

**2013 WLTA Educational Seminar  
Everett  
November 2, 2013**

**Recent Foreclosure Cases  
Affecting Title Insurance  
after the Trustee Sale**

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October 20, 2012

## Four Decisions from the WA Supreme Court:

Albice v. Premier Mortgage Services  
174 Wn.2d 560 (2012)

Bain v Metropolitan Mortgage  
175 Wn.2d 83 (2012)

Klem v. Washington Mutual  
176 Wn.2d 771 (2013)

Schroeder v. Excelsior Management  
177 Wn.2d 94 (2013)



## Five Decisions from the Courts of Appeals:

Frizzell v. Murray

170 Wn.App 420 (Div. II 2012) (Review Accepted)

Walker v. Quality Loan Service Corp

Div I 8/5/13

Rucker v. Novastar

Div I 8/5/2013 (unpublished)

Leipheimer v. ReconTrust Co

Div I 8/5/2013 (unpublished)

Bavand v. OneWest Bank

Div I 9/9/2013



## The Score [2012-2013]:

Borrowers: 9

Lenders: 0

Trustees: 0

Prior to 2012, only one WA appeal decision set aside a Trustee sale:

*Cox v. Helenius*

103 Wn.2d 383 (1985)



# As recently as 2010, the Federal courts in WA supported MERS

*Daddabbo v. Countrywide*

W.D. Wash. 5/20/10

The borrower stopped the sale with a lawsuit claiming MERS has no beneficial interest in the Note and the Trustee had no power to initiate foreclosure. The Court dismissed the claims, stating "The assertion is baffling."



## **“The three primary goals of the Deed of Trust Act are:**

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

*Plein v Lackey*, 149 Wn2d 214 (2003).



# Rules for Judicial Interpretation of the Deed of Trust Act:

- Trustees must strictly comply with the Act
- Courts must strictly construe the Act in the borrower's favor
- deemed necessary to protect borrowers in a nonjudicial foreclosure that lacks the safeguards that would be available to them in a judicial proceeding



# What Causes a Void Sale?

## 1. Trustee Inequitable Conduct:

Cox - Trustee knowledge of action to eliminate the debt

Cox - Trustee conflict of interest as attorney for Beneficiary





# What Causes a Void Sale?

## 2. Trustee Errors Causing Prejudice to Borrower:

*Koegel v. Prudential Mutual*

51 Wn.App. 108 (Div. I; 1988)

(a) NTS less than 30 days

(b) Legal description error



# What Causes a Void Sale?

## 2. Trustee Errors Causing Prejudice to Borrower:

### *Koegel v. Prudential Mutual*

- Borrower failed to start a legal action to stop the sale
- RCW 61.24.130 pre-sale remedies



# What Causes a Void Sale?

## 3. Trustee had no authority:

*Cox* - An action on the Note was pending

*Albice* - Sale continued beyond 120-day limit

*Schroeder* - Failure of Non-Agricultural requirement

*Bain/Rucker/Leipheimer/Bavand* – Not validly appointed by a Beneficiary that was the holder of the Note



## Failure to Enjoin Prior to Sale

- Presale injunction remedies of RCW 61.24.130
- Koegel v. Prudential Mutual  
51 Wn.App. 108 (Div. I; 1988)
- Brown v Household Realty  
146 Wn.App 157 (2008)
- RCW 61.24.127 [owner-occupied residential property (2009)]  
(1) failure to enjoin before the sale may not be deemed a waiver of a claim for damages.



## Failure to Enjoin Prior to Sale

RCW 61.24.127 (2) The nonwaived claims listed under subsection (1) of this section are subject to the following limitations:

(b) The claim may not seek any remedy at law or in equity other than monetary damages;

(c) The claim may not affect in any way the validity or finality of the foreclosure sale or a subsequent transfer of the property;

(d) A borrower or grantor who files such a claim is prohibited from recording a lis pendens or any other document purporting to create a similar effect, related to the real property foreclosed upon;

(e) The claim may not operate in any way to encumber or cloud the title to the property that was subject to the foreclosure sale, ...



## Failure to Enjoin Prior to Sale

- *Albice* and *Klem* decisions do not limit based upon failure to enjoin:
- Waiver "only where it is equitable under the circumstances and where it serves the goals of the act."
- *Frizzell v. Murray*  
170 Wn.App 420 (Div. II 2012)  
(Review accepted by Supreme Court)





# 1. There must be a recorded Assignment of Deed of Trust to a true Beneficiary.

- The Grantor/Assignor may be MERS, or a lender that is not the original Beneficiary.
- A connected chain of title of the Beneficiary is not required to be recorded in WA *[yet]*.
- The Grantee/Assignee must be a true Beneficiary.
- A servicing agent is not a true Beneficiary unless it actually holds the Note.



## 2. The Appointment of Trustee must be signed by a true Beneficiary.

- The date of the signature on the Assignment should be prior to the date of the signature on the Appointment of Trustee.
- The recording date of the Assignment must be either before or at the same time as the recording of the Appointment. The property records therefore must show the Assignment to the Beneficiary before the Appointment of Trustee by that Beneficiary.







3. The Assignment of Deed of Trust to the Beneficiary and the Appointment of Trustee must be recorded before the date of signature by the Trustee on any document required for the foreclosure procedures.

- The *Klem* decision makes it clear that falsely dating documents by the Trustee will not be disregarded as harmless!





#### 4. The Trustee must provide a copy of a Certificate reciting it actually holds the note, signed and sworn by the Beneficiary.

- The Trustee should have that Certificate, prior to the date of signature by the Trustee on any document required for the foreclosure procedures.
- If the Certificate is signed by a servicing agent, the Certificate must recite the owner of the indebtedness has appointed the servicing agent to hold the note and to foreclose.

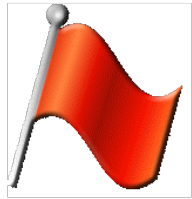


4. The Trustee must provide a copy of a Certificate reciting it actually holds the note, signed and sworn by the Beneficiary.

- Alternatively, the Certificate may be in the name of the true Beneficiary signed by the servicing agent as Attorney in Fact [we must have the POA], reciting the true Beneficiary holds the Note.
- If the servicing agent is signing as Attorney in Fact, all foreclosure documents will be in the name of the true Beneficiary, not the servicing agent..

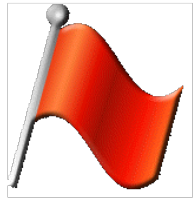


# Good Underwriting Discretion



- Always estimate the equity value lost to the borrower

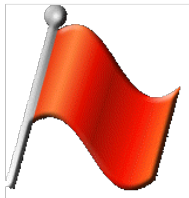
# Good Underwriting Discretion



- Always estimate the equity value lost to the borrower
- Only insure a prior Trustee sale for a good faith full value purchaser

# Good Underwriting Discretion

- Always estimate the equity value lost to the borrower
- Only insure a prior Trustee sale for a good faith full value purchaser
- Never overlook or insure through technical errors just because your company was involved with the TSG



# Questions?

- Where the public records show a prior Beneficiary and no assignments, what should be recorded to show the current holder of the promissory note [“Note”] is the present Beneficiary?
- Where the public records show MERS is the Beneficiary, may the current holder of the Note sign on behalf of MERS to assign to itself as the new Beneficiary?
- Is actual possession of the Note required for a servicing company to be entitled to initiate a Trustee sale as the Beneficiary?



# Questions?

- What authority documentation is required for a servicing company to be entitled to initiate a Trustee sale as the Beneficiary?
- Where a servicing company is not the owner of the promissory Note, may the servicing agent appoint a successor Trustee?
- Can the current holder of the Note appoint a successor Trustee prior to recording an assignment of the Deed of Trust from the prior Beneficiary?





# Questions?

- When will a third party purchaser at the Trustee Sale not qualify as a bona fide purchaser due to sophistication or knowledge of matters that do not appear on the public records of the prior Trustee sale?

