
**SUPREME COURT
OF THE STATE OF WASHINGTON**

CERTIFICATION FROM THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

LAURA ZAMORA JORDAN, as her separate estate,
and on behalf of others similarly situated,

Plaintiff

v.

NATIONSTAR MORTGAGE, LLC,
A Delaware limited liability company,

Defendant

**MEMORANDUM OF AMICI CURIAE
THE MORTGAGE BANKERS ASSOCIATION AND
THE CONSUMER MORTGAGE COALITION**

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The Court's decision held that Nationstar could not place a lock box on a property after its borrower defaulted. If left undisturbed, the decision could harm Washington borrowers by decreasing the value of their property; could harm Washington communities by creating blighted properties that drive down neighborhood home values and decrease tax revenue; and could impose additional costs on Washington lenders, increasing the cost and restricting the supply of credit for Washington's citizens. *Amici* respectfully urge reconsideration. At a minimum, the *Amici* suggest the Court clarify the opinion so as to be clear that it reaches only the conduct at issue in the case, the changing of locks, and does not address other aspects of property preservation which further protect borrowers, lenders, and the general public.

I. PROPERTY PRESERVATION CONDUCTED BY OR FOR LENDERS AND NOTEHOLDERS GREATLY BENEFITS WASHINGTON BORROWERS, LENDERS, AND COMMUNITIES.

It is always unfortunate when a homeowner defaults on a home mortgage. Defaults are most often due to life events, such as illness, loss of job, or divorce, that thrust the mortgagor into financial distress.¹ Borrowers in default often find themselves not only unable to pay the mortgage but also without financial resources to maintain the home or other property in proper

¹ N. Nichols, "Home Alone: Home Mortgage Foreclosure Rescue Scams and the Theft of Equity," *J. of Affordable Housing & Comm. Dev. L.* (2002) at 280.

condition. Many are in the even-more difficult situation where the cause of the default is something, such as a medical issue, that prevents the mortgagor from performing even basic upkeep.²

In many situations, a defaulting borrower abandons the property, often long before a foreclosure is imminent.³ These vacancies can carry serious negative consequences, including safety issues and decay due to weather, improper or non-existent heating and cooling, infestation, vandalism, and other circumstances that arise because no one is present.⁴ These situations, in turn, degrade neighborhoods, creating safety, health, and fire hazards. The property's value can plummet,⁵ undermining a lender or noteholder's interest, as the value of the home is at that point likely the only source for repayment of the debt.

Sections 7 and 9 of the standard form Washington deed of trust were included in the contract to authorize lenders, their successor noteholders, and agents such as loan servicers to take remedial steps in the event of disrepair, vacancies or safety issues

² "How to Buy a Foreclosure," Real Estate Lawyers (available at <http://www.realestatelawyers.com/resources/real-estate/real-estate-transactions/how-to-buy-foreclosure.htm>).

³ Housing Wire, "Voluntarily Abandoned Mortgages Continue to Grow According to Study" (April 30, 2010).

⁴ "Vacant and Abandoned Properties: Turning Liabilities into Assets," U.S. Department of Housing and Urban Development, Winter 2014 (available at <https://www.huduser.gov/portal/periodicals/em/winter14/highlight1.html>).

⁵ National Vacant Properties Campaign, "Vacant Properties: The True Costs to Communities," (August 2005) (available at www.smartgrowthamerica.org/documents/true-costs.pdf) at 6 ("NVPC").

at the home or other property.⁶ Relying on those sections, these parties inspect properties when a loan is in default,⁷ and, when necessary, take appropriate remedial measures such as removing trash, cutting grass and removing debris, winterizing, draining pools, and responding to fire hazards.⁸

These preservation activities provide direct benefits to both parties to the loan. For the borrower, who agreed as a condition of taking the loan to maintain the home or other property, the preservation activities take care of what is needed. This also has the ancillary economic benefit that maintaining property value increases the likelihood that the foreclosure sale will allow the noteholder to recoup what is owed *and* generate excess funds to go to the borrower, and reduce the chances of a deficiency for which a borrower could be liable. RCW §§ 61.24.080, .100.

Preserving a property after default or when a borrower abandons benefits the community at large. Un-kept and abandoned properties are visually unappealing, and can present dangerous conditions (unattended backyard pools, the presence of squatters, drug activity). Homes can deteriorate into disrepair very rapidly,

⁶ Fannie Mae Uniform Washington Deed of Trust (available at https://www.fanniemae.com/content/legal_form/3048w.doc).

⁷ “Managing Property Inspections,” Freddie Mac (March 2016) (available at www.freddiemac.com/learn/pdfs/service/prop_insp.pdf).

⁸ The Washington State Housing Finance Commission *requires* lenders that originate loans as part of its bond program to comply with Fannie Mae and Freddie Mac servicing guidelines. Mortgage Origination Agreement between WSHFC and Alabama Housing Finance Commission (Dec. 15, 2011) at § 4.17.

and escape the attention of law or code enforcement. They stand as a nuisance to neighbors and can cause a diminution in their property values as well.⁹ Appropriate property inspection and preservation actions by a lender thus benefit the neighbors of a defaulted borrower by keeping their property values and community appeal intact.

II. LOCAL AUTHORITIES SEEK TO REQUIRE PROPERTY PRESERVATION.

Washington public policy requires mitigation of damages and disfavors waste and public nuisances.¹⁰ Not surprising, then, several Washington communities have passed ordinances that purport to *require* lenders to conduct an extensive array of actions to maintain a property's value, including *locking doors and boarding windows and openings* that would allow third parties to enter.¹¹ The ordinances, if they are enforceable, seek to impose these substantial obligations to some extent regardless whether the lender or noteholder (or other entity with legal or equitable title or

⁹ NVPC at 13.

¹⁰ *Labriola v. Pollard Group, Inc.*, 152 Wash.2d 828, 840 (2004); *Plattner v. Bonnett*, 180 Wash.App. 1026 (Wash. Ct. App. April 15, 2014). *See also City of Bremerton v. Sesko*, 116 Wash. App. 1054 (2003) (city brings nuisance action against individual who left vehicles and junk on property).

¹¹ Spokane Mun. Code § 17F.070.520; Bremerton Mun. Code § 6.10. Jurisdictions across the country have similar laws. Boston Mun. Code § 16-52.1; Chicago Mun. Code § 13-12-126; Tampa City Code § 19-135.

any interest) is in actual possession of the property.¹²

Washington general public policies are consistent with federal law. Several federal agencies, most prominently the Department of Housing and Urban Development (“HUD”), insure loans for many State residents who, without federal assistance, could not otherwise obtain a home. HUD requires mortgagees to conduct inspections, rekey locks, secure windows and doors, and board up the abandoned property as part of pre-foreclosure servicing obligations.¹³

III. THE DECISION THREATENS SERIOUS ADVERSE IMPACTS ON WASHINGTON RESIDENTS.

The property preservation activities discussed above directly benefit the public interest.¹⁴ The decision invalidates the most basic preservation tool, using a lockbox to keep out unauthorized persons. Its rationale could undermine broader property preservation terms in the Washington deed of trust. *Amici* urge the Court to reconsider its decision because it could have wide-ranging negative consequences for Washington’s citizens.

A. Adverse Impacts On Defaulting Borrowers.

Washington public policy seeks to protect the financial interests of the State’s citizens. *Mendoza v. Rivera-Chavez*, 140

¹² Spokane Mun. Code § 17F.070.520B(5) (lender or person with legal or equitable title or any other interest in the property must maintain it subject to a notice of default).

¹³ HUD Mortgagee Letter 2010-18, “Update of Property and Preservation (P&P) Requirements and Cost Reimbursement Procedures” (May 13, 2010).

¹⁴ Restatement of Property § 4.1 cmt. c (it is “important to protect [property] against the elements and vandalism”).

Wn.2d 659, 664 (2000). The decision threatens to harm the persons it purports to protect: defaulting borrowers. Their most immediate financial interest arises if there is a judicial foreclosure: the borrower benefits if a sale generates a positive return (which they keep) rather than a deficiency (which they might have to pay).

Property preservation activities also serve the greater interest of borrowers in maintaining the condition and value of their home or property. All concerned in real property lending hope that a default will be temporary and resolved favorably to the borrower. Many defaults are worked out in repayment plans and modifications; others resolve when the borrower regains employment or a health condition clears. These positive results occur even for borrowers who abandoned a property or stopped maintaining it during default. Enabling lenders and noteholders to preserve the home or other property while the default is being resolved greatly benefits homeowners and property owners.

Unfortunately, under the majority opinion, lenders and noteholders will be hamstrung or prevented from lending a hand and enabling the homeowner to keep value in the property. That, in turn, will make it harder for the homeowner to justify working out the loan and maintaining homeownership. The public policy of this State ought to be to encourage the homeowner and lenders to work together and support stability and success in this way.

B. Adverse Impacts On Communities And Governments.

Reconsideration is needed because the decision could result in serious negative impacts on neighbors, communities, and municipalities arising from property deterioration and associated risks. If a defaulting borrower abandons a property and the lender or noteholder cannot place a lock box, excluding those not authorized to be there, vacant homes can become a magnet for illegal squatters¹⁵ or a target for criminal activity ranging from theft of copper wiring to use by prostitutes or drug dealers.¹⁶ This is especially true in rural communities, where visibility and distance create a greater risk of illegal and dangerous activity. And if the majority opinion is construed to undermine other remedial measures allowed by Sections 7 and 9, no person could undertake to assist a borrower (perhaps someone hospitalized or elderly and infirm) with such basic yet important measures as preventing infestation, winterizing the property, or removing garbage. In the very frequent situation where a borrower has neither means nor physical ability to do these things, they *simply will not be done* if the Court's decision is construed broadly.

State policy ought to encourage parties to a lending

¹⁵ Q13 Fox News "Neighborhoods battle scourge of vacant homes, problems with squatters" (available at <http://q13fox.com/2015/06/03/neighborhoods-battle-with-scourge-of-vacant-homes-squatters>).

¹⁶ "Vacant homes targeted by copper thieves," WLOX (Biloxi MS, 2011) (available at <http://www.wlox.com/story/13986894/vacant-homes-targeted-by-copper-thieves>); NVPC at 3.

relationship to provide for these types of stopgap measures when necessary to preserve the home and protect the public. With due respect to the majority, *Amici* submit that exercising Section 7 and 9 remedies is not a way “to recover possession” (Op. 8), but a means to preserve the status quo for the benefit of everyone.

In contrast, unattended properties with serious unaddressed problems can not only hurt neighbors and local communities in several ways, but can impair tax revenue because lower property values mean municipalities collect less property tax. Blight can drive taxpayers seeking to escape crime-ridden property out of communities entirely, further depressing valuations and tax revenue.¹⁷ And communities can be stuck with costs needed to attend to abandoned properties including increased demand on building inspectors, fire departments, and police,¹⁸ which substantially increase during foreclosure proceedings.¹⁹

Further impact on the State’s communities would arise because loan defaults typically are more frequent in lower income communities.²⁰ The increased risks and financial costs that could

¹⁷ NVPC at 6-7,12.

¹⁸ NVPC at 3.

¹⁹ Americans For Fin. Reform, “We All Pay A Price For the Foreclosure Crisis,” (Feb. 28, 2011), <http://ourfinancialsecurity.org/2011/02/we-all-pay-a-price-for-the-foreclosure-crisis/> (estimating municipal costs of \$5,400 for an inhabited and \$19,000 for an abandoned foreclosed property).

²⁰ A. Williams, Foreclosing Foreclosure: Escaping the Yawning Abyss of the Deep Mortgage and Housing Crisis, 7 Nw. J. L. & Soc. Pol’y 455, 471 (2012).

result from the opinion would hit such communities harder, though they are least able to shoulder the resulting consequences.

The result of a rule thwarting some or all of the property preservation actions allowed in the deed of trust is a downward spiral radiating outward from the properties where defaults occur that can impair schools, police and fire departments, and other public services. Reconsideration is needed to assure that the ill the majority apparently perceived (requiring contact with a third party to access a residence) is not overwhelmed by its stated cure.

C. Adverse Impacts On Credit.

The decision also harms *Amici*'s members and the lending community, and could impair the cost and supply of loans available in Washington. If lenders, noteholders and servicers cannot take preservation actions for fear of liability under *Jordan*, they might face fines and enforcement actions in localities requiring things *Jordan* expressly or impliedly does not permit.²¹ Washington courts should construe contracts to allow parties to comply with the law rather than violate it. *McCaughan v. Mitchell*, 2005 WL 1406159, at *2 (Wash. Ct. App. 2005).

To avoid this potential liability, lenders could gain formal and exclusive possession of property through foreclosure, or by appointment of a receiver, but these options impose significant

²¹ The potential liability is significant: in Bremerton lenders face a \$100 *per day* penalty if they fail to maintain property; in Spokane the daily penalty is \$260.

legal and administrative costs. And both are time-consuming; in the time before the lender gains possession the property could be damaged, increasing the lenders' losses and the borrower's costs.

These risks increase lenders' costs of doing business in this State. Perhaps more troubling, the decision suggests that the security given for Washington loans is not as readily protected and therefore the loans themselves are riskier. These real world impacts could increase the costs of lending or reduce credit availability, just as the housing economy has turned the corner.

Borrowers grant lenders contract rights to protect the collateral securing repayment of their loans. Lenders are not installing a new borrower when they place a lock box on a door; they are instead trying to exclude unwarranted third parties who could damage a property to the detriment of the lender or noteholder and the borrower. The Court should grant reconsideration to protect these important preservation activities.

* * *

The Court should reconsider the decision because of these potential adverse impacts. At a minimum, it should more clearly limit its holding to apply only to the changing of locks, thereby not prohibiting lenders and noteholders from engaging in other important preservation activities discussed above.

Respectfully submitted,



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Dated: August 3, 2016

CERTIFICATE

I certify that on the 3rd day of August, 2016, I mailed a copy of the foregoing Memorandum of Amici Curiae The Mortgage Bankers Association and The Consumer Mortgage Coalition and to the counsel of record listed below, postage prepaid, as well as emailed to the addresses indicated.

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Executed on this 3rd day of August, 2016, at Seattle, Washington.



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