



## WASHINGTON FORECLOSURE LAW

# Is Our State Ready for the Next Chapter in Real Estate Finance?

by Wendy Walter

**T**he greater Seattle area is one of the hottest real estate markets in the nation. Prices are surging and buyers are willing to pay close to half a million dollars for a house with toxic mold.<sup>1</sup> For most in our state, foreclosures seem to be an issue of the past, from a time when our economy was dealing with the hangover effects of a massive housing bubble. But I'm not sure our real estate finance community has forgotten the sins of the past, or even that we are on a path to more foreclosures. Still, foreclosure law cannot remain status quo. The foreclosure process is a necessary one for any healthy economy, and our state's law is less than

ideal in several areas. While the Legislature made strides when the volumes of foreclosures were mounting, Washington law might not be ready for the next stages in our economy's trajectory, when our foreclosure timelines are longer.

We have four main gaps in foreclosure law that, if left unfilled, will create more issues for all parties involved. These include neighborhoods dealing with blight, successors-in-interest facing judicial foreclosure, borrowers wanting the process to be expedited, and lenders trying to originate new deals in an electronic age.

### Zombie Foreclosures and Unintended Consequences of *Jordan v. Nationstar*

In *Jordan v. Nationstar*,<sup>2</sup> the Washing-

ton Supreme Court was asked to decide whether hundreds of thousands of deeds of trust provisions allowing the lender to take measures necessary to secure vacant and abandoned properties were enforceable. Despite a well-written amicus brief on behalf of the City of Spokane voicing the public policy concerns it had about invalidating these contractual provisions, the Supreme Court found that there is a hole in our state law prohibiting lenders from non-judicially obtaining possession of a property, even if it is vacant, before completion of a foreclosure sale.

If you take that ruling into the context of a judicial foreclosure, when the sale might not happen for eight to 12 months and the sheriff's deed might not be issued for another four to five months after expiration of the additional eight-to-12 month redemption period (that's up to 2.5 years, if you're doing the math), the impact of this decision in a judicial foreclosure context is potentially severe.

This opinion was rendered in response to certified questions involving a case where a foreclosure had not yet been initiated, but all parties (and the Court) seemed to focus on the possibility that if foreclosure did occur, it would be non-judicial, and the foreclosure sale would concurrently vest title and right of possession. Most judges and non-foreclosure lawyers assume that the non-judicial foreclosure process doesn't take that long, perhaps 120 days. Due to the pre-foreclosure contacts that are necessary before initiating a non-judicial action — many of these done before it is discovered that a judicial foreclosure might be necessary — the Washington foreclosure process is lengthy whether you move judicially or non-judicially.

The Fannie Mae standard for the time frame from last payment default to foreclosure sale in Washington is now 540 days<sup>3</sup> — almost two years. This number is based on a study of Fannie Mae's portfolio, blending judicial and non-judicial matters. While Washington's process is not as long as Oregon or New York — which reached a new high of 1,020 days in that same report — we are heading down that track if our lawmakers decide to introduce any more legislative amendments either designed to slow down the process or ultimately have that unintended effect.

If it takes an average of 540 days to go to sale, and the lender is statutorily

prohibited from making entry into the property if one conservatively interprets the *Jordan* decision, we have a problem with vacant and abandoned properties that won't be solved efficiently, absent legislative amendment.

Many states have recently enacted "fast-track legislation" designed to speed up the process for vacant and abandoned properties, including Ohio and Illinois. Washington might be up next.

Spokane does not benefit from the mortgage contract as both the lender and the borrower do. Yet its taxpayers will incur the costs of appointing custodial receivers when lenders cannot secure and maintain vacant or illegally occupied homes. — Brief of Amicus Curiae on Behalf of the City of Spokane

### Heirs and devisees: Or, as the CFPB Calls Them, "Successors in Interest"

In addition to concerns over vacant and abandoned properties, we also have an issue with how deceased borrower cases are handled in the foreclosure process.

For heirs and devisees, it's no secret that "successors in interest" have the attention of the Consumer Finance Protection Bureau (CFPB) because of the high number of complaints the Bureau has received related to servicer interactions with heirs of deceased borrowers and other successors. In fact, the Bureau has proposed rules to try to provide more rights to such successors and has informed servicers covered under the rules to come up with better policies and procedures to guide the successors toward a non-foreclosure resolution, if possible.<sup>4</sup>

This is where our state's struggle comes in. Under the current Washington law, heirs and devisees do not have a quick, efficient way to transfer title, absent filing a potentially expensive probate and appointing a personal representative. A lack of probate affidavit will work in certain cases, depending on which title company is underwriting the transfer. My firm has over a thousand cases in judicial foreclosure in Washington because of this issue of a gap in title transfer upon the death of the borrower.

In Washington, even though the Legislature has allowed a right for a successor to mediate, many of those succes-

sors will not have the opportunity. The non-judicial remedy, which is where the mediation statute arises, is not an option for beneficiaries and servicers of mortgage loans when title is not clearly

vested after the death of the borrower. In other words, those parties have to foreclose judicially because title can't be ascertained and there is no great guidance in Washington law on who is entitled to notice of the foreclosure.

Heirs and devisees of the deceased borrower must be named as defendants in the lawsuit. In certain counties, the creditor is being asked to open a probate and appoint a personal representative to help with getting notice out to all possible heirs. These probate cases can add thousands of dollars onto the already expensive judicial foreclosure process.

Even if the heirs and devisees are interested in reinstating the loan, chances are good that they will likely pay more for it because the Legislature has not modernized the statute to create a more efficient foreclosure process. It is difficult to explain to a relative of a deceased borrower that they were sued, not because we need them to pay anything (these lawsuits are brought *in rem*), but rather because Washington law requires that they be sued. There is pressure from the investor, the homeowners or condominium association, and from the city or county to foreclose on properties like this because of the risk of loss. The investor is concerned about lost interest and the city and neighborhood is concerned that the property is vacant or abandoned, with the possibility of squatters or unsavory characters drawn to the neighborhood. Still, there is no fast track to get notice out and complete the title transfer.

### Judicial Foreclosure: Why Does It Take So Long?

Obtaining a judgment does not typically take any longer in a foreclosure case compared to a regular civil action. But getting to the sale is when the delay happens. Comparing the process to the non-judicial sale process, it can take just as much time, if not more, to obtain an order of sale, get



### What Is a Zombie Foreclosure?

A zombie foreclosure occurs when the owner of a property leaves or abandons the property and assumes that the lender will foreclose the property to recover the debt owed by the owner.

the sheriff to set up their side, publish notices, hold the sale, and get the return on the sale. After the sale, the plaintiff or winning bidder must obtain an order confirming the sale, apply to obtain the certificate of sale, get it recorded, and take the recorded copy back to obtain the sheriff's deed. All of this assumes no redemption period. If, however, the sale was subject to an eight-or-12 month redemption period, there is another delay after that period expires to request the sheriff's deed and send it out for recording.<sup>5</sup>

Foreclosure trustees are really efficient at processing sales. Our county sheriffs' offices, while they have improved in processing many of these actions, are not the most efficient, as they often process using paper-based systems. They are not funded enough to make the process efficient, since this is not their primary duty in our communities.

In Ohio, for example, to reduce the burden on sheriffs' departments from handling the sales, legislation allows private sale officers to more efficiently conduct the foreclosure in an expedited fashion for vacant and abandoned properties. The Ohio law also allows electronic bidding. Colorado allows online foreclosure sales, recognizing that the market of potential buyers will be much larger if a physical presence at a foreclosure sale is not required.

Washington law could be modernized to allow certain counties the ability to work with foreclosure trustees to help relieve the backlogs of foreclosure sales and to help allow for a more efficient deed delivery process.

### Lack of Authority for E-Notes

Mortgage lending is modernizing. With almost all states adopting a uniform standard under the Uniform Electronic Transactions Act (UETA), there is a common and consistent understanding of how electronic contracts and notes are negotiated,

signed, stored, and held for enforcement.

This is just a minor part of the origination market at this point, but if the Legislature doesn't look at adopting UETA or modernizing existing foreclosure law, we will continue to see an increase in the number of judicial foreclosures. Because the beneficiary in Washington must be the "actual holder" of the note in order to foreclose, and we do not have UETA or laws to provide that electronic control over the note would be acceptable, as we originate more e-notes, we will have more judicial foreclosures.

### Much Work to Be Done

Even though foreclosure volumes have returned to pre-crisis levels and real estate values are on the rise, there is still much work to be done to modernize our foreclosure laws so that they can be more efficient for the modern economy. The good news is that we can learn from the programs put into place from other states grappling with the same concerns. "Zombie" foreclosure and fast-track processes for vacant and abandoned properties are a national hot topic. Allowing non-judicial foreclosure when a borrower is deceased is allowed in California, for example. Ohio and Colorado are modernizing the sheriff sale process and electronic auctions. Electronic notes and UETA are prevalent in almost every other state.

Washington is home to some of the most cutting-edge technology and industry in the country. With some focus and hard work, our laws can meet these same high standards. **NWL**



**WENDY WALTER** is a partner at McCarthy Holthus, LLP. Wendy has practiced both in-house and privately in

the area of foreclosure and default servicing since 2003. Her practice is focused on judicial foreclosure and regulatory compliance, and she has been following the CFPB regulations since its inception. Wendy can be reached at [wwalter@mccarthyholthus.com](mailto:wwalter@mccarthyholthus.com).

### NOTES

1. *The Seattle Times*, "Seattle home too dangerous to enter sells for \$427,000 after 'insane' bidding war," July 5, 2016, by Mike Rosenberg [www.seattletimes.com/business/this-mold-house-decaying-home-too-dangerous-to-enter-sparks-insane-bidding](http://www.seattletimes.com/business/this-mold-house-decaying-home-too-dangerous-to-enter-sparks-insane-bidding).
2. *Jordan v. Nationstar Mortg., LLC*, No. 92081-8, 2016 Wash. LEXIS 817 (July 7, 2016).
3. [www.fanniemae.com/content/guide\\_exhibit/foreclosure-timeframes-compensatory-fees-allowable-delays.pdf](http://www.fanniemae.com/content/guide_exhibit/foreclosure-timeframes-compensatory-fees-allowable-delays.pdf).
4. See link to CFPB's proposed rules to amend the mortgage servicing rules promulgated in 2013. A final rule is pending and might be issued summer 2016. [http://files.consumerfinance.gov/f/201411\\_cfpb\\_proposed-rule\\_mortgage-servicing.pdf](http://files.consumerfinance.gov/f/201411_cfpb_proposed-rule_mortgage-servicing.pdf).
5. It is not clear whether a party can waive their right to redemption under Washington law. A clear waiver provision in state law might help in those cases where the borrowers really want to move on.

## WELCOME NEW ASSOCIATES



### BRIAN S. EPLEY

Environmental Litigation, Tribal Government  
[bepley@scblaw.com](mailto:bepley@scblaw.com) | 206.223.8938



### NICHOLAS G. THOMAS

Environmental Litigation, Tribal Government  
[nthomas@scblaw.com](mailto:nthomas@scblaw.com) | 206.829.2703

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