

Washington Supreme Court Closes the Door on Changing the Locks

In [*Jordan v. Nationstar Mortgage, LLC*](#), the Washington Supreme Court issued a stern warning to lenders seeking to change the locks on foreclosure properties. Given the significant potential liability exposure created by the opinion, foreclosing lenders should read the opinion with care and ensure their policies, procedures, and practices in that state comport with the Court's articulated standards.

The relevant underlying facts in *Jordan* are relatively straightforward: Following the borrower's 2011 default, the servicer's vendor changed the lock on the front door of the property. Significantly, this was the only door to the house, other than a rear screen door. The borrower only discovered that the locks were changed when she returned home and found a notice explaining what had happened posted on her door. While many of the underlying facts were not in dispute, the servicer and borrower disagreed as to whether the property was, in fact, vacant. The vacancy of the property was important because the servicer stated it only changed the locks if the property was found to be vacant or unsecure. After calling the number identified on the notice, the borrower ultimately was able to get into her house using the secure lockbox on her door.

The *Jordan* case began as a state court class action by the borrower alleging a broad range of claims against the servicer, including trespass, breach of contract, and violations of state and federal consumer protection laws. The Supreme Court acknowledged the scope of the issue in its opinion: "Jordan represents a certified class of 3,600 Washington homeowners who were locked out of their homes pursuant to similar provisions in their deeds of trust with Nationstar. This case presents an important issue for these homeowners and the thousands of others subject to similar provisions, as well as the many mortgage companies that have a concern with preserving and protecting the properties in which they have an interest." The servicer removed the case to United States Federal District Court. Following removal, the litigants filed cross summary judgment motions. Because the District Court felt that resolution of the case depended upon interpretation of unresolved state law issues, it certified two questions to the Washington Supreme Court, which were the genesis of the Washington Supreme Court's July 7, 2016 opinion.

The first question posed to the Washington Supreme Court was whether the "entry" provisions in the deed of trust conflicted with Washington law. "Entry" provisions are not uncommon in deeds of trust and permit a lender to "allow the

lender to enter, maintain, and secure the property after the borrower's default or abandonment" of the property. While the servicer sought to emphasize the vacant nature of the property, the Court effectively rejected the distinction as immaterial. Rather, the Court held that the determinative issue was whether the servicer's action constituted "taking possession" of the property. Because the Court believed that the servicer "effectively ousted [borrower] by changing her locks" it concluded the seller "exercised its control over the property." Such pre-foreclosure possessory acts contravened the mandate of Washington law. Having concluded that the entry provisions in the deed of trust conflicted with Washington law, the Court found those provisions unenforceable.

The second question, which will be left for discussion in future blogs, involved whether a servicer could only gain access to foreclosure properties through the "judicial appointment of a third party receiver." In a victory for the servicer community, the Court concluded that the receivership process was *not* the sole avenue open to the foreclosure servicer.

Following *Jordan*, the message for the servicer community is clear: A servicer who acts to secure a property pre-foreclosure—even where that property is vacant—exposes itself to significant potential liability for its actions. Even where the loan documents appear to provide the servicer a contractual right to act, that right will likely be deemed unenforceable based upon Washington law.