IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2005 Term

FILED
March 18, 2005
released at 10:00 a.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Nos. 31744 & 31745

JACKIE LUCAS, JANICE LUCAS, JACK OVERBAUGH, CHARLOTTE OVERBAUGH, DALE MICHAELSON, PANSY MICHAELSON, AND ANGELA MICHAELSON, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiffs,

V.

FAIRBANKS CAPITAL CORP., A CORPORATION, R. VANCE GOLDEN, III, JOHN DOE AND ROBERT DOE, AS TRUSTEES,
Defendants.

Certified Question from the Circuit Court of Lincoln County
Honorable Jay M. Hoke, Judge
Civil Action No. 03-C-2
CERTIFIED QUESTIONS ANSWERED

Submitted: January 12, 2005
Filed: March 18, 2005

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JUSTICE DAVIS delivered the Opinion of the Court.

CHIEF JUSTICE ALBRIGHT and JUSTICE STARCHER concur in part, dissent in part, and reserve the right to file separate opinions.

SYLLABUS BY THE COURT

1. The trustee in a trust deed given as security in connection with a home mortgage loan owes a fiduciary duty to the signatories of the trust deed.

2. The fiduciary duty owed by the trustee in a trust deed given as security in connection with a home mortgage loan does not require the trustee to review account records to ascertain the actual amount due prior to foreclosing under W. Va. Code § 38-1-3 (1923) (Repl. Vol. 1997).

3. The trustee in a trust deed given as security in connection with a home mortgage loan may not consider a trust grantor's objections to the foreclosure sale. Instead, where the trust grantor wishes to challenge a foreclosure, the proper remedy is for the grantor to seek an injunction or to file an action to have the foreclosure sale set aside.

4. W. Va. Code § 38-1-3 (1923) (Repl. Vol. 1997) does not require creditors in a deed of trust, or their representatives, to pursue remedies that are not set out in the deed of trust or any relevant statute to attempt to cure a default prior to pursuing a foreclosure under W. Va. Code § 38-1-3.

Davis, Justice:

The Circuit Court of Lincoln County presents this Court with two certified questions involving sales under deeds of trust given as security for home mortgage loans under W. Va. Code § 38-1-3 (1923) (Repl. Vol. 1997). The first question inquires whether a trustee's fiduciary duty requires him or her to, prior to foreclosure, perform functions that are not expressly set out in any relevant statute or the deed of trust document. We answer this question in the negative. The second question asks whether the creditor in a deed of trust must pursue remedies that are not set out in the deed of trust document or any relevant statute to attempt to cure a default prior to foreclosure. We likewise answer this question in the negative.

I.

FACTUAL AND PROCEDURAL HISTORY

The underlying putative class action lawsuit was filed on January 2, 2003, in the Circuit Court of Lincoln County, by plaintiffs Jackie and Janice Lucas, Jack and Charlotte Overbaugh, Dale and Pansy Michaelson, and Angela Kennedy, individually and on behalf of all others similarly situated (hereinafter collectively referred to as "the Lucases"), against defendants Fairbanks Capital Corp. (hereinafter referred to as "Fairbanks"), and R. Vance Golden, III (hereinafter referred to as "Mr. Golden").[1] The

[1]The complaint was later amended to include as defendants John Doe and (continued...)

Lucases are homeowners who are obligated under home loans for which Fairbanks is the loan servicer.[2] The Lucases alleged numerous wrongful acts by Fairbanks in performing its loan servicing activities, such as failing to post or improperly posting payments tendered, charging and collecting unlawful fees, and illegally pursuing foreclosure. They asserted causes of action against Fairbanks for breach of the duty of good faith and fair dealing, illegal pursuit of foreclosure, and collection of unauthorized charges.

Mr. Golden, the second named defendant in the Lucases law suit, serves as trustee or substitute trustee on many West Virginia deeds of trust for loans serviced by Fairbanks. The Lucases asserted claims against Mr. Golden for breach of fiduciary duty as trustee and illegal pursuit of forfeiture. The Lucases sought actual and punitive damages against both Fairbanks and Mr. Golden, and further sought to enjoin Fairbanks and Mr. Golden from pursuing "illegal practices as alleged." In addition, the Lucases filed a motion for a temporary injunction to enjoin Fairbanks and Mr. Golden from foreclosing on any properties in West Virginia. On or about January 8, 2003, the Circuit Court of Lincoln

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[1](...continued)
Robert Doe, as trustees.

[2]As a loan servicer, Fairbanks does not extend funds to borrowers. Instead, Fairbanks is paid a fee by the creditors of loans to provide various administrative services such as sending out monthly statements to borrowers, responding to borrower inquiries, collecting payments from borrowers, forwarding payments to the owners of the loans it services, appointing trustees on West Virginia deeds of trust, and referring loans out for foreclosure.

County entered an order granting the temporary injunction and directing that Mr. Golden "shall not proceed with any foreclosure on behalf of defendant Fairbanks on loans serviced by Fairbanks in the State of West Virginia until further order of this Court."

Thereafter, on or about January 17, 2003, the Lucases filed a motion seeking partial judgment on the pleadings and a motion to certify questions. Substantial proceedings followed, including significant settlement discussions. The parties ultimately reached a monetary settlement of the action. However, the parties apparently disagreed as to whether they had also resolved issues related to declaratory or injunctive relief, which led the Lucases to file a motion to enforce settlement. Following a hearing on or about December 8, 2003, the circuit court approved, at least on a preliminary basis, the monetary settlement, but did not act on the motion to enforce settlement as it related to other relief. The circuit court did, however, hear arguments related to the Lucases' motion to certify questions, and ultimately agreed to certify the following two questions to this Court:

> 1. Does the fiduciary duty of the trustee to both parties of a deed of trust include the duty to proceed to foreclosure (a) only after review of the account records to ascertain the actual amount due, and (b) to consider legitimate objections of the grantor/homeowner to foreclosure sale?

The circuit court answered this question in the affirmative.

> 2. Does the principle that equity abhors a forfeiture require home equity loan servicers such as Fairbanks Capital Corp. to pursue another remedy (*e.g.* a repayment plan, or other remedy at law) other than foreclosure when it can be made whole through such other remedy?

The circuit court answered this question in the affirmative.

Following the circuit court's ruling granting the motion to certify questions, the parties negotiated further and apparently reached an agreement with respect to disputed declaratory and injunctive aspects of their dispute, with the exception of the issues raised in the questions herein certified. By order entered December 8, 2003, the circuit court certified the two above-quoted questions to this Court. On March 24, 2004, Fairbanks filed a petition in this Court asking that we accept the questions certified, and further asking that we reformulate those questions. On the same day, the Lucases filed a petition asking this Court to docket the certified questions. We consolidated the two petitions for purposes of our consideration and accepted the certified questions for review. Upon examining the briefs filed by the Lucases; Fairbanks; Mr. Golden;[3] and The West Virginia Bankers Associate, Inc and The West Virginia Association of Community Bankers, Inc., as Amici Curiae;[4] hearing oral arguments, and reviewing the relevant law, we reformulate both questions and now answer them in the negative.[5]

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[3]Though Mr. Golden is a named defendant in the action below, he has joined the Lucases in asking this Court to answer the certified questions affirmatively and to provide a set of rules to govern trustees in the exercise of their official duties.

[4]We pause briefly to acknowledge our appreciation for the participation of the Amici Curiae in this case.

[5]Although we choose to exercise our power to reformulate the certified questions, we reject the proposed reformulated questions offered by Fairbanks. *See* Section II, *infra*.

II.

CERTIFIED QUESTIONS

Upon consideration of the questions certified by the Circuit Court of Lincoln County, we have determined that reformulating them will allow this Court to better address the legal questions therein raised. In this respect, we have previously held that

> "'[w]hen a certified question is not framed so that this Court is able to fully address the law which is involved in the question, then this Court retains the power to reformulate questions certified to it under both the Uniform Certification of Questions of Law Act found in *W. Va. Code*, 51-1A-1 *et seq*. and *W. Va. Code*, 58-5-2 [1967], the statute relating to certified questions from a circuit court of this State to this Court.' Syl. Pt. 3, *Kincaid v. Mangum*, 189 W. Va. 404, 432 S.E.2d 74 (1993)." Syllabus Point 1, *Aikens v. Debow*, 208 W. Va. 486, 541 S.E.2d 576 (2000).

Syl. pt. 1, *Charter Communications VI, PLLC v. Community Antenna Serv., Inc.*, 211 W. Va. 71, 561 S.E.2d 793 (2002). *Accord* W. Va. Code § 51-1A-4 (1996) (Repl. Vol. 2000) ("The [S]upreme [C]ourt of [A]ppeals of West Virginia may reformulate a question certified to it."). Therefore, we reformulate the first certified question as follows:

> 1. Does the trustee in a trust deed given as security in connection with a home mortgage loan owe a fiduciary duty to the signatories of the trust deed to, prior to foreclosing under W. Va. Code § 38-1-3 (1923) (Repl. Vol. 1997), (1) review account records to ascertain the actual amount due, or (2) consider objections to foreclosure raised by the trust grantor?

The second certified question is reformulated to ask:

> 2. Does the principle that equity abhors a forfeiture require creditors in a deed of trust, or their representatives, to pursue remedies that are not set out in the deed of trust, or any

relevant statutes, to attempt to cure a default prior to pursuing a foreclosure under W. Va. Code § 38-1-3?

Following a brief statement of the appropriate standard for our review, we will address each of these questions in turn.

III.

STANDARD OF REVIEW

It is well-settled law that "'[t]he appellate standard of review of questions of law answered and certified by a circuit court is *de novo*.' Syllabus point 1, *Gallapoo v. Wal-Mart Stores, Inc*., 197 W. Va. 172, 475 S.E.2d 172 (1996)." Syllabus pt. 2, *Keplinger v. Virginia Elec. & Power Co.*, 208 W. Va. 11, 537 S.E.2d 632 (2000). *Accord* Syl. pt. 1, *Perito v. County of Brooke*, 215 W. Va. 178, 597 S.E.2d 311 (2004); Syl. pt. 2, *Charter Communications v. Community Antenna Serv., Inc.*, 211 W. Va. 71, 561 S.E.2d 793. Accordingly, we proceed to conduct a plenary review of the reformulated certified questions.

IV.

DISCUSSION

In presenting their arguments to this Court in relation to the questions herein certified, the parties have discussed at length the changes that have occurred in the lender/borrower relationship in this State. They have explained the development and growth of the secondary mortgage market and exhorted its pros and cons. They also discuss the

pervasive use of loan servicers such as the defendant Fairbanks in the lending industry. Furthermore, the parties explore the possible benefits and risks of accomplishing change in this critical area, which ranges from providing greater protection for homeowners to severely limiting the availability of mortgage loans to West Virginians.

In this regard, the Lucases and Mr. Golden urge this Court to develop and adopt a set of rules to govern the conduct of loan servicers and trustees in connection with the administration of loans in trustee foreclosure proceedings. While the extent and depth of their efforts is laudable, the simple fact is that they have not chosen the proper forum in which to have their multifarious concerns addressed. We do not deny that the present statute governing sales under trust deeds, enacted long ago in 1923, may well be inadequate to address the complexities of the modern state of the home loan mortgage industry as it relates to trust deed transactions. However, such issues are for the Legislature to resolve.

> "'[T]he judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines."' *State ex rel. Blankenship v. Richardson*, 196 W. Va. 726, 735, 474 S.E.2d 906, 915 (1996) (quoting *Lewis v. Canaan Valley Resorts, Inc.*, 185 W. Va. 684, 692, 408 S.E.2d 634, 642 (1991)).

State ex rel. Orlofske v. City of Wheeling, 212 W.Va. 538, 546-47, 575 S.E.2d 148, 156-57 (2002). Consequently, in addressing the certified questions before us, we will constrain ourselves to interpreting, if necessary, and applying the relevant statutory provisions.

A. Reformulated Question One

> Does the trustee in a trust deed given as security in connection with a home mortgage loan owe a fiduciary duty to the signatories of the trust deed to, prior to foreclosing under W. Va. Code § 38-1-3 (1923) (Repl. Vol. 1997), (1) review account records to ascertain the actual amount due, or (2) consider objections to foreclosure raised by the trust grantor?

We begin by discussing whether the duty owed by a trustee in a deed of trust is that of a fiduciary. The Lucases characterize the duty owed by the trustee to both the trust debtor and the trust creditor as a fiduciary duty. Fairbanks does not disagree with this characterization.

We previously have defined a fiduciary duty as "'[a] duty to act for someone else's benefit, while subordinating one's personal interests to that of the other person. It is the highest standard of duty implied by law [.]'" *Elmore v. State Farm Mut. Auto. Ins. Co.*, 202 W. Va. 430, 435, 504 S.E.2d 893, 898 (1998) (quoting *Black's Law Dictionary* 625 (6th ed. 1990)). *See generally Black's Law Dictionary* 523 (7th ed. 1999) ("A duty of utmost good faith, trust, confidence, and candor owed by a fiduciary (such as a lawyer or corporate officer) to the beneficiary (such as a lawyer's client or a shareholder); a duty to act with the highest degree of honesty and loyalty toward another person and in the best interests of the other person (such as the duty that one partner owes to another).").

Though not using the term "fiduciary," this Court has described what basically amounts to a fiduciary duty on the part of a trustee in the deed of trust context by holding that "[i]t is the duty of the trustee to look to the rights and interests of the trust-debtor, as well as to those of the trust-creditor, in-as-much as he is the agent of both parties, and bound to act impartially, between them." Syl. pt. 7, *Hartman v. Evans*, 38 W. Va. 669, 18 S.E. 810 (1893). This holding and similar comments have been repeated often throughout the history of this State. *See Moore v. Hamilton*, 151 W. Va. 784, 792, 155 S.E.2d 877, 882 (1967) ("It is, however, the duty of a trustee in a deed of trust to look to the interests of the trust debtor as well as to those of the creditor and the trustee, who is the agent of both parties, is bound to act impartially between them." (citing *Hartman*)); *Stephenson v. Point Pleasant Bldg. & Loan Ass'n*, 108 W. Va. 701, 703, 152 S.E. 790, 790 (1930) ("A trustee must always act impartially, and as far as possible for the advantage of all parties interested in the sale, and use reasonable efforts to obtain the best price he can." (citations omitted)); Syl. pt. 9, *Copelan v. Sohn*, 75 W. Va. 83, 82 S.E. 1016 (1912) ("An attorney for the creditor is not incompetent to act as trustee in a deed of trust securing a debt; but being then the agent of both parties he is bound, in executing the trust, to act honestly and impartially between the parties, and endeavor by proper notice and otherwise to obtain the best price for the property, and if necessary, to invoke the aid of a court of equity in doing so."); *First Nat'l Bank v. Prager*, 50 W. Va. 660, 690, 41 S.E. 363, 376 (1902) ("In *Rossett v. Fisher*, 11 Grat. [492,] 498-99 [(Va. 1854)], the court says: 'A trustee in a deed of trust is the agent of both parties and bound to act impartially between them; nor ought he to permit the urgency of the

creditors to force the sale under circumstances unjust to the debtor at an inadequate price.'"), *overruled in part on other grounds by Frye v. Miley*, 54 W. Va. 324, 46 S.E. 135 (1903); *Smith v. Lowther*, 35 W. Va. 300, 308, 13 S.E. 999, 1001 (1891) ("It has been frequently held that the trustee in a deed of trust is the agent of both the grantor and the *cestui que trust*, and his duty requires him to act impartially between them. A confidence is reposed in him by both parties . . . ."); Syl. pt. 3, *Livey v. Winton*, 30 W. Va. 554, 4 S.E. 451 (1887) ("A trustee in a deed of trust is the agent of both parties, and bound to act impartially between them. He is bound to bring the estate to the hammer, for the best interest of his *cestui que trust*, and should use all reasonable diligence to obtain the best price for the land.").

Moreover, in discussing the duty of a trustee in connection with sales under the deed of trust pursuant to W. Va. Code § 38-1-3, this Court alluded to the existence of a fiduciary duty in the case of *Emery's Motor Coach Lines v. Mellon National Bank & Trust Co. of Pittsburgh*, where we commented, in discussing the sale of property in foreclosure of a deed of trust, that "[i]t is a well known principle, long established in this state, that, as a matter of public policy, *a fiduciary* cannot profit from the sale of property to which he bears *a trust relationship*." 136 W. Va. 735, 745, 68 S.E.2d 370, 375 (1951) (citations omitted) (emphasis added). Accordingly, to clarify the law with respect to the existence of a fiduciary duty on the part of a trustee to a deed of trust, we now expressly hold that the trustee in a trust deed given as security in connection with a home mortgage loan owes a fiduciary duty to the signatories of the trust deed.

Turning now to the essence of the first certified question, the Lucases argue that the fiduciary duty includes the duty to proceed to foreclosure *only after* reviewing the account records to ascertain the actual amount due as well as to consider legitimate objections of the grantor/homeowner to the foreclosure sale. We disagree with these propositions.

We begin our analysis by reviewing the relevant statute, while bearing in mind that "[t]he primary object in construing a statute is to ascertain and give effect to the intent of the Legislature." Syl. pt. 1, *Smith v. State Workmen's Comp. Comm'r*, 159 W. Va. 108, 219 S.E.2d 361 (1975). The duties of a trustee with respect to a sale under a trust deed are set out in W. Va. Code § 38-1-3 (1923) (Repl. Vol. 1997), which states:

> The trustee in any trust deed given as security shall, whenever required by any creditor secured or any surety indemnified by the deed, or the assignee or personal representative of any such creditor or surety, after the debt due to such creditor or for which such surety may be liable shall have become payable and default shall have been made in the payment thereof, or any part thereof, by the grantor or other person owing such debt, and if all other conditions precedent to sale by the trustee, as expressed in the trust deed, shall have happened, sell the property conveyed by the deed, or so much thereof as may be necessary, at public auction, having first given notice of such sale as prescribed in the following section.

Notably, there is nothing in this statute, or in the other statutes that appear in the same article of the Code, specifically identifying the legislative purpose for which it is intended to serve.

Before examining the specific language contained in this statute, however, we observe that "[t]he [L]egislature has provided for two types of real property foreclosure sales: judicial sales [under W. Va. Code § 55-12-1, *et seq*.], and trustee sales [under W. Va. Code § 38-1-1, *et seq*.]." *Fayette County Nat'l Bank v. Lilly*, 199 W. Va. 349, 354-55, 484 S.E.2d 232, 237-38 (1997) (footnotes omitted). Accordingly, in exploring the legislative intent underlying the foreclosure scheme presently before us, we must examine why the Legislature would knowingly establish two distinct methods of obtaining the same end. In this regard, we are guided by the maxim

> "[a] statute should be so read and applied as to make it accord with the spirit, purposes, and objects of the general system of law of which it is intended to form a part; it being presumed that the legislators who drafted and passed it were familiar with all existing law applicable to the subject-matter, whether constitutional, statutory, or common, and intended the statute to harmonize completely with the same and aid in the effectuation of the general purpose and design thereof, if its terms are consistent therewith." Syllabus Point 5, *State v. Snyder*, 64 W. Va. 659, 63 S.E. 385 (1908).

Syl. pt. 2, *Bond v. Bond*, 215 W. Va. 22, 592 S.E.2d 801 (2003). Since it is unlikely that the Legislature would provide two separate statutory schemes to achieve the same result unless there was some reason therefor, we believe it is useful to identify the differences between the two types of foreclosure sales for real property. We previously have recognized this distinction thusly:

> In describing a central difference between the two types of real property foreclosure sales, one commentator has noted that "[t]he high cost attendant to the judicial system and time lapse between the actual default and time of sale make the [judicial

> sale] less popular. . . . In contrast, [the trustee] sale is a 'streamlined more efficient version of judicial foreclosure.'"

Lilly at 355, 484 S.E.2d at 238 (quoting Pamela Giss, *An Efficient and Equitable Approach to Real Estate Foreclosure Sales: A Look at the New Hampshire Rule*, 40 St. Louis U.L.J. 929, 939 (1996) (additional citation omitted)). Based upon the foregoing, we believe it may be readily inferred that the legislative purpose for allowing trustee foreclosure is to provide a more time efficient and economical method of foreclosure. Having made this acknowledgment, we are reluctant to accept the Lucases' invitation to interpret W. Va. Code § 38-1-3 in a manner that complicates the trustee foreclosure process, as such a construction would be contrary to the legislative intent of the statute.

Turning to the specific statute at issue in this case, we look to its language in search of support for the Lucases' theory of requiring a trustee to ascertain the amount of debt prior to foreclosure. We find none. Rather, the duties of a trustee set out in the statute are rather sparse. First, the trustee must receive a communication from a creditor or surety indemnified by the deed that the debt has become due, a default has occurred, and that a foreclosure sale is demanded. This is evidenced by the following statutory language:

> The trustee in any trust deed given as security shall, whenever required by any creditor secured or any surety indemnified by the deed, or the assignee or personal representative of any such creditor or surety, *after the debt due* to such creditor or for which such surety may be liable *shall have become payable and default shall have been made in the payment thereof*, or any part thereof, by the grantor or other person owing such debt . . . sell the property conveyed by the

> deed, or so much thereof as may be necessary, at public auction . . . .

W. Va. Code § 38-1-3 (emphasis added).

Plainly, there is nothing in the foregoing portion of the statute upon which to base a requirement that a trustee ascertain the amount of the outstanding debt prior to foreclosing on the subject property. "'A statute, or an administrative rule, may not, under the guise of "interpretation," be modified, revised, amended or rewritten.' Syllabus point 1, *Consumer Advocate Division of Public Service Commission v. Public Service Commission*, 182 W. Va. 152, 386 S.E.2d 650 (1989)." Syl. pt. 5, *Perito v. County of Brooke*, 215 W. Va. 178, 597 S.E.2d 311 (2004). The statute does, however, go on to additionally direct that, prior to a trustee sale at public auction, "all other conditions precedent to sale by the trustee, as expressed in the trust deed, shall have happened." W. Va. Code § 38-1-3. Thus, if a requirement for ascertaining the amount of debt was included in the trust deed itself, the trustee would be required to comply therewith. Absent such a specific requirement in the trust deed, however, there is simply no authority that would compel the trustee to make such a determination.

In support of their position that a trustee has a duty to proceed to foreclosure *only after* reviewing the account records to ascertain the actual amount due, the Lucases rely on this Court's decision in *Copelan v. Sohn*, 75 W. Va. 83, 82 S.E. 1016. The Lucases assert

in their brief that, under *Copelan*, "when there is some kind of impediment to a fair sale . . . the trustee is '*required* to invoke the assistance of a court of equity' when there is any doubt about the amount of debt secured." (Quoting *Copelan* at 90, 82 S.E. at 1018). We find the Lucases reliance on *Copelan* unpersuasive.[6]

The particular text to which the Lucases direct our attention is mere dicta, and therefore is not binding on this Court. Moreover, the related syllabus point in *Copelan*, which is the official authority for which the decision stands, did not include the term "required." Rather, Syllabus point 9 of *Copelan* addressed an attorney for the creditor acting as trustee and stated:

> An attorney for the creditor is not incompetent to act as trustee in a deed of trust securing a debt; but being then the agent of both parties he is bound, in executing the trust, to act honestly and impartially between the parties, and endeavor by proper notice and otherwise to obtain the best price for the property, and if necessary, to invoke the aid of a court of equity in doing so.

75 W. Va. 83, 82 S.E. 1016. Under the language of this syllabus point, it is left to the trustee to exercise his or her judgment in determining whether there is such an impediment to a

[6]*Copelan* involved the 1891 version of the statute pertaining to sales under trust deeds, which may be found at chapter 77 of the Code of 1891. The portion of the 1891 version of the statute that relates to the particular topics covered in W. Va. Code § 38-1-3 are substantially the same as they currently appear in W. Va. Code § 38-1-3. The 1891 statute also includes additional topics that have now been separated into various sections of Article 1, Chapter 38 of the West Virginia Code. Because none of those additional provisions are at issue in connection with the instant certified questions, we do not address them.

proper execution of his or her duties as to require the assistance of a court.[7] This interpretation, we think, is further supported by this Court's holding in Syllabus point 8 of *Hartman v. Evans*, where the Court stated

> Where there is, from any cause, an impediment to his making a fair and proper sale, (1) as where, from the fact of the deed of trust being one of long standing, or from any cause, the amount due and to be raised by a sale is uncertain; (2) where there are various deeds of trust or other incumbrances; (3) where the legal title is outstanding; (4) where there is a cloud upon the title, – *the trustee may*, of his own motion, apply to a court of equity to remove such impediment to a proper execution of the trust; and, if he should fail to do this, the party injured by his default has a right to make such application.

38 W. Va. 669, 18 S.E. 810 (emphasis added). *Accord Washington Nat'l Bldg. & Loan Ass'n v. Buser*, 61 W. Va. 590, 595, 57 S.E. 40, 42 (1907) ("[W]here the amount due and to be raised by sale is uncertain, the trustee, who is the agent of both parties and is bound to act impartially, *may* of his own motion apply to a court of equity for his own sake, as well as for the interests of those concerned, to remove the impediment and direct his conduct." (emphasis added)). *Cf.* Syl. pt. 8, *Pence v. Jamison*, 80 W. Va. 761, 94 S.E. 383 (1917) ("A trustee in a deed of trust is under no duty to seek the aid of a court of equity in the administration of the trust, unless it appear that there are prior liens of uncertain amount or whose validity has not been determined, or some other equity which would render uncertain

[7]We note that "[t]he distinction between law and equity was abolished by Rule 2 of the West Virginia Rules of Civil Procedure[,] which provides that '[t]here shall be one form of action to be known as "civil action."'" *Realmark Devs., Inc. v. Ranson*, 214 W. Va. 161, 164, 588 S.E.2d 150, 153 (2003).

the title of a purchaser at a sale made by such trustee.").

Based upon the foregoing analysis, we hold that the fiduciary duty owed by the trustee in a trust deed given as security in connection with a home mortgage loan does not require the trustee to review account records to ascertain the actual amount due prior to foreclosing under W. Va. Code § 38-1-3 (1923) (Repl. Vol. 1997).

We do pause briefly to note, however, that we find nothing in the relevant statute to expressly prohibit a trustee from obtaining information regarding the amounts due prior to foreclosure, or from seeking the aid of a court to resolve such an issue if, in the judgment of the trustee, such information is necessary to the proper execution of his or her duties. Indeed, even though not required, such action may be the more prudent course. *See Hartman v. Evans*, 38 W. Va. at 679, 18 S.E. at 814 ("In deeds of trust, especially those of long standing, where the amount due and to be raised by a sale is uncertain . . . where there are various deeds of trust or other incumbrances . . . where the legal title is outstanding . . . where there is a cloud upon the title . . . or in conclusion any impediment to a fair execution of the trust, the trustee, who is the agent of both parties, and bound to act impartially between them, *may and ought of his own motion* to apply to a court of equity for his own safety, as well as for the interest of those concerned, to remove the impediment and direct his conduct; and, if he should fail to do this, the party injured by his default has an unquestionable right to do so." (emphasis added)).

We similarly disagree with the Lucases' contention that the fiduciary duty of the trustee to both parties of a deed of trust includes the duty to consider legitimate objections of the grantor/homeowner to a foreclosure sale. Based upon the same principles of statutory construction discussed above, we find nothing in the language of W. Va. Code § 38-1-3 to suggest that a trustee has a duty to consider objections to the foreclosure sale. *See* Syl. pt. 5, *Perito v. County of Brooke*, 215 W. Va. 178, 597 S.E.2d 311 ("'A statute, or an administrative rule, may not, under the guise of "interpretation," be modified, revised, amended or rewritten.' Syllabus point 1, *Consumer Advocate Division of Public Service Commission v. Public Service Commission*, 182 W. Va. 152, 386 S.E.2d 650 (1989)."); Syl. pt. 1, *Smith v. State Workmen's Comp. Comm'r*, 159 W. Va. 108, 219 S.E.2d 361 ("The primary object in construing a statute is to ascertain and give effect to the intent of the Legislature.").

To the contrary, we previously have observed that a trustee does not have the power to resolve disputes between the grantor and grantee. In *Villers v. Wilson*, we stated that "[a] trust deed sale is normally conducted by a private individual, not a court. The trustee has limited powers, *which do not include the power to resolve controversies over debts owed by the secured creditor to the debtor*." 172 W. Va. 111, 115, 304 S.E.2d 16, 19 (1983) (emphasis added) (citations omitted).

Instead, where the trust grantor wishes to challenge a foreclosure, the proper

remedy is for the grantor to seek an injunction or to file an action to have the foreclosure sale set aside:

> [T]he lending institutions of this state have operated under the current trustee foreclosure scheme since the founding of this state. This scheme has always permitted a grantor to seek an independent action to either prevent a real property foreclosure from taking place, or to have a real property foreclosure sale set aside.

Fayette County Nat'l Bank v. Lilly, 199 W. Va. 349, 357, 484 S.E.2d 232, 240. *See also Dennison v. Jack*, 172 W. Va. 147, 157, 304 S.E.2d 300, 310 (1983) ("The grantor of a trust deed may seek a court injunction against a proposed trust deed foreclosure sale, *Wood v. The West Virginia Mortgage & Discount Corporation*, 99 W. Va. 117, 127 S.E. 917 (1925), *cf. Villers v. Wilson*, 304 S.E. 16, (W. Va. 1983), or subsequent to a foreclosure sale, such a grantor may seek to have that sale set aside. *Moore v. Hamilton*, 151 W. Va. 784, 792, 155 S.E.2d 877, 882 (1967); Syl. pt. 2, *Corrothers v. Harris*, 23 W. Va. 177 (1883). In *Moore* and *Corrothers*, this Court stated that a sale under a trust deed will not be set aside unless for 'weighty reasons.'"). Thus it is for a court, and not the trustee, to address objections of the grantor/homeowner to a foreclosure sale.

In accordance with the foregoing analysis, we now hold that the trustee in a trust deed given as security in connection with a home mortgage loan may not consider a trust grantor's objections to the foreclosure sale. Instead, where the trust grantor wishes to challenge a foreclosure, the proper remedy is for the grantor to seek an injunction or to file

an action to have the foreclosure sale set aside.

B. Reformulated Question Two

> Does the principle that equity abhors a forfeiture require creditors in a deed of trust, or their representatives, to pursue remedies that are not set out in the deed of trust, or any relevant statutes, to attempt to cure a default prior to pursuing a foreclosure under W. Va. Code § 38-1-3?

The circuit court answered this question in the affirmative.

By virtue of the foregoing question, this Court is being asked to invoke the principles of equity to amend a statute to add provisions that were not adopted by the legislature in enacting the statute. We decline this invitation. We find nothing in the text of W. Va. Code § 38-1-3 that imposes upon a creditor, or its representative, the duty to pursue remedies other than foreclosure upon the default of the debtor.[8] In the absence of such a

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[8]W. Va. Code § 38-1-3 (1923) (Repl. Vol. 1997) states in full:

> The trustee in any trust deed given as security shall, whenever required by any creditor secured or any surety indemnified by the deed, or the assignee or personal representative of any such creditor or surety, after the debt due to such creditor or for which such surety may be liable shall have become payable and default shall have been made in the payment thereof, or any part thereof, by the grantor or other person owing such debt, and if all other conditions precedent to sale by the trustee, as expressed in the trust deed, shall have happened, sell the property conveyed by the deed, or so much thereof as may be necessary, at public auction, having first given

(continued...)

requirement being imposed by the legislature, we may neither create nor enforce one. "[C]ourts cannot read into a statute that which is not within the intent of the Legislature, manifest from the statute itself." *State v. Abdella*, 139 W. Va. 428, 448, 82 S.E.2d 913, 924 (1954) (citations omitted).

We recognize that there have been instances in which this Court has interpreted a vague statute to include a requirement that, perhaps, was not readily apparent on the face of the statute in order to give effect to the intent of the Legislature. However, the present case certainly does not present such a circumstance. The relationship between debtors and creditors in the home mortgage industry is far too complex for this Court to endeavor to fashion a rule requiring a creditor to take additional steps before seeking foreclosure by the trustee to the deed of trust. We are ill-equipped to ascertain the potential impact of such an action.[9] This is, without question, an issue for the Legislature to undertake.

> It is not the province of the courts to make or supervise legislation, and a statute may not, under the guise of interpretation, be modified, revised, amended, distorted, remodeled, or rewritten, or given a construction of which its words are not susceptible, or which is repugnant to its terms which may not be disregarded. 50 Am. Jur., Statutes, Section 228.

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[8](...continued)
notice of such sale as prescribed in the following section.

[9]For example, we have no method for obtaining necessary data to measure the impact, financial and otherwise, of imposing additional requirements on creditors prior to allowing foreclosure.

State v. General Daniel Morgan Post No. 548, Veterans of Foreign Wars, 144 W.Va. 137, 145, 107 S.E.2d 353, 358 (1959). Accordingly, we hold that W. Va. Code § 38-1-3 (1923) (Repl. Vol. 1997) does not require creditors in a deed of trust, or their representatives, to pursue remedies that are not set out in the deed of trust or any relevant statute to attempt to cure a default prior to pursuing a foreclosure under W. Va. Code § 38-1-3. Based upon this holding, we answer the second reformulated question in the negative.

V.

CONCLUSION

For the reasons stated in the body of this opinion, we answer the two questions herein certified by the Circuit Court of Lincoln County, as reformulated, in the negative.

Certified questions answered.