

# Washington Law Review

---

Volume 48  
Number 4 *Symposium: Comprehensive Judicial  
Reform—A Timely Alternative to Piecemeal  
Modification*

---

8-1-1973

## Due Process and Deeds of Trust—Strange Bedfellows?

David A. Leen

Peter A. Galbraith

John Gant

Follow this and additional works at: <https://digitalcommons.law.uw.edu/wlr>



Part of the [Property Law and Real Estate Commons](#)

---

### Recommended Citation

David A. Leen, Peter A. Galbraith & John Gant, *Due Process and Deeds of Trust—Strange Bedfellows?*, 48 Wash. L. Rev. 763 (1973).

Available at: <https://digitalcommons.law.uw.edu/wlr/vol48/iss4/3>

This Article is brought to you for free and open access by the Law Reviews and Journals at UW Law Digital Commons. It has been accepted for inclusion in Washington Law Review by an authorized editor of UW Law Digital Commons. For more information, please contact [cnyberg@uw.edu](mailto:cnyberg@uw.edu).

## DUE PROCESS AND DEEDS OF TRUST— STRANGE BEDFELLOWS?

David A. Leen,\* Peter A. Galbraith,† and John Gant‡

The operative effect of the Washington Deed of Trust Act<sup>1</sup> has been altered by various legal developments since its creation in 1965. The 1967 amendments to the Act,<sup>2</sup> legislation authorizing use of a master form deed of trust,<sup>3</sup> and the Federal Tax Lien Act of 1966 are a few such developments.<sup>4</sup> However, no development subsequent to the Act's inception has had potentially greater impact than the evolving concept of procedural due process. The Washington courts have contributed to this constitutional evolution,<sup>5</sup> following closely a series of United States Supreme Court decisions holding that the due process clause of the fourteenth amendment precludes a state from

---

\* Member, Washington State Bar Ass'n; Reginald Heber Smith Fellow; Staff Attorney, Seattle Legal Services; B.A., Beloit College, 1968; J.D., University of Oregon, 1971.

† Second year law student, University of Washington; B.A., University of Pennsylvania, 1969.

‡ Member, Washington State Bar Ass'n; Director of Litigation, Seattle Legal Services; B.A., University of Arizona, 1964; J.D., Cornell University, 1967.

1. WASH. REV. CODE ch. 61.24 (Supp. 1972).

2. Ch. 30 [1967] Wash. Sess. Laws 101. See text accompanying notes 17-19 *infra*.

3. Ch. 148 [1967] Wash. Sess. Laws 711, WASH. REV. CODE ch. 65.08 (Supp. 1972). The section provides that a deed of trust or mortgage may be recorded and serve as constructive notice when the deed or mortgage incorporates the form by reference. Washington Mortgage Correspondents Association, a Washington corporation, recorded a master form deed of trust on June 12, 1967, with the Auditor of King County, Washington (Auditor file No. 6188051). Similar documents were filed in each county in Washington.

4. Pub. Law No. 89-719, § 108, 26 U.S.C. § 7425 (1970). In essence the Act provides that a junior federal tax lien (which is of record more than thirty days before the sale) is extinguished by a private foreclosure sale (which includes a trustee's sale) if the Internal Revenue Service [IRS] receives notice twenty-five days prior to the sale, but that the IRS has a right of redemption for "a period of 120 days from the date of such sale or the period allowable by state law, whichever is longer." *Id.* (emphasis added). The amount the IRS must pay to redeem the property is the amount *legally* satisfied by reason of the sale. As a deficiency judgment is prohibited in a private deed of trust foreclosure, WASH. REV. CODE § 61.24.100 (Supp. 1972), the amount legally realized at the sale will usually be the balance of the outstanding obligation. See generally Sanders & McDonald, *Non-Judicial Foreclosures and the Federal Tax Lien Act of 1966*, 24 Sw. L.J. 815 (1970).

5. See *Seattle Credit Bureau v. Hibbitt*, 7 Wn. App. 219, 499 P.2d 92 (1972); *Lucas v. Stapp*, 6 Wn. App. 971, 497 P.2d 250 (1972). Both decisions are discussed in note 27 *infra*.

depriving a person of a significant interest in property without prior notice and an opportunity to be heard.<sup>6</sup>

This article analyzes the potential effect of this constitutional development on the Washington Deed of Trust Act. In addition to describing the Act and examining its possible constitutional defects, the article briefly discusses the policy questions involved and suggests general guidelines for change.

## I. THE WASHINGTON DEED OF TRUST ACT

Trust deed financing is a three-party arrangement in which the borrower (grantor) deeds real property to a trustee who holds the deed to protect the lender's (beneficiary's) interest.<sup>7</sup> Although trust deeds have been used in Washington for over half a century, lending institutions were not attracted to this financing device until 1965.<sup>8</sup> Prior to 1965, trust deeds had to be foreclosed judicially and offered little advantage over conventional mortgages.<sup>9</sup> With the passage of the Washington Deed of Trust Act of 1965, trust deed financing became the most widely used security device in real property transactions in Washington state.

The 1965 Act added two features to trust deed financing which made it the preferable means of handling real property security transactions. First, the Act authorized nonjudicial sales of secured property

---

6. See, e.g., *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969).

7. See Gose, *The Trust Deed Act in Washington*, 41 WASH. L. REV. 94 (1966) [hereinafter cited as Gose].

8. *Id.* at 94.

9. *Id.* See also Shattuck, *Real Property Mortgage Foreclosure—Redemption*, 36 WASH. L. REV. 309, 310 (1961). Foreclosure of conventional mortgages in Washington requires a time consuming judicial process that culminates in a sale which does not vest title in the purchaser. The delay between the original default on the mortgage and the judicial sale can be lengthy; this coupled with the borrower's statutory one year redemption period (eight months if the mortgagee waives a deficiency judgment and the property is nonagricultural), WASH. REV. CODE § 6.24.140 (Supp. 1972), which includes the right to continued possession of the property if the borrower filed a homestead exemption prior to the sale and occupies the land as a homestead at the time of the sale, *id.* § 6.24.210, can extend the total time required to vest title in the lender to fifteen months and beyond. The right to possession of a homestead during the redemption period applies even after the judicial foreclosure of a purchase money mortgage. See *First Nat'l Bank v. Tiffany*, 40 Wn. 2d 193, 242 P.2d 169 (1952). Although the lender is entitled to a deficiency judgment if appropriate, it has been argued that a delay in excess of fifteen months in acquiring title after default can inhibit mortgage financing. See Comment, *Statutory Redemption: The Enemy of Home Financing*, 28 WASH. L. REV. 39 (1953).

## Due Process and Deeds of Trust

by the trustee six months following default, provided the deed contained a power of sale and a judicial foreclosure action was not pending.<sup>10</sup> This feature obviated the necessity of incurring the excessive delay and high costs inherent in judicially supervised foreclosures.<sup>11</sup> Second, the Act stripped debtors and junior security holders of their statutory right of redemption following sale.<sup>12</sup> Thus, in a sale made pursuant to the 1965 Act the purchaser gets immediate title to the land and need not wait for the debtor and junior security holders to fail to exercise their redemption rights. However, the lender desirous of exploiting these features of the 1965 Act must pay a price—the Act precludes recovery of a deficiency judgment.<sup>13</sup>

Under the 1965 Act, as amended in 1967, a lender-beneficiary can invoke the private sale provision of a trust deed simply by requesting the trustee to issue the required statutory notice indicating that the sale will be held in 120 days.<sup>14</sup> The arrearage (payments of principal and interest presently due) must be set forth in the notice, but trustee costs, which include attorney fees and other incidental costs of the sale, need not be disclosed.<sup>15</sup> Generally, the debtor must contact the trustee to ascertain the total amount of money which must be paid in order to discontinue the sale. The debtor, any beneficiary under a subordinate trust deed, and any subordinate lienholder of record may prevent the sale by curing the default prior to the date set for the sale.<sup>16</sup>

In 1967 the Washington Legislature approved amendments to the 1965 Act designed to reduce the time and expense of selling real property secured under a deed of trust after default. The minimum statutory notice time, formerly 180 days, was reduced to the present minimum of 120 days.<sup>17</sup> Trustees now are authorized to activate private

---

10. WASH. REV. CODE § 61.24.030 (Supp. 1972). In addition to the requirements noted in the text, four other requirements must be met to foreclose under the 1965 Act: (1) the trust deed must provide that the property is not used for agricultural or farming purposes; (2) a default must have occurred which by the terms of the deed makes operative the power of sale; (3) no action on an obligation secured by the deed can be pending; and (4) the deed must have been recorded in the county where the land is situated. *Id.*

11. Gose at 95. See note 9 *supra*.

12. WASH. REV. CODE § 61.24.050 (Supp. 1972) provides: "After sale, as in this chapter provided, no person shall have any right by statute or otherwise to redeem from the deed of trust or from the sale." See also note 9 *supra*.

13. WASH. REV. CODE § 61.24.100 (Supp. 1972).

14. *Id.* § 61.24.040.

15. *Id.* See also note 132 *infra*.

16. WASH. REV. CODE § 61.24.090 (Supp. 1972).

17. *Id.* § 61.24.040.

sale deed provisions and pursue nonjudicial realization procedures even though a judicial foreclosure is pending.<sup>18</sup> Finally, the amendments allow a subordinate lienholder of record who prevents a private sale by curing the default to add the costs incurred in curing the default, including reasonable attorneys' fees, to his lien.<sup>19</sup>

Recent judicial developments subject the continued vitality of the Washington Deed of Trust Act to serious doubt, for the growth of procedural due process raises serious questions as to the constitutionality of its nonjudicial sale provisions. As business necessity demands a predictive analysis of the validity of nonjudicial sale provisions in deeds of trust, it is essential to examine in detail the relation between procedural due process and deeds of trust.

## II. DUE PROCESS AND DEEDS OF TRUST

### A. *The Rise of Procedural Due Process*

The rapid growth of procedural due process<sup>20</sup> is one of the most startling judicial developments in recent years.<sup>21</sup> While due process was early held to require notice and an opportunity to be heard,<sup>22</sup> more recently it has been held that such notice and opportunity to be heard "must be granted at a meaningful time and in a meaningful manner."<sup>23</sup> In a series of cases<sup>24</sup> beginning in 1969 with *Sniadach v.*

---

18. *Id.* See Gose at 100-01. A lender is still forbidden from foreclosing privately if it has already begun judicial foreclosure proceedings. WASH. REV. CODE § 61.24.030(4) (Supp. 1972).

19. *Id.* § 61.24.090.

20. The fourteenth amendment to the United States Constitution provides: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1.

21. The recent developments in procedural due process have been the subject of voluminous commentary in legal periodicals. For an extensive treatment of the most recent procedural due process case, *Fuentes v. Shevin*, 407 U.S. 67 (1972), see 48 WASH. L. REV. 646, 649-60 (1973).

22. "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified. Common justice requires that no man shall be condemned in his person or property without notice and an opportunity to make his defense." *Baldwin v. Hale*, 68 U.S. 223, 233 (1863) (citations omitted).

23. *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

24. See *Fuentes v. Shevin*, 407 U.S. 67 (1972) (notice and an opportunity to be heard required before a debtor's property can be seized in a prejudgment replevin action); *Stanley v. Illinois*, 405 U.S. 645 (1972) (notice and a hearing required before a state may deprive the father of illegitimate children of the custody of such children after the death of the mother); *Bell v. Burson*, 402 U.S. 535 (1971) (notice and a hearing required before a state may suspend a driver's license under an uninsured motorist

## Due Process and Deeds of Trust

*Family Finance Corp.*<sup>25</sup> and extending most recently to *Fuentes v. Shevin*,<sup>26</sup> the United States Supreme Court has focused primarily upon the “meaningful time” requirement and has gradually developed the applicable procedural due process standard: *Absent a valid waiver and except in extraordinary situations, due process requires notice and an opportunity to be heard before any person can be deprived of any significant property interest by state action.*<sup>27</sup> While this basic standard is far from self-explanatory, it is useful to examine the meaning of the key phrases by applying the due process standard to a typical deed of trust foreclosure.

### B. Does Procedural Due Process Apply to Deeds of Trust?

#### 1. Does the Borrower Have a “Significant Property Interest”?

A borrower in a deed of trust arrangement has legal title and an equitable interest in the land being purchased; the trustee has only a lien on the land.<sup>28</sup> This interest in land is clearly a sufficient property interest to require due process protections. One of the primary reasons for the growth of the concept of procedural due process in recent years has been the expansive reading given the term “property.” In the words of the *Fuentes* Court, “The Fourteenth Amendment’s protection of ‘property’, however, has never been interpreted to safeguard only

---

statute); *Boddie v. Connecticut*, 401 U.S. 371 (1971) (states are prohibited from denying access to courts in divorce actions solely because of inability to pay court costs); *Wisconsin v. Constantineau*, 400 U.S. 433 (1971) (state excessive drinking statute which allowed local police to prohibit liquor sales to named person without prior notice and hearing held unconstitutional); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (notice and a hearing required before welfare payments are suspended pending a later hearing); and *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969) (notice and an opportunity to be heard required prior to prejudgment garnishment of wages).

25. 395 U.S. 337 (1969).

26. 407 U.S. 67 (1972).

27. State courts have independently developed a similar due process standard. *See, e.g., Randone v. Appellate Dept.*, 5 Cal. App. 3d 536, 488 P.2d 13, 96 Cal. Rptr. 702 (1971), *cert. denied*, 407 U.S. 924 (1972) (prejudgment attachment without prior notice and a hearing unconstitutional). The Washington courts have kept pace with the due process developments. *See Seattle Credit Bureau v. Hibbitt*, 7 Wn. App. 219, 499 P.2d 92 (1972) (holding in *Lucas, infra*, applied to a creditor with a security interest in property); *Lucas v. Stapp*, 6 Wn. App. 971, 497 P.2d 250 (1972) (Washington’s attachment statute, WASH. REV. CODE § 7.12.020(10) (1959), held unconstitutional because of failure to provide for prior notice and a hearing); *see the discussion of Lucas and Hibbitt in 48 WASH. L. REV.* 646, 653-54 (1973).

28. *See Gose* at 103.

the rights of undisputed ownership. Rather it has been read broadly to extend protection to 'any significant property interest' . . . ."<sup>29</sup>

Indeed it has! Recent decisions have interpreted "any significant property interest" to include the right to: use and possession of household goods (a stove and stereo) in which the seller retained a security interest;<sup>30</sup> custody of one's illegitimate children after the mother's death;<sup>31</sup> continued possession of a driver's license;<sup>32</sup> access to state courts to judicially dissolve a marriage;<sup>33</sup> preservation of a person's reputation, honor, or integrity;<sup>34</sup> a statutory entitlement to continued welfare benefits;<sup>35</sup> and use of a person's wages.<sup>36</sup> However, a tenant in a periodic month-to-month tenancy has a significant property interest—the right to continued use and possession of rented property—only if the rent has been paid and all the covenants of the lease have been honored.<sup>37</sup>

Surely the borrower's interest in land held pursuant to a deed of trust falls within this expanded definition. The borrower has an equitable interest in the land which can be freely alienated, subject of course to the outstanding obligation. Moreover, the borrower has a right to use and possession of the land which he can exercise himself or transfer to another through a lease agreement.

## 2. *Is There a "Deprivation" and When Does It Occur?*

The borrower under a trust deed loses all of his interests in the land when the trustee's sale occurs. The Washington Deed of Trust Act expressly provides that there is no right of redemption after the trustee's sale.<sup>38</sup> By statute, the purchaser at the trustee's sale is entitled to

29. *Fuentes*, 407 U.S. at 86, citing *Boddie*, 401 U.S. at 379.

30. *Fuentes*, 407 U.S. at 70, 86. *Fuentes* has clarified that the property in question need not be a "necessity of life" to merit due process protections. *Id.* at 88-90.

31. *Stanley v. Illinois*, 405 U.S. 645, 649 (1972).

32. *Bell v. Burson*, 402 U.S. 535, 539 (1971).

33. *Boddie v. Connecticut*, 401 U.S. 371, 374 (1971).

34. *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971).

35. *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970).

36. *Sniadach*, 395 U.S. at 342 (Harlan, J., concurring).

37. *Lindsey v. Normet*, 405 U.S. 56, 64-67 (1972). Tenants do not have a right to continued possession of rented premises without paying rent while the alleged wrongdoings of the landlord are litigated. Hence, it is appropriate for an unlawful detainer statute to provide for an expedited trial limited to determining if the monthly rental has been paid and the covenants of the lease honored. See the discussion of *Lindsey* in note 157 *infra*.

38. See note 12 *supra*.

## Due Process and Deeds of Trust

possession twenty days after sale and is expressly authorized to bring a summary unlawful detainer proceeding to obtain such possession.<sup>39</sup> Hence, the trustee's sale is an overt and (with the exception of the borrower's implied right to possession for twenty days after sale) complete deprivation of all of the borrower's interest in the land.

In return for the loss of all of his interest in the land, the borrower theoretically receives the proceeds of the trustee's sale. If those proceeds equal the fair market value of the property, it can be argued that no deprivation occurs. In *Strutt v. Ontario Savings and Loan Association*,<sup>40</sup> a California appeals court found that because the fair market value of the borrower's property at the time of the trustee's sale did not exceed the balances due on two trust deed notes *plus the costs of sale*, "the plaintiff had no equity in the real property at the time of the trustee's sale and has suffered no damages as a result thereof."<sup>41</sup> While the *Strutt* court's analysis may be incorrect even given the particular facts of the case because the court failed to acknowledge that the costs of the trustee's sale are paid out of the borrower's equity in the land,<sup>42</sup> as the California court later noted, "it is common knowledge that at forced sales such as a trustee's sale the full potential value of the property being sold is rarely realized, and, in fact, [the lender] was the only bidder at the trustee's sale."<sup>43</sup> Because the costs of the trustee's sale must be paid out of the proceeds of the artificially low sale price, only the exceptional borrower receives any compensation for his equity in the land. A more likely outcome is that the amount realized at the trustee's sale will equal the amount due on the outstanding trust note, with the result that the borrower receives no compensation for his equity in the land. This uncompensated loss of equity is an obvious deprivation.

In addition to the trustee's sale, an earlier, more subtle deprivation of a significant property interest also may occur. The Washington

---

39. WASH. REV. CODE § 61.24.060 (Supp. 1972).

40. 28 Cal. App. 3d 866, 105 Cal. Rptr. 395 (1972). See also the discussion of *Strutt* in note 145 *infra*.

41. 28 Cal. App. 3d at 876, 105 Cal. Rptr. at 401.

42. Even if the amount of the bid at the trustee's sale is the fair market value of the property, the proceeds of the sale are first applied to the expense of the sale. See WASH. REV. CODE § 61.24.080(1) (Supp. 1972). As the trustee's sale is being forced upon a borrower who may not wish to sell, even at fair market value, the resulting loss of equity (the expenses of the sale) would appear to be a deprivation.

43. 28 Cal. App. 3d at 876, 105 Cal. Rptr. at 402.



Deed of Trust Act provides that "at least one hundred and twenty days before [the trustee's] sale, notice thereof shall be recorded in the office of the auditor in each county in which the deed is recorded."<sup>44</sup> The statutorily required recording of the notice of sale 120 days before the trustee's sale may be a significant deprivation of property because: (1) it substantially reduces the alienability of the borrower's interests in the land, and (2) it substantially reduces the borrower's equity in the land. Although on first reading this suggestion may seem untenable, a close examination of the recent due process decisions reveals substantial support for this conclusion,<sup>45</sup> for in addition to giving the concept of "property" a broad reading, the recent cases also have expanded significantly the interpretation of "deprivation."

The touchstone of a discussion of the concept of "deprivation" is Justice Harlan's definition in *Sniadach*. Harlan concluded that any deprivation which "cannot be characterized as *de minimis* . . . must be accorded the usual requisites of procedural due process: notice and a prior hearing."<sup>46</sup> While the term *de minimis* is not self-defining, the recent procedural due process cases provide useful illustrations of what is not a *de minimis* deprivation. In the words of the *Fuentes* Court, "[I]t is now well-settled that a temporary, non-final deprivation of property is nonetheless a 'deprivation' in terms of the Fourteenth Amendment."<sup>47</sup> Hence, the Supreme Court has held that a deprivation includes a temporary freeze of wages caused by a prejudgment writ of garnishment,<sup>48</sup> a temporary termination of welfare benefits pending a fair hearing,<sup>49</sup> a temporary seizure of household goods pursuant to a prejudgment writ of replevin,<sup>50</sup> and the temporary suspension of a driver's license until the posting of the security necessary to cover potential claims arising from a traffic accident.<sup>51</sup> Using this expanded definition of "deprivation," it is essential to identify exactly

---

44. WASH. REV. CODE § 61.24.040 (Supp. 1972). The California deed of trust statute, CAL. CIV. CODE § 2924 (West Supp. 1973), provides for the recording of a notice of default three months before the trustee's sale.

45. For a 1970 federal district court decision which concludes the opposite, see note 121 and accompanying text *infra*.

46. *Sniadach*, 395 U.S. at 342 (Harlan, J., concurring).

47. *Fuentes*, 407 U.S. at 84-85, citing *Sniadach* and *Bell*.

48. *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969).

49. *Goldberg v. Kelly*, 397 U.S. 254 (1970).

50. *Fuentes v. Shevin*, 407 U.S. 67 (1972).

51. *Bell v. Burson*, 402 U.S. 535 (1971).

what a borrower is deprived of at the time of the recording of the notice of trustee's sale and to determine whether that deprivation is *de minimis*.

(a) *Alienability*. The nature of the deprivation cannot be described adequately in a readily recognizable phrase. Perhaps the most precise description is that a person is deprived of the right to freely alienate his interest in the land and to receive the fair market value of that interest. Fair market value is defined as: "the amount of money which a purchaser willing but not obliged to buy the property would pay an owner willing but not obliged to sell it, taking into consideration all the uses for which the land was suited and might in reason be applied."<sup>52</sup> When the notice of sale is recorded, any potential purchaser has *record notice* that the borrower is not "an owner willing but not obliged to sell" the property. While the borrower may still alienate his interest in the property after the recording of the notice of sale, it is highly unlikely that he will receive a reasonable approximation of its fair market value.<sup>53</sup>

Ownership of an interest in property, real or personal, surely includes the right to sell the interest at any time and for a meaningful price, usually fair market value. It also includes the ability to use the property interest as security or collateral for a loan. Whatever the label given these abilities, a borrower's proverbial bundle of sticks includes the ability to mortgage, convey, or assign his interest in the land, however large or small it may be, and to receive a reasonable approximation of the fair market value of that interest. We shall label this particular stick "alienability." Is the borrower deprived of the alienability of his property interest when the notice of sale is recorded?

To answer this question, it is helpful to turn to analogous situations involving the attachment of real property or the filing of a *lis pendens*.<sup>54</sup> R.C.W. § 7.12.020(10),<sup>55</sup> the most commonly used section of Washington's attachment statute, has been found unconstitutional on due

---

52. P. NICHOLS, *THE LAW OF EMINENT DOMAIN* § 12.2[1] (Sackman ed. 1971).

53. It is certain that "[f]orced sales, such as . . . a sale under a deed of trust . . . do not show market value." *Id.* § 12.3113[1]. It seems likely that the sale of property after the recording of the notice of sale also will not reflect fair market value because the willing seller-willing buyer test is not met.

54. WASH. REV. CODE § 4.28.320 (1959). Generally speaking, a *lis pendens* constitutes an inchoate lien on the property in question.

55. WASH. REV. CODE § 7.12.020(10) (1959).

process grounds in *Lucas v. Stapp*<sup>56</sup> and *Seattle Credit Bureau v. Hibbitt*.<sup>57</sup> While the property involved in *Lucas* and *Hibbitt* was personalty,<sup>58</sup> the reasoning of the two cases applies equally to real property. Although personal property is attached by having the sheriff take it into his possession,<sup>59</sup> whereas real property is attached less dramatically by sending a notice to the county auditor for inclusion in the recording index,<sup>60</sup> a significant deprivation of property occurs in both cases. As one commentator has suggested:<sup>61</sup>

It is true that generally prejudgment attachment of realty will not deprive the owner of the use and "drive him to the wall," but in a very practical sense it will be a significant restriction on alienation. If, for example, realty were the only available asset to be converted into money to use for family necessities or to defend the lawsuit, the owner would have great difficulty selling or mortgaging the property subject to the attachment lien.

Thus prejudgment attachment of real property affects the alienability of the property by clouding the owner's title or equitable interest.

The filing of a *lis pendens* has a similar effect on the alienability of real property.<sup>62</sup> The Washington Supreme Court early declared in *Washington Dredging & Improvement Co. v. Kinnear*:<sup>63</sup>

The *lis pendens* is evidently viewed by law as a cloud on the title to land which it describes. The [owners] have an undoubted right to have that cloud removed. The order of the court refusing to remove it is an order affecting their substantial rights, and is therefore appealable.

---

56. 6 Wn. App. 971, 497 P.2d 250 (1972). See note 27 *supra*.

57. 7 Wn. App. 219, 499 P.2d 92 (1972). See note 27 *supra*.

58. In both cases the property interest was use and possession of an automobile.

59. WASH. REV. CODE § 7.12.130(2) (1959).

60. *Id.* § 7.12.130(1).

61. Smith, *Sniadach and Summary Procedures: The Constitution Comes to the Marketplace*, 5 IND. LEGAL F. 300, 333-34 (1972). See also *Osmund v. Spence*, 327 F. Supp. 1349 (D. Del. 1971), *vacated on other grounds*, 405 U.S. 971 (1972), where a three judge court declared unconstitutional state statutes and court rules which permitted entry of judgments by confession upon warrant of attorney without prior notice and a hearing, concluding that:

We have no doubt that a significant property interest is involved . . . because the lien resulting from the entry of judgment, while not completely depriving the debtor from the use of his property, would nevertheless seriously restrict his ability to sell it or use it for collateral.

327 F. Supp. at 1356. Cf. *Robinson v. Loyola Foundation, Inc.*, 236 So. 2d 154, 159 (Fla. Ct. App. 1970).

62. WASH. REV. CODE § 4.28.320 (1959).

63. 24 Wash. 405, 407, 64 P. 522, 523 (1901).

## Due Process and Deeds of Trust

Pursuant to statute, a *lis pendens* is filed at the commencement of a lawsuit affecting title to real estate and is recorded without prior notice and opportunity for a hearing. Since it is as much a deprivation of a significant property interest as is a prejudgment attachment of property, it, too, may be unconstitutional on due process grounds.

Is the deprivation which occurs at the time of the recording of the notice of sale in a private deed of trust foreclosure directly analogous to the deprivation caused by a prejudgment attachment or the recording of a *lis pendens*?<sup>64</sup> Unlike many attachment or *lis pendens* situations in which a bona fide purchaser of real property will have no notice of a third party's claim to the property until the documents are recorded, a potential purchaser of a borrower's interest under a deed of trust agreement always will have record notice that the lender claims an interest in the land.<sup>65</sup> But record notice of the existence of a mortgage does not make land inalienable. The potential purchaser may wish to assume the mortgage and pay the borrower the amount of his equity in the land, or the purchaser may leave the details of paying off the outstanding mortgage to the borrower. In contrast, the potential purchaser who has record notice of an impending trustee's sale would be far less likely to acquire the borrower's equity, particularly if it was only a marginal amount.<sup>66</sup> The purchaser may decide that the borrower's equity does not exceed the amount of the default plus the added trustee's costs,<sup>67</sup> or the purchaser may choose to wait and either purchase the property directly at the trustee's sale<sup>68</sup> or from the lender after the sale at less than fair market value.

To understand the similarities between a prejudgment attachment or a *lis pendens* and the recording of the notice of sale more clearly, consider the following. Assume that a mortgagee forecloses on property held subject to the mortgage and that a *lis pendens* is filed. Even

---

64. The Gose article concluded that the two are directly analogous. "Apparently this notice provision is similar to *lis pendens* cutting off all subsequent lienors, encumbrances, or grantees." 41 WASH. L. REV. at 98.

65. The deed of trust will be recorded as a mortgage. WASH. REV. CODE § 61.24.020 (Supp. 1972).

66. As it often takes a number of years to obtain a substantial equity in land, the majority of all homeowners probably have only marginal equity.

67. The trustee's costs are discussed in detail in the text accompanying notes 71-76 *infra*.

68. Given the quality of title conveyed at the trustee's sale, this would be an attractive alternative.

though the mortgagee has an interest in the land, the filing of the *lis pendens* is as much a deprivation of property as is a *lis pendens* filed by a third party with no prior record interest in the land.<sup>69</sup> The mortgagee's interest in the property is limited to a lien in the amount of the mortgage; beyond this lien the mortgagee may not interfere with the mortgagor's interests, specifically the alienability of the property. By the same analysis, the lender's interest in property secured by a deed of trust is limited to a lien in the amount of the obligation; if the recording of the notice of sale restricts the alienability of the property, as we assert that it does,<sup>70</sup> then the lender (through the trustee) is depriving the borrower of a significant property interest.

Thus, in practice, the recording of the notice of sale substantially reduces the alienability of the borrower's interest in the land. We believe that this is not a *de minimis* deprivation of property.

(b) *Amount of equity.* Notwithstanding the loss of alienability resulting from the borrower's inability to receive the fair market value of his interest in the land, the recording of the notice of sale can have the direct effect of substantially reducing the amount of the borrower's equity in the land. This occurs for a simple reason: most of the eventual costs of the private foreclosure sale are added to the amount of the borrower's default at this initial stage of the procedure. The Washington Deed of Trust Act provides that to cure a default after the recording of the notice of sale, the borrower must pay the amount of the principal and interest (without acceleration of the outstanding balance) then owing plus "the costs of the trustee incurred and the trustee's fee accrued, which accrued fee shall not exceed fifty dollars."<sup>71</sup> The fifty-dollar limit apparently applies only to the trustee's fee, not to the other costs incurred.

What are these other costs? First, the cost of a title search will be included, since R.C.W. § 61.24.040<sup>72</sup> requires that notice of the trus-

---

69. By analogy, the *Fuentes* majority apparently found no difference between a pre-judgment replevin action brought by a secured or an unsecured creditor. Disregarding the creditor's interest in the disputed property, the Court stated in a footnote, "Procedural due process is not intended to . . . accommodate all possible interests: it is intended to protect the particular interests of the person whose possessions are about to be taken." 407 U.S. at 90 n.22. See also the discussion in the text accompanying notes 175-76 *infra*.

70. See also note 64 *supra*.

71. WASH. REV. CODE § 61.24.090 (Supp. 1972).

72. *Id.* § 61.24.040.

## Due Process and Deeds of Trust

tee's sale be sent to every person claiming an interest or lien of record in the land at least 120 days before the sale. Because the trustee will try to set the date of sale as early as possible to minimize the lender's loss, the title search may occur immediately upon receipt of a notice of default. Second, the trustee's costs at this point include the recording fee(s) and the cost of mailing notice to all interested parties. Third, and most important, the trustee's costs often include reasonable attorneys' fees.<sup>73</sup> While the statute makes no explicit mention of what the trustee's costs at this point in time can include, the practice is to include attorneys' fees.<sup>74</sup> Moreover, some attorneys assert that the amount of the attorney's fee is the same regardless of whether the trustee's sale occurs or not.<sup>75</sup> The amount of the fee can be \$200 or more. These three "costs incurred" together with the statutory trustee's fee of \$50 often total \$350 or more. All of these costs accrue contemporaneously with the recording of the notice of sale and can have a dev-

---

73. *Id.* The opinion of the local bar is that a non-attorney trustee who does not retain an attorney at the time of the recording of the notice of sale is engaging in the unauthorized practice of law. Letter from Harry C. Wilson, Chairman, Unauthorized Practice of Law Comm., to Board of Governors, Washington State Bar Ass'n, April 1, 1966, on file with the *Washington Law Review*.

The trustee may require the assistance of an attorney to interpret the results of the title search and to determine who must be sent the statutorily required notice. An attorney also may be necessary to determine whether to proceed with a private or a judicial foreclosure proceeding.

74. See Circular Letter No. 232 from Dep't of Housing and Urban Development [HUD], Seattle Area Office, to Employees and Persons Doing Business with HUD-FHA, Feb. 4, 1972; Circular Letter No. 221 from HUD, Seattle Area Office, to Employees and Persons Doing Business with FHA, June 3, 1971, both on file with the *Washington Law Review*.

There appears to be a trend developing by attorneys charging unreasonably high fees for processing delinquent mortgages. Mortgagees [*sic*] have been charged up to \$200 by attorneys in addition to costs for ordering a title search and sending routine letters.

.....  
It appears they are charging fees as if each mortgage will be foreclosed.

*Id.*

75. *Id.*

One direct cause of mortgagors losing their property is attorney's fees. As soon as a mortgagee refers a mortgage to an attorney for foreclosure, fees are initiated. When a mortgagor makes an effort to contact the mortgagee at this point, their standard answer is, "It's out of our hands, you'll have to talk to our attorney." Upon contacting the attorney, the mortgagor is advised that all payments must be made including attorney fees before the mortgage will be reinstated. Often a mortgagor will have raised sufficient funds to make the required mortgage payments but cannot pay the attorney fees which, by this time, even though the only work involved is preparing several process forms and ordering a title search, will be anywhere from \$100 to \$250.

HUD, Circular Letter No. 221 *supra* note 74.

astating effect on the borrower's ability to cure the default.<sup>76</sup> In effect, any increase in the amount necessary to cure the default correspondingly decreases the borrower's equity in the property. Hence, the recording of the notice of sale at the commencement of the foreclosure process substantially reduces the borrower's equity in the property. We believe that this is not a *de minimis* deprivation.

To summarize this discussion, the private foreclosure of a deed of trust in Washington results in three deprivations of property: (1) the taking of all of the borrower's interest in the property without full compensation at the time of the trustee's sale; (2) a substantial reduction of the alienability of the borrower's interest at the time of recording the notice of sale; and (3) a substantial reduction of the borrower's equity in the land at the time of the recording of the notice of sale.

### 3. *Does the Deprivation of Property Involve State Action?*

Not every deprivation of property violates due process, for the fourteenth amendment's directive, "nor shall any *state* deprive any person of life, liberty or property without due process of law . . ." <sup>77</sup> has been interpreted over the years to mean that only deprivations which involve "state action" violate due process. The recent Supreme Court procedural due process cases all involved obvious state action: a court clerk issued a prejudgment writ of garnishment pursuant to a state statute,<sup>78</sup> a state agency terminated welfare payments pending a hearing,<sup>79</sup> a local police officer posted a restriction of sales of liquor pur-

---

76. An example will illustrate the potential effect of these additional costs. Assume that a borrower defaults on his January mortgage payment of \$150. The lender will typically refuse to accept the February payment of \$150 unless it is accompanied by the delinquent January payment (\$300 total). Assuming that the borrower saves the unaccepted payments, the position of the parties in early April, when the lender sends the trustee a notice of default, will be as follows. The borrower will be four months in default (\$600), but will have saved up three months' payments (\$450), leaving a net default of only one month (\$150). On receiving the notice of default, the trustee will almost immediately incur the costs described in the text. The total amount needed to cure the default will jump from \$600 (four months' payments) to \$950 or more. The net amount needed to cure the default will jump from \$150 (one month's payment) to \$500 or more, an amount which may prohibit cure.

77. U.S. CONST. amend. XIV, § 1.

78. *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969).

79. *Goldberg v. Kelly*, 397 U.S. 254 (1970).

## Due Process and Deeds of Trust

suant to a state excessive drinking statute,<sup>80</sup> court officials denied access to the state's machinery for dissolving a marriage,<sup>81</sup> a state official suspended a state-issued driver's license,<sup>82</sup> state officials deprived the father of illegitimate children of the custody of his children after the mother's death,<sup>83</sup> and a court clerk issued a prejudgment writ of replevin which was levied by a local deputy sheriff.<sup>84</sup> However, the concept of state action can be subjected to very subtle refinements.<sup>85</sup> For our purposes, a private trustee's sale pursuant to the Washington Deed of Trust Act seems to involve sufficient state action to violate the due process clause.<sup>86</sup> Although the trustee's power of sale is expressly provided for in the trust deed agreement and no state official directly reviews the procedure at any stage of the process, the Washington Deed of Trust Act represents such a profound change from the pre-existing Washington law,<sup>87</sup> has such a substantial impact on the nature of the "private" foreclosure and the rights of the parties thereto, and relies so heavily upon actions by state officials that the necessary state action appears to be present.

Upon first impression, the state action question presented in a deed of trust foreclosure in Washington appears to be very similar to the state action question posed by a "self-help" repossession under Uniform Commercial Code section 9-503.<sup>88</sup> This latter issue has been the

---

80. *Wisconsin v. Constantineau*, 400 U.S. 433 (1971).

81. *Boddie v. Connecticut*, 401 U.S. 371 (1971).

82. *Bell v. Burson*, 402 U.S. 535 (1971).

83. *Stanley v. Illinois*, 405 U.S. 645 (1972).

84. *Fuentes v. Shevin*, 407 U.S. 67 (1972).

85. *See, e.g.*, *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972) (issuance of state liquor licenses to racially discriminatory private clubs is not sufficient state action to violate the fourteenth amendment); *Reitman v. Mulkey*, 387 U.S. 369 (1967) (a racially discriminatory amendment to the California State Constitution which prohibited the state from denying the right of any person to decline to sell or rent real property to any person constituted sufficient state action to violate the equal protection clause of the fourteenth amendment).

86. For a more general discussion of state action and the power of sale, *see* Comment, *Power of Sale After Fuentes*, 40 U. CHI. L. REV. 206, 217-20 (1972).

87. *See* note 9 *supra*.

88. WASH. REV. CODE § 62A.9-503 (Supp. 1972) states:

Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action.

The precise question is whether a self-help repossession involves sufficient state action to violate the due process clause of the fourteenth amendment.



subject of frenzied litigation.<sup>89</sup> A brief examination of the first two major federal district court decisions on the question reveals the arguments involved.

In *Adams v. Egley*,<sup>90</sup> a California federal district court held that a UCC self-help repossession involved sufficient state action to be within the due process clause and found section 9-503 to be unconstitutional for failing to provide notice and a hearing to the debtor before the repossession occurred. The *Adams* court reasoned that California state law, specifically sections 9-503 and 9-504 of the California Commercial Code, encouraged private repossessions, citing *Reitman v. Mulkey*.<sup>91</sup> While the UCC repossession provisions were included in the actual contract, the *Adams* court reasoned that the sellers were induced to include the provisions because of the state statutes.

In *Oller v. Bank of America*,<sup>92</sup> another federal district court in California reached the opposite conclusion. The *Oller* court found no state action in self-help repossessions because the creditor is not a governmental agency, no government official assists the creditor in the repossession, the act of repossession is not compelled, and the authority to repossess is based upon a contractual right which had been judicially approved prior to the adoption of the California Commercial Code. The *Oller* court met *Adams v. Egley* head-on and simply refused to be persuaded, distinguishing the *Reitman* holding as being limited to a compelling factual situation involving racial discrimination.

If the *Adams* approach prevails, a private deed of trust foreclosure in Washington undoubtedly is "state action," for the very purpose of

---

89. With respect to federal district courts, compare *Adams v. Egley*, 338 F. Supp. 614 (S.D. Cal. 1972), *appeal docketed*, No. 72-1484, 9th Cir., 1972 (sufficient state action, § 9-503 is unconstitutional), and *Michel v. Rex-Noreco, Inc.*, CCH SECURED TRANSACTIONS GUIDE, ¶ 52,070 (D. Vt. 1972) (sufficient state action, § 9-503 unconstitutional) with *Oller v. Bank of America*, 342 F. Supp. 21 (N.D. Cal. 1972), *appeal docketed*, No. 72-1888, 9th Cir., 1972 (no state action, no jurisdiction to decide constitutionality); *Greene v. First Nat'l Exchange Bank*, 348 F. Supp. 672 (W.D. Va. 1972) (passive state action only which does not violate the due process clause); *Kirksey v. Theilig*, 351 F. Supp. 727 (D. Colo. 1972) (no state action, no violation of due process); *Pease v. Havelock National Bank*, CCH SECURED TRANSACTIONS GUIDE ¶ 52,095 (D. Neb. 1972) (no state action, no jurisdiction to decide constitutionality); and *Colvin v. Avco Financial Services*, 1973 CCH POVERTY LAW REPORTER ¶ 16,750 (D. Utah 1973) (no state action, no jurisdiction to decide constitutionality.)

90. 338 F. Supp. 614 (S.D. Cal. 1972), *appeal docketed*, No. 72-1484, 9th Cir., 1972.

91. 387 U.S. 369 (1967). See note 85 *supra*.

92. 342 F. Supp. 21 (N.D. Cal. 1972), *appeal docketed*, No. 72-1888, 9th Cir., 1972.

the Act was to enable lenders to include a power of sale in the underlying real property obligation. Yet even if the more restrictive *Oller* analysis prevails, there nevertheless may be sufficient state action in a deed of trust foreclosure to violate due process because a Washington deed of trust foreclosure is distinguishable from a self-help repossession. We suggest three significant differences: (1) as the power of sale in real property transactions was not a judicially approved contractual right in Washington,<sup>93</sup> the 1965 Act created the entire foreclosure procedure and strictly governs the rights and duties of the parties involved; (2) the Washington Act's foreclosure mechanism requires actions, albeit ministerial ones, by state officials which directly result in a deprivation of property—a master form deed of trust is on record in each county, each individual trust deed is recorded, and most important, the notice of trustee's sale must be recorded in the appropriate county 120 days before the sale;<sup>94</sup> and (3) the Act's enforcement provision is dependent upon the use of the unlawful detainer statute<sup>95</sup> and can result in the eviction of the borrower by a local deputy sheriff.

The trustee under a deed of trust instrument in Washington is a creature of statutory origin. While it may be stretching the point to call the trustee a state official, he is the only person who is authorized to sell the property at a private sale.<sup>96</sup> The trustee derives his power from the Washington Act, which spells out who may be trustee<sup>97</sup> and details exactly what the trustee must do to exercise the power of sale.<sup>98</sup> As there was no pre-existing private power of sale in real estate transactions in Washington,<sup>99</sup> the Washington Act completely governs the rights of the parties prior to and after the trustee's sale, the interest conveyed by the sale, and even the time which must elapse after default before the sale can occur.<sup>100</sup>

---

93. See note 9 *supra*.

94. See note 3 *supra*; WASH. REV. CODE §§ 61.24.020, .040 (Supp. 1972).

95. WASH. REV. CODE § 61.24.060 (Supp. 1972). The unlawful detainer statute is codified in WASH. REV. CODE ch. 59.12 (1959).

96. See the discussion of the trustee's role in Comment, *Due Process Evolution—Fuentes and the Deed of Trust*, 26 Sw. L.J. 876, 886 (1972):

[T]he trustee's right to act at all is a statutory creation. . . . The trustee, though not technically a state officer, is the only person authorized by the statute to sell the property upon foreclosure. The foreclosure sale provision is wholly inoperative without his legislatively condoned action.

97. WASH. REV. CODE §§ 61.24.010-.020 (Supp. 1972).

98. *Id.* §§ 61.24.030-.040.

99. See note 9 *supra*.

100. WASH. REV. CODE ch. 61.24 (Supp. 1972).

In many ways there is as much state action in a Washington deed of trust foreclosure as there is in either a prejudgment attachment or replevin situation. In *Fuentes* and *Lucas v. Stapp*,<sup>101</sup> at the behest of a private creditor and according to a state statute, a court clerk at an *ex parte* proceeding issued a prejudgment writ, which was then presented to a local deputy sheriff. Pursuant to the writ, the sheriff seized the debtor's property. Similarly, in a deed of trust foreclosure, pursuant to statute, a private creditor instructs the trustee to present a notice of sale to the county auditor. When the county auditor records the notice of sale, he is "seizing" the borrower's property just as plainly as the sheriff above, for the loss of alienability of the property can have just as devastating an effect as the seizure of household goods.<sup>102</sup>

Additionally, the deprivation which occurs after the trustee's sale can directly parallel the deprivation in *Fuentes* or *Lucas*. The Washington Deed of Trust Act relies for its enforcement mechanism upon the unlawful detainer statute.<sup>103</sup> Generally, at the completion of the unlawful detainer proceeding, a writ of restitution or a writ of assistance is directed to the county sheriff to physically restore possession to the purchaser at the trustee's sale. The borrower who is physically evicted from property by a deputy sheriff surely suffers as directly by state action as the debtor who loses property through prejudgment replevin or attachment.

The ultimate question of whether a private deed of trust foreclosure constitutes state action awaits future judicial determination. We believe that in Washington there appears to be sufficient state action in a deed of trust foreclosure to violate due process.

#### 4. *The Deed of Trust Foreclosure: An Extraordinary Situation?*

It is well established that in "extraordinary situations" there can be a deprivation of property without prior notice and a hearing. These situations usually involve cases in which an overriding public interest warrants immediate action to protect members of the public.<sup>104</sup> The

---

101. 6 Wn. App. 971, 497 P.2d 250 (1972), discussed in note 27 *supra*.

102. See the discussion in the text accompanying notes 44-76 *supra*.

103. See note 95 *supra*.

104. See, e.g., *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594 (1950) (summary seizure of property necessary to protect the public from misbranded drugs); *North American Cold Storage v. Chicago*, 211 U.S. 306 (1908) (summary seizure necessary to protect the public from contaminated food).

*Fuentes* court acknowledged that "(t)here are extraordinary situations that justify postponing notice and a hearing."<sup>105</sup> Observe that the effect of an extraordinary situation is not to *eliminate* the need for notice and a hearing but only to *postpone* it. Thus, this brief discussion may be unnecessary since the Washington Deed of Trust Act does not provide for a hearing, but merely acknowledges the obvious right of the borrower to initiate court action to restrain the threatened sale, which in constitutional terms is a woefully inadequate opportunity to be heard.<sup>106</sup>

Even assuming for the moment that the Act does provide an opportunity to be heard, a deed of trust foreclosure does not appear to qualify as an extraordinary situation which would justify postponing the notice and hearing. The latest procedural due process case, *Fuentes v. Shevin*,<sup>107</sup> provides a three-part test to determine if an extraordinary situation exists: (1) is the seizure or deprivation necessary to secure an important governmental or general public interest? (2) is there a need for very prompt action? and (3) is there strict state control by an official acting under the standards of a narrowly drawn statute to ensure that the seizure or deprivation is necessary and justifiable in the particular instance?<sup>108</sup> While it is not clear whether all three of these questions must be answered in the affirmative for an extraordinary situation to exist, it is certain that at least one question must be answered affirmatively.<sup>109</sup>

A deed of trust foreclosure appears to fail all three tests. Answering the questions in reverse order, there is obviously no strict control by a state official at any point in a typical deed of trust foreclosure. Neither would there seem to be any pressing need for very prompt action: real property, unlike personalty, cannot be absconded with by the debtor. The immediate recording of the notice of sale with its attendant deprivation of the borrower's property interest does not appear to be compelled; there is no reason why the recording cannot occur as little as thirty days before the sale.<sup>110</sup> Finally, it is questionable whether a

---

105. *Fuentes*, 407 U.S. at 90, citing *Boddie*, 401 U.S. at 379.

106. This conclusion is reached in the text accompanying notes 145-60 *infra*.

107. 407 U.S. 67 (1972).

108. *Id.* at 91-92.

109. For an extended discussion of the *Fuentes* test, see 48 WASH. L. REV. 646, 655-60 (1973).

110. See note 195 *infra*.

lender who forecloses on a deed of trust is acting to secure an important governmental or general public interest; there seems to be nothing more than private gain at stake.<sup>111</sup> Moreover, when one examines the precise question of whether there is an important governmental interest in recording the notice of sale at the very beginning of the foreclosure procedure, thereby depriving the borrower of the alienability of his interest and substantially reducing his equity in the land by increasing the amount necessary for cure,<sup>112</sup> while at the same time providing no recognizable benefit to the lender,<sup>113</sup> the question answers itself. Thus a deed of trust foreclosure is not an extraordinary situation which would justify even postponing a notice and hearing.

##### 5. *Can Due Process Rights Be Contractually Waived in a Deed of Trust Instrument?*

The foregoing discussion establishes that a private deed of trust foreclosure deprives a borrower of a significant property interest by state action in a non-extraordinary situation. Accordingly, the borrower has a constitutional right to the due process protections of notice and a hearing prior to the deprivation unless there has been a valid waiver of that right. To make this determination, one must consider whether there can be a contractual waiver of the borrower's due process protections in a deed of trust instrument. Although a recent Supreme Court decision, *Overmyer v. Frick*,<sup>114</sup> establishes that due process rights can be contractually waived, the standard applied in *Overmyer* is difficult to meet. Such a waiver must be "voluntarily, intelligently, and knowingly" made.<sup>115</sup> As the *Fuentes* Court points out:<sup>116</sup>

The contract in *Overmyer* was negotiated between two corporations; the waiver provision was specifically bargained for and drafted by their lawyers in the process of these negotiations. . . . [I]t was "not a case of unequal bargaining power or overreaching. The Overmyer-Frick agreement, from the start, was not a contract of adhesion."

111. See *Fuentes*, 407 U.S. at 92 (when secured creditors utilize state replevin statutes to summarily seize a debtor's property, "no more than private gain is directly at stake.").

112. See the text accompanying notes 44-76 *supra*.

113. See the text immediately following note 180 *infra*.

114. 405 U.S. 174 (1972).

115. *Id.* at 187. See generally the discussion of waiver in *Fuentes*, 407 U.S. at 94-96.

116. *Id.* at 95.

## Due Process and Deeds of Trust

[405 U.S. at 186] Both parties were “aware of the significance” of the waiver provision. [*Id.*] . . . .

The Court in *Overmyer* observed that “where the contract is one of adhesion, where there is great disparity in bargaining power, and where the debtor receives nothing for the [waiver] provision, other legal consequences may ensue.” [*Id.* at 188.]

Thus whether the borrower’s due process rights can be waived in the deed of trust instrument depends on the facts of each case.<sup>117</sup> Probably very few fact situations will be found where the waiver provision was bargained for and drafted (with or without lawyers) in the process of negotiation between parties of equal bargaining power, or where both parties were aware of the significance of the waiver provision. It seems likely that a court usually will find either a contract of adhesion, a great disparity in bargaining power, or a situation in which the borrower received no consideration for the waiver provision.

The Washington Supreme Court recently has shown marked reluctance to enforce waivers of substantial contractual, as distinguished from constitutional, rights. Speaking of the validity of a waiver of an implied warranty of merchantability, the Washington court stated in *Berg v. Stromme*.<sup>118</sup> “Waivers of such warranties, being disfavored in law, are ineffectual unless explicitly negotiated between buyer and seller and set forth with particularity showing the particular qualities and characteristics of fitness which are being waived.” It can be expected that a standard of at least this stringence will be applied to an attempted waiver of a constitutional right.

There are very few appellate cases dealing with a waiver of due process rights in a deed of trust. In *MCA, Inc. v. Universal Diversified Enterprises Corp.*,<sup>119</sup> a California appellate court faced with a borrower who had executed a trust deed as security on a promissory note of \$715,000, who admitted that there was no disparity of bargaining

---

117. A recent comment concluded:

Apparently the [*Fuentes*] Court has formulated a new test for an effective contractual waiver of due process. To insure validity, such a waiver (1) must appear in type commensurate in size with the type or print in the body of the contract, (2) must be actually bargained for on a status of equal and full understanding of its meaning, and (3) must be accompanied by an explanation of its impact or must specifically describe what is in fact being waived.

Comment, *Due Process Evolution—Fuentes and the Deed of Trust*, 26 Sw. L.J. 876, 883 (1972).

118. 79 Wn. 2d 184, 196, 484 P.2d 380, 386 (1971).

119. 27 Cal. App. 3d 173, 103 Cal. Rptr. 522 (1972).

power, and who did not contend that it received nothing in exchange for agreeing to a nonjudicial sale in event of default, refused to find a contract of adhesion merely because the waiver provision was contained in a form document.<sup>120</sup> The *MCA* court upheld the waiver.

A 1970 federal district court decision, *Young v. Ridley*,<sup>121</sup> did not hesitate to find and approve a waiver in a real property power of sale situation. The *Young* court found that the implicit premise of the District of Columbia deed of trust statute "is that an owner who has willingly given a power of sale has waived judicial foreclosure."<sup>122</sup> The *Young* opinion relied upon two very old Supreme Court decisions<sup>123</sup> and two moderately recent state cases,<sup>124</sup> all pre-*Sniadach*, to uphold the statute in question.

*Young v. Ridley*, one of the first post-*Sniadach* procedural due process cases, gave *Sniadach* a very limited reading, finding no deprivation of a constitutionally protected property interest.<sup>125</sup> In determining the validity of the waiver, the court applied the principles of general contract law, not the principles governing waiver of a constitutional right.<sup>126</sup> Because of these two major errors, the case would seem to be of questionable precedential value.

---

120. 103 Cal. Rptr. at 525.

121. 309 F. Supp. 1308 (D.D.C. 1970).

122. *Id.* at 1312.

123. *Scott v. Paisley*, 271 U.S. 632 (1926); *Bell Silver & Copper Mining Co. v. First Nat'l Bank*, 156 U.S. 470 (1895).

124. *Ross v. Belcher*, 79 Idaho 473, 321 P.2d 210 (1958); *Great Falls Nat'l Bank v. McCormick*, 448 P.2d 991 (Mont. 1968). Both cases were pre-*Sniadach* and pre-*Fuentes*, and there was no discussion of the meaningful time and meaningful manner requirement.

125. Plaintiff in *Young* alleged that a deprivation of property occurred at the commencement of the foreclosure mechanism, an argument very similar to that advanced in the text accompanying notes 44-76 *supra*. The *Young* court held: "Mere institution of the foreclosure mechanism in no way affects a debtor's use of his property." 309 F. Supp. at 1312.

This result is easily explained. First, the *Young* court gave *Sniadach* a very limited reading; see *Fuentes*, 407 U.S. at 72-73 n.5. *Fuentes* has established that *Sniadach* is to be given a broad reading, *id.* at 80-84, 88-90. Second, and more important, the statutorily required notice thirty days prior to the private sale was not recorded, unlike Washington's procedure. (While a copy of the notice was to be sent to the Commissioner of the District of Columbia, the purpose of that notice was to enable the D.C. officials to "investigate the proposed foreclosure to protect against . . . abuses . . ." 309 F. Supp. at 1311.) Hence, the alienability of the borrower's interest was not affected at the commencement of the foreclosure procedure.

126. The *Young* court anticipated the change in the waiver standard. "[W]hether the validity of an agreement to waive judicial foreclosure, *i.e.* to grant a power of sale, should be tested by more stringent standards than those of general contract law remains for decision." *Id.* at 1313.

## Due Process and Deeds of Trust

Although a valid contractual waiver of due process rights is possible, there appears to be no shortcut to a determination of whether the waiver was voluntarily, intelligently, and knowingly made. We suggest that most residential deed of trust instruments will fail to meet this standard.<sup>127</sup> Finally, even if there can be a valid waiver of the right to a hearing in a deed of trust instrument, due process requires that the statutory framework must meaningfully provide for that right. In the words of Justice Harlan,<sup>128</sup> “That the hearing required by due process is subject to waiver . . . does not affect its root requirement that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest.”

### *C. Does the Washington Deed of Trust Act Comply with Due Process Requirements?*

The foregoing discussion has established that procedural due process applies to deed of trust foreclosures. The recording of the notice of sale and the trustee's sale appear to be a deprivation of property within the meaning of the due process clause of the fourteenth amendment. The deprivation is the result of state action, it does not occur in an exceptional situation, and there will seldom be a valid waiver of the procedural due process rights involved. Given this result, it is necessary to determine whether the Washington Deed of Trust Act complies with due process requirements. This determination is a simple one—does the Act provide for notice and an opportunity to be heard prior to a deprivation of property?

#### *1. Notice*

At present, the Washington Act requires that at least 120 days prior to the trustee's sale, notice of that sale is to be (1) recorded with the county auditor; (2) mailed by first class and by certified mail, return

---

127. Moreover, if the validity of *any* deed of trust foreclosure occurring under the present statute (without prior notice and a hearing) is subject to a later constitutional attack on the ground of no valid waiver of the borrower's due process rights, the quality of the title acquired by the purchaser at the trustee's sale will suffer. It is possible that title insurers would refuse to insure the purchaser's title or that the cost of the title insurance would skyrocket.

128. *Boddie*, 401 U.S. at 378-79 (Court's italics).



receipt requested, to the borrower and all other parties claiming an interest in the land; and (3) posted in a conspicuous place on the property or else served as any summons is served upon any occupant of the real property involved.<sup>129</sup> In addition, during the four weeks preceding the time of sale, a copy of the notice is to be published in a legal newspaper in the county where the property is located.<sup>130</sup> The notice must contain: (1) the names of the borrower (grantor), trustee (grantee), and lender (beneficiary); (2) a description of the land; (3) the default for which foreclosure is made; (4) the date by which the default must be cured in order to cause a discontinuance of sale; (5) the amount in arrears if a default is for failure to make payment; (6) the sum owing on the obligation secured by the deed of trust; and (7) the time and place of sale.<sup>131</sup> Although it does not inform him of the exact amount necessary to cure the default,<sup>132</sup> it is certain that the statutory notice adequately informs the borrower of the impending trustee's sale.

But in constitutional terms, is notice of impending doom enough to satisfy due process requirements? The constitutional *raison d'être* for notice is to alert a person of an opportunity to be heard. The early Supreme Court case of *Baldwin v. Hale*<sup>133</sup> concisely stated the relationship between notice and a hearing: "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified."<sup>134</sup> Statutory notice is constitutionally inadequate if it does not notify the recipient of an opportunity to be heard.<sup>135</sup> Since the statutory notice contains no mention of any potential opportunity to be heard, under this analysis the Washington

---

129. WASH. REV. CODE § 61.24.040(1) (Supp. 1972).

130. *Id.* § 61.24.040(3).

131. *Id.* § 61.24.040(2).

132. The statutorily required notice does not require a total figure of the sum needed to discontinue the sale, but merely the total amount in arrears at the time of the notice. Yet the statute provides that after the recording of the notice of sale, the amount needed to cure the default includes not only the amount in arrears on the underlying obligation (which cannot be accelerated), but also the trustee's costs. (See note 71 and accompanying text.) The result is that if on receipt of the required notice the borrower promptly confronts the lender with the amount of arrears listed in the notice, the offer of payment often will be refused because it does not include an additional amount for the trustee's costs. Thus, the burden is on the borrower to contact the trustee and ask for a statement of the exact amount necessary to cure the default.

133. 68 U.S. 223 (1863).

134. *Id.* at 233.

135. See *Goldberg*, 397 U.S. at 267-68; *Mullane v. Central Hanover Bank & Trust Co.*, 337 U.S. 306, 314 (1950).

## Due Process and Deeds of Trust

Deed of Trust Act would not appear to meet the constitutional requirements for notice.

### 2. *Opportunity to be Heard*

The Washington Deed of Trust Act does not provide for an automatic hearing prior to either the recording of the notice of sale or the trustee's sale. The only conceivable opportunities to be heard under the Act are (1) the borrower's opportunity to bring an action to restrain the trustee's sale,<sup>136</sup> and (2) the borrower's opportunity to defend himself in an eviction proceeding brought after the sale occurs.<sup>137</sup> Does either of these two "opportunities" equal the constitutionally required opportunity to be heard?

The recent procedural due process cases have frequently discussed the required opportunity for a hearing. "The fundamental requisite of due process is the opportunity to be heard."<sup>138</sup> It must be granted "at a meaningful time and in a meaningful manner."<sup>139</sup> Though subject to waiver and variable in form, the opportunity to be heard must be provided *before* a deprivation of property occurs.<sup>140</sup> "Due process requires that there be an opportunity to present every available defense."<sup>141</sup> The right to a hearing is not dependent upon a showing that there is a valid defense which can be raised,<sup>142</sup> nor may it be denied

---

136. "Nothing contained in this chapter shall prejudice the right of the grantor [borrower] or his successor in interest to restrain, on any proper ground, a threatened sale by the trustee under a deed of trust." WASH. REV. CODE § 61.24.130 (Supp. 1972).

137. The Act specifically authorizes the purchaser at the trustee's sale to bring a summary unlawful detainer action against the borrower twenty days after the trustee's sale. *Id.* § 61.24.060. The unlawful detainer statute is codified in WASH. REV. CODE ch. 59.12 (1959).

138. *Grannis v. Ordean*, 234 U.S. 385, 394 (1914).

139. *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

140. *Boddie*, 401 U.S. at 378-79 (Court's italics). A hearing *after* the deprivation is constitutionally inadequate because even though damages can be awarded for a wrongful deprivation,

no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred. "This Court has not . . . embraced the general proposition that a wrong may be done if it can be undone . . ."

*Fuentes*, 407 U.S. at 82, quoting *Stanley v. Illinois*, 405 U.S. 645, 647 (1972).

141. *Lindsey v. Normet*, 405 U.S. 56, 66 (1972), quoting *American Sur. Co. v. Baldwin*, 287 U.S. 156, 168 (1932).

142. "To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process would have led to the same result because he had no adequate defense upon the merits." *Fuentes*, 407 U.S. at 87, quoting *Coe v. Armour Fertilizer Works*, 237 U.S. 413, 424 (1915).

because of the cost or inconvenience involved.<sup>143</sup> Nevertheless, it is only an opportunity for a hearing: "Of course, no hearing need be held unless the defendant, having received notice of his opportunity, takes advantage of it."<sup>144</sup>

(a) *The opportunity to bring a court action to restrain the sale.* The mere opportunity to bring a court action to restrain a deprivation of property does not appear to constitute an "opportunity to be heard" within the meaning of the procedural due process cases.<sup>145</sup> In the context of a typical deed of trust foreclosure, the opportunity to commence a lawsuit to restrain the threatened sale would seem more illusory than meaningful. Since almost by definition a defaulting purchaser has financial problems, the costs involved in instituting suit would be prohibitive.<sup>146</sup>

At the outset, it should be observed that notice of the opportunity to restrain the trustee's sale is given to the borrower after the recording of the notice of sale. As a deprivation occurs at the time of the recording of the notice of sale,<sup>147</sup> this opportunity fails the "meaningful time" test. To provide an opportunity to be heard *before* a deprivation occurs, it would be necessary to provide notice to the borrower that the recording of the notice of sale is imminent, in order that the recording could be restrained.

At a more basic level, it would not appear that the borrower's opportunity to initiate a lawsuit to restrain the trustee's sale constitutes the required opportunity to be heard. The United States Supreme Court was faced with an analogous argument in *Stanley v. Illinois*,<sup>148</sup> which held that a father has a significant interest, property or other-

---

143. *Fuentes*, 407 U.S. at 90 n.22.

144. *Id.* at 93 n.29.

145. For a contrary conclusion, see *Strutt v. Ontario Savings & Loan Ass'n*, 28 Cal. App. 3d 866, 105 Cal. Rptr. 395, 403 (1972) (dictum: California's deed of trust statute is constitutional because the borrower is given ninety days in which to refinance the property or "institute an action to enjoin the sale and thereby obtain the judicial hearing contemplated by [*Sniadach* and *Fuentes*]"). See also note 163 and accompanying text *infra*.

146. Such costs include attorneys' fees and court costs, and if the litigation will not be completed before the scheduled date of the trustee's sale, the cost of the bond necessary for temporary and preliminary injunctive relief (which would equal at least the arrearages plus the current payments). See WASH. SUPER. CT. (CIV.) R. 65(c) and WASH. REV. CODE § 7.40.080 (1959). Two recent Washington cases have held that a trial court cannot disregard this bond requirement. *Irwin v. Estes*, 77 Wn. 2d 285, 461 P.2d 875 (1969); *Evar, Inc. v. Kurbitz*, 77 Wn. 2d 948, 468 P.2d 677 (1970).

147. See notes 44-76 and accompanying text *supra*.

148. 405 U.S. 645 (1972).

## Due Process and Deeds of Trust

wise, in the custody of his illegitimate children after the mother's death. In striking down an Illinois procedure which automatically made the children wards of the state and placed them in foster homes without provision for a hearing to determine the fitness of the father for custody purposes, the Court rejected the argument that no deprivation occurred because of the father's later opportunity to institute adoption or guardianship proceedings to regain custody of the children. Beyond holding that an opportunity for a hearing *after* the deprivation (loss of custody) is constitutionally inadequate with the classic line, "This Court has not, however, embraced the general proposition that a wrong may be done if it can later be undone,"<sup>149</sup> the *Stanley* Court went on to discuss the probable futility of the later adoption or guardianship proceedings. In the course of this analysis, Justice White, the author of the majority opinion, stated: "Passing the obvious issue whether it would be futile or burdensome for an unmarried father—without funds and already presumed unfit—to petition for custody, this suggestion [fails for other reasons]."<sup>150</sup> While this is mere dictum, the common sense approach of the *Stanley* Court—is this opportunity futile or burdensome?—seems directly applicable to a deed of trust foreclosure. Measured under this standard, the borrower's opportunity to initiate a court action to restrain the trustee's sale, which comes after a deprivation (the recording of the notice of sale), certainly would seem burdensome.

Because of the unavoidable costs, the opportunity to commence a court action to restrain the sale always will fail to pass the "meaningful time" test. The applicable rule is simple: an opportunity to be heard must be provided *before* a deprivation occurs. But in constitutional terms, the costs of litigation are themselves a "deprivation!"<sup>151</sup> Hence, so long as it costs money to initiate a lawsuit, any "opportunity to be heard" which results from the initiation of a lawsuit *cannot* come before a deprivation occurs.

In *Fuentes v. Shevin*,<sup>152</sup> the Supreme Court examined very similar deprivations. The defendant creditors in *Fuentes* argued that a sum-

---

149. *Id.* at 647.

150. *Id.* at 648.

151. The deprivation is the loss of use and possession of the money necessary to institute the court action. See note 146 *supra*.

152. 407 U.S. 67 (1972).

mary seizure of property pursuant to a prejudgment writ of replevin did not cause a deprivation because the debtors could quickly recover possession of the replevied property by posting a bond; the Court held that the bond procedure merely altered the type of deprivation. Instead of being deprived of use and possession of the *goods* pending the final hearing on the merits, the debtors were deprived of the use and possession of the money necessary to post the *bond*.<sup>153</sup> Since both of these deprivations occurred without prior notice and a hearing, they were equally unacceptable. In the same discussion, the *Fuentes* Court carefully distinguished between the replevin bond situation and the bond requirement upheld in *Lindsey v. Normet*.<sup>154</sup> The *Lindsey* Court upheld an Oregon procedure which required a tenant to post a bond in order to obtain a continuance of an eviction proceeding brought pursuant to an unlawful detainer statute.<sup>155</sup> But as the *Fuentes* Court carefully pointed out, "the tenant did not have to post security in order to remain in possession before a hearing; rather, he had to post a security only in order to obtain a *continuance* of the hearing."<sup>156</sup>

In a deed of trust foreclosure, in order to remain in possession until a hearing the borrower *does* have to furnish the money necessary for court costs, attorneys' fees and any necessary bond. Indeed, the borrower must initiate a court action and incur the concomitant expenses *to even obtain a hearing—any hearing*. The *Fuentes* analysis seems to confirm that the opportunity to initiate court action to restrain the impending trustee's sale is not the equivalent of the constitutionally required opportunity to be heard before a deprivation of property occurs.<sup>157</sup>

---

153. *Id.* at 85.

154. 405 U.S. 56 (1972).

155. *Id.* at 65.

156. 407 U.S. at 85 n.15 (Court's italics).

157. On first reading, language in *Lindsey*, 405 U.S. at 65-68, seems to suggest a contrary conclusion. In rejecting the contention that a tenant is denied due process of law by the extremely limited scope of an expedited unlawful detainer hearing, Justice White, speaking for the majority, stated: "The tenant is not foreclosed from instituting his own action against the landlord and litigating his right to damages or other relief in that action." *Id.* at 66. On closer reading, however, *Lindsey* does not support the contention that an opportunity to initiate a court proceeding equals a constitutionally required opportunity to be heard, for the Court found that the plaintiff tenants had no protected property interest which entitled them to continued possession of the leased premises without paying rent. The *Lindsey* Court implicitly assumed that a tenant's significant property interest—the right to use and possession of leased premises—is contingent upon payment of the rent; absent such payment, the landlord is immediately entitled to possession of the property. A delay in evicting a defaulting

## Due Process and Deeds of Trust

Other language in *Fuentes* also supports this conclusion. The *Fuentes* Court faced a situation somewhat analogous to a deed of trust foreclosure in determining the constitutionality of the Pennsylvania prejudgment replevin procedure. In contrast to the challenged Florida replevin statute on which the opinion focused, the Pennsylvania procedure allowed a creditor to obtain an *ex parte* writ of replevin without also filing an underlying suit for repossession,<sup>158</sup> thus forcing the debtor to initiate court action to contest the merits of the seizure. In describing the Pennsylvania procedure, the *Fuentes* Court stated:<sup>159</sup>

Unlike the Florida statute, however, the Pennsylvania law does not require that there *ever* be opportunity for a hearing on the merits of the conflicting claims to possession of the replevied property. . . . If the party who loses property through replevin seizure is to get even a post-seizure hearing, he must initiate a lawsuit himself.

Since the *Fuentes* Court explicitly recognized the debtor's ability to initiate a lawsuit and yet stated that Pennsylvania law did not require that there *ever* be an opportunity for a hearing on the merits, it would appear to be the *Fuentes* Court's judgment that the option to initiate a lawsuit does not equal the constitutionally required opportunity to be heard.<sup>160</sup>

---

tenant results in a deprivation of the landlord's property interests. In upholding the constitutionality of the unlawful detainer statute, the *Lindsey* Court reasoned that a procedure which allowed a landlord to file suit soon after nonpayment of rent, which allowed the tenant to retain possession of the premises pending the expedited hearing, and which limited the hearing to the simple issues of whether the rent has been paid and whether the covenants of the lease have been honored, adequately balanced the conflicting property interests of landlords and tenants. Moreover, the *Lindsey* tenants were arguing "that they are denied due process of law because the rental payments are not suspended while the alleged wrongdoings of the landlord are litigated." *Id.* at 67. By the *Lindsey* Court's analysis, the tenants had no protected property interest unless the rent had been paid, and hence the tenants were not entitled to the procedural due process protections of notice and a hearing—of any kind. The Court's statement that the tenants were still able to litigate the landlord's culpability in another proceeding merely reaffirmed the tenants' pre-existing rights.

In a deed of trust context, a borrower would appear to have two protected property interests—the right to continued possession and use of the property (which may be conditioned upon payment of the mortgage installments) and an equitable interest in the land (which is *not* conditioned upon payment of the mortgage installments). See the text accompanying notes 28-37 *supra*.

158. As a result, there was no later trial on the merits of the repossession. In the usual case, the deprivation occurs as a result of a supplemental prejudgment seizure procedure; a later hearing is provided on the merits of the underlying claim. See the discussion of prejudgment seizure procedures in 48 WASH. L. REV. 646, 647-49 (1973).

159. 407 U.S. at 77-78 (Court's italics).

160. The facts of *Fuentes* are technically but not substantively distinguishable from a deed of trust foreclosure. In a prejudgment replevin situation, a debtor was entitled to

(b) *The opportunity to defend in an unlawful detainer proceeding.* Does the borrower's opportunity to defend himself in an unlawful detainer action brought by the purchaser after the trustee's sale satisfy the requirements of due process? Again the answer is no.

First, the hearing in the eviction proceeding fails to meet the meaningful time requirement. Two deprivations of property already have occurred—the recording of the notice of sale and the trustee's sale itself. Second, the hearing in the eviction proceeding fails to meet the meaningful manner requirement. It is well established in Washington that a trial court's jurisdiction in an unlawful detainer action is of extremely limited scope. In *Peoples National Bank v. Ostrander*,<sup>161</sup> the defendants in an unlawful detainer proceeding brought by the purchaser after the trustee's sale attempted to allege as an affirmative defense that the deed of trust was obtained by fraud because the plaintiffs had represented it as a mortgage. Further, in a cross-complaint, the defendants sought to reform the deed of trust and have it declared a mortgage. The trial court granted the plaintiff's motion to strike both the cross-complaint and the affirmative defense. The Washington Court of Appeals affirmed, stating:<sup>162</sup>

An unlawful detainer action does not contemplate a full-blown trial. . . .

"In an unlawful detainer action, the court sits as a special statutory tribunal to summarily decide the issues authorized by statute and not as a court of general jurisdiction with the power to hear and determine other issues."

. . . Due to the trial court's limited jurisdiction in an action for unlawful detainer, set-offs or counterclaims have not been allowed. . . . However, affirmative equitable defenses have been permitted.

---

a hearing on the merits *after* his property had been seized. In a deed of trust foreclosure, the burden is on a borrower to initiate court action at a time when his property has not yet been sold. Yet the difference is superficial; as was discussed earlier, a significant deprivation occurs at the time of the recording of the notice of sale, for the borrower may lose the alienability and the equity necessary to raise the money needed to initiate a court proceeding to restrain the sale. Like a prejudgment seizure pursuant to a writ of replevin, the recording of the notice of sale comes without prior notice and opportunity for a hearing.

161. 6 Wn. App. 28, 491 P.2d 1058 (1971).

162. *Id.* at 30-31, 491 P.2d at 1060, quoting *Young v. Riley*, 59 Wn. 2d 50, 52, 365 P.2d 769, 771 (1961).

The *Ostrander* court went on to reach the highly questionable conclusion that the defendants' affirmative defense of fraud was not an affirmative equitable defense, reasoning that the defendants were not denied an adequate remedy at law by the Washington Deed of Trust Act.<sup>163</sup>

Extended discussion of what constitutes an equitable defense would seem unnecessary. The central point is clear—the borrower is restricted significantly in the kinds of defenses he may raise because of the limited scope of inquiry in an unlawful detainer proceeding. Accordingly, there is no opportunity to be heard “in a meaningful manner.”<sup>164</sup>

Thus the Washington Deed of Trust Act violates due process. To satisfy constitutional standards, notice and an opportunity to be heard must be accorded the borrower. Not only must this notice and opportunity for a hearing occur *before* a deprivation of property occurs, but it cannot be dependent upon the borrower's initiation of a court proceeding. A more detailed discussion of the form and timing of the required hearing is presented later in this article.<sup>165</sup>

### III. POLICY CONSIDERATIONS

Stated simply, procedural due process provides a borrower with two protections—notice and an opportunity to be heard before a deprivation of property occurs. The overriding purpose of these protections, in the words of Justice Stewart, “is to protect [a person's] use and possession of property from arbitrary encroachment—to minimize substantively unfair or mistaken deprivations of property . . . .”<sup>166</sup> Surely the borrower would benefit from the addition of these

---

163. The *Ostrander* court's analysis of whether the Washington Deed of Trust Act provided the defendant (borrower) with an adequate remedy at law is unsatisfactory. After a cursory review of the circumstances surrounding the Act's adoption, a brief discussion of the Act's foreclosure mechanism, the borrower's right to act affirmatively to restrain the sale, and the purchaser's express ability to bring an unlawful detainer action to recover possession after the trustee's sale, the court stated: “To allow one to delay asserting a defense until this late stage of the proceeding would be to defeat the spirit and intent of the trust deed act.” 6 Wn. App. at 32, 491 P.2d at 1060. If the quoted statement is correct, the spirit and intent of the trust deed act, as well as the act itself, violate due process of law.

164. *But see* the apparently contradictory language in *Lindsey* discussed in note 157 *supra*.

165. *See* the text accompanying notes 181-193 *infra*.

166. 407 U.S. at 81.



protections to the private deed of trust foreclosure mechanism. Notice and a hearing would allow the borrower to defend against an unfair or mistaken claim of default<sup>167</sup> or to raise collateral defenses such as fraudulent misrepresentation of the nature of a trust deed instrument at the time of signing.<sup>168</sup> Notice of the upcoming hearing might spur the borrower to cure the default early in the foreclosure procedure—at a time when the fair market value of his property interest remains unimpaired.<sup>169</sup> The hearing itself would provide for automatic judicial supervision of the trustee costs. As many borrowers receive no compensation for their equity in property sold at a trustee's sale, the added cost of the hearing would not reduce the amount a borrower actually receives from the sale.<sup>170</sup> Although borrowers inevitably would have to bear the added costs of notice and a hearing, these costs often would be distributed to most home buyers through slight increases in the cost of federal mortgage insurance.<sup>171</sup> But would the addition of these sub-

---

167. For a discussion of the potential abuses of a private sale *see* Comment, *Power of Sale Foreclosure After Fuentes*, 40 U. CHI. L. REV. 206, 212 (1972):

Private sale is open to many abuses: for example, the mortgagee may not make a good faith effort to realize any more than the amount of the debt, despite the fact that the mortgagor has considerable equity in the property; the mortgagee may foreclose through the power of sale for only a technical default which a court might overlook; . . . the mortgagee may sell the property after a default that is the product of fraudulent or near-usurious terms in the mortgage contract, terms that a court would refuse to enforce in a judicial foreclosure.

168. *See* the discussion of *Ostrander* in notes 161-163 and accompanying text *supra*.

169. As is suggested in the text accompanying note 183 *infra*, it seems necessary to schedule the required hearing before the recording of the notice of sale.

170. *See* the text immediately following note 43 *supra*. By way of illustration, consider the following example. Suppose that the fair market value of property sold at a trustee's sale is \$25,000, that the outstanding balance of the obligation is \$20,000, and that the costs of the private sale are \$350. The amount of the lender's bid at the sale would be \$20,350, the outstanding balance plus the costs of sale. The borrower would receive nothing for his equity. If the addition of notice and a hearing increased the costs of the sale to \$500, the amount of the lender's bid would be \$20,500. Again the borrower would receive nothing for his equity, so the added costs do not directly affect the borrower's position. While lenders may have to bear these increased costs if federal mortgage insurance programs are not applicable (*see* note 171 *infra*), these added costs can be spread among all home buyers through very slight increases in interest rates.

171. If the borrower is insured, federal mortgage insurance programs usually pay the costs of the foreclosure sale, judicial or private. *See generally* 12 U.S.C. § 1706c *et seq.* (1970) (Federal Housing Administration mortgage insurance); 38 U.S.C. § 1810 *et seq.* (1970) (Veteran's Administration mortgage insurance). As only 0.3 to 0.5 percent of all mortgage loans are foreclosed, *see* Comment, *Power of Sale Foreclosure After Fuentes*, 40 U. CHI. L. REV. 206, 212 (1972), any increase in the cost of a private deed of trust foreclosure would have only a minimal effect on the total cost of mortgage insurance and could be distributed evenly to all federally insured home buyers by small increases in the cost of federal mortgage insurance.

## Due Process and Deeds of Trust

stantial protections for the borrower have a detrimental effect on lenders' interests in a private deed of trust foreclosure?

The requirement of notice and a hearing before a deprivation of property occurs can result in an increased delay before a creditor recovers possession of secured property after default and arguably can increase the creditor's loss. While few lawyers and judges would dispute the necessity for due process protections to prevent unfair or mistaken deprivations of property when the untested claims of an unsecured creditor form the basis for summary state action,<sup>172</sup> deep differences of opinion regarding the necessity for notice and a hearing can arise when the creditor has a security interest in the disputed property.<sup>173</sup> Justice White, dissenting in *Fuentes*, reasoned that *after default* a secured creditor's interest in minimizing his loss—the interest of preventing further use and deterioration of the property<sup>174</sup>—is as deserving of protection as the debtor's interest in the secured property.<sup>175</sup> Justice White would have preferred to balance the conflicting property interests rather than provide due process protections to the debtor at the expense of the secured creditor.<sup>176</sup> However, in a deed of trust foreclosure under the Washington Act, lenders do not appear to have a significant property interest in preventing further use and deterioration of the property. Unlike personalty, real property is not subject to rapid deterioration in value. More importantly, as is discussed below, the Washington Act expressly prohibits a private trustee's sale immediately after default.

---

172. Several of the recent due process cases were decided by a unanimous or near unanimous Court. For example, in *Sniadach* the vote was 8-1, in *Bell*, 9-0 (three justices concurred without opinion.)

173. The *Fuentes* Court was divided 4-3. (Justices Douglas, Brennan, Stewart, and Marshall comprised the majority, while Chief Justice Burger and Justices White and Blackmun dissented. The author of the *Fuentes* dissent, Justice White, had not dissented in any of the previous procedural due process cases listed in note 24 *supra*.) The creditor in *Fuentes* had a security interest in the property being summarily replevied.

174. 407 U.S. at 102 (White, J., dissenting).

175. *Id.* Justice White readily admitted that a debtor has a significant property interest (the right to use and possession) in secured property, but only so long as the debtor makes the required installment payments. *Id.* at 99. Justice White employed a similar analysis in his majority opinion in *Lindsey*, discussed in note 157 *supra*.

176. 407 U.S. at 100-02. The *Fuentes* majority refused to directly consider whether a secured creditor has a significant property interest which must be balanced against the debtor's property interests after an alleged default because it was unwilling to believe a creditor's contention that a default had occurred until that contention had been tested in open court. *Id.* at 83. On the contrary, Justice White was willing to believe the creditor's contention without requiring a prior hearing. *Id.* at 100.

When a default does occur, a lender's goal is simple—minimize the loss by acquiring title and possession of the particular property as soon as possible. It was to implement this goal that lenders pressed for adoption of the Washington Deed of Trust Act. While the Act gives the trustee the power to sell the property privately after a default and precludes any redemption after the sale,<sup>177</sup> it nevertheless affords some protection to the borrower by expressly providing: "The sale as authorized under this chapter shall not take place less than six months from the date of default in the obligation secured."<sup>178</sup> The outcome of this legislative compromise is straightforward. The borrower can retain possession of the premises for at least six months after default.<sup>179</sup> The lender cannot obtain title and possession of the property until the expiration of the same six-month period.<sup>180</sup>

Given this automatic six-month delay, the lender is not affected by what happens after the trustee is notified of the default; indeed, the lender probably wishes to see the default cured. Unfortunately, however, the borrower *is* affected by the mechanics of the foreclosure process, losing much of the alienability of his land and a substantial amount of equity early in the procedure. The recording of the notice of sale and the contemporaneous addition of substantial trustee's costs can often impair the borrower's ability to cure the default, to the detriment of both the lender and the borrower. As the present mechanics of a private deed of trust foreclosure deprive the borrower of substantial property interests early in the procedure without benefitting the lender, and as the Washington Act can be amended to provide the borrower with due process protections without affecting the lenders'

---

177. *But see* note 4 *supra*, discussing the Federal Tax Lien Act.

178. WASH. REV. CODE § 61.24.040(6) (Supp. 1972). In practice, this six-month figure is seldom obtained. Most lenders do not declare a debtor in default and notify the trustee until the third month after the initial default. After notification, because of the requirement of 120 days of recorded notice before the sale, it takes the trustee at least another four months to hold the sale. The legislature, in its wisdom, may have intended a seven- to nine-month delay before the foreclosure sale.

179. This six-month "redemption" period is considerably shorter than the borrower's one-year or eight-month statutory redemption period after a judicial foreclosure of a homestead. (*See* note 9 *supra*.) The relatively liberal protections afforded to borrowers through homestead exemptions and lengthy redemption periods may stem from the Washington State Constitution, which provides: "The legislature shall protect by law from forced sale a certain portion of the homestead and other property of all heads of families." WASH. CONST. art. XIX, § 1.

180. In addition, lenders are prohibited from obtaining a deficiency judgment. WASH. REV. CODE § 61.24.100 (Supp. 1972).

interests (as will be shown in the following section), there should be no serious policy objections to the constitutionally required changes.

### IV. GUIDELINES FOR CHANGE

Since the Washington Deed of Trust Act appears to violate due process of law, it is necessary to amend the Act so as to provide the borrower with notice and an opportunity to be heard before a deprivation of property occurs. The necessary hearing cannot depend upon the borrower's shouldering the burden of initiating a court action; the borrower must be provided an automatic opportunity to be heard—an opportunity which requires little more than appearing in court at an appointed time.<sup>181</sup> Even though the hearing is subject to waiver and there is a likelihood that many borrowers will not appear, it is clear that the opportunity to be heard must be provided by statute. It follows, then, that one of the parties to the deed of trust instrument should have a statutory burden of filing suit against the borrower to obtain judicial approval of the forthcoming private foreclosure. To avoid a conflict with the trustee's traditional role,<sup>182</sup> it seems necessary to require the lender to institute suit against the borrower.

The Deed of Trust Act should require the lender to establish in the court action that a default has occurred, that the statutory requirements of notice have been or will be met, that the costs incurred by the trustee are reasonable, and that the trustee is entitled to (1) record

---

181. If the borrower is given an automatic opportunity for a hearing but does not appear in court after adequate notice, the hearing requirement has nonetheless been satisfied. See note 144 and accompanying text *supra*.

182. The Washington Deed of Trust Act both prohibits the same person (legal or natural) from acting as both trustee and beneficiary and precludes the trustee and the beneficiary from entering an agency relationship. WASH. REV. CODE § 61.24.020 (Supp. 1972). In practice this provision of the Act often is ignored, giving rise to litigation. See, e.g., *Foos v. Webster*, No. 758705 (King Co. Super. Ct. 1972); *Farley v. Metropolitan Mortgage & Sec. Co.*, No 764555 (King Co. Super. Ct. 1973). Although there are no appellate decisions in Washington concerning the trustee's relationship to the parties in a deed of trust, the problem has long been the subject of judicial inquiry. See, e.g., *National Life Ins. Co. v. Silverman*, 454 F.2d 899, 915 (D.C. Cir. 1971) ("Trustees under deeds of trust also have the duty to act for the benefit of both parties, borrower as well as lender, and to be impartial; . . . [t]he same good faith is required of trustees under a deed of trust of real estate as is required of other fiduciaries"); *Spruill v. Ballard*, 58 F.2d 517, 519 (D.C. Cir. 1932) ("[T]he law requires of a trustee . . . that he act fairly toward both parties and in the best interest of each and not for the exclusive benefit of either, because, after he has acted, the right of redemption is lost.").

the notice of sale, and (2) conduct a private sale a short time thereafter.

### A. *The Timing of the Hearing*

The opportunity for a hearing must precede any deprivation of the borrower's property that is not *de minimis*. Since the recording of the notice of sale deprives the borrower of the continued alienability and some of the equity in the land,<sup>183</sup> it would seem necessary to provide for notice and a hearing prior to the recording of the notice of sale. Provision for a hearing at this early stage of the proceeding would best accomplish the goal of "minimiz[ing] substantively unfair or mistaken deprivations of property."<sup>184</sup> If the borrower wants to contest the lender's claim of default or to raise collateral defenses,<sup>185</sup> it still would be possible to use the land itself as a source of revenue to retain an attorney. Of equal importance, when coupled with suggested changes in the required notice,<sup>186</sup> a provision for an early hearing may impel the borrower to raise the money necessary to cure the default prior to the time of the hearing. Again, the land itself may be a source of funds at this early stage in the proceeding. Finally, even if the only issue is the amount of costs incurred by the trustee, an early hearing would permit judicial supervision of those costs, potentially increasing the borrower's ability to cure the default.

All of the advantages of a hearing prior to the recording of the notice of sale become equivalent disadvantages if the time of the hearing is delayed until just prior to the trustee's sale, after the notice of sale has been recorded. The loss of alienability and equity may prohibit the borrower from obtaining legal representation at the hearing or from curing the default before the hearing.

In sum, to comply with the requirements of due process and to maximize the borrower's protections, it would seem necessary to schedule the time of the required hearing before the recording of the notice of sale. As will be discussed below,<sup>187</sup> in order to protect the

---

183. See the text accompanying notes 44-76 *supra*.

184. *Fuentes*, 407 U.S. at 81.

185. See, e.g., the discussion of *Peoples Nat'l Bank v. Ostrander*, 6 Wn. App. 28, 491 P.2d 1058 (1971), in the text accompanying notes 161-63 *supra*.

186. See the discussion in the text immediately following note 196 *infra*.

187. See the discussion in the text accompanying note 195 *infra*.

lenders' interests, it seems logical to reschedule the recording of the notice of sale to a time just prior to the actual trustee's sale.

### *B. The Scope of the Hearing*

It is clear from the recent procedural due process cases that the form of the required opportunity to be heard is subject to variances "appropriate to the nature of the case."<sup>188</sup> The form of the hearing appropriately is affected by (1) the simplicity of the issues;<sup>189</sup> (2) the length of time of the deprivation;<sup>190</sup> (3) the relative weight of liberty or property interests involved;<sup>191</sup> and (4) the nature of the subsequent proceedings, if any.<sup>192</sup>

Application of these four factors to a deed of trust foreclosure clearly indicates the scope of the required hearing. First, the issues involved in a deed of trust foreclosure are likely to be simple factual determinations. Has the borrower defaulted? Are there any defenses, legal or equitable, to the default? Has the trustee incurred unnecessary or exorbitant costs or failed to comply with the notice requirements of the Act? While more complicated issues such as allegations of fraud by the use of a deed of trust represented to be a mortgage<sup>193</sup> undoubtedly will arise, hearings which involve detailed inquiry into the applicable facts or law probably will be the exception rather than the rule. Second, while the deprivation of property at the time of the recording of the notice of sale in theory will be only temporary, the deprivation of property at the trustee's sale will be permanent. Third, the property interests involved often will be of the highest importance; courts and legislatures traditionally have guarded the possessory interests of a "homeowner" with the utmost jealousy. Finally, because it makes little sense from an economic or policy viewpoint to have both a probable cause hearing at an early stage in the proceeding (such as before the recording of the notice of sale) and then a later trial on the merits

---

188. *Fuentes*, 407 U.S. at 82, quoting *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 313 (1950).

189. *Fuentes*, 407 U.S. at 87 n.18, citing *Lindsey v. Normet*, 405 U.S. 56, 65 (1972).

190. *Fuentes*, 407 U.S. at 86.

191. *Id.* at 90 n.21, citing *Boddie*, 401 U.S. at 378.

192. *Fuentes*, 407 U.S. at 82, citing *Boddie*, 401 U.S. at 378.

193. See the discussion of *Ostrander* in the text accompanying notes 161-63 *supra*.

(prior to the trustee's sale), it is unlikely that there will be subsequent proceedings.

The importance of the property interest involved, the permanence of the deprivation, and the lack of any subsequent proceeding all suggest that a full trial on the merits is necessary. Fortunately, the probable simplicity of the issues suggests that such a trial would not constitute an unworkable intrusion in the deed of trust foreclosure mechanism.

### C. *Notice*

The present notice provisions are subject to constitutional criticism for failure to alert the recipient of an opportunity to be heard.<sup>194</sup> Therefore, it is necessary to include in the statutorily required notice a provision fully explaining to the borrower the approximate time and nature of the forthcoming opportunity to be heard. Other changes in the notice provision will be suggested below.

### D. *General Considerations*

In the spirit of preventing "unfair or mistaken deprivations of property," we suggest that in addition to providing for notice and a hearing prior to a deprivation of property, any proposal for statutory change should attempt to maximize the borrower's opportunity to cure the default. To achieve this goal, we suggest four guidelines:

- (1) the borrower's ability to alienate his interest in the land should not be impaired any earlier than necessary,
- (2) the requisite costs of the foreclosure sale should not be incurred until the latest possible time,
- (3) the borrower should be appraised of the gravity of the situation as early as possible,
- (4) the borrower should always be fully advised of the exact amount necessary to cure the default.

From the borrower's point of view, any statute which reflects the guidelines listed above while still complying with due process requirements should result in substantial improvements in the deed of trust foreclosure mechanism.

---

194. See the text accompanying notes 132-35 *supra*.

## Due Process and Deeds of Trust

To achieve these goals and to comply with due process requirements, we believe that three major changes in the Washington Act are mandatory. First, the recording of the notice of sale should be changed from early in the proceeding to a time just prior to the sale (for example, thirty days prior to sale). Second, the legislature should adopt a mechanism for providing prompt, expedited trials before a deprivation of property occurs. Third, at the earliest possible stage in the foreclosure proceeding, the trustee should be required by statute to provide the borrower complete information concerning the amount necessary to cure the default and the consequences of delay in curing the default.

An obvious solution to the necessity of providing for notice and a hearing before the recording of the notice of sale would be to delay the time of the recording (and of the notice to interested parties) until thirty days prior to the trustee's sale. This change would substantially benefit the borrower, for it would provide an additional ninety days of unimpaired alienability after a default occurs. In addition, by postponing the costs of a title search, recording fees, and (perhaps) the necessity for consultation with an attorney until late in the proceeding, the change would minimize the added trustee's costs and maximize the borrower's opportunity to cure the default early in the proceeding.<sup>195</sup>

Both the conclusion that the hearing required by due process should be a full trial on the merits and that it must precede the recording of the notice of sale highlight an urgent need for change in the court procedure. On the one hand, the required hearing could increase the workload of the courts; on the other, it is necessary to keep the total length of time necessary to effectuate a deed of trust foreclosure to a minimum in order to protect lenders' interests. Unless the legislature decides to abandon "private" deed of trust foreclosures altogether in favor of conventional judicial foreclosures, it will be necessary to furnish a mechanism for providing prompt, expedited trials after an alleged default but prior to the recording of the notice of sale.

---

195. In the 1965 Act, the notice of sale was to be recorded 180 days before the sale. The 1967 amendments to the Act shortened this time period to 120 days (*see* text accompanying note 14 *supra*) and added a provision prohibiting the sale from occurring less than six months after default. WASH. REV. CODE § 61.24.040(6) (Supp. 1972). Now that the earliest possible time the trustee's sale can occur is separately fixed by statute, there seems to be no practical reason for requiring a 120 day delay between the recording of the notice of sale and the sale itself. Usually the only bidder at the sale will be the lender and the amount of the bid will be the outstanding balance of the trust deed note. *See* text accompanying note 43 *supra*.



The procedural prerequisites for this new expedited proceeding could be modeled after an unlawful detainer proceeding.<sup>196</sup>

To truly maximize the borrower's ability to cure the default, the notice provisions of the Washington Act should be changed. The borrower's best chance to cure the default is early in the foreclosure process, before the lender commences legal action. To ensure that a borrower acts during this crucial time period, the trustee should be required to give the borrower more adequate notice. For example, on receiving a notice of default, the trustee could be required to send a first notice to the borrower informing him that the lender has declared him in default, that suit will be instituted against him by the lender in thirty or sixty days, that a notice of sale will be recorded in approximately ninety days, and that a trustee's sale probably will occur in 120 days unless the borrower cures the default or successfully defends the suit.<sup>197</sup> Ideally, this first notice should contain an exact statement of the total amount necessary to cure the default within the next thirty days and for each succeeding thirty-day period. A provision for such notice would ensure that a borrower is alerted to the gravity of the situation at the earliest possible time and made fully aware of the inevitable consequences of his failure to cure the default.

In summary, it is our hope that by following the suggested guidelines and adopting the three proposed changes, the legislature will conform the Washington Deed of Trust Act to the requirements of procedural due process. This result could be reached without increasing the length of time necessary to effectuate a deed of trust foreclosure.

## CONCLUSION

In its present form the Washington Deed of Trust Act appears to violate due process of law. Pursuant to its provisions, borrowers are

---

196. WASH. REV. CODE ch. 59.12 (1959). The summons issued pursuant to the unlawful detainer statute is returnable not less than six nor more than twelve days from the date of service. *Id.* § 59.12.070. However, the scope of the hearing must be broader than the limited inquiry of an unlawful detainer proceeding. See notes 161-63 and accompanying text *supra*.

197. While the borrower may have received similar information from the lender before a default was declared, we suggest that such direct and immediate notice from the trustee would better alert the borrower to the gravity of the situation. Additionally, the trustee costs added by this required notice should be minimal, because no title search would be necessary (only the borrower and lender need receive a copy).

deprived of significant property interests by state action in a non-exceptional situation without prior notice and a hearing. Given the stringent standards for waiver, it is unlikely that borrowers have validly waived their due process rights in existing deed of trust instruments.

Accordingly, the Washington Act should be amended to conform with due process requirements. It appears necessary to furnish borrowers notice and an automatic opportunity for a full trial on the merits prior to the recording of the notice of sale. For this and other reasons, it seems sensible to delay the recording of the notice of sale until approximately thirty days before the trustee's sale. Moreover, to maximize the borrower's ability to cure his default, it seems appropriate to require the trustee to furnish more timely and detailed notice to the borrower immediately after receiving a default notice. These changes should provide substantial new protections to borrowers without detriment to lenders. By maximizing the borrower's opportunity to cure the default, the changes actually may benefit both parties.

Notwithstanding the constitutional mandate and the practical necessity for change, the courts traditionally are reluctant to impose their concepts of procedural due process upon a system created by legislative design. It is to be hoped that the Washington Legislature will assume the responsibility for change that the courts often are forced to undertake as a last resort.