



Home Foreclosure Legal Aid Project

Lawyers Helping Homeowners

Module Two:

Restraint of Sale and Post-Foreclosure Remedies;
Bankruptcy and Foreclosures; Loan Modifications
and Work-outs

Training Materials:

Steve Fredrickson, Northwest Justice Project

1. PowerPoint: Restraining Trustees' Sales & Post-Foreclosure Litigation
2. Post-Foreclosure Issues & Unlawful Detainer Actions

Gloria Nagler, Nagler & Associates

1. PowerPoint: When Is Bankruptcy Useful In Foreclosure Context?

Fred Corbit, Northwest Justice Project

1. Loan Modifications and Work-outs
*Rules set for cutting payments on mortgages
by Holden Lewis, bankrate.com*

Steve Fredrickson

Steve Fredrickson was born in West Seattle and later moved to Bremerton and graduated from East Bremerton High School. He attended the University of Chicago and received a BA in Political Science. He returned to Seattle after college and entered the University of Washington Law School in 1969. After completing his first year in law school, Steve began working as a law clerk at Seattle Legal Services Center, the local legal aid program serving Seattle and King County. He continued working there during the school year and summers until his graduation in 1972.

Upon graduation, Steve was awarded a Reginald Heber Smith Community Lawyer Fellowship in Seattle and continued working at Seattle Legal Services Center as a "Reggie" until 1974. After his Reggie Fellowship, he worked as a staff attorney at the Center and at its successor organizations, Evergreen Legal Services and Columbia Legal Services, until 2004. In 2004, Steve joined

Northwest Justice Project as a Statewide Advocacy Coordinator where he currently coordinates NJP's work on housing, consumer, community economic development, and low-wage worker issues.

Steve's 36 years of legal aid practice have covered all areas of poverty law but have emphasized landlord-tenant and real estate law. He has authored or co-authored a number of publications on residential landlord-tenant law and is a frequent speaker on the topic at continuing legal education programs.

Gloria Nagler

Gloria Nagler is a principal in the law firm of Nagler & Associates. She is currently serving as the Plan Trustee in the Spokane Catholic Diocese bankruptcy. Gloria joined Seattle history a couple of years ago by representing the Kalakala Foundation in its Chapter 7 proceeding. Her creditor-debtor practice includes Chapter 11 business reorganizations, out-of-bankruptcy workouts, and Chapter 13 and Chapter 7 work. Her practice especially emphasizes clients with tax issues, small businesses in distress, and clients caught in complex divorce situations. Gloria clerked in the mid-1980's for the now retired Honorable Robert W. Skidmore, U.S. Bankruptcy Judge for the Western District of Washington at Tacoma. Gloria was named a top bankruptcy lawyer by *Seattle Magazine* in 2007.

Fred Corbit

Fred Corbit has practiced law since 1980. Presently he is an attorney at the Northwest Justice Project (NJP). Prior to going into public service at the NJP on August 31 of this year, he was a partner at Heller Ehrman LLP. At Heller Ehrman Fred represented companies and individuals from across the country in connection with issues related to finance, real estate, acquisitions and sales, business litigation, and bankruptcy. Prior to joining Heller Ehrman in 1989, Fred was a partner at the Lasher law firm in Seattle. Throughout Fred's professional career, he has lectured at Continuing Legal Education programs and has published numerous law related articles.

Washington State Bar Association

Home Foreclosure Legal Aid Project

Restraining Trustees' Sales &
Post-Foreclosure Litigation

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Restraining the Sale

Grounds for restraining sale:

Any person who has an interest in the property may restrain a trustee's sale on "any proper legal or equitable ground."
RCW 61.24.130(1).

Restraining the Sale

Notice seeking restraint of sale:

Person seeking restraint of sale must give five days notice to trustee of time, place, and judge before whom application for restraining order is to be made. Notice shall include copies of all pleadings. RCW 61.24.130(2). CR 6; CR 81.

Restraining the Sale

Joinder of Parties:

All necessary parties should be named in pleadings and served, but service is not required as a prerequisite to restraining sale on anyone but the trustee. CR 19

Effect of *lis pendens*; RCW 4.28.320.

Restraining the Sale

Payment & security requirement:

Court shall require as condition of granting the restraining order payment of the sums that would be due on the obligation secured by the deed of trust if the deed of trust was not being foreclosed. RCW 61.24.130(1).

Restraining the Sale

Payment based on type of default:

(a) Default in making the periodic payment of principal, interest, and reserves, such sums shall be the periodic payment of principal, interest, and reserves paid to the clerk of the court every thirty days.

Restraining the Sale

(b) Default in making payment of an obligation then fully payable by its terms, such sums shall be the amount of interest accruing monthly on the obligation at the nondefault rate, paid to the clerk of the court every thirty days.

Restraining the Sale

(c) Default in performance of any nonmonetary obligation secured by the deed of trust, the court shall impose such conditions as it deems just.

Restraining the Sale

Additional security:

Court may also condition restraining order on security for payment of costs, damages, and attorney fees, as may be incurred by reason of the restraining order. Court may consider grantor's equity in property. RCW 61.24.130(1)(b).

Restraining the Sale

Court's authority to waive requirements:

Separation of powers issue. Legislature can't abridge or curtail court's constitutional authority to issue injunctions; *Blanchard v. Golden Age Brewing Co.*, 188 Wash. 396 (1936); *Bowcutt v. Delta N. Star Corp.*, 95 Wn. App. 311 (1999); CR 65(c).

Post-Foreclosure Remedies

Party waives right to post-foreclosure-sale remedies where party (1) received notice of the right to enjoin the sale, (2) had actual or constructive knowledge of a defense to foreclosure prior to the sale, and (3) failed to bring an action to obtain a court order enjoining the sale. *Brown v. Household Realty Corp.*, 146 Wn. App. 157 (2008).

Post-Foreclosure Remedies

Brown does not address whether the borrower has a post-foreclosure-sale remedy for defects in the foreclosure process itself, e.g., failure to observe the statutory requirements, the existence of an actual conflict of interest on the part of the trustee, or failure to be impartial.

Post-Foreclosure Remedies

Brown also declined to decide whether a party who files a lawsuit after the initiation of the foreclosure process and unsuccessfully attempts to obtain a preliminary injunction restraining the sale could be barred from obtaining relief at trial.

Legislative Response to *Brown*

Ch. 292, Laws of 2009; ESB 5810

Effective Date: July 26, 2009.

Failure to bring civil action to enjoin sale
not a waiver of damage claims for:

- (a) Common law fraud or
misrepresentation;
- (b) Violation of Title 19 RCW;
- (c) Failure of trustee to materially comply
with RCW 61.24.

Brown Response

Limitations on damage claims:

- (a) Must be brought within earlier of SOL or two years from foreclosure sale;
- (b) No remedy other than money damages;
- (c) Can't affect validity of sale or transfer;
- (d) Can't record lis pendens;
- (e) Can't encumber or cloud title;
- (f) Actual damages unless CPA claim.

Brown Response

Only applies to foreclosure of owner-occupied residential real property.

Doesn't apply to foreclosure of deed of trust securing commercial loan.

Post-Foreclosure UDAs

Purchaser at trustee's sale entitled to possession on twentieth day following the sale and “shall also have a right to the summary proceedings to obtain possession of real property provided in chapter 59.12 RCW.” RCW 61.24.060.

Relief in RCW 59.12 UDA

Show cause hearing?* *IBF, LLC v. Heuft*, 141 Wn. App. 624, 174 P.3d 95 (2007)

Witnesses?

30-day trial date?

.375 procedure?

Possession?

Damages?

Double damages?

Attorney Fees?

Notice to Tenants

Trustee must serve NOTS on occupants of single-family residence, condominium, cooperative, or other dwelling unit in a multiplex containing fewer than five residential units, whether or not the rental agreement is recorded; notice may be single notice addressed to "occupants" for each unit known to trustee or beneficiary. RCW 61.24.040(1)(b)(vi).

Notice to Tenants

Trustee must cause a copy of the notice of sale described in RCW 61.24.040(1)(f) to be posted in a conspicuous place on the property, or in lieu of posting, cause a copy of the notice to be served upon any occupant of the property.

RCW 61.24.040(1)(e).

Notice to Tenants

If the trustee elects to foreclose the interest of any occupant or tenant of property comprised solely of a single-family residence, or a condominium, cooperative, or other dwelling unit in a multiplex or other building containing fewer than five residential units, the following notice shall be included as Part X of the Notice of Trustee's Sale:

Notice to Occupants

X. NOTICE TO OCCUPANTS OR TENANTS

The purchaser at the trustee's sale is entitled to possession of the property on the 20th day following the sale, as against the grantor under the deed of trust (the owner) and anyone having an interest junior to the deed of trust, including occupants who are not tenants. After the 20th day following the sale the purchaser has the right to evict occupants who are not tenants by summary proceedings under chapter 59.12 RCW. For tenant-occupied property, the purchaser shall provide a tenant with written notice in accordance with RCW 61.24.060; (Ch. 292, Laws of 2009, eff. 7/26/09).

New Tenant Protections

Ch. 292, Laws of 2009; ESB 5810

Effective Date: July 26, 2009.

If trustee elects to foreclose interest of occupant in tenant-occupied property:

Must post and mail separate notice addressed to “Resident of property subject to foreclosure sale.”

Notice must advise that foreclosure process has begun, may be completed in 90 days or more, new owner must either give new rental agreement or 60-day notice to vacate.

Effect of Trustee's Deed

Trustee's deed shall recite that the sale was conducted in compliance with this chapter and deed of trust, which recital shall be prima facie evidence of compliance and conclusive evidence in favor of bona fide purchasers and encumbrancers for value. RCW 61.24.040(7).

Failure to Give Notice

..., except that 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 to such person. In such case, the lien or interest of such omitted person shall not be affected by the sale and such omitted person shall be treated as if such person was the holder of the same lien or interest and was omitted as a party defendant in a judicial foreclosure proceeding.

Trustee's Authority

Successor not vested with powers of trustee until RAST is recorded

RCW 61.24.010(2):

Upon recording the appointment of a successor trustee in each county in which the deed of trust is recorded, the successor trustee shall be vested with all powers of an original trustee.

Post-Foreclosure UDAs

Ordinarily, can't raise defenses in UDA that could have been raised prior to the trustee's sale. *Peoples Nat'l Bank v. Ostrander*, 6 Wn. App. 28 (1971); *Steward v. Good*, 51 Wn. App. 108 (1988).

Claims & Defenses

May present a variety of legal and equitable defenses and set-offs in an unlawful detainer action.

Beware of possible res judicata or collateral estoppel effects of litigating or not litigating title issues and other issues in an unlawful detainer action. See *Kelly v. Powell*, 55 Wn. App. 143 (1989).

Counterclaims

Ordinarily, can't assert counterclaim in an unlawful detainer action.

"If the counterclaim, affirmative defense, or setoff excuses the tenant's failure to pay rent (or other breach), then it is properly asserted in an unlawful detainer action." *Heaverlo v. Keico Indus.*, 80 Wn. App. 724, 728 (1996)

Foreclosure Rescue Cases

Is there a landlord-tenant relationship?

Is it covered by RCW 59.18?

Is it covered by RCW 59.12?

Is it covered by ejectment, RCW 7.28?

Foreclosure Rescue Cases

Special unlawful detainer act requirements for evictions that involve distressed homes and conveyances of properties that were in danger of foreclosure. Ch. 278, Laws of 2008; RCW 61.34.

Foreclosure Rescue Cases

RCW 59.18.363 requires that in an unlawful detainer action involving property that was a distressed home:

(1) The plaintiff shall disclose to the court whether the defendant previously held title to the property that was a distressed home, and explain how the plaintiff came to acquire title;

Foreclosure Rescue Cases

(2) No rent escrow pending trial when a material question of fact exists as to whether the plaintiff acquired title from the defendant directly or indirectly through a distressed home conveyance;

Foreclosure Rescue Cases

(3) Automatic stay of UDA and consolidation with pending or subsequent quiet title action when a defendant claims that the plaintiff acquired title to the property through a distressed home conveyance.

Post-Foreclosure Issues & Unlawful Detainer Actions

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**We gratefully acknowledge use of these materials that were
prepared for the King County Bar Association's Foreclosure
Assistance Panel Training on April 23, 2009**

Foreclosures & Unlawful Detainer Actions

1. Foreclosure Rescue Cases - General. In transactions that purport to be sales with leases and rights to repurchase, the purchaser/lessor may file an unlawful detainer action to recover possession from the seller/lessee if there has been a default under the lease or the purchaser/lessor is asserting other possessory rights. The threshold question is usually how to accurately characterize the relationship between the parties to the transaction.

If the sale and lease with repurchase rights are invalid, then there is no landlord-tenant relationship and, therefore, no unlawful detainer jurisdiction to recover possession. If the sale and lease with repurchase rights are valid, then there would be a landlord-tenant relationship between the parties that is probably covered by the Residential Landlord-Tenant Act (RLTA) and resulting unlawful detainer jurisdiction (a lease with an option to purchase a single family dwelling is covered by the RLTA unless the agreement has been approved in writing by the tenant's attorney; RCW 59.18.415).

If the lease with repurchase rights is construed as an option that has already been exercised or as a real estate purchase and sale agreement, then there also may be no landlord-tenant relationship and no unlawful detainer jurisdiction. Those relationships would probably be excluded from RLTA coverage by RCW 59.18.040(2). Landlord-tenant relationships that are not covered by the RLTA or the Manufactured/Mobile Home Landlord-Tenant Act, RCW 59.20, would, nevertheless, be covered by common law real property principles, contract principles, and the Unlawful Detainer Act, RCW 59.12. Again, an unlawful detainer action pursuant to RCW 59.12 would not be available if there is no landlord-tenant relationship between the parties.

As a result of the increase in foreclosure rescue cases and related abuses, the RLTA was amended in 2008 to require special requirements for evictions that involve distressed homes and conveyances of properties that were in danger of foreclosure. RCW 61.34; Ch. 278, Laws of 2008.

RCW 59.18.363 requires that in an unlawful detainer action involving property that was a distressed home:

(1) The plaintiff shall disclose to the court whether the defendant previously held title to the property that was a distressed home, and explain how the plaintiff came to acquire title;

(2) A defendant who previously held title to the property that was a distressed home shall not be required to escrow any money pending trial when a material question of fact exists as to whether the plaintiff acquired title from the defendant directly or indirectly through a distressed home conveyance;

(3) There must be both an automatic stay of the action and a consolidation of the action with a pending or subsequent quiet title action when a defendant claims that the plaintiff acquired title to the property through a distressed home conveyance.

2. Unlawful detainer action as special statutory proceeding. The unlawful detainer action is a special statutory procedure for the recovery of rental property. RCW 59.12. It is summary in nature, in derogation of the common law, and is strictly construed in favor of the tenant. *Housing Authority v. Terry*, 114 Wn.2d 558 (1990); *Wilson v. Daniels*, 31 Wn.2d 633 (1948); *Sullivan v. Purvis*, 90 Wn. App. 456 (1998). See Stoebuck, Vol. 17 WASHINGTON PRACTICE, Chap. 6 *Landlord and Tenant* (1995); Fredrickson, Vol. IC WASHINGTON PRACTICE, Chap. 88 *Termination of Tenancies and Unlawful Detainer* (1997).

3. Claims and defenses in unlawful detainer actions. Defendants may present a variety of legal and equitable defenses and set-offs in an unlawful detainer action. Defendants should beware, however, of the possible res judicata and collateral estoppel effects of litigating or not litigating title issues and other issues in an unlawful detainer action. See *Kelly v. Powell*, 55 Wn. App. 143 (1989).

a. Pleading Affirmative Defenses. Defenses such as lack of jurisdiction over the person or subject matter, insufficiency of process or service of process, or failure to state a claim upon which relief may be granted should be set forth in the answer if not made in a motion. CR 12(b) and (h).

b. Real party in interest and capacity to maintain action. An unlawful detainer action must be prosecuted in the name of the real party in interest. CR 17. If the real party in interest is a corporation (or probably a partnership or association as well) it must be represented by a licensed attorney. *Lloyd Enters. v. Longview Plumbing*, 91 Wn. App. 697 (1998). Objections to the capacity of the party initiating the suit should be raised in the answer. CR 9(a), CR 17. Those objections may include failure of a person or entity conducting business under an assumed name to allege filing of a proper certificate. RCW 19.80.040. See *Reese Sales Co., Inc. v. Gier*, 16 Wn. App. 664 (1977). But see *Griffiths & Sprague Stevedoring Co. v. Bayly, Martin & Fay, Inc.*, 71 Wn.2d 679 (1967).

c. Claim of Ownership or No Landlord-Tenant Relationship. Chapter 59.12 RCW ordinarily applies only to landlord-tenant relationships (but see RCW 59.12.030(6) regarding entry without permission or color of title). RCW 59.12.030; *Turner v. White*, 20 Wn. App. 290 (1978). In cases where there is no landlord tenant relationship but there is a dispute as to possession, the party out of possession must ordinarily bring an ejectment action under RCW 7.28 rather than an unlawful detainer action (e.g. buyer/seller disputes, former employees who resided on premises as term of employment, family members who never paid rent). See *Puget Sound Inv. Group, Inc. v. Bridges*, 92 Wn. App. 523 (1998). Unlawful detainer is, however, authorized to recover possession after a nonjudicial deed of trust foreclosure or real estate contract forfeiture. RCW 61.24.060; RCW 61.30.100(3). See *Savings Bank v. Mink*, 49 Wn. App. 204 (1987).

Although title cannot be quieted in an unlawful detainer proceeding, the defendant can assert an ownership claim as an affirmative defense in an unlawful detainer action. *Proctor v. Forsythe*, 4 Wn. App. 238 (1971); *Snuffin v. Mayo*, 6 Wn. App. 525 (1972); *Sundholm v. Patch*, 62 Wn.2d 244 (1963). See also *Kelly v. Powell*, 55 Wn. App. 143 (1989) (requesting specific performance of an exercised option to purchase). If issues of ownership remain unresolved in a quiet title

action, determining the right to possession in an unlawful detainer action may be premature. *Pearson v. Gray*, 90 Wn. App. 911 (1998).

d. Equitable Defenses. Most of the equitable defenses that can be asserted in an ordinary civil action, including estoppel, laches, and waiver, may also be asserted in an unlawful detainer action. See CR 8(c); CR 12(b).

Equitable defenses are expressly authorized in unlawful detainer actions covered by the RLTA, RCW 59.18.400, and the court, on a number of occasions, had recognized the right to raise equitable defenses prior to the passage of the RLTA. See *Andersonian Inv. Co. v. Wade*, 108 Wash. 373 (1919); *Income Properties Inv. Corp. v. Trefethen*, 155 Wash. 493 (1930); *Thisius v. Sealander*, 26 Wn.2d 810 (1946); *Motoda v. Donohoe*, 1 Wn. App. 174 (1969); *Shoemaker v. Shaug*, 5 Wn. App. 700 (1971). See also *First Union Management v. Slack*, 36 Wn. App. 849 (1984); *Port of Longview v. IRM, Ltd.*, 96 Wn. App. 431 (1999)(Commercial case).

e. Set-offs and counterclaims. The RLTA permits tenants to assert any set-off arising out of the tenancy. RCW 59.18.400. A set-off is any demand of a like nature that can be asserted against a party in a civil action upon an express or implied contract. The ability to raise a set-off as a defense is purely statutory, *Fischer Flouring Mills Co. v. U.S.*, 17 F.2d 232, 235 (9th Cir. 1927), and must be pleaded. RCW 4.32.150. Judgment may be entered on a set-off that exceeds the plaintiff's demand. RCW 4.56.075. There continues to be authority that a set-off cannot be asserted in an unlawful detainer action that is not covered by the RLTA. *Young v. Riley*, 59 Wn.2d 50 (1961).

Although there are few decisions describing the types of claims that can be asserted as set-offs in unlawful detainer actions, tenants should be able to claim any damages resulting from the landlord's failure to perform any of its contractual, statutory, or common law obligations (e.g. payment of utility bills which are the landlord's obligation). *Foisy v. Wyman*, 83 Wn.2d 22 (1973); *Tipton v. Roberts*, 48 Wash. 391 (1908)(tenant repair costs as set-off); *Gentry v. Krause*, 106 Wash. 474 (1919); *Parks v. Lepley*, 160 Wash. 287 (1931); *Reichlin v. First National Bank*, 184 Wash. 304 (1935).

Although set-offs that arise out of the tenancy may be asserted in a residential unlawful detainer proceeding that is covered by the RLTA, general counterclaims are still not permitted unless they would prove facts that excuse the tenant's breach. See, however, *Munden v. Hazelrigg*, 105 Wn.2d 39 (1985), which permits general counterclaims, cross-claims, etc., when right to possession ceases to be an issue and the matter is converted to a general civil action.

Ordinarily, a tenant may not assert a counterclaim in an unlawful detainer action. *Young v. Riley*, 59 Wn.2d 50 (1961). The court may, however, have jurisdiction to decide the merits of a counterclaim that is essential to determining right to possession. "If the counterclaim, affirmative defense, or setoff excuses the tenant's failure to pay rent (or other breach), then it is properly asserted in an unlawful detainer action." *Heaverlo v. Keico Indus.*, 80 Wn. App. 724, 728 (1996) citing *Munden v. Hazelrigg*, *supra*. See also, *Kelly v. Powell*, 55 Wn. App. 143 (1989); *Sprincin v. Sound Conditioning*, 84 Wn. App. 56, 65 (1996).

Notwithstanding these authorities, in *Housing Authority v. Terry*, 114 Wn.2d 558 (1990), the court restated generally that counterclaims are not permitted in unlawful detainer actions. This language, however, is dicta in a decision that dismissed the action against the tenant on other grounds. The tenant had actually asserted an "affirmative defense" seeking "reasonable accommodation" for his handicap in the form of a Section 8 certificate that would have allowed him to vacate the premises and move to another subsidized unit. In this way, the affirmative defense would not have excused the breach or even contested possession.

4. Rent escrow requirements. In 1983 the Landlord-Tenant Act was amended to add a new section, RCW 59.18.375, that provides for payment of rent into the court registry under certain limited circumstances. As a general rule, the court has no authority to condition the tenant's right to defend an unlawful detainer upon payment of rent in the court registry, except as provided in RCW 59.18.375. RCW 59.18.370-410. This procedure was amended in 2008. Ch. 75, Laws of 2008. This procedure can now only be utilized if (1) there is a landlord-tenant relationship covered by the RLTA and resulting unlawful detainer jurisdiction; (2) it's an eviction based upon nonpayment of rent; and (3) the plaintiff serves a separate notice either with a filed eviction summons and complaint or later that is in the form prescribed and contains the language required by RCW 59.18.375.

RCW 59.18.375 is an optional procedure that the landlord can use only in eviction actions based upon nonpayment of rent. Under this section, the landlord can request that the tenant be evicted before a hearing or trial unless the tenant either:

1. Pays into the court registry the amount of rent alleged to be owing and continues to pay the monthly rent as it becomes due, while the action is pending; or
2. Submits a signed and sworn statement that he or she does not owe the rent claimed to be owing because of a legal or equitable defense or a set-off arising out of the tenancy.

If a landlord intends to use this procedure, the landlord must serve a separate RCW 59.18.375 notice that describes the requirements that the tenant must meet to avoid issuance of a writ of restitution. The tenant must either tender the rent into the court or file a sworn response that rent is not owing by the specific date specified in the notice that must be not less than seven days after service of the notice.

The notice deadline may not precede the return date in the summons and complaint. If the notice is served with the eviction summons and complaint, then the deadline for complying with the notice and the deadline for responding to the eviction summons and complaint must be the same date. If the tenant denies that rent is owing, the written denial must be a sworn statement and must be filed in addition to filing the answer to the complaint.

If the tenant does not comply with the above requirements, but still answers the complaint and asserts defenses, the court can issue the writ of restitution but should not enter a judgment until after a trial or hearing on the amount of rent that is owed. RCW 59.18.375. *But see, Duvall Highlands, LLC v. Elwell*, 104 Wn. App. 763 (2001).

Tenants who are defending an unlawful detainer on the basis that they do not owe the amount of rent claimed to be due should not have to pay rent into the court registry as a condition of obtaining a hearing before a writ of restitution is issued. Under the 2008 amendments to RCW 59.18.375, tenants who fail to comply with the payment or sworn statement requirements by the deadline date still have the right to schedule a hearing on the eviction and retain or be restored to possession if they establish a defense.

The only other provision for payment of rent into the court registry is in RCW 59.18.380. This section is similar to a stay of execution or supersedeas bond and is applicable if a landlord prevails at a show cause hearing in a nonpayment of rent unlawful detainer action. The tenant can post a bond to stay execution of any writ until a final judgment is entered after trial except in the case of some drug-related evictions. RCW 59.18.390.

5. Show cause hearings. RCW 59.18.370, *et seq.* provides for an optional procedure to have a pretrial hearing to determine if the landlord should be restored to possession immediately (i.e. have a writ of restitution issued). This procedure is referred to as a show cause hearing and generally is conducted by a court commissioner, the civil motion judge or the presiding judge. Only the court can order the tenant to appear at a show cause hearing. RCW 59.18.370. There is no show cause hearing procedure in RCW 59.12, but the court may have the authority to authorize such a procedure in a RCW 59.12 eviction. *IBF, LLC v. Heuft*, 141 Wn. App. 624 (2007)

a. Order to show cause. The order to show cause must specify a hearing date that shall not be less than seven nor more than thirty days from the date of service on the tenant. RCW 59.18.370. The tenant may answer orally or in writing at the show cause hearing. RCW 59.18.380. A show cause hearing scheduled fewer than seven days from the date of service should be stricken. *Canterwood Place v. Thande*, 106 Wn. App. 844 (2001). If the court authorizes service of the order to show cause by mail, then service is deemed complete on the third day following the date of mailing, unless the third day falls on a Saturday, Sunday, or legal holiday. CR 5(b)(2)(A).

b. Issuing the writ. The court will examine the parties and witnesses orally at the show cause hearing and ascertain whether the plaintiff has the right to be restored to possession of the property. The rules of evidence apply and witnesses must ordinarily appear personally for examination. The standard which the court must use in making this determination is not clear. RCW 59.18.380 provides as follows:

" . . . and if it shall appear that the plaintiff has the right to be restored to possession of the property, the court shall enter an order directing the issuance of a writ of restitution . . ."

Defendants should argue that the appropriate standard is the same as summary judgment and that the only time a writ of restitution may be issued before trial is where the plaintiff can demonstrate that there is no genuine issue as to any material fact and that the plaintiff is entitled to a writ as a matter of law. CR 56. This is a reasonable construction of the requirement that the court find that the landlord has the right to be restored to possession of the property.

This interpretation is expressly or impliedly endorsed in cases that hold that the court should not make rulings at a preliminary hearing which impair the defendant's right to a jury trial or to adequately present defenses when the defendant has demonstrated a factual dispute. *See Tuschoff v. Westover*, 60 Wn.2d 722 (1962); *Hartson Partnership v. Goodwin*, 99 Wn. App. 227 (2000); *Housing Authority v. Pleasant*, 126 Wn. App. 382 (2005).

c. Granting other relief at hearing. The court may also grant or deny other relief requested by the plaintiff if it determines that the plaintiff is or is not entitled to the relief as a matter of law. RCW 59.18.380. The court may also grant or deny the relief requested by the defendant at the show cause hearing including dismissal of the plaintiff's complaint. RCW 59.18.380.

d. Bonds. If a writ of restitution is issued at the show cause hearing in an unlawful detainer based upon nonpayment of rent, the tenant can stay execution of the writ by paying into the court registry or to the plaintiff the rent and court costs determined to be owing plus the monthly rent as it becomes due, until a final hearing on the merits. RCW 59.18.380. This is a separate provision from the prehearing payment provisions of RCW 59.18.375 described above. The tenant may also stay enforcement of the writ pending trial by posting a bond in evictions for reasons other than nonpayment of rent, except some drug-related evictions. RCW 59.18.390. The landlord must post a bond to indemnify the tenant if a writ of restitution is issued in any unlawful detainer prior to final judgment. *See Meadow Park v. Canley*, 54 Wn. App. 371 (1989).

e. Jury trial. Factual issues in unlawful detainer actions must be tried by a jury unless a jury is waived. RCW 59.12.130. A jury is waived if the jury demand is not filed before the case is set for trial. The process of demanding a jury and the conduct of a jury trial are governed by Rules 38 and 39 of the Civil Rules for Superior Court. *Thompson v. Butler*, 4 Wn. App. 452 (1971). The court may direct a verdict as in other civil cases. *Peterson v. Crockett*, 158 Wash. 631 (1930). If the issues raised are primarily equitable, the court may exercise its discretion and strike the jury demand. *Thompson v. Butler, supra*; *See Himpel v. Lindgren* 159 Wash. 20 (1930).

It is arguably error for the court to decide material factual issues at either a show cause hearing or an expedited trial if it deprives the defendant of the opportunity to have the case heard by a jury. *See Tuschoff v. Westover*, 60 Wn.2d 722 (1962); *Hartson Partnership v. Goodwin*, 99 Wn. App. 227 (2000); *Housing Authority v. Pleasant*, 126 Wn. App. 382 (2005). *See, however, Meadow Park v. Canley*, 54 Wn. App. 371 (1989).

6. Unlawful detainer actions after nonjudicial foreclosure. The Deed of Trust Act provides that the purchaser at a trustee's sale is entitled to possession on the twentieth day following the sale and "shall also have a right to the summary proceedings to obtain possession of real property provided in chapter 59.12 RCW." RCW 61.24.060.

a. Limitations on defenses. There are a number of cases that limit the ability of borrowers to challenge nonjudicial deed of trust foreclosures in post-foreclosure sale unlawful detainer actions. *See, e.g., Steward v. Good*, 51 Wn. App. 509 (1988); *Koegel v. Prudential Mut. Savings Bank*, 51 Wn. App. 108 (1988); *Peoples Nat'l Bank of Washington v. Ostrander*, 6 Wn. App. 28 (1971). While it is undoubtedly preferable to bring a lawsuit to contest the default or

restrain the sale before the sale is conducted, the right to contest the sale should not be deemed waived, even when it is exercised after the sale, if the purchaser at the sale was not a stranger to the transaction or if the borrower lacked notice of the right to enjoin the trustee's sale or lacked actual or constructive knowledge of a defense to foreclosure prior to the sale. This is consistent with RCW 61.24.040 that specifies that “failure to bring such a lawsuit may result in a waiver of any proper grounds for invalidating the Trustee's sale.” (Emphasis added).

In *Cox v. Helenius*, 103 Wn.2d 383 (1985) the court allowed defenses to be raised that the sale was void because of defects in the foreclosure process itself even though the case was initially an unlawful detainer action brought after the sale. In *Savings Bank of Puget Sound v. Mink*, 49 Wn. App. 204 (1987) the court held that a number of defenses raised by the appellant were *not* properly assertable in an unlawful detainer action but referenced *Cox v. Helenius*, *supra*, and noted: “the Supreme Court recognized that there may be circumstances surrounding the foreclosure process that will void the sale and thus destroy any right to possession in the purchaser at the sale.”

In *Cox*, the Court recognized two bases for post-foreclosure-sale relief: defects in the foreclosure process itself, i.e., failure to observe the statutory prescriptions and the existence of an actual conflict of interest on the part of the trustee.

In 2008, the Deed of Trust Act was amended to alter the trustee’s fiduciary duties. Ch. 153, Laws of 2008. The Act now provides that 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. Instead, the trustee or successor trustee shall act impartially between the borrower, grantor, and beneficiary. RCW 61.24.010.

In *Brown v. Household Realty Corp.*, 146 Wn. App. 157 (2008) the court held that a party waives the right to post-foreclosure-sale remedies where the party (1) received notice of the right to enjoin the sale, (2) had actual or constructive knowledge of a defense to foreclosure prior to the sale, and (3) failed to bring an action to obtain a court order enjoining the sale.

Although *Brown* bars a borrower's post-foreclosure-sale claim arising out of any underlying obligation secured by the foreclosed deed of trust when the borrower fails to seek presale remedies under the Act, it does not address whether the borrower has a post-foreclosure-sale remedy for defects in the foreclosure process itself, e.g., failure to observe the statutory prescriptions and the existence of an actual conflict of interest on the part of the trustee pursuant to *Cox*. *Brown* also declined to decide whether a party who files a lawsuit after the initiation of the foreclosure process and unsuccessfully attempts to obtain a preliminary injunction restraining the sale could be barred from obtaining relief at trial.

- b. Defenses based on defects in trustee’s sale procedure. The trustee must serve a notice of trustee’s sale on occupants of single-family residence, condominium, cooperative, or other dwelling unit in a multiplex containing fewer than five residential units, whether or not the rental agreement is recorded; notice may be single notice addressed to "occupants" for each unit known to trustee or beneficiary. RCW 61.24.040(1)(b)(vi).

The trustee must cause a copy of the notice of sale described in RCW [61.24.040\(1\)\(f\)](#) to be posted in a conspicuous place on the property, or in lieu of posting, cause a copy of the notice to be served upon any occupant of the property.

RCW 61.24.040(1)(e).

A successor trustee is not vested with the powers of a trustee until a resignation and appointment of a successor trustee is recorded. RCW 61.24.010(2): “Upon recording the appointment of a successor trustee in each county in which the deed of trust is recorded, the successor trustee shall be vested with all powers of an original trustee.”

If the trustee elects to foreclose the interest of any occupant or tenant of property comprised solely of a single-family residence, or a condominium, cooperative, or other dwelling unit in a multiplex or other building containing fewer than five residential units, the following notice shall be included as Part X of the Notice of Trustee's Sale:

X. NOTICE TO OCCUPANTS OR TENANTS

The purchaser at the trustee's sale is entitled to possession of the property on the 20th day following the sale, as against the grantor under the deed of trust (the owner) and anyone having an interest junior to the deed of trust, including occupants and tenants. After the 20th day following the sale the purchaser has the right to evict occupants and tenants by summary proceedings under the unlawful detainer act, chapter [59.12](#) RCW;

The trustee's deed shall recite that the sale was conducted in compliance with this chapter and deed of trust, which recital shall be prima facie evidence of compliance and conclusive evidence in favor of bona fide purchasers and encumbrancers for value. RCW 61.24.040(7).

These recitals are not conclusive as to anyone who did not receive the required notices. “..., except that 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 to such person. In such case, the lien or interest of such omitted person shall not be affected by the sale and such omitted person shall be treated as if such person was the holder of the same lien or interest and was omitted as a party defendant in a judicial foreclosure proceeding.”

c. Joinder of tenant in unlawful detainer action. The tenant of property that is purchased at a nonjudicial foreclosure sale is an essential party to an unlawful detainer action brought by the purchaser of the property and the failure to join the tenant as a party deprives the trial court of subject matter jurisdiction. An unlawful detainer action is not moot just because the tenant no longer has possession of the contested premises. *Laffranchi v. Lim*, 146 Wn. App. 376 (2008).

7. Limitations on relief in RCW 59.12 unlawful detainer actions after foreclosure.

The Deed of Trust Act authorizes use of a RCW 59.12 unlawful detainer action only to recover possession of the property after a trustee's sale. RCW 61.24.060. Unlike a RLTA RCW 59.18 unlawful detainer action, there is no statutory authorization for a show cause hearing (*although*

see IBF, LLC v. Heuft 141 Wn. App. 624 (2007) holding that the trial court's decision to hold a show cause hearing in a RCW 59.12 commercial eviction was not an abuse of discretion and was not error), no authorization for a RCW 59.18.375 rent escrow procedure, and no statutory authorization for reasonable attorney fees. The purchaser at the trustee's sale may not be able to rely on a prevailing party attorney fees provision in the deed of trust in a post-foreclosure sale unlawful detainer action, particularly if there is no privity of contract between the sale purchaser and the occupant.

Although purchasers often seek damages for unlawful detainer in post-foreclosure sale unlawful detainer actions, an award of damages is not authorized by RCW 61.24.060. The legislature knows how to authorize such damage awards if it chooses to do so. The Real Estate Contract Forfeiture Act, unlike the Deed of Trust Act, specifically authorizes a seller to obtain an award of actual damages caused by the occupant's failure to surrender possession after the forfeiture and for costs and reasonable attorney fees in a RCW 59.12 unlawful detainer action. RCW 61.30.100(3).

There may also be an issue whether the purchaser at the sale is entitled to relief at a show cause hearing or other preliminary relief in a RCW 59.12 unlawful detainer action if there is no witness present who is competent to testify to entitlement to possession pursuant to a trustee's deed. The rules of evidence apply in these proceedings and the parties may raise any relevant evidentiary objections.

8. Attorney fees. A landlord who prevails in a RCW 59.18 (and RCW 59.20 by reference) unlawful detainer action may be awarded costs and reasonable attorney's fees. RCW 59.18.410. A tenant who prevails in an unlawful detainer action may be awarded costs and reasonable attorney's fees, as well. RCW 59.18.290(2); *Soper v. Clibborn*, 31 Wn. App. 767 (1982). The defendant may be deemed the prevailing party when the plaintiff takes a voluntary nonsuit. *Walji v. Candyco, Inc.*, 57 Wn. App. 284 (1990); *Andersen v. Gold Seal Vineyards*, 81 Wn.2d 863 (1973) (long-arm statute); *Western Stud Welding v. Omark Industries*, 43 Wn. App. 293 (1986). A party may recover reasonable attorney's fees even if legal services are provided at no cost (except when a tenant covered by the RLTA prevails on a retaliation defense - RCW 59.18.250). *Holland v. Boeing Company*, 90 Wn.2d 384 (1978); *Harold Meyer Drug v. Hurd*, 23 Wn. App. 683 (1979). RCW 4.84.330 may also authorize an award of reasonable attorney's fees to the prevailing party if provided in the rental agreement, notwithstanding the limitations on attorney's fees specified in RCW 59.18.230(2)(c). *Wright v. Miller*, 93 Wn. App. 189 (1998).

9. Ejectment. Although the unlawful detainer action is the procedure most frequently used for evicting tenants, it is not the only procedure available. A landlord may also proceed by way of ejectment. *Petsch v. Willman*, 29 Wn.2d 136 (1947); *Verline v. Hyssop*, 2 Wn.2d 141 (1940); *Honan v. Ristorante Italia*, 66 Wn. App. 262 *rev. den.* 120 Wn.2d 1009 (1992)

The procedure for ejectment is contained in RCW 7.28.010, *et seq.* Although a landlord need not serve one of the notices specified in RCW 59.12.030 to commence an ejectment action, the procedure is seldom used. It is commenced with a regular statutory twenty-day summons; there is no provision for pretrial writs of restitution; there is no statutory priority over other civil

actions, and there is no statutory right to either reasonable attorney's fees or double damages if the landlord prevails.

Ejectment could conceivably be used where the landlord has substantial monetary claims against a tenant that could not be recovered in an unlawful detainer action due to the court's limited jurisdiction. If the landlord could recover possession relatively quickly through the use of summary judgment or preliminary injunctive relief, then it may be able to avoid the necessity of bringing successive actions by combining its damage claims with an ejectment action.

Ejectment may be the only procedure available for evicting a tenant at will due to the fact that a tenancy at will does not fit into any of the notice categories described in RCW 59.12.030 and therefore a landlord may not utilize an unlawful detainer action. This may also be true for other occupants who are not considered tenants. *Turner v. White*, 20 Wn. App. 290 (1978). *See also Najewitz v. Seattle*, 21 Wn.2d 656 (1944); 1C Wash. Prac., Methods of Practice, § 88.8 (4th ed.); 17 Wash. Prac. Real Estate: Property Law, § 6.16 (2d ed.); 20 WASH. L. REV. 169 (1945).



WHEN IS BANKRUPTCY USEFUL IN FORECLOSURE CONTEXT?

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MAY 2009



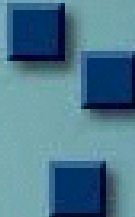


Initial Meeting with Client


Be sure client brings with her
a copy of the foreclosure sale
notice.

No other way to be certain of the
critical date.





Once the foreclosure sale has taken place, the bankruptcy filing cannot save the home.



■ TIME BETWEEN FILING ■ BANKRUPTCIES

§ 1328: Must wait 4 years from filing date of case with previous discharge in Chapter 7, 11, 12 to file Chapter 13
OR

Must wait 2 years from previous Chapter 13

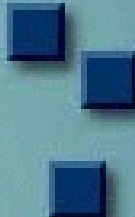





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- Must wait 8 years between
- Chapter 7 filings





If a house saver, Debtor could file Chapter 13 sooner than four years, just no discharge obtained.



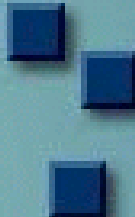


Previous filings In same Year


If client has filed one other
bankruptcy in last 12 months,
then stay for debtor lasts only 30
days absent court order;

However, stay protecting property
will be in place.





If client has filed two or more bankruptcies in past 12 months, then there is no stay unless debtor obtains court order granting stay.



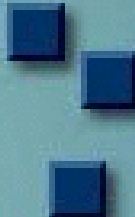



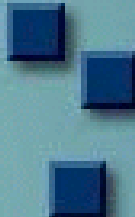
PRE-FILING CREDIT COUNSELING

If client must file bankruptcy, direct client to do credit counseling immediately.

List of approved agencies on court's website.



- 
- For Chapter 7s and 13s, scheduled foreclosure sale will not in itself be sufficient for waiver. In reWallert, 332 B.R. 884 (Bankr. D.Minn. 2005).
- 



Chapter 7 is straight liquidation
bankruptcy where Trustee sells
non-exempt assets.

Chapter 13 allows debtor to cure
default and save home.



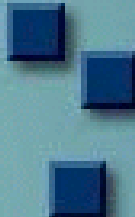


CHAPTER 7 AS REMEDY


Gives no time to cure arrearage,
however:

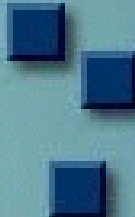
If credit card debt is impeding
mortgage payments, can
discharge credit card debt.






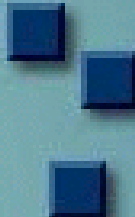
If there is significant equity in home, and no time for debtor to sell home, file Chapter 7 and Trustee will sell it (if client unable/unwilling to file Chapter 13, for example).






If nothing else, debtor can live
in the house rent-free in Chapter
7 until foreclosure sale or until
Trustee sells home.





If tax liability from debt forgiveness from foreclosure sale is an issue, if foreclosure occurs **AFTER** filing Chapter 7, debt forgiveness will not be taxable.



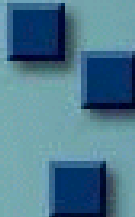


WHAT WILL CHAPTER 13 DO FOR DEBTOR?


Filing will stop foreclosure (only if filed before the sale)

Will give debtor up to 60 months to bring the arrearage current





Can give debtor more time to
market home, if debtor can make
mortgage payments.





Debtor can discharge some or most non-priority debt in “best efforts” Plan.





SCREENING CLIENTS FOR CHAPTER 13

Amount of debt:

Debt limits: \$336,900 unsecured
\$1,010,650 secured





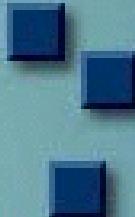
Debt limits do not
double in joint case





History of previous discharge?





Must be individual, sole proprietor
or married couple


Corporations, LLCs, partnerships can
not file Chapter 13.






* Must have regular income

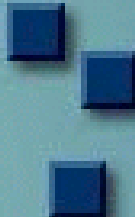

Can be seasonal, from family member, unemployment: as long as income is verifiable and adequate.

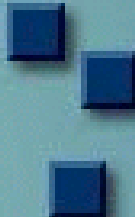





- WHAT WILL MONTHLY PAYMENT BE:

- The greatest of:
 1. Disposable income, calculated under new Means Test and using IRS standards for expenses, OR
- 

- 
- 2. Value of all non-exempt assets (liquidation value) paid over 36 months OR
 - 3. Payment in full of all priority debts over life of Plan
- 



If spouse has significant
separate property, spouse
should not join in filing of
bankruptcy unless absolutely
necessary.



MEDIAN INCOME EFFECT

§ 1325(b): Plan must be 5 years if Debtor has income equal to or in excess of median income.



"Median Income":

Median income in 2009 for 4-person family is:

Oregon: \$72,735

Washington: \$82,445





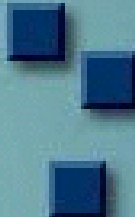
www.wawb.uscourts.gov





Calculate monthly income during last 6 months before filing. Then multiply times 12.

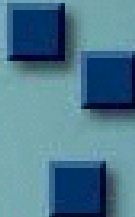





If that figure is lower than
Median Income for
Washington, then no means
test analysis and debtor
presumptively qualifies to file
Chapter 7

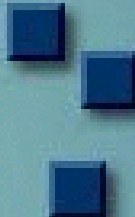
OR






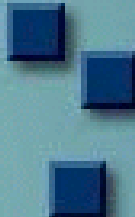
If filing Chapter 13 and under median income, debtor can do 36-month Plan instead of 60 months.






If figure is lower than Median
Income for Washington, then
no means test analysis and
debtor presumptively qualifies
to file Chapter 7.






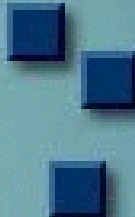
If 51% or more of total debt is
business-related debt, not consumer
Debt, then debtor's income is not
material.






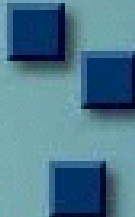
Modify Home Loan in Chapter 13?

- Modification of debt secured by residence? § 1322(b)(2)
 - Only if there is other collateral OR
- 




• If Congress
authorizes
bankruptcy
judges to
modify home
loans OR





Case law allows bankruptcy court to strip junior lien from primary residence if there is NO equity in property to support the lien.



Rules set for cutting payments on mortgages

BY HOLDEN LEWIS

bankrate.com

People with unaffordable mortgages now have one set of rules, applicable nationwide, to determine whether they can get lower monthly payments.

Folks who can afford their mortgages but need help to refinance to lower rates don't get a lot of help.

The Obama administration's housing plan encourages lenders to modify the mortgages of homeowners who can't afford their monthly house payments because of hardship.

The definition of hardship is loose and includes: lost income, increased expenses, payment shock from an adjustable-rate mortgage and "other indications of being at risk of default."

Qualified homeowners would keep their current loans, but the payments would be reduced to 31 percent of before-tax income.

Most borrowers would see their payments rise after five years.

The aim of the Making Home Affordable program is to "prevent the destructive impact of foreclosures on families and communities," according to the Treasury Department.

Two weeks ago, the Obama administration announced the outlines of the foreclosure prevention program, which then was dubbed the Homeowner Affordability and Stability Plan.

The guidelines for the mortgage modification plan explain who is eligible and how those monthly house payments are reduced to 31 percent of income.

Here are some qualifications to be eligible for a loan modification:

- It has to be the homeowner's primary residence, and must be occupied and habitable.
- The balance on the first-lien mortgage can't be more than \$729,750 for a single-family home.
- It's OK if foreclosure proceedings already have begun or if the borrower is suing the lender.
- If the borrower qualifies, then the mortgage servicer figures out what it will take to decrease the monthly house payments to 31 percent of income.

Here's how that shakes out:

- Under this plan, the house payment comprises principal, interest, taxes, homeowners insurance (including flood insurance) and homeowners association or condo fees. It excludes mortgage insurance premiums.
- Past-due interest, taxes and insurance are added to the mortgage's balance. Late fees must be waived.
- As a first step, the lender drops the interest rate as low as 2 percent. If that's sufficient to bring the payment down to 31 percent of income, then that's the rate. For example, if cutting the interest rate to 4.625 percent drops the payment to the 31 percent threshold, the rate doesn't go any lower.
- If dropping the rate to 2 percent doesn't do the trick, the next step is to extend the term of the loan up to 40 years. It doesn't have to be 40 years; it's all good if a 2 percent rate over a 37-year term brings the monthly payments down to 31 percent of income.
- If a 2 percent rate and a 40-year term don't get the payment down enough, the third step is to "forbear principal." This means that the borrower owes the same amount as before but pays interest on only part of the mortgage balance.

For example, someone might owe \$300,000 but pay 2 percent interest for 40 years on \$250,000. All \$300,000 must be paid back if the homeowner sells the home or refinances the mortgage later.