# Wrongful Foreclosures in Washington

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## 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]

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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 Issue5 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/statsandtrends/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 FORREST L. REV. (forthcoming Issue5 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 judgments[14] 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 the be *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 trustees[27] 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/businesstechnology/2022333977_bizharney01xml.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 Dept 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. Stoebuck & 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 pursing 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 rule[62] 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 question[66] 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 countervailing 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 distress[87] 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 requests 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 at., *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 Treasury[96] 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 modification if the homeowner (1) stops making normal payments for three months;[98] (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 actionable[100] 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]

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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 appliea 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 wavier 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' notice[143] 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 statue 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 Wavier 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. Ticor 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 price[171] 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; s*ee, 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 easy 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. Maas[216] 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); Ronzone 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 trial[254] 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 opinon).

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,'" 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* case[282] 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 by 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 restitution[353] 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 trustee . . . .[361]

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*.

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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).