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WASHINGTON DEED OF TRUST ACT AND RECENT DEVELOPMENTS

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I. Introduction.

The most common instrument used to create a security interest in real property in Washington is the deed of trust. The Deed of Trust Act (DTA or Act) was enacted in Washington in 1965.[1] The DTA has since been amended several times in response to specific issues that have arisen in its application. The DTA was intended to bring Washington mortgage practice into the "modern" era of finance.[2] The Act has provided a relatively simple and efficient method of creating a mortgage lien on real property and foreclosing the lien in the event of borrower default in residential and commercial transactions.[3] The most recent amendments to the DTA have attempted to provide additional consumer protection elements to the non-judicial foreclosure process to assist homeowners. It is not clear whether these amendments will succeed in providing any meaningful relief to homeowners with mortgages or whether the amendments will only delay and complicate the foreclosure process.

II. The Washington Deed of Trust Act

A deed of trust is a three-party security instrument that, in Washington, is a mortgage variant. In a typical transaction in which the deed of trust secures the payment of a promissory note, the "grantor" is the borrower and owner of the encumbered property; the "beneficiary" is the lender and the "trustee" is a third party that is granted a power of sale for the property. If the grantor defaults in its payment obligations to the beneficiary, the trustee sells the property and the proceeds of the sale are applied first to satisfy the grantor's debt to the beneficiary and any excess is paid to the grantor.

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[1] Laws of 1965; ch. 74, codified as Chpt. 61.24 RCW.

[2] "By enacting the Deed of Trust Act, with its private sale provisions, Washington has . . . taken a substantial step in modernizing its archaic real property realization procedures." Gose, *The Trust Deed Act in Washington*, 41 Wash. L. Rev. 94, 104 (1966).

[3] While it is difficult to obtain the total number of mortgage transactions in the State of Washington from 1966 through the present date that have utilized deeds of trust, the number of re-sales of existing houses gives some basis for making an estimate. In 2011, according to data from the Washington Center for Real Estate Research at Washington State University (since merged with the Runstad Center for Real Estate Studies at the University of Washington http://www.wcrer.wsu.edu/default.aspx), there were approximately 350,000 re-sales of existing homes (that was down from approximately 485,000 re-sales in 2007). While not all of these transactions involved a deed of trust, these figures do not include sales of new homes, commercial mortgage transactions or refinances. It is not hard to imagine that in the 47 years since enactment, there have been more than 10 million deed of trust transactions. During that same period, there have been less than 50 reported cases involving a challenge to the enforcement of the DTA or interpretation of the statute arising from those transactions.

Deeds of trust were originated as part of the English system of mortgage finance.[4] As such, the device was part of the common law applicable to Washington.[5] The principal feature of a deed of trust was the ability of the trustee to sell the property pursuant to the power of sale without resorting to a court action in equity to foreclosure.[6] The benefit of utilizing a deed of trust with a power of sale was severely limited, however, by the Washington territorial legislature in the adoption in 1869 of what is now RCW 7.28.230:

> A mortgage of any interest in real property shall not be deemed a conveyance so as to enable the owner of the mortgage to recover possession of the real property, without a foreclosure and sale according to law: . . .

The disenchantment of the lending community with the Washington foreclosure process became evident in the 1950s with law review articles[7] and legislative efforts to amend the foreclosure statute. The principal complaints centered on the length of the statutory redemption period and the cost and delays associated with the judicial foreclosure process.[8] After attempts in 1955, 1957, 1959, 1961, and 1963, efforts to make the foreclosure process more "efficient" culminated in the enactment of the DTA in 1965.

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[4] See Gose & Harris, *Deed of Trust: Its Origin and Development in the United States and in the State of Washington*, 32:3 REAL PROPERTY PROBATE & TRUST 8 (WSBA, Summer 2005) for a more complete discussion of the history of deeds of trust under English and American law.

[5] For a discussion of the theoretical nonjudicial foreclosure of a deed of trust pursuant to a power of sale in the Washington Territory prior to 1869, see *Kennebec v. West One Bank*, 88 Wn.2d 718, 724 (1977).

[6] "The object of the insertion of such power of sale was to enable the mortgage to be foreclosed, and the interest of the mortgagors in the property divested, without a suit in equity." *First National Bank of Seattle v. Woolery*, 6 Wash. 215, 217 (1893), in discussion the exercise of the power of sale in a chattel mortgage.

[7] See Comment, *Statutory Redemption: The Enemy of Home Financing*, 28 Wash.L.Rev. 39 (1953); Shattuck, *Security Transactions*, 36 Wash.L.Rev. 303 (1961).

[8] "Our entire method∑ of foreclosure is extremely cumbersome and therefore costly. At the present time the minimum cost of foreclosure in Washington is between 250 and 300 dollars." Comment, *Statutory Redemption*, *supra*, p. 45. Professor Shattuck, in commenting on a 1961 amendment to RCW 6.24.140 shortening the period of redemption to eight months, left no doubt as to his low regard for the Washington foreclosure process:

> This patently ineffectual legislation is the only tangible progress so far achieved in a drive which began in 1955, for reform of Washington's obsolete and inefficient real property mortgage foreclosure system. . . . Since 1869 Washington mortgage foreclosures have been regulated by the general-execution-statute provision for redemption after the sheriff's sale. This is a feature unknown to the common law or to equity . . .
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> By reason of its continued adherence to both the judicial-proceding [sic] type of foreclosure and also the redemption-after-sale type of mortgage statute, Washington is close to achieving the position of being the state in which it costs the most and takes the longest to realize on a real property mortgage.

Shattuck, *supra*, p. 310.

The DTA was relatively straightforward.[9] To create a deed of trust, the security instrument (i) was executed by the grantor, (ii) conveyed the property to a qualified trustee,[10] (iii) granted to the trustee a power of sale and (iv) recited that the property was not used for agricultural purposes. When the obligation secured by the deed of trust was satisfied, the trustee, at the request of the beneficiary, "reconveyed" the property to the grantor.

In the event of a default, so long as (i) the deed of trust was recorded, (ii) no other action was pending on the obligation secured by the deed of trust, (iii) 180 days elapsed between the date of the sale of the property and the recording of the notice of default, (iv) specified notices were mailed, posted and published commencing 120 days prior to the sale, the trustee was authorized to sell the property at a private sale.[11] The proceeds of the sale were applied first toward the costs of sale, then in satisfaction of the secured obligation and finally to the grantor (or whoever else was entitled to the excess proceeds).[12]

The basic structure of resolving defaults with a mortgage foreclosure and a nonjudicial foreclosure under the DTA were similar. In a judicial foreclosure, the lender would typically declare a default and accelerate the balance due under the secured note following a default; the judicial foreclosure provided notice to the borrower and all junior lien claimants that the foreclosure was taking place since the borrower and all junior lien claimants were required to be named in the foreclosure action and receive service of process; the duration of the foreclosure proceeding and the redemption period following the foreclosure sale provided the borrower and junior lien claimants with the opportunity to cure the default and maintain ownership of the property; and protection for the borrower from lenders taking advantage of dislocations in the market was provided through the upset price (prior to the foreclosure sale) and fair value hearing (after the foreclosure sale).[13]

The DTA had these same procedural elements, albeit in a different order and with different time frames. In a nonjudicial foreclosure, the lender would typically declare a default and accelerate the balance due under the secured note; notices of the nonjudicial

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[9] The DTA, as enacted in 1965, had 13 sections and was printed on a little over five pages.

[10] Laws of 1965, ch. 74, §§ 1(2) & §2.

[11] Laws of 1965, ch. 74, §§ 3 & 4.

[12] Laws of 1965, ch. 74, §8.

[13] Laws of 1935, ch. 125, §1 (codified as part of RCW 61.12.060): ". . . The court, in ordering the sale, may in its discretion, take judicial notice of economic conditions, and after a proper hearing, fix a minimum or upset price to which the mortgaged premises must be bid or sold before confirmation of the sale. The court may, upon application for the confirmation of a sale, if it has not theretofore fixed an upset price, conduct a hearing, establish the value of the property, and, as a condition to confirmation, require that the fair value of the property be credited upon the foreclosure judgment. . . ."

foreclosure were provided to the borrower and all junior lien claimants;[14] there was a cure period of 180 days *prior to the sale* during which the borrower or junior lien claimants could cure the default and preserve their interests in the property; following the sale there was no right of redemption, but the debt secured by the deed of trust was deemed to have been satisfied.[15]

Both judicial and nonjudicial foreclosure procedures provided (i) the lender a method to realize upon its collateral; (ii) notices to the borrower and junior lien claimants to enable them to protect their property interests; (iii) an opportunity for the borrower to cure; and (iv) protection to the borrower from deficiency judgments. Both schemes also granted special treatment to farms – in the case of the DTA, agricultural property was excluded from the nonjudicial foreclosure process; in the case of judicial foreclosures, a one-year redemption period was guaranteed following a judicial foreclosure sale of farmland.[16] The emphasis of the DTA was upon shortening the time necessary for a mortgagee to obtain title to property following default, minimizing judicial involvement in the foreclosure process and providing protection to the borrower by eliminating the possibility of deficiency judgments.

III. Judicial Interpretation and Amendments

Almost from the date the DTA was enacted, there were proposals to modify the statute. These proposals have addressed perceived problems with the statute that detracted from its goal of promoting efficiency (i.e. speed) and minimizing judicial intervention in the foreclosure process and issues raised by various judicial decisions interpreting the DTA.

Prior to 2008, the DTA was amended ten (10) times. These amendments fell into five general categories: (1) amendments to clarify what were perceived to be internal ambiguities in the statute; (2) amendments reflecting language and grammatical changes (such as eliminating male pronoun references); (3) amendments to address issues raised by specific court decisions and issues encountered by lawyers and title companies in the nonjudicial foreclosure process; (4) amendments providing additional consumer protections for residential borrowers; and (5) amendments providing additional rights to lenders against guarantors and borrowers in commercial transactions. For the residential borrower, none of these amendments altered the basic structure of the DTA – following a default, the residential borrower had six months to cure and a nonjudicial foreclosure extinguished all rights of the borrower in the property and all obligations of the borrower to the lender. The issues addressed in the published opinions construing the DTA have focused on challenges to compliance with the statutory procedures for a nonjudicial sale, disputes concerning rights in surplus funds following foreclosure and resolution of claims by the borrower against the lender asserted during or after the nonjudicial foreclosure process.

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[14] Laws of 1965, ch. 74, §4(1).

[15] Laws of 1965, ch. 74, §5 & §10.

[16] See Laws of 1965, ch. 74, §3(2) and RCW 6.23.020 and 61.12.095.

The first amendments occurred in 1967 to address various issues raised immediately following the adoption of the DTA.[17] Section 4 of the DTA (RCW 61.24.040) was amended to shorted the time period for recording a notice of default to 120 days prior to the sale, but the requirement that the nonjudicial sale of the property could not take place any sooner than six (6) months from the date of default giving rise to the right to foreclose was not changed. The provision requiring that no other action be pending to enforce the obligation secured by the deed of trust was deleted (although the condition that no other action be pending remained under RCW 64.21.030(4) as a condition to foreclosure). The procedure for obtaining possession of the property following foreclosure was shifted from an action under Chpt. 59.16 RCW to Chpt. 50.12 RCW. The method of handling surplus funds from the bid were changed so that the trustee was relieve of any obligation after depositing the surplus funds with the clerk of the court in the county in which the property was located. Section 9 of the DTA (RCW 61.24.090) was amended to make it clear that junior lien holders that cured a default were entitled to add the cure amounts to the obligation secured by their lien and a procedure was added to require the trustee to record a notice in the event the default was cured.[18]

In 1975, the DTA was amended to (1) allow title agencies and U.S. government agencies to act as trustees; (2) allow an employee or an agent of the beneficiary to be the trustee; (3) require additional notices thirty days prior to the sale alerting the owner of the property to the amount due and that additional costs would be incurred if the default were not cured; (4) specify the form of notice to be given 120 days prior to foreclosure to include additional disclosures to the grantor/borrower; (5) permit the continuance of the sale for a period of up to thirty days; (6) require that the scheduled sale could not occur prior to 190 days after the default occurred giving rise to the right to foreclose; (7) cap trustee's fees at $25 to $75 plus reasonable attorney's fees and total trustee and attorney fees if the foreclosure involved a single-family dwelling were not to exceed $250; and (8) clarify the bonding requirements for restraining a sale of a single-family residence.[19]

The additional notice requirements in the 1975 amendments to the DTA (particularly the necessity to seek a restraint of the sale in order to dispute the secured obligation) were perhaps in response to the first reported decision construing the DTA, *Peoples Nat. Bank of Wash. v. Ostrander*, 6 Wn.App. 28 (Wn.App. 1971). *Ostrander* was the first of several cases dealing with the ability of grantors to assert claims against the beneficiary following a nonjudicial sale. The defendants granted a deed of trust to Peoples National Bank. Following default and nonjudicial foreclosure, the defendants asserted various claims against the Bank in an unlawful detainer proceeding commenced pursuant to RCW 61.24.060 to recover possession after the nonjudicial sale. The trial

[17] The changes to the DTA in this amendment were suggested in a 1966 Washington Law Review article summarizing the DTA authored by John Gose, a lawyer involved in drafting the DTA. Not included in the amendment were the proposals (1) allowing reasonable discretion for the time and place of sale; (2) providing for deficiency judgments and (3) expressing the legislative intent in favor of utilization of deeds of trust. Gose, supra, at pp. 104-107.

[18] Laws of 1967, ch. 30.

[19] Laws of 1975, 1st Ex. Sess., ch. 129.

court dismissal of the defendants' claims was affirmed. The Court, in what would become a consistent interpretive theme in DTA litigation,[20] found that the failure of the defendants to seek to restrain the sale was fatal to any attempt to litigate claims related to the transaction that resulted in the granting of the deed of trust following nonjudicial foreclosure:

> The statutory scheme of the act gives the purchaser at a trustee's sale the right to possession on the twentieth day following the sale. RCW 61.24.060. The act was designed by the legislature to avoid time-consuming judicial foreclosure proceedings and to save substantial time and money to both the buyer and the lender. . . . By the terms of the act it is clear the legislature did not contemplate that after the trustee's sale further lengthy proceedings would be required to obtain possession. . . .
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> . . . On May 16, 1970 they [the defendants] were served with notice of sale to be held September 25, 1970. At any time between May 16 and September 25 they could have restrained the sale and litigated the issue of fraud. . . . To allow one to delay asserting a defense until this late stage of the proceedings would be to defeat the spirit and intent of the trust deed act. We hold RCW 61.24.130 affords the grantor an adequate remedy at law and find no error in striking defendants' cross-complaint and amended answer.

Ostrander, id. at pp. 31 – 32.

Amendments in 1981 (1) made further changes to the definition of a permitted trustee; (2) deleted the limitations on trustee fees for residential foreclosures; (3) imposed additional conditions for the entry of an order restraining a sale; (4) changed the wording

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[20] See *Plein v. Lackey*, 149 Wn.2d 214 (Wash. 2003) [Failure to seek to restrain sale as provided under the DTA waived any right to seek to set aside the nonjudicial on the grounds that no debt was due even though grantor had commenced an action seeking an injunction against the enforcement of the deed of trust and the secured note]; *Brown v. Household Realty Corp.,* 146 Wn.App. 157 (2008) [Failure to seek restraint of sale waived all claims that could be asserted against the lender in connection with the transaction giving rise to the deed of trust]; *CHD, Inc. v. Boyles,* 138 Wn.App. 131 (2007) [failure to seek restraint of sale under RCW 61.24.130 precluded assertion of statute of limitations defense to underlying obligation even though grantor had commenced a declaratory judgment action asserting the defense]; *Olsen v. Pesarik*, 118 Wn.App. 688 (2003) [Action to restrain nonjudicial sale was proper means to dispute the amount owed under the secured obligation]; *Woolworth v. Micol Land Co.,* 55 Wn.App. 671 (1989) [Failure by junior creditor to seek to restrain sale waived claim that nonjudicial sale was conducted in violation of the automatic stay applicable in grantor's bankruptcy]; *Carlson v. Gibraltar Savings of Washington, F.A.,* 50 Wn.App. 424 (1988) [laches barred maintenance of an action to set aside a nonjudicial sale commenced three years following the foreclosure even though in other litigation it was determined that the lender did not have a right to foreclose.]; *In re Marriage of Kaseburg*, 126 Wn.App. 546, 108 P.3d 1278 (Wn.App. Div. 2 2005) [Failure of spouse to seek to restrain sale removed the debt and property involved in the sale from a subsequent divorce proceeding and the trial court erred in recalculating the amount of debt and value of the property in connection with making an award to the spouse]

of the statutory notice and publication requirements prior to sale;[21] (5) increased the period for postponement of the sale up to one hundred-twenty days and (6) made various "cleanup" amendments to the DTA language.[22]

Reported decisions that construed the DTA between the 1975 and 1981 amendments included challenges to the validity of the basic scheme of the statute. In *Helbling Bros., Inc. v. Turner*, 14 Wn.App. 494, 497-498 (1975), the Court of Appeals affirmed the right of beneficiary of a deed of trust to judicially foreclose and obtain a deficiency judgment against the borrower ("Where an individual elects to foreclose the deed of trust pursuant to the terms of RCW 61.24.040, the terms of RCW 61.24.100 are made operative, precluding the entry of a deficiency judgment or establishing a redemption period. Respondent, not having elected to foreclose the deed of trust pursuant to the terms of RCW 61.24.040, was not precluded from obtaining a deficiency judgment." *Id*., at 497-498).[23] The Supreme Court in *Kennebec, Inc. v. Bank of the West*, 88 Wn.2d 718 (1977) upheld the constitutionality of the DTA and rejected the argument that the nonjudicial foreclosure process violated the due process rights of the grantor/borrower. In *Rustad Heating & Plumbing Co. v. Waldt*, 91 Wn.2d 372 (1979) the Supreme Court held that a deed of trust was a species of mortgage and therefore the beneficiary of the deed of trust was entitled to exercise a right of redemption under RCW 6.24.130(2) following the foreclosure of a labor lien and subsequent sale of the encumbered property.

During this time period, the first challenge occurred to a nonjudicial sale based upon alleged improper conduct of the trustee. In *McPherson v. Purdue*, 21 Wn.App. 450 (1978), the attorney for the beneficiary conducted a nonjudicial sale of encumbered property following a default by the grantor. The notices of sale and trustee's deed purported to convey two easements benefitting the encumbered property, although the notices and deed also disclaimed all express and implied warranties associated with the property. The trustee, who was also the attorney for the beneficiary,[24] knew that the

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[21] The changes in Laws of 1981, ch. 161, §3 relating to the timing of publication of notice of the nonjudicial sale ("once between the thirty-second and twenty-eighth day before the date of the sale, and once between the eleventh and seventh date before the date of sale" replacing the prior requirement that notice be published "weekly during the four weeks preceding the time of sale") addressed the issue raised in *Morrell v. Arctic Trading Co., Inc.,* 21 Wn.App. 302 (1978). In that case, the court was asked to determine whether the weekly publication requirement involved a "legal week" (a seven-day period) or a "calendar week" (Monday through Sunday). The court did not directly answer that issue, but concluded that since notice of the sale was published four times during the twenty-eight day period prior to the date of sale, the requirements of RCW 61.24.040(1)(f)(3) were satisfied.

[22] Laws of 1981, ch. 161.

[23] In *Thompson v. Smith*, 58 Wn.App. 361 (1990), a deed in lieu of foreclosure was deemed to be the equivalent of a nonjudicial foreclosure, barring any action for deficiency.

[24] As noted above, the 1975 amendments to the DTA permitted agents and employees of the beneficiary to serve as a trustee. "Former RCW 61.24.020 prohibited such persons as Doezie from acting as trustee; this prohibition was removed by Laws 1st Ex.Sess.1975, ch. 129 § 2, which did not become effective until September 8, 1975, some three months after the trustee's sale here. Although Doezie was the agent of Bank

grantor did not own one of the easements. The purchaser at the nonjudicial sale sued the beneficiary when it was discovered that title to the second easement was not included in the sale. Noting that the DTA did not provide any specific answer to the issue of the duty of the trustee to prospective purchases, the Court reviewed decisions from other jurisdictions to conclude that the trustee had a very limited duty of disclosure:

> . . . [the trustee's] status as Bank of the West's agent did not affect his duty to prospective buyers because, performing as trustee, Doezie was required to act as the agent of the beneficiary in foreclosing the deed of trust. [citation omitted] Doezie [the trustee] would only have owed a duty to prospective purchasers if he had made any representations or answered any questions concerning title; in that case, he would have owed them a duty of full and accurate disclosure. [citations omitted] Offering the property for sale as described in the deed of trust was all that Doezie was required to do [citation omitted] and his disclaimers of warranty of title or encumbrances were sufficient to negate the existence of even that limited duty on his part.

Id. at 453-454.[25]

Following the 1981 amendments, the validity of deeds of trust as liens on homesteads was challenged. Although the major portion of the opinion in *Mahalko v. Arctic Trading Co., Inc.,* 99 Wn.2d 30 (1983), involved a discussion of the timing of attachment of judgment liens to homestead property under Chpt. 6.12 RCW, a critical portion of the opinion dealt with whether a deed of trust was a valid lien on the homestead. In resolving a dispute over the relative priority of a judgment lien and a deed of trust affecting homestead property, the Court concluded that a deed of trust was a "mortgage" under RCW 6.12.100 and encumbered the homestead:

> Contrary to counsel for Mahalko's oral argument, a deed of trust is not an invidious instrument by which a creditor can take full advantage of the judgment debtor. A deed of trust may be nonjudicially foreclosed, but at the same time, it is not subject to acceleration as is a mortgage. A grantor may cure his or her default until 10 days before the trustee's sale by making back payments plus costs. RCW 61.24.090. Both the deed of trust and the mortgage have their respective advantages, but each is a lien for the purposes of RCW 6.12.100.

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of the West and could not legally act as trustee, McPherson does not challenge this illegality nor seek to set aside the sale." *McPherson*, 21 Wn.App. at 453.

[25] Although Washington courts have not applied a strict "caveat emptor" standard to purchasers at trustees' sales, decisions have emphasized the obligation of the purchaser to inform itself concerning the status of the property and have not been sympathetic to reading any implied representations into the trustee's notices. For a similar result, see *Mann v. Household Finance Corp. III*, 109 Wn.App. 387 (2001), rejecting a claim that the trustee and beneficiary had an obligation to notify the purchaser at a nonjudicial sale that there existing a senior deed of trust encumbering the property.

Id. at 38.

The following year, the Supreme Court rejected the argument that deeds of trust encumbering homestead property must be judicially foreclosed. In *Felton v. Citizens Federal Sav. and Loan Ass'n of Seattle*, 101 Wn.2d 416 (1984), the Court held that a nonjudicial sale under the DTA was neither a "forced sale" nor an execution as defined by RCW 6.12.090 and therefor not exempted by that statute from sale.[26] A ruling to the contrary would have more or less eliminated the attractiveness of using a deed of trust to finance home loans.[27]

In 1985, the Supreme Court dealt with another challenge to a nonjudicial sale based on the conduct of the trustee, but this challenge was made by the borrower/grantor instead of the purchaser at the sale. *Cox v. Helenius*, 103 Wn.2d 383 (1985) involved just about every bad fact possible for a nonjudicial sale:

- The property involved was a single family residence;
- The secured debt arose from defective repairs to a swimming pool;
- The cost to correct the defect work was more than the original bill;
- The trustee under the deed of trust was the attorney for the pool repair company;
- The house was worth $200,000 to $300,000, with at least $100,000 of equity;
- Prior to the sale the owner of the house had commenced a lawsuit seeking damages against the repair company and also sought to enjoin the sale;

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[26] The Court did have occasion to revisit the language that had been used in *Mahalko*, *supra*: "We note that in [*Mahalko*], we held, in part, that a deed of trust is equivalent to a mortgage within the meaning of RCW 6.12.100 and that homestead property, upon which a creditor held a valid deed of trust, could thus be reached by execution under this section. Although both parties in Mahalko apparently realized that a nonjudicial foreclosure under a deed of trust is distinguishable from a judicial execution under a mortgage, neither party argued that a deed of trust falls outside the provisions of RCW 6.12.090 due to this distinction. This issue was raised for the first time in the instant case. Upon examining this question, we agree with respondents that a deed of trust is valid against homestead property because it reaches the homestead by means of nonjudicial foreclosure. As such a sale is not an "execution" under RCW 6.12.090, that statute is simply inapplicable. *Felton*, 101 Wn.2d at 423-424.

[27] The lien of a junior deed of trust also attaches to the excess sale proceeds from a foreclosure of a senior encumbrance and is superior to the owner's homestead right. *In re Upton*, 102 Wn.App. 220 (2000). If the holder of the junior deed of trust obtains a judgment against the grantor rather than foreclosing the junior deed of trust, the lien of the deed of trust still attaches to any excess sale proceeds from the nonjudicial sale of the senior lien. See *Boeing Employees' Credit Union v. Burns*, 66420-4-I (WACA Div. I, March 19, 2012). If the deed of trust is given in connection with a guaranty of a commercial loan, the homeowner may be entitled to retain its homestead exemption following foreclosure. *In re Trustee's Sale of Real Property of Brown*, 161 Wn.App. 412 (2011). After some confusing language in *Washington Mut. Sav. Bank v. United States*, 115 Wn.2d 52, 793 P.2d 969 (Wash. 1990), that raised a question as to whether junior obligations survived the nonjudicial foreclosure of the senior deed of trust, the Supreme Court made clear in *Beal Bank v. Sarich*, 161 Wn.2d 544 (2007) that even though the foreclosure of the senior deed of trust eliminates the junior lien, the indebtedness is not affected and the holder of the junior obligation has the right to obtain a judgment against the grantor for the junior indebtedness.

- The attorney for the homeowner met with the attorney for the pool repair company shortly before the sale to discuss settlement and believed that the sale would not be conducted;
- The sale price of the property at the nonjudicial sale was $11,798; and
- The purchaser at the sale, which occurred two weeks before Christmas, was a disbarred attorney

The problem for the homeowner in *Cox, supra*, was that although a lawsuit had been commenced seeking damages and a permanent injunction against the nonjudicial sale, the grantor of the deed of trust never sought to restrain the sale in accordance with RCW 61.24.130. The Supreme Court held, however, that the existence of the lawsuit by the homeowner challenging the secured obligation and the trustee's knowledge of the existence of the lawsuit meant that trustee knew that the requirement that no other action be pending to challenge the debt was not satisfied. Conducting the sale with that knowledge rendered it "void:"

> The Coxes failed to apply for an order restraining the sale, although they requested that relief in their amended complaint. Here, however, the trial judge properly determined that the lawsuit the Coxes filed after receiving the notice of default but prior to initiation of foreclosure constituted an action on the obligation. Therefore, one of the statutory requisites to nonjudicial foreclosure was not satisfied.

Cox, 103 Wn.2d at 388. The Court also noted that even if the statutory prerequisites to foreclosure had been satisfied, the conduct of the trustee and the grossly inadequate purchase price would be sufficient to void the sale.[28] The trustee had fiduciary duties to both the grantor and beneficiary, and the status of the trustee as the attorney for the beneficiary may well have created a conflict that could not be reconciled with the Code of Professional Responsibility.

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[28] Although grossly inadequate purchase price may be grounds to set aside the sale at the request of the grantor/borrower, the beneficiary faces greater difficulty in attempting to overturn a sale in the event the trustee makes a mistake in accepting a low bid. In *Udall v. T.D. Escrow Services, Inc.*, 159 Wn.2d 903 (2007), the beneficiary and trustee were unable to rescind a sale when the trustee mistakenly accepted a bid of $59,422.20 when the debt owed to the beneficiary was $159,421.20:

> It is the interests of trustee T.D., which can avoid potential liability by repudiating the sale, and third party purchaser Udall, that are truly at stake in this case. The Act was not promulgated to protect and benefit trustees to the detriment of purchasers. Allowing repudiation of a nonjudicial foreclosure sale based solely on a deficiency in price would result in a low opening bid triggering doubt about the sale's finality. This, in turn, would deter buyers and impair the efficacy of the nonjudicial foreclosure process. Undermining public confidence in the finality of foreclosure sales is contrary to the Act's goals of promoting efficient, inexpensive, and procedurally sound foreclosures and the stability of land titles. *Id.*, at 916.

The result in *Udall*, *supra*, was effectively overruled by Laws of 2012, ch. 185, §14, which, effective June 7, 2012, allows the trustee to rescind a sale if there is a mistake in the bidding process.

Cox, supra, has been the most-cited opinion dealing with challenges to nonjudicial sales conducted in Washington.[29] Lawyers and litigants have argued (and will continue to argue) over the opinion's scope and the extent of duties imposed upon the trustee as articulated and implied in the opinion. It is possible that the case has been over-analyzed and the Coxes claims were resolved on the simple principle announced at the beginning of the opinion:

> The theme of the transaction attempted parallels an action heard by Judge J.E. Wyche, a member of Washington's early judiciary. When a jury returned a verdict in a suit disputing title over 100 acres of ranch land, he threatened to set aside their verdict, stating "While I am a judge, it takes 13 men to steal a ranch."

Cox, 103 Wn.2d at 385. The opinion did, however, have at least two clear messages for practitioners: First, the lawyer representing a grantor who wants to contest the validity of the obligation secured by the deed of trust incurs great risk in not seeking to restrain the sale in accordance with RCW 61.24.130. Second, lawyers should exercise caution in acting as trustees to foreclose a deed of trust if their client is the beneficiary.[30]

The mid- to late-1980s brought increased stress to the real estate industry resulting from a variety of factors, including monetary activity designed to reduce inflation that created swings in interest rates, changes in the United State tax code that granted and then eliminated favorable tax benefits available to the real estate industry, legislation reducing regulatory oversight of federal savings and loan associations and a general decline in loan underwriting standards. Both borrowers and lenders suffered financial reverses that created additional foreclosure litigation.

During this period there were a series of amendments that could be described as "tinkering" with the DTA to resolve real and hypothetical problems in commercial

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[29] It remains the exception, as opposed to the rule, that conduct and errors by the trustee will provide the basis for a successful challenge to a nonjudicial foreclosure by the grantor, particularly if the grantor has not availed itself of the pre-sale restraint procedures. See *Koegel v. Prudential Mut. Sav. Bank,* 51 Wn.App. 108 (1988) [challenge to a nonjudicial sale based on error in legal description of property sold rejected as a result of grantor failing to seek a restraint of the sale and the lack of any prejudice to the grantor]; *Meyers Way Development Limited Partnership v. University Savings Bank*, 80 Wn.App. 655 (1996) [the trustee did not act improperly by failing to investigate whether non-monetary defaults had been cured, failing to communicate with the grantor concerning erroneous conclusions concerning the adequacy of notice and requiring the beneficiary provide an indemnity as a condition to acting as trustee]; *Amresco Independence Funding, Inc. v. SPS Properties, LLC,* 129 Wn.App. 532 (2005) [trustee's notice of default sent to attorney for junior lienholder not grounds for setting aside sale]; *County Espresso Stores v. Sims*, 87 Wn.App. 741, 943 P.2d 374 (1997) [claims that the trustee's actions "chilled" bids at the nonjudicial foreclosure sale were rejected where there was no evidence presented of an actual bidder who did not bid and claim that trustee failed to marshal assets barred by failure to seek to restrain the sale].

[30] For additional observations on the potential ethical issues created by the attorney for the beneficiary acting as the trustee in a nonjudicial sale, see Washington State Bar, *Informal Ethics Opinion* 87-1. Compare with *Cascade Manor Associates v. Witherspoon, Kelley, Davenport & Toole*, P.S., 69 Wn.App. 923 (1993), holding that a lawyer acting as a trustee under a deed of trust does not automatically breach fiduciary duties simply by being the attorney for the beneficiary.

foreclosures that became apparent as a result of increased foreclosure activity and to address the changing structure of the lending industry. In 1985, the legislature added RCW 61.24.045 to provide a mechanism for persons other than the grantor/borrower and junior lien holders to receive notices of defaults that were recorded and mailed by the trustee following default. In that same year, (1) changes were made to RCW 61.24.020 that made it clear that, except as provided in the DTA, deeds of trust were subject to all laws relating to mortgages;[31] (2) the requirement that no other action be pending with respect to the obligation secured by the deed of trust was modified to include only those actions commenced by the beneficiary (or its assignees) seeking to collect the secured indebtedness[32]; (3) other persons claiming an interest in the property entitled to notice of the foreclosure were identified; (4) the method by which the sale could be continued was modified to allow continuances by publication and written notice;[33] and (5) changes were made to the form of notice specified by RCW 61.24.040, including provisions relating to continuing the sale.[34]

In 1987, RCW 61.24.010 was modified to make it clear that professional service entities comprised of attorneys were qualified to act as trustees and the "no pending action" requirement in RCW 61.24.030 was again modified to make it clear that the appointment of a receiver during the pendency of the foreclosure did not constitute the commencement of an "action" that would prohibit the commencement of a nonjudicial foreclosure. The notice provision in RCW 61.24.040 was again modified to correct the mistaken deletion of the grantor as a party entitled to receive notice that had occurred in

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[31] This amended provision might have been useful in resolving the homestead and redemption issues presented in the *Rustad Heating & Plumbing, supra*, *Mahalko, supra* and *Felton, supra,* cases, and has proved useful in resolving other disputes. The amended statute, RCW 61.24.020 was used in *Walcker v. Benson and McLaughlin, P.S.,* 79 Wn.App. 739 (1995) to resolve the issue of whether the statute of limitations was a defense to a nonjudicial foreclosure. The grantor had obtained an order restraining the sale on the basis that the statute of limitations barred collection of the secured debt. The Court of Appeals held that RCW 7.28.300, which makes the statue of limitations a defense in mortgage foreclosures, also applied to deeds of trust. In *Kezner v. Landover Corp.,* 87 Wn.App. 458 (1997), the claim by the former owner of property to uncollected rents due for the period prior to nonjudicial foreclosure was rejected. RCW 61.24.020 was cited to make RCW 7.28.230, which makes rents that have not been collected prior to foreclosure part of the real property acquired by the purchaser at the foreclosure sale, applicable to nonjudicial deed of trust foreclosures.

[32] Arguably, this revision would have changed at least one of the grounds for voiding the sale in *Cox, supra*, since the grantor rather than the beneficiary had initiated the action contesting the debt secured by the deed of trust.

[33] Since 1975, there has been a limit of 120 days for continuances of sales. RCW 61.24.040(6). If the sale date is continued beyond 120 days, it is necessary to start the process again, provide new notices of sale and establish a new sale date. The trustee can continue the sale multiple times, so long as the total length of the continuance does not exceed 120 days. See *Wells Fargo Bank Minnesota v. Vincent,* 124 Wn.App. 1 (2004). In *Bingham v. Lechner*, 111 Wn.App. 118 (2002), the argument that a sale could be indefinitely continued was rejected. The failure to complete the sale allowed the statute of limitations to run on the underlying obligation and a second attempt to foreclose the deed of trust was barred.

[34] Laws of 1985, ch. 193.

the 1985 amendments. RCW 61.24.090 was modified to provide a method to contest the reasonableness of the attorney and trustee fees charged during the foreclosure. Additional changes were made to RCW 61.24.130 clarifying the requirements to be satisfied for a court to restrain a nonjudicial sale (continuing payment obligations were imposed that, in general, were less favorable to the borrower that the prior bonding requirements)[35] and the procedure to be followed when a bankruptcy court granted relief from stay for a nonjudicial sale that had been halted as a result of the borrower/grantor filing a petition in bankruptcy.[36]

In 1989, further amendments were made to RCW 61.24.040 to explicitly state that rights of persons who were entitled to receive notice of a foreclosure proceeding, but to whom no notice was given, were not affected by the foreclosure sale and the delivery of the trustee's deed.[37]

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[35] The bonding requirements in RCW 61.24.130 can present a significant obstacle to pursuing claims against the beneficiary while attempting to preserve ownership of the property. In *Bowcutt v. Delta North Star Corporation*, 95 Wn.App. 311 (1999), in which the homeowner sought to recover damages from an equity skimming scheme, the requirement of a bond was waived since the trial court had the authority to enjoin the sale under Chpt. 9A.82 RCW and then issue an injunction on terms within the court's discretion pursuant to RCW 7.40.080 (noting that RCW 61.24.130 was intended to protect "good faith lenders"). A more direct approach was taken by the court in *Cronkhite v. Kemp*, 741 F.Supp. 822 (E.D. Wash. 1989). The plaintiff, who was receiving disability benefits as his sole income, claimed that HUD had wrongfully denied him admission to a mortgage relief plan that that would provide relief from a pending FNMA foreclosure. HUD asserted that any restraint of the sale must be conditioned upon continuing mortgage payments pursuant to RCW 61.24130. The preliminary injunction was issued in spite of the statutory requirement because "imposition of a bond, or an order that plaintiff pay into the court's registry the full amount of the monthly mortgage payments, would effectively deprive plaintiff of the opportunity to bring before HUD the merits of his petition for acceptance into the assignment program, thereby rendering this court's decision an empty gesture." *Id.* at 827.

[36] Laws of 1987, ch. 352.

[37] Laws of 1989, ch. 361. This amendment overruled *Glidden v. Municipal Authority of Tacoma,* 111 Wn.2d 341 (1988), a decision that created the possibility that the presumption of BFP status by receipt of a trustee's deed reciting that the sale was conducted in accordance with the statute might eliminate the liens of persons who had not been given the notices required by statute of the trustee's sale (". . . these recitals shall not affect the lien or interest of any person entitled to notice under RCW 61.24.040(1), if the trustee fails to give the required notice. . ."). *Glidden, supra,* followed *Steward v. Good*, 51 Wn.App. 509 (1988), in which the Court of Appeals upheld the BFP status of a purchaser who received a trustee's deed following a nonjudicial sale, although the Court did go beyond a mere reliance of the recitations contained in the trustee's deed and the statutory presumption:

> Thus, the Goods [the purchasers at the sale] showed they lacked any actual notice and also showed the payment of a valuable consideration. The burden of showing that the purchase price was so inadequate as to put the Goods on inquiry notice then shifted to the Stewards. They did not meet this burden. The Stewards contend that obtaining the property for this small price amounts to a windfall. There is, however, nothing in the record to indicate what, if any, equity the Stewards had at the commencement of the default proceedings. *Steward*, 51 Wn.App. at 513.

A purchaser is not entitled to the status of a BFP if the deed does not comply with the requirements of the DTA. In *Albice v. Premier Mortg. Services of Washington, Inc.*, 239 P.3d 1148 (Wn.App. 2010), the buyer received a deed which recited that the sale had been held in conformance with legal requirements, but did

In 1990, two changes were made to the DTA that affected only commercial transactions. To facilitate nonjudicial foreclosures involving multiple parcels of collateral securing the same obligation in commercial loans, the "no other action" provision in RCW 61.24.030(4) was further amended to allow simultaneous judicial actions to foreclose "any other lien or security interest granted to secure the obligation secured by the deed of trust being foreclosed." A related change was made to RCW 61.24.100 to explicitly state that nonjudicial foreclosure against one property did not preclude enforcement against other collateral securing the same obligation.[38]

The courts struggled with foreclosures involving multiple parcels securing the same obligation. In *Donovick v. Seattle-First Nat. Bank*, 111 Wn.2d 413 (1988), the borrower contested the foreclosure of multiple deeds of trust securing the same obligation. The trustee conducted the sale of one property, followed by the sale of the second property. The borrower/grantor objected, asserting that under RCW 61.24.100, the debt was "satisfied" at the conclusion of the first sale. The Court rejected the argument, although it did so primarily on policy grounds as opposed to any specific statutory authority. The Court noted that had both parcels been in a single deed of trust, there would be no question as to the ability of the trustee to sell both in the same sale, as opposed on one immediately after the other.

Shortly after *Donovick*, supra, the two-parcel, single deed of trust scenario was presented. The complication in *Queen City Sav. & Loan Ass'n v. Mannhalt,* 111 Wn.2d 503 (1988) was that the parcels were in different counties. The grantor sought to overturn the sale of the parcel located in Whatcom County because the sale was conducted in Snohomish County. The Supreme Court held that the language of RCW 61.24.040(5) addressed this possibility and expressly allowed the sale of both parcels to occur in the county in which one of the parcels was located. The statute was not limited in application to parcels that straddled county lines.[39]

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not recite the facts that showing that the sale complied with law, as required by RCW 61.24.040(7). Had the deed recited the date of the original sale and the six continuances, it would have been apparent that the sale occurred 161 days after the original sale date, which was not permitted by the DTA. The buyer at the sale knew the sale had been continued for more that 120 days and could not rely on the recitations in the trustee's deed.

[38] Laws of 1990, ch. 111.

[39] Justice Dore dissented in both *Queen City, supra* and *Donovick, supra*: "For the second time this term, the court rescues a lender from its own mistake, at the expense of the Deeds of Trust Act (hereinafter the Act) and the borrowers it was intended to protect. . . . This deed of trust contains an ambiguity which, when construed against the lender, leaves the lender undersecured. The majority dispenses with both our rules of contract interpretation and the requirement that we strictly construe the Act in its attempt to avoid that ambiguity. The result is that, once again, we have opened new opportunities for abuse and evasion of the Act by lenders." *Queen City*, 111 Wn.2d at 511.

The last DTA amendments prior to the onslaught of the downturn in the housing market occurred in 1998.[40] These changes, which were extensive, consisted of an expansion of liability for borrowers and guarantors in commercial transactions coupled with additional protections for residential borrowers. The 1998 amendments[41] allowed certain post-foreclosure claims to survive a nonjudicial foreclosure in commercial transactions. To effectuate this change, (1) a new definition section was added at RCW 61.24.005 that defined "commercial loan" and other terms; (2) additional notices were required to be given to the guarantor pursuant to a new section, RCW 61.24.042; (3) RCW 61.24.100 was substantially amended to allow in commercial transactions deficiency actions against guarantors and post-foreclosure actions against grantors/borrowers to recover wrongfully withheld rents and insurance proceeds and damages from waste.[42]

Changes were also made to RCW 61.24.010 that required corporate trustees to have at least one officer that was Washington resident and allowed various other professional entities to serve as a trustee so long as all owners were Washington-admitted attorneys. Trustees were also explicitly permitted to resign. Trustees were required to maintain a street address in Washington at which service of process could be made.[43] Occupants of a residential dwelling unit that was the subject of a nonjudicial foreclosure were to receive notice of the foreclosure in addition to the owner of the property. Beneficiaries were not permitted to collect rents from occupants of single-family

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[40] In addition to the eight amendments discussed above, two other changes to the DTA were made as a result of amendments to other statues. In 1991 (Laws of 1991, ch. 72, §58), there was a change to reference to Title 23B in RCW 61.24.010 in response to the comprehensive amendment of the Washington Business Corporations Act. In 2004 (Laws of 2004, ch. 161, §5, adding RCW 61.25.025), a new section was added to the DTA declaring "[a]ll of the rights, duties, and privileges conveyed under the federal service members civil relief act, P.L. 108-189, are applicable to deeds of trust under Washington law."

[41] Laws of 1998, ch. 295. According to the Senate Bill Report ESSB 6191, as passed Senate, February 11, 1998: "The Deed of Trust Act is amended to clarify and modernize it procedures, and reflect current practices."

[42] Although the original language of RCW 61.24.100 stated that the effect of a nonjudicial sale was to "satisfy" the obligations secured by the deed of trust, several decisions prior to 1998 allowed beneficiaries to pursue claims or retain payments related to the "satisfied" obligation after a nonjudicial sale. *Meyers Way Development Limited Partnership v. University Savings Bank*, 80 Wn.App. 655 (1996) allowed a claim for conversion to be maintained against affiliates of the borrower following nonjudicial sale arising from the removal and sale of sand and gravel from the encumbered property prior to the nonjudicial sale, although opinion implies that it was necessary for the debt to exceed the amount bid at the nonjudicial sale in order to maintain the action. *Cascade Manor Associates v. Witherspoon, Kelley, Davenport & Toole, P.S.*, 69 Wn.App. 923 (1993), allowed the foreclosing lender to retain payments of rent and attorneys fees paid by the borrower pursuant to a court order even though the property securing the obligation giving rise to the order had been sold at a nonjudicial foreclosure. *Glenham v. Palzer,* 58 Wn.App. 294 (1990), allowed claims against third parties to recover loan losses following a nonjudicial foreclosure. To a large extent, the 1998 amendments mirrored the so-called "bad boy carve-out" provisions that were found in typical non-recourse loans that imposed personal liability on borrowers for such things as wrongful appropriate of rents, insurance and condemnation proceeds and failure to pay real estate taxes.

[43] Laws of 1998, ch. 295, §4 (amending RCW 61.24.030(6)).

residences without first providing a court order or the consent of the landlord authorizing the payment to the beneficiary.[44]

The 1998 amendments to RCW 61.24.020 specifically authorized the judicial foreclosure of deeds of trust granted on agricultural property (avoiding the argument that there was no remedy available to a lender that happened to make a loan secured by a deed of trust encumbering agricultural property) and the sale of both real and personal property at the trustee's sale if the deed of trust encumbered both real and personal property. RCW 61.24.050 was amended to solve a potential problem if the grantor/borrower declared bankruptcy prior to the delivery of the trustee's deed; the sale was deemed final as of the day of the trustee accepted the bid so long as the trustee's deed was recorded within fifteen days after acceptance, so arguably the property would not be included in the debtor's bankruptcy. The procedure of "credit bidding" was specifically authorized in RCW 61.24.070. The method of disbursing any funds in excess of the foreclosed indebtedness was clarified to protect junior lien claimants.[45] "Bid chilling" was made an unfair business practice and a violation of Chpt. 19.86 RCW.[46]

IV. The Great Recession – DTA Response

The oft repeated judicial mantra has been that the DTA should be construed to further the three principle legislative objectives of the Act: (i) The nonjudicial foreclosure process should remain efficient and inexpensive; (ii) the process should provide an adequate opportunity for interested parties to prevent wrongful foreclosure and (iii) the process should promote the stability of land titles.[47] Just as significant as the stated objectives of the Act were those goals that were not included as legislative objectives, such as the establishment of a process that maximizes the value of the foreclosed property or the maintenance of stability of family residences.

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[44] Laws of 1998, ch. 295, §§5 & 16 (adding RCW 61.24.040(1)(b)(vi) and RCW 61.24.140).

[45] Sweet v. O'Leary, 88 Wn.App. 199 (1997) applied RCW 61.24.080(3) to determine that a homestead claim attached to excess sale proceeds with priority over the claim of judgment creditor that had not executed on the excess value of the homestead prior to the nonjudicial sale. In order to assert a claim against surplus funds from a nonjudicial sale, it is axiomatic that the claimant must have an interest in the property sold. See *In re Trustee's Sale of Real Property of Whitmire*, 134 Wn.App. 440 (2006), holding that an attorney's lien on a judgment did not create a lien on the surplus sale proceeds from the nonjudicial sale of property to which the judgment lien attached.

[46] Laws of 1998, ch. 295, §15 (adding RCW 61.24.135).

[47] These objectives first appeared in *Cox,* 103 Wn.2d at 387. See also *Plein v. Lackey, supra; Queen City Savings v. Mannhalt, supra; Brown v. Household Realty, supra; CHD v. Boyles, supra; Udall v. T. D. Escrow Services, supra; Country Stores v. Sims, supra; Albice v. Premier Mortgage Services, supra; Amresco Independence Funding v. SPS Properties, supra; Thompson v. Smith, supra; Glenham v. Palzer, supra; Glidden v. Municipal Authority of Tacoma, supra*; *Donovick v. Seattle-First National Bank, supra*; *Koegel v. Prudential Mut. Sav. Bank, supra*; *Moore v. Federal National Mortgage Association*, 020912 WAWDC, C11-1342RSL (9th Cir. Feb. 9, 2012); *Vawter v. Quality Loan Service Corp. of Wash.,* 707 F.Supp. 1115 (W.D.Wash. 2010); *In re Fritz,* 188 B.R. 438, (Bkrtcy.E.D.Wash. 1995).

The central philosophical underpinning of the DTA has always been that an efficient (i.e. speedy, inexpensive, not subject to judicial interference and delay) foreclosure process following default will benefit the residents of the State of Washington as a whole by reducing lending costs and promoting the availability of credit.[48] A central assumption in this belief has been that real estate markets function in a normal and customary fashion. Starting in 2007, it was not clear that this assumption was correct. As the real estate market declined (particularly the residential market), changes in the real estate lending industry prompted the legislature to re-examine the purpose of the DTA and the relationship of the DTA with residential homeowners.

The residential mortgage industry became increasingly tied to the "securitization" process.[49] The end result of securitization was the transfer of home loans from the lender that originally made the loan to an entity that held thousands of loans (or portions of loans) for the benefit of passive investors. In essence, the "lender" disappeared and the homeowner was left with a "lenderless" loan. The only contact point between borrower and the owner of the loan was a "servicer," who, pursuant to a contract with the entity that owned the loan, collected payments and monitored the borrower's performance. This system was designed to minimize costs and was not designed to deal with borrower problems that arose if the borrower had problems making mortgage payments due to illness, unemployment or other change in circumstances.

In 2008, the legislature enacted amendments to the DTA that were aimed at the role of the trustee in the foreclosure process.[50] On the one hand, an attempt was made to define the duty (or lack thereof) of the trustee to assist trustees in resolving conflicting demands from grantors and beneficiaries. On the other hand, additional requirements were imposed on trustees in response to homeowner complaints that they were unable to communicate with trustees once the foreclosure process commenced.

RCW 61.24.010 was amended to add two additional sections defining the standard of conduct for the trustee:

> (3) The trustee or successor 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.
>
> (4) The trustee or successor trustee shall act impartially between the borrower, grantor, and beneficiary.[51]

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[48] While this statement has logical appeal, there is no statistical information that has ever been presented that demonstrates the validity of this belief as to credit markets in the State of Washington.

[49] For a description of securitization and the various industry participants, see *Cervantes v. Countrywide Home Loans, Inc.,* 656 F.3d 1034 (9th Cir. 2011).

[50] Laws of 2008, ch. 153.

[51] Laws of 2008, ch. 153, §1.

The trustee was required to maintain a physical presence in Washington and was required to have telephone service at its Washington address.[52] The trustee was required to provide information concerning the amount required to pay the entire obligation in the notice of default to the borrower and update that information following written request by the borrower.[53] If the trustee continued the sale by proclamation, written notice of the continuance and new sale date was required to be mailed to persons entitled to receive notice of the sale.[54] The trustee was authorized to continue the sale even if an order restraining the sale had been entered[55] and to refuse to complete the sale if the trustee believed that the bidding had been collusive.[56]

The Task Force for Homeowner Security appointed by the Governor made various recommendations aimed at minimizing the disruption to the Washington real estate market from increasing defaults of subprime mortgages.[57] These recommendations, as well as other legislative activity, focused upon regulation of the mortgage brokers and consumer education. Some of these recommendations were enacted,[58] including a change in RCW 61.24.030 that featured additional warnings to the homeowner emphasizing the potential consequences of the foreclosure process and suggesting various alternatives actions for the borrower:

> In the event the property secured by the deed of trust is owner-occupied residential property, a statement, prominently set out at the beginning of the notice, which shall state as follows:
>
> "You should take care to protect your interest in your home. This notice of default (your failure to pay) is the first step in a process that could result in you losing your home. You should carefully review your options. For example:
> . . .
> Can you sell your property to preserve your equity?
> Are you able to refinance this loan with a new loan from another lender with payments, terms, and fees that are more affordable?
> . . .

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[52] Laws of 2008, ch. 153, §2, amending RCW 61.24.030(6).

[53] Laws of 2008, ch. 153, §3, amending RCW 61.24.040(1)(f)

[54] Laws of 2008, ch. 153, §3, amending RCW 61.24.040(6)

[55] Laws of 2008, ch. 153, §5, adding RCW 61.24.130(6).

[56] Laws of 2008, ch. 153, §6, amending RCW 61.24.135.

[57] The complete report of the Task Force can be found at http://www.dfi.wa.gov/taskforce/default.htm

[58] Laws of 2008, ch. 108.

> Do you know if filing for bankruptcy is an option? What are the pros and cons of doing so?
> Do not ignore this notice; because if you do nothing, you could lose your home at a foreclosure sale. . . .
> . . . If you desire legal help in understanding your options or handling this default, you may obtain a referral (at no charge) by contacting the county bar association in the county where your home is located. . . ."[59]

Other legislation from the Task Force report increased regulation of mortgage broker practices, including the classification of mortgage fraud as a felony. Following this same theme, the legislature also enacted:

- Amendments to Chpt. 19.146 RCW, the Mortgage Brokers Practices Act, providing that mortgage brokers had a fiduciary duty to borrowers;[60]
- Amendments to Chpt. 61.34 RCW to regulate "distressed home consultants" offering assistance to homeowners facing foreclosure;[61]
- Amendments to Chpt. 31.04 RCW, the Consumer Loan Act, to regulate mortgage brokers that were exempt from registration under the Mortgage Broker Practices Act because of a registration with the Fannie Mae or Freddie Mac, but were not otherwise subject to regulatory oversight;[62] and
- Authorization for the state Housing Commission to make grants to assist low and moderate-income distressed homeowners.[63]

Unfortunately, the residential real estate market continued to decline and residential foreclosures increased.[64] The legislature shifted its focus to the foreclosure process. In so doing, the legislature began to shift the emphasis of the DTA from providing an efficient process to resolve mortgage defaults to mitigating the hardship suffered by homeowners and tenants as a consequence of default.

The DTA was amended to address the rights of tenants in foreclosed properties and to encourage contact between the lender and the homeowner to promote resolution of the default that avoided default.[65] The definition section of the DTA, RCW 61.24.005, was amended to add definitions for "Owner-Occupied," "Residential real property," and

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[59] Laws of 2008, ch. 108, §22.

[60] Laws of 2008, ch. 109

[61] Laws of 2008, ch. 278

[62] Laws of 2008, ch. 78

[63] Laws of 2008, ch. 322.

[64] The home prices for the 20-city Case Shiller Index peaked in July 2006 and by the spring of 2009, had declined by 32%. S&P/Case-Shiller Home Price Indices 2009 A Year in Review (January 2010)

[65] Laws of 2009, ch. 292.

"Tenant-occupied property."[66] Following the commencement of the foreclosure process, the trustee was required to provide a separate notice to tenants alerting them of the possibility of the fact that they might have to relocate as a consequence of the foreclosure.[67] The time period for eviction of tenants was increased to sixty-days following the foreclosure.[68]

Additional relief was provided to homeowners who believed that they had been the victims of fraud or unfair business practices when they obtained their home loan. RCW 61.24.127 was added to the DTA to allow post-sale actions by the borrower against the lender for damages from fraud, misrepresentation and violations of the Consumer Protection Act.[69] The remedies of the borrower were limited to actual damages, however, and the claim was not to "encumber or cloud the title to the property." These provisions applied only to "owner-occupied residential real property" and not to commercial loans.

The standard of conduct for the trustee that had been enacted in the prior year was changed from a duty to act "impartially" to a "duty of good faith to the borrower, beneficiary and grantor."[70] It was not clear that the continuing effort to define the duty of the trustee following *Cox, supra*, was really providing any meaningful guidance in the absence of additional judicial precedents construing the shifting statutory guidelines.[71]

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[66] Laws of 2009, ch. 292, §1.

[67] Laws of 2009, ch. 292, §3.

[68] Laws of 2009, ch. 292, §4. A similar provision, Protecting Tenants at Foreclosure Act of 2009, was passed at the federal level. PL 111-22 (12 USC §5201 *et seq.*) The Act was effective May 20, 2009 and allows tenants to remain in possession for the unexpired term of their lease, unless the new owner intends to use the property as its principle residence. At least 90-days notice to vacate is required to be given by the new owner of the property for shorter-term or month-to-month leases. The Act applied to foreclosures of all residential property involving a "federally related" mortgage. The provisions expire December 31, 2012.

[69] Laws of 2009, ch. 292, §6. This statute reversed the result of *Brown v. Household Realty Corp.,* 146 Wn.App. 157 (2008), which had held that the failure of the borrower to seek restraint of the sale barred any post-sale claims against the lender.

[70] Laws of 2009, ch. 292, §7.

[71] The language of RCW 61.24.010(3) was patterned after a provision in the Oregon deed of trust act, ORS 86.790(7). For a discussion of the effect of the Oregon statute on claims against the trustee, see opinion and order entered in *Rapacki v. Chase Home Finance LLC, et. al,* CV-11-185-HZ (D.Or. 2011) http://docs.justia.com/cases/federal/district-courts/oregon/ordce/3:2011cv00185/101418/30/0.pdf?1308838334. Given the additional language in RCW 61.24.010(4) concerning "good faith," it is unclear whether Oregon precedents will be helpful in resolving claims arising under Washington law. Other than the cases cited previously dealing with challenges by borrowers and purchasers at foreclosure sales to set aside or enforce nonjudicial sales, there have been no reported cases in which claims for damages have been asserted against a trustee for irregularities in conducting the sale. In 2004, the Washington State Bar Association imposed a one-year suspension arising from a lawyer's in nonjudicial sales as a trustee in which posting costs were increased by 50 to 100% without prior disclosure to the client. This conduct was found to violate RPC 1.8(a), which prohibits obtaining a pecuniary interest adverse to the client. See *Discipline*

The trustee was also required to have proof that the beneficiary seeking foreclosure was the owner of the promissory note or other obligation secured by the deed of trust, although the trustee was authorized to rely upon the sworn statement of the beneficiary to establish this fact. Contact information concerning the identity of the owner of the note and the loan services was to be included in the notices provided to the grantor in an attempt to improve communication between the borrower and lender.[72]

In a more direct way to increase borrower-lender communication, the 2009 amendments required the beneficiary (or its authorized agent) contact or attempt to contact the borrower "in order to assess the borrower's financial ability to pay the debt secured by the deed of trust and explore options for the borrower to avoid foreclosure."[73] The lender was required to mail a letter to the borrower with information concerning alternatives to foreclosure and attempt to arrange a meeting, either by phone or in person. All of this activity was intended to encourage the borrower to seek counseling and perhaps qualify for one of the federal mortgage assistance programs that were made available during this time period through the Department of Housing and Urban Development (HUD). The beneficiary was required to complete a "Foreclosure Loss Mitigation Form" certifying under penalty of perjury that it had complied with the pre-notice of default contact requirements. If the borrower did not respond within thirty days to the lender's notices, the lender was permitted to pursue the foreclosure process. The contact provisions codified at RCW 61.24.031 did not apply to:

(i) Commercial loans;
(ii) Deeds of trust securing obligations under which a grantor is not a borrower or guarantor;
(iii) Deeds of trust securing a purchaser's obligations under a seller-financed sale.[74]

The 2009 amendments did not change the basic timeline for nonjudicial foreclosures. The DTA still required that a nonjudicial sale could not take place sooner than 190 days following the event of default giving rise to the right to foreclose. The thirty-day period for contacts between the borrower and lender could theoretically occur in the 60-day period following a default while still preserving a 120-day period for the time between the recorded notice of default required and the scheduled sale date.[75] From a practical standpoint, however, the notification procedures added thirty days to the

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Notice – David Edward Fennell, Washington State Bar Association, Effective May 11, 2004, http://www.mywsba.org/default.aspx?tabid=180&dID=607.

[72] Laws of 2009, ch. 292, §8.

[73] Laws of 2009, ch. 292, §2.

[74] Originally, the notification procedures were to apply only to loans made between January 1, 2003 and December 31, 2007, but this limitation was removed in 2011.

[75] A notice of default must be given to the borrower in the statutory form thirty days before a notice of sale may be recorded. RCW 61.24.030(8). The notice of sale must be recorded not less than ninety days before the scheduled sale. RCW 61.24.040(1)

process, since most lenders did not start the foreclosure process until the borrower had missed two or three payments, which rendered the overall 190-day sale timeline somewhat problematical. The amendments also did not require the lender to make any accommodations to the borrower in form of payment or interest rate relief. The assumption of the amendments was that borrowers would avail themselves of various federal mortgage modification programs in order to avoid the foreclosure.

The legislature revisited this assumption in 2011 in passing the Foreclosure Fairness Act.[76] Section 1 of the Act acknowledged that previous efforts were not achieving the desired result:

> (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;
> . . .
> (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
> . . .
> (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. . . . [77]

The Foreclosure Fairness Act (FFA) built on the 2009 amendments and for certain lenders, required that mediations be conducted. The purpose of the mediation was to make a realistic assessment of the borrower's ability to service a modified mortgage and have a discussion with the lender concerning possible alternatives to foreclosure, including modifications pursuant to various federal programs and relocation assistance in conjunction with a deed in lieu of foreclosure.

The requirements of the FFA apply to foreclosures applicable to owner-occupied residential real estate commenced after the effective date of July 22, 2011.[78] The notice

[76] Laws of 2011, ch. 58.

[77] Laws of 2011, ch. 58, §1.

[78] See RCW 61.24.030(9) and 61.24.031(7).

created under the 2009 amendments was expanded to include a reference to a right to mediation available to certain borrowers. The exemptions from the requirement to provide the Loss Mitigation Notice were not changed – commercial loans, seller-financed transactions and deeds of trust securing obligations of a grantor other than as a borrower or guarantor remained exempt. The limitation in the 2009 amendments to deeds of trust executed between 2003 through 2012 was, however, removed. The beneficiary was not permitted to issue a notice of default to the homeowner borrower unless thirty days had elapsed since the "initial contact" with the homeowner or, if the homeowner "responds to the initial contact, ninety days after the initial contact."[79] The addition of the ninety-day requirement if the borrower responded to the lender's letter had the effect of extending the total required time to complete the nonjudicial foreclosure process by twenty days.

A housing counselor[80] contacted by the homeowner or the homeowner's attorney were given the ability to require a mediation to be conducted by some lenders.[81] In addition to deed of trust transactions exempt from the provisions of RCW 61.24.031, the mediation provisions of the FFA were not applicable to federal insured depository institutions that conducted less than two hundred fifty nonjudicial foreclosure sales during the prior year, as certified to the Department of Commerce annually.[82]

The Department of Commerce was given the responsibility to supervise the mediation process. The FFA had detailed requirements concerning submissions to be made to the mediator and required that the someone with authority to bind the lender attend the mediation.[83] The goal of the mediation, in addition to promoting contact between the borrower and the lender, was to come to a determination whether the borrower might qualify for a federal modification program, such as home affordable modification program (HAMP) and whether the "net present value of receiving payments pursuant to a modified mortgage" equaled or exceeded the "anticipated recovery following foreclosure."[84]

Within seven business days following the completion of the mediation, the mediator was required to submit a statement concerning the outcome of the mediation and whether the parties participated in "good faith" in the mediation process, as defined in RCW 61.24.163(8).

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[79] Laws of 2011, ch. 58, §5; RCW 61.24.031(1)(a). The date of "initial contact" was deleted in 2012 and substituted with reference to date of completion of due diligence outlined in the FFA to contact the borrower. See Laws of 2012, ch. 185, §4.

[80] Defined by Laws of 2011, ch. 58, §6; RCW 61.24.160.

[81] Laws of 2011, ch. 58, §7; RCW 61.24.163(1): "The foreclosure mediation program established in this section applies only to borrowers who have been referred to mediation by a housing counselor or attorney."

[82] Laws of 2011, ch. 58, §§8 & 9; RCW 61.24.165 & 61.24.166.

[83] See generally RCW 61.24.163.

[84] RCW 61.24.163(7)(b).

> (a) The mediator's certification that the beneficiary failed to act in good faith in mediation constitutes a defense to the nonjudicial foreclosure action that was the basis for initiating the mediation. In any action to enjoin the foreclosure, the beneficiary shall be entitled to rebut the allegation that it failed to act in good faith
>
> (b) The mediator's certification that the beneficiary failed to act in good faith during mediation does not constitute a defense to a judicial foreclosure or a future nonjudicial foreclosure action if a modification of the loan is agreed upon and the borrower subsequently defaults.
>
> (c) If an agreement was not reached and the mediator's certification shows that the net present value of the modified loan exceeds the anticipated net recovery at foreclosure, that showing in the certification shall constitute a basis for the borrower to enjoin the foreclosure.

RCW 61.24.163(11). In addition, RCW 51.24.135 was amended to provide:

> It is an unfair or deceptive act in trade or commerce and an unfair method of competition in violation of the consumer protection act, chapter 19.86 RCW, for any person or entity to: (a) Violate the duty of good faith under section 7 of this act; (b) fail to comply with the requirements of section 12 of this act; or (c) fail to initiate contact with a borrower and exercise due diligence as required under RCW 61.24.031.[85]

Funding for the mediation program was provided by charging foreclosing lenders $250 for each owner-occupied residential real property for which a notice of sale was recorded, including all nonjudicial foreclosures conducted in the three months prior to the effective date of the FFA. Federally insured institutions conducting less than two hundred fifty residential foreclosures during the prior year were exempted from the payment of the fee.[86] The real estate excise tax statute was also amended to make clear that in deed of lieu transactions, the payment of relocation assistance did not constitute consideration to the grantor of the deed in lieu that triggered an obligation to pay the tax.[87]

In addition to the FFA, the legislature addressed complaints that lenders failed to timely respond to proposed "short-sale" transactions.[88] RCW 61.24.026 was added to the DTA, which required that a "senior lender" respond to a proposed short sale within one-

[85] Laws of 2011, ch. 58, §14.

[86] RCW 61.24.172 and 61.24.174.

[87] Laws of 2011, ch. 58, §15, amending RCW 82.45.030.

[88] A short sale is a transaction in which the lender agrees to release its lien for payment of less than the total amount due.

twenty days from receipt of a written offer.[89] The senior lender was not obligated to accept any offer. In addition, the provisions of RCW 61.24.127, which was enacted in 2009, were amended to allow grantors to recover damages post-sale from the lender's failure to timely respond to a short-sale offer.

The limited duration of the mediation program created by the FFA does not allow for an evaluation of its effectiveness. The legislature, however, has continued to address residential foreclosures in its latest legislative session. In 2012, further amendments were made to the FFA to address short sales. A new section was added to the DTA that required lenders to notify borrowers in short sale transactions whether the lender was waiving its rights to seek a deficiency from the borrower.[90] The statute of limitations for an action to collect a deficiency arising from a short sale was shortened to three years from the date the lender released its mortgage lien.[91]

The notification provisions in RCW 61.24.031 that were a condition precedent to issuing the notice of default were further amended to delete reference to a thirty-day period from "initial contact" to a thirty-day period from completion of the due diligence requirements intended to contact the borrower. The time period for referral to mediation was limited to no later than twenty-days after the recording of a notice of default, although the trustee was prohibited from proceeding with a scheduled sale until the mediator completed its certification if the matter had been referred to mediation following the recording of the notice of sale. The time periods for exchanges of documents between the borrower and beneficiary were altered and the time for conducting the mediation was extended from forty-five days to seventy days from the date of the referral from the Department of Commerce. The form of notices was also changed to emphasize the possibility of mediation and the availability of alternatives to foreclosure. An additional thirty days was added to the sale process if the borrower was entitled to receive the letter notifications specified in RCW 61.24.031.[92]

Unrelated to the FFA, the 2012 amendments also allowed the trustee to rescind a sale within eleven days for the following reasons:

> (i) The trustee, beneficiary, or authorized agent for the beneficiary assert that there was an error with the trustee foreclosure sale process including, but not limited to, an erroneous opening bid amount made by or on behalf of the foreclosing beneficiary at the trustee's sale;
> (ii) The borrower and beneficiary, or authorized agent for the beneficiary, had agreed prior to the trustee's sale to a loan modification agreement, forbearance plan, shared appreciation mortgage, or other loss mitigation

[89] Laws of 2011, ch. 364.

[90] Laws of 2012, ch. 185.

[91] Laws of 2012, ch. 185 §1(2).

[92] Laws of 2012, ch. 185, §§9 & 10.

agreement to postpone or discontinue the trustee's sale; or
(iii) The beneficiary or authorized agent for the beneficiary had accepted funds that fully reinstated or satisfied the loan even if the beneficiary or authorized agent for the beneficiary had no legal duty to do so.[93]

V. Conclusion.

The DTA has been the statutory framework for real estate financing since its enactment in 1965. Judicial interpretation of the DTA has confirmed its validity as a method of mortgage financing and the effectiveness of nonjudicial sales to enforce the rights of the lender. The primary purposes of the DTA was the establishment of an efficient and inexpensive foreclosure process that provided an adequate opportunity for interested parties to prevent wrongful foreclosure and promoted the stability of land titles. These goals, however, did not address the issues that might arise in the event of a widespread decline in real estate values and rise in foreclosures that have occurred since 2007. In an effort to address these market developments, the legislature has recently repeatedly amended the DTA to encourage non-foreclosure resolutions of residential mortgage defaults. The effectiveness of these efforts will be determined in the future, but for the present, it is difficult to reconcile the additional complexity added to the DTA with its original legislative objectives.

[93] Laws of 2012, ch. 185, §14. This provision has the effect of reversing the outcome in the *Udall v. T.D. Escrow Services, Inc.*, 159 Wn.2d 903 (2007).