McCarthy ◆ Holthus
A Limited Liability Partnership
A Multijurisdictional Law Firm
108 1st Avenue South, Ste. 300
Seattle, WA 98104
Telephone (206) 319-9100
Facsimile (206) 274-4902
www.McCarthyHolthus.com

Washington HB 2057

On March 28, 2018, Governor Jay Inslee signed into law sweeping changes to the Washington Deed of Trust Act that will impact everything from how and when servicers can secure and preserve abandoned property, to the fees paid to conduct foreclosures in Washington, to the definition of who may be a beneficiary entitled to foreclose. This article will address the most relevant and impactful of changes set to take effect on June 7th of this year.

Property Preservation

Perhaps most immediately relevant to loan servicers is a series of changes intended to address the impact of the *Jordan* decision of 2016. *Jordan* severely limited the ability of a mortgage servicer to enforce those provisions of the deed of trust that require a borrower to preserve and maintain property pledged as security for a loan. Under the decision, loan servicers cannot safely enter onto property for the purpose of securing, preserving or maintaining property absent consent of the borrower or a court order.

The impact of the *Jordan* decision was to put at risk any servicer completing certain preservation activities in a state that might have laws similar to Washington. Specifically, any state that explicitly restricts possession to a creditor until after final sale. Under such a law, a court could hold that actions such as the change of a lock or even entry into the property itself are tantamount to possession and thus trespass. The new law in Washington stops short of restoring the contractual rights of entry to a servicer, but does introduce a third option for entry.

Under the new law, a county, city or town may notify a mortgage servicer that a property has been determined to be abandoned, in mid-foreclosure, and a nuisance. Upon receipt of this notice, a mortgage servicer or its designee may enter the property. Entry on to the property will be only for the purposes of abating the identified nuisance, preserving property, or preventing waste but the servicer may take steps to secure the property.

However, the right to enter, preserve and secure is not without limitation and instruction. Specifically, a servicer or its designee must:

(1) Make a record of entry by means of time-stamped photographs showing the manner of entry and personal items visible within the residence upon entry.
(2) Not remove personal items from the property unless items are hazardous or perishable, and in such case of removal must inventory the items removed
(3) The servicer must post a notice on the front door that includes:
    a. A statement that prior to foreclosure the borrower/owner or occupant authorized by the borrower/owner has the right to possession; and
    b. A statement that the owner or authorized occupant has the right to request that any locks installed by the servicer be removed within 24 hours and replaced with new locks accessible only by the owner or authorized occupant; and
    c. A toll free, 24 hour number that the owner or authorized occupant may call in order to gain timely entry, which entry must be provided no later than the next business day; and
    d. The telephone number of the statewide foreclosure hotline recommended by the housing finance commission and the statewide civil legal aid hotline, together with a statement that the property owner may have the right to participate in mediation.

The records contemplated above must be maintained for at least four years and if the servicer discovers that the property is occupied upon entry, or if the servicer is contacted by the owner or an authorized occupant, the servicer is required to leave and cease efforts to preserve or secure the property.

Although the limitations listed above are not insignificant, it is anticipated that in most cases the property will truly be abandoned and thus much of the above will not come into play. There will however still be times when a court order is necessary. In the past, some courts have been hesitant to issue these orders as there was no specific statutory authority. Fortunately, the new law now specifically contemplates the filing of an action to obtain a court order to preserve and protect property. Further, the law makes clear that this action in no way prejudices the right of the servicer to continue with a non-judicial foreclosure.

It is important to note that if a county, city or town provides notice to a servicer that property is abandoned and in need of repair, failure of the servicer to act can result in a super lien against the property. The super lien is limited to only the actual costs of remedy (no attorney fees or fines) completed by the county, city or town, but this lien would survive foreclosure.

Finally as to property preservation, if the *servicer* is the first party to discover that the property is abandoned and a nuisance, under the new law that servicer may make a request upon the county, city or town for a determination that the property is abandoned and that the servicer should be allowed entry. The county, city or town will then have 15 days from the receipt of that request to respond. The available responses are either (a) provision of the notice and accompanying affidavit allowing the servicer access; (b) response that the property is not abandoned; or (c) response that the county, city or town does not have adequate resources or is otherwise unable to

make the requested determination. Thus, the abandonment determination that will allow access can either originate with the servicer or the county, city or town. However, in not every case where the determination originates with the servicer will access be allowed.

Who is entitled to foreclose?

Property Preservation isn't all that is new in Washington. After many years of ambiguity and confusion, the new law finally addresses the identity of who may be a foreclosing beneficiary. For many years the law in Washington has required that before a notice of trustee's sale is recorded, a trustee must have proof that the beneficiary is the *owner* of any note secured by the deed of trust to be foreclosed. The trustee was allowed to rely on a declaration from the beneficiary that it was the *actual holder* of the note as proof that the beneficiary was the owner.

The defect with the above is of course that an owner and a holder are not the same thing and those words are not synonyms. A note may be "owned" by FNMA or FHLMC but held by a servicer for the purposes of enforcement. Further, a declaration that the servicer is the "actual holder" doesn't make that servicer the "owner" of the note. Finally, it isn't at all clear what the difference is between a holder and an actual holder is when completing a declaration.

Fortunately, our long regional nightmare comes to an end with the new legislation. From June 7th forward, the trustee must have proof that the beneficiary is the *holder* of the note secured by the deed of trust and a declaration from the beneficiary that it is the holder of that note will provide sufficient proof. Thus, we can remove the word "actual" from the form beneficiary declaration and we should no longer need to address arguments about ownership when conducting a foreclosure.

Foreclosure when the borrower is deceased

In Washington, when a borrower is deceased, title companies have by and large refused to insure non-judicial foreclosure. The theory has apparently been that if the borrower is deceased, there is no effective way to provide notice to the borrower. Thus, the foreclosure must proceed judicially. After June 7th, this should change.

Under the new law, in the case where a borrower is known to the mortgage servicer or trustee to be deceased, the notice of default must be sent to any spouse, child, or parent of the borrower known to the trustee or servicer, and to any record owner of the property, at any address provided to the trustee or servicer as well as the property address to the heirs and devisees of the borrower.

If the Trustee or Servicer does not have addresses for all required recipients, then the trustee must complete "due diligence" that includes a search of, in the county where the property is located, the public records and information for any obituary, will, death certificate, or case in probate within the county for the borrower and grantor. If the search fails to result in the identification of any required recipient, then the trustee must record with the notice of sale a declaration attesting to the completion of the search and results.

Once the Notice has been sent, if a party contacts the trustee or servicer and claims to be a successor in interest to the borrower, then the claiming party will have 30 days to provide proof of the death of the borrower and then an additional 60 days to provide proof of their interest in the property. If such proof is provided, then the claiming party will be considered a successor in interest with rights to certain listed information, including the payoff and reinstatement amounts for the loan.

It is important to note that even if a party is determined to be a successor in interest, the statue does not impose any affirmative duty on the mortgage servicer to alter any obligation or provide any loan modification. Further, the servicer and trustee are free to proceed with the non-judicial foreclosure after provision of the required material.

In the event that a potential successor in interest fails to reach out the trustee or servicer until after the recording of the Notice of Sale, the obligations of the trustee and servicer will depend on when the potential successor reaches out with a claim. Only if the potential successor contacts the trustee or servicer more than 45 days before the scheduled sale must the servicer then provide information on the loan not less than 20 days before the sale is called. Any request received less than 45 days before the sale must still be answered, but postponement of the sale will not be required by statute.

Although the new procedure will increase the cost of the non-judicial foreclosure as the due diligence procedure will include necessary fees and costs, the savings in time and costs over the current judicial process will more than compensate for those increases.

Increase in the foreclosure tax

As the number of defaults have decreased dramatically in Washington, so too has the revenue collected for funding Housing Counseling and Mediation programs. To address this funding shortfall, the legislature has increased the assessment for recording of a Notice of Trustee's Sale from $250.00 per Notice to $325.00 per Notice. Further, a new mechanism has been added for increasing or decreasing this amount as conditions dictate.

It is important to remember that these fees are due for all beneficiaries who record more than fifty Notices of Sale per year. A beneficiary may be exempt from participating in the mediation program if it is a federally insured institution that did not complete more than 250 sales in the preceding calendar year, but payment of the $325.00 per notice fee is due of all beneficiaries who record more than 50 notices in a given year.

Adoption of a limited Declaration of Nonmonetary Interest

The Washington legislature followed a lead of California law during this session with the adoption of a declaration of non-monetary status option. If a trustee is named as a defendant in an action or proceeding, but there are no allegations of unlawful actions or omissions or substantive misdeeds of the trustee, then not less than 35 days after service of the summons and complaint on the trustee, the trustee may file a declaration of nonmonetary status. The declaration must be served as any other pleading would be served and must set forth specific

information describing why it believes the declaration is appropriate and the rights of the plaintiff to object to the declaration.

If no party thereafter objects within 30 days of the filing, the trustee will continue to be bound by the orders of the court, but will not be required to participate further and will not be subject to any monetary award or other damages, fees or costs.

The declaration is somewhat limited in that a party can bring a trustee back into the action if through the process of discovery new facts are learned that would lead to a claim against the trustee. However, it is hoped that this option will assist in controlling the costs of defense for named trustees where appropriate.

Pre-judicial foreclosure notice for reverse mortgages

One consistent theme of concern during the legislative session was the relative lack of regulation under state law on reverse mortgage foreclosure. A first action that may have more to follow is in a newly required notice now required at least 33 days before the filing of any complaint to judicially foreclose a reverse mortgage.

Under the new law, the Department of Commerce will promulgate a form notice that must be sent to the property address and any other address that the servicer or trustee may have for the borrower. This notice, which must be in English and Spanish, will include a description of the nature of the default or claimed reason for the foreclosure as well as the amount of money necessary to cure the default if the default is not the death of the borrower. Failure to send the notice as directed in the form directed will be a per se unfair or deceptive act in trade or commerce affecting the public interest in violation of the Washington consumer protection act.

Conclusion

Although the changes to the Washington Deed of Trust Act are broad and far-reaching, they fortunately should have little impact on established procedures for mortgage loan servicers. A small change will be required to limited forms, but most servicer created and executed forms should remain the same. Further, with the exception of deceased borrower cases where the timelines and required processed should *lessen*, little change should be required to the ordinary workflow. Over the next two months, we at McCarthy Holthus will continue to prepare for the changes ahead to insure the smoothest transition possible and be available to assist with implementation of the new law.