities in which they are located.³ The Entry Provisions lessen that negative impact by allowing Freddie Mac, its servicers, and its contractors to maintain at least a minimum level of appearance and upkeep for abandoned homes.

This concern is articulated in numerous municipal ordinances from across the state that attempt to deal with the issue of abandoned, in-foreclosure properties. These ordinances include Spokane Municipal

³ See <http://www.seattletimes.com/business/empty-foreclosed-houses-burden-cities-neighborhoods/>

Code § 17F.070.520 (requiring lenders to register and maintain abandoned properties); Pierce County Council Resolution R2013-15 (directing various county agencies to develop and present abandoned property registry and maintenance program); Bremerton Municipal Code § 6.10 (abandoned property registration and maintenance program); Renton Municipal Code Chapter 1-3 (regulating abandoned building but not specifically referencing lenders); Lynnwood Municipal Code Chapter 16.08 (same).

Appearance and property value are not the only concerns, but the Entry Provisions protect life and limb as well. As seen above, the Guide requires servicers to secure electrical, gas, dryer vents, septic, etc., all of which could cause pollution or personal injury if simply left abandoned.

There can be little doubt that the large number of foreclosures during the Great Recession negatively impacted surrounding land values.⁴ These communities can be protected by proactive security and maintenance work performed by lenders and servicers. This work will only be done in a timely and efficient manner, however, where lenders may take advantage of contractual provisions such as the Entry Provisions

⁴ See Zandi, Mark, The Impact of Distress Sales on House Prices, The Federal Reserve Bank of New York, <http://www.newyorkfed.org/regional/compendium/session2.pdf>.

to gain access to abandoned properties. In this way, the Entry Provisions reinforce the legislative goals of the Deed of Trust Act.

3. **The Entry Provisions Do Not Prejudice Borrowers.**

The final goal of the Deed of Trust Act is that borrowers should have the opportunity to prevent wrongful foreclosure. *Plein*, 149 Wn. 2d at 225. As applied here, this goal means that a borrower must have an adequate remedy in the rare event that a lender or servicer violates the Entry Provisions – such as by entering and securing property that is not actually abandoned.

Freddie Mac takes no position on the merits of Jordan's claims that Nationstar wrongfully entered her property. *See* Order Certifying Questions pp. 4-7. What is clear, however, is that Jordan believes she suffered damage as a result of this entry and has sued seeking damages for the same. Just as with a wrongful foreclosure lawsuit, a suit for trespass or trespass to chattels provides a robust remedy to a borrower who is damaged by violation of the Entry Provisions.

The core contractual concept of mitigation of damages underlies the entirety of the Entry Provisions. The Entry Provisions allow a servicer to mitigate its damages when the borrower defaults on his or her loan. Similarly, by re-keying one of the doors on property where the servicer has entered pursuant to the Entry Provisions, the servicer is ensuring that

property remains secure after it has left. Indeed, in the rare circumstance that a servicer enters property that has not been abandoned (as alleged here), re-securing the property mitigates damages that a borrower might suffer by making sure that the property does not remain accessible to the public at large.

Indeed, there is nothing fundamentally unsound about the Entry Provisions themselves. As explained above, the Entry Provisions only operate when the lender has reason to believe that the borrower has defaulted and abandoned the subject property. State tort law claims provide an adequate remedy to any borrower injured by wrongful implementation of the Entry Provisions.

V. CONCLUSION

While any foreclosure of a home is unfortunate, the Deed of Trust Act recognizes that foreclosures can be performed in a way consistent with Washington State's public policy goals. Whether or not the Entry Provisions are enforceable must be judged against these public policy goals. As explained above, the Entry Provisions make the foreclosure process cheaper and more efficient, they protect the value of land in communities in which foreclosed properties are located, and they do not deprive borrowers of legal remedies in the case they are inappropriately

implemented. As such, the Entry Provisions are enforceable and, respectfully, this Court should rule accordingly.

RESPECTFULLY SUBMITTED December 4, 2015.

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I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Executed on this 4th day of December, 2015, at Seattle, Washington.


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Case Number: 92081-8
Case Name: Jordan v. Nationstar Mortgage , LLC
Pleading Names: Motion for Permission to File Memorandum of Amicus Curiae
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Amicus Brief of Federal Home Loan Mortgage Corporation
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