

Lender Services Update: Lender Liability for Forbearance and Foreclosures

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by [Brian Free](#)

HCMP's Lender Services & Finance attorneys strive to ensure that you are aware of important new legislation and decisions. Three new legal developments affecting financial institutions are summarized below. If have any questions or want to discuss these cases, please feel free to contact us.

[Court of Appeals Finds Lender Liability for Certain Forbearance Terms](#)

A recent decision by the Court of Appeals makes clear that a lender may be liable under Washington's Consumer Protection Act for merely entering into a forbearance agreement with a borrower in default. In *Mellon v. Regional Trustee Services Corp.*, the plaintiff borrowers alleged that the lender used the prospect of home foreclosure to persuade the borrowers to enter into a forbearance agreement that was alleged to be impossible for the borrowers to perform due to their unemployment. When the borrowers eventually defaulted on the forbearance agreement, the lender foreclosed. The Court of Appeals held that the borrowers stated a claim for violation of the Consumer Protection Act against the lender for unfair or deceptive business practices. Read the full decision [here](#).

[Supreme Court Holds That a Lender May be Liable for Improper Nonjudicial Foreclosure, Even if Foreclosure Sale is Discontinued](#)

State and federal courts were previously divided on whether a borrower could pursue claims against a lender for wrongful foreclosure if no foreclosure sale had occurred. In its September 2014 opinion *Frias v. Asset Foreclosure Services, Inc.*, the Washington Supreme Court confirmed that violations of the state's Deed of Trust Act can be actionable under the Consumer Protection Act. Accordingly, if a borrower can prove facts that generally govern Consumer Protection Act claims—including an unfair or deceptive practice and a compensable injury—a borrower may be able to recover for a lender's failure to follow Deed of Trust Act requirements. The *Frias* Court held, however, that the Deed of Trust Act does not create an independent cause of action in the absence of a completed foreclosure sale. Read the full decision [here](#).

[Supreme Court Accepts Review of Foreclosure Deficiency Case](#)

Washington's Supreme Court will determine whether nonjudicial foreclosure eliminates a guarantor's liability for a deficiency under the terms of a common deed of trust form. The state's Court of Appeals has issued divided opinions on this matter.

Division II of the Court of Appeals has ruled that where a deed of trust secures "related documents" that include guarantees, a nonjudicial foreclosure eliminates a lender's right to pursue a deficiency against guarantors. Many LaserPro deeds of trust contain this language, so this opinion has potentially far-reaching implications in Washington. When faced with similar facts, Division I of the Court of Appeals reached an opposition conclusion.

The Washington Supreme Court has accepted review of the Division I decision, and has scheduled oral argument for November 18. We expect an opinion to be issued mid to late 2015. Read the Division II decision [here](#) and Division I decision [here](#).



[Brian Free](#) is a litigator whose practice focuses on commercial litigation and insolvency, with an emphasis on representation of financial institutions and securities firms.

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