



COUNSELOR'S CORNER

Recent Deed of Trust Act Cases Pose New Challenges

By Andrew G. Yates, Lane Powell PC



In 2013, Washington courts issued several decisions impacting the way banks, loan servicing companies, foreclosure trustees and other industry participants must approach claims arising out of nonjudicial foreclosure proceedings against residential real property.

Washington Supreme Court Cases

Lawyers often say that “bad facts make bad law” and *Klem v. Wash. Mut. Bank*, 176 Wn.2d 771, 295 P.3d 1179 (2013), proves that this adage still holds true. In *Klem*, the guardian ad litem (“GAL”) desired to sell property to pay for the incapacitated owner’s care. The GAL had an agreement to sell the property, but the closing date was a month after the scheduled foreclosure sale. The trustee refused to postpone because it

had a policy of not doing so unless the beneficiary expressly authorized a continuance. A third party purchased the property for a dollar more than the total amount due and promptly resold it for a substantial profit. The court held that the trustee’s deference to the beneficiary and failure to exercise independent discretion was an unfair or deceptive act or practice under Washington’s Consumer Protection Act (“CPA”). The court also held that the trustee’s act of falsely dating and notarizing the Notice of Trustee Sale satisfied the first three elements of a CPA claim — (1) an unfair or deceptive act or practice, (2) that it impacts the public interest, and (3) occurs in trade or commerce. Importantly for banks and loan servicers, the court stated in a footnote that if the beneficiary controlled the trustee so as to make it the beneficiary’s agent, the benefi-

ciary could be vicariously liable for the acts of the trustee. Without substantial analysis or discussion of other relevant cases and statutes, the *Klem* court also suggested that the Deed of Trust Act’s (“DTA”) waiver doctrine applied only to challenges to the sale itself, although the doctrine had previously barred most post-sale claims for damages and challenges to the sale’s validity.

In *Schroeder v. Excelsior Management Group, LLC*, 177 Wn.2d 94, 297 P.3d 677 (2013), the court held that parties may not alter by contract the DTA’s requirement that land must be primarily nonagricultural in character to be sold via a nonjudicial foreclosure. The *Schroeder* decision is a strong signal from the Washington Supreme Court that the DTA will be construed strictly, in the borrower’s favor, and that its requirements can rarely, if ever, be altered, even by agreement of the parties to a deed of trust.

More important cases are coming. The court will issue opinions in *Frizzell v. Murray*, No. 87927-3, and *BAC Home Loans LP v. Fulbright*, No. 88853-1. *Frizzell* involves whether the grantor of a deed of trust waived the right to assert post-sale challenges where the grantor obtained an order restraining the sale but failed to comply with conditions that the grantor pay the amount owed into the court registry. *Fulbright* concerns whether a bank may redeem a condominium unit where a superpriority condo assessment lien is foreclosed upon but the bank recorded its deed of trust before the condo fees became delinquent, and if not, whether a 2013 amendment to RCW 6.23.010(1)(b), the redemptioner statute, applies retroactively to permit the bank to redeem the property.

Washington Court of Appeals Cases

In *Walker v. Quality Loan Service Corp.*, 308 P.3d 716 (2013), the Washington Court of Appeals recognized a pre-sale cause of action for damages against a trustee for material failures to comply with the DTA or actions taken without property authority. The court also held that a beneficiary may be vicariously liable for the trustee’s actions



and applied a low standard for alleging the injury and causation elements of a CPA claim that is arguable at odds with other important CPA cases. However, the change in the law represented by *Walker* may be short-lived. Whether DTA supplies a pre-sale claim for damages and if so, what principles govern the claim under the DTA and CPA are questions certified to the Washington Supreme Court in *Frias v. Asset Foreclosure Services*. Thus, the way courts analyze statutory damages claims in pre-sale cases will likely change again.

In *Bavand v. OneWest Bank*, the court found that on the record before it, there was not enough evidence of OneWest or Mortgage Electronic Registration Systems, Inc.'s authority to appoint the successor trustee and thus the trustee lacked the authority to exercise the power of sale in the plaintiff's deed of trust. The *Bavand* decision also recognized the possibility that the failure to comply with the DTA provision on appointment of successor trustees could result in CPA liability.

Finally, in *Rucker v. NovaStar Mortgage*, 2013 WL 5537301, the applicable pooling and servicing agreement ("PSA") allowed the loan servicer to foreclose in its own name, but because other language in

the PSA indicated that the servicer was at least for some purposes an independent contractor rather than an agent of the loan owner, the court found that there were genuine questions as to whether the servicer could appoint the successor trustee and whether the borrowers had waived the right to challenge the sale's finality.

In sum, these cases confirm that courts are likely to continue to construe the DTA strictly and in the borrower's favor, with the biggest impact likely still to come when the Washington Supreme Court decides *Frias*. 



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