Supreme Court No. 90509-6

(Court of Appeals No. 70592-0-I)

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

ROCIO TRUJILLO,

Plaintiff-Petitioner,

v.

NORTHWEST TRUSTEE SERVICES, INC.,

Defendant-Respondent,

and

WELLS FARGO, N.A.,

Defendant.

AMICUS CURIAE MEMORANDUM OF THE NORTHWEST JUSTICE PROJECT IN SUPPORT OF PETITION TO REVIEW

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I. INTEREST OF *AMICUS*

The Northwest Justice Project ("NJP") is a statewide non-profit law firm that provides representation and counseling to low- and moderate-income homeowners in Washington. NJP has counseled and represented thousands of Washington homeowners over the last five and one-half years since the current foreclosure crisis began.

NJP and its homeowner clients have a substantial interest in this Court's resolution of the proper interpretation of "owner" and "beneficiary" as used in RCW 61.24.030(7)(a) of the Deed of Trust Act ("DTA"), both because it governs a trustee's authority to proceed with the foreclosure process in good faith, and because it determines a homeowner's right to mediation under the Foreclosure Fairness Act ("FFA").

NJP respectfully submits this *Amicus Curiae* Memorandum in Support of Petition for Review pursuant to RAP 13.4(h). As described below, the Petition involves an issue of substantial public interest, and Amicus urges the Court to accept the Petition for Review pursuant to RAP 13.4(b)(4).

II. ARGUMENT

A. *Trujillo* Raises an Issue of Substantial Public Interest.

The vast majority of foreclosures in Washington are non-judicial because it is a less expensive, streamlined process. However, the DTA counterbalances that convenience with heightened protections for the borrower. The *Trujillo* court's interpretation guts a key protection of the DTA.

"[T]he statute's [DTA] reference to 'owner' has long-puzzled [sic] courts..."[1] The *In re Butler* court acknowledges widespread confusion concerning a critical provision of the DTA in its recent opinion citing *Trujillo.* Yet, rather than address the significance of the word "owner" in RCW 61.24.030(7)(a), the *In re Butler* court follows *Trujillo's* lead and simply ignores it.

Trujillo holds that the beneficiary entitled to authorize a DTA foreclosure "may be any of three specified persons:

> (i) the ***holder*** of the instrument, (ii) a ***nonholder*** in possession of the instrument who has the rights of a holder, ***or*** (iii) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to RCW 62A.3-309 or 62A.3-418(d)."[2]

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[1] *In re Butler*, 512 B.R. 643, 657 (Bankr. W.D. Wash. 2014) (emphasis added).
[2] *Trujillo v. Northwest Trustee Services, Inc.*, ___Wn. App. ___, 326 P.3d 768, 779 (2014) (quoting RCW 62A.3-301; first emphasis in original, other emphasis added).

Respondent Northwest Trustee Services ("NWTS") asserts that the *Trujillo* decision "does not raise an issue of substantial public interest because this case involved a private transaction..."[3] Yet, beginning the same day *Trujillo* was published,[4] NWTS's counsel have repeatedly cited *Trujillo* (and cases citing *Trujillo*) for the proposition that the beneficiary need only be the holder of the note. Numerous other cases have already cited *Trujillo* with approval since its recent publication.[5] The rapid and widespread reliance on *Trujillo* and the fact that the Washington Court of Appeals is a unitary court means that *Trujillo* has already had, and will continue to have, substantial statewide impact on case law and homeowners' rights concerning this crucial provision of the DTA.[6]

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[3] *NWTS's Answer to Petition for Review* at 3.

[4] *NWTS's Second Statement of Supplemental Authority* in *Lyons,* Supreme Court No. 89132-0, dated June 2, 2014 (citing *Trujillo*); *NWTS's Third Statement of Supplemental Authority* in *Lyons,* Supreme Court No. 89132-0, dated June 19, 2014 (citing *Brodie,* which in turn cites *Trujillo*); *NWTS's Fourth Statement of Supplemental Authority* in *Lyons,* Supreme Court No. 89132-0, dated July 21, 2014 (citing *In re Butler,* which in turn cites *Trujillo*).

[5] *See, e.g., Knecht, et al. v. Fidelity Nat'l Title Ins. Co.,* 2014 WL 4057148, * 7 (W.D. Wash. Aug. 14, 2014); *Stafford v. SunTrust Mortgage, Inc.,* 2014 WL 376479, *3 (W.D. Wash. July 31, 2014); *Bateh v. Wells Fargo Bank, N.A.,* 2014 WL 3739511, *5 (W.D. Wash. July 29, 2014); *Singh v. Federal Nat'l Mortgage Ass'n,* 2014 WL 3739389, *5 n.3 (W.D. Wash. July 28, 2014); *In re Butler,* 512 B.R. 643, 657 (Bankr. W.D. Wash. July 9, 2014); *Brodie v. Northwest Trustee Services, Inc.,* 2014 WL 2750123, *1 (9th Cir. June 18, 2014).

[6] *Trujillo* is cited for its most radical holding, that the beneficiary authorized to initiate non-judicial foreclosure may be any "person entitled to enforce" under RCW 62A.3-301, in the *Answer of JPMorgan Chase Bank, N.A. to Petition for*

Trujillo is also significant because the holder is not necessarily the owner in a substantial percentage of home mortgage loans.[7] Government-Sponsored Enterprise ("GSE") loans—those owned or guaranteed by Fannie Mae or Freddie Mac, yet serviced by some other entity—comprised 47% of the home mortgage loan market in 2010,[8] and their market share is expanding. In the first nine months of 2012, Freddie Mac and Fannie Mae funded 69% of *new* mortgages.[9] These GSE loans alone represent a large number of mortgages in which the holder is not necessarily the owner. Further, many mortgages are held in securitized trusts and serviced by a separate entity. This common arrangement matters both in terms of determining authority to foreclose and in properly evaluating whether a beneficiary is exempt from mediation under the FFA. Consequently, correct and consistent interpretation of

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Review in *Stehrenberger v. JPMorgan Chase Bank, N.A.*, Supreme Court No. 90504-5, filed on August 4, 2014.

[7] The question of whether the servicer does legally hold the note is outside the scope of this memorandum.

[8] *See* FHFA *Current Market Data Enterprise Share of Residential Mortgage Debt Outstanding 1990 – 2010*, http://www.fhfa.gov/datatools/downloads/pages/current-marketdata.aspx (showing combined Freddie Mac and Fannie Mae percent share of the total mortgage debt outstanding as of 2010).

[9] *See* Eisinger, Jesse, *We've Nationalized the Home Mortgage Market. Now What?*, ProPublica, Dec. 18 2012, http://www.propublica.org/article/weve-nationalized-the-home-mortgage-market-now-what.

RCW 61.24.030(7)(a) in identifying the beneficiary is of widespread importance to Washington homeowners.

B. *Trujillo* Implicates Both Well-Established and Newer DTA Provisions Important to Homeowners.

Three avenues of relief exist in the event of a defaulted promissory note: suing on the note under RCW 62A.3, foreclosing judicially under RCW 61.12, or foreclosing non-judicially under RCW 61.24 (the DTA). The standing requirements for each of these processes reflect a level of stringency consistent with the stakes. Under RCW 62A.3, for example, the defendant stands to lose money, not possession of the home, and so the plaintiff merely needs to be a "person entitled to enforce," which can include even a thief in possession of the note.[10]

At the other end of the spectrum, in a non-judicial foreclosure, the borrower stands to lose the home (and possibly equity).without the protective oversight of the court. The three overarching goals of the DTA are (1) to create an efficient and

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[10] RCW 62A3-301 ("'Person entitled to enforce' an instrument means (i) the holder of the instrument, (ii) a nonholder in possession of the instrument who has the rights of a holder, or (iii) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to RCW 62A.3-309 or 62A.3-418(d). A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument.").

inexpensive process; (2) to promote stability of land titles; and (3) to prevent wrongful foreclosures.[11] In keeping with the need for heightened borrower protections, the legislature imposed more stringent requirements for what party may non-judicially foreclose in RCW 61.24.030(7)(a) by requiring that the beneficiary be the *owner* of the note. The legislature specified that the trustee may rely on a declaration stating that the beneficiary is the "actual holder" of the note to meet this proof of ownership requirement unless in so doing, the trustee has violated its duty of good faith under RCW 61.24.010(4). RCW 61.24.030(7)(a) & (b). Additionally, because of the lack of judicial oversight, this Court has held that the DTA must be strictly construed in favor of the borrower.[12]

The *Trujillo* holding would require the least stringent standard of a "person entitled to enforce" a note— that of RCW 62A.3-301 to be the only proof requirement in the non-judicial

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[11] *See Cox v. Helenius,* 103 Wn.2d 383, 387, 693 P.2d 683 (1985) (citing Comment, *Court Actions Contesting the Nonjudicial Foreclosure of Deeds of Trust in Washington,* 59 WASH. L. REV. 323, 330 (1984)); *Albice v. Premier Mortgage Services of Washington, Inc.,* 174 Wn.2d 560, 567, 276 P.3d 1277 (2012).

[12] *Albice,* 174 Wn.2d at 566 (because the non-judicial foreclosure process under the DTA lacks the protections enjoyed by borrowers in judicial foreclosure, courts must "strictly construe the statute in the borrower's favor").

foreclosure context.[13] Because persons entitled to enforce under RCW 62A.3-301 include non-holders and persons not in possession of the note (*see* RCW 62A.3-301(ii) & (iii)), the effect of the *Trujillo* holding, contrary to the non-judicial foreclosure statute, is to allow a *non-beneficiary* to foreclose under the DTA.[14]

Properly interpreting the term "beneficiary" also has an even broader impact under the DTA that goes beyond the common fact pattern of *Trujillo*. Identification of the correct beneficiary determines a homeowner's rights under the Foreclosure Fairness Act ("FFA").[15] The FFA exempts certain financial institutions from the mediation requirements if they were not the beneficiary of deeds of trust in more than 250 trustee sales in the preceding year.[16] The Department of Commerce has been relying on the beneficiary declaration to identify the beneficiary for purposes of determining exemption from mediation. *See* RCW 61.24.163(5) (cross-referencing RCW 61.24.030(7)(a)). Under Commerce's view, in

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[13] *Trujillo,* 326 P.3d at 776.
[14] *See* RCW 61.24.005(2) (defining term "beneficiary" under the DTA as "the holder"); *Bain v. Metropolitan Mortgage Group, Inc.*, 175 Wn.2d 83, 104, 285 P.3d (2012) (stating that "holder" as used in DTA's definition of "beneficiary" has same meaning as under the UCC); RCW 62A.1-201(21)(A) (defining "holder" under UCC as "person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession").
[15] The DTA was initially amended in 2011 to include the FFA provisions.
[16] RCW 61.24.166.

cases where Fannie Mae or Freddie Mac owns the note, but a servicer who is on the exempt list claims to hold it, the beneficiary declaration need only name the servicer as the beneficiary and the homeowner is consequently deprived of her right to mediation, even though neither Fannie Mae nor Freddie Mac is exempt from mediation under the FFA.

In a case challenging Commerce's position and addressing the proper identification of the beneficiary for the purpose of determining exemption from mediation under the FFA,[17] Judge Shaller of the Thurston County Superior Court recently denied Plaintiff's Amended Petition for Declaratory and Injunctive Relief, citing *Trujillo* for the proposition that mere holder status was sufficient to determine the beneficiary under RCW 61.24.163(5) and the cross-referenced RCW 61.24.030(7)(a).[18] That plaintiff filed a Notice of Appeal to Supreme Court on August 20, 2014

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[17] *Brown v. Washington State Dep't of Commerce*, Thurston County Superior Court Case No. 13-2-01713-7.
[18] Findings of Fact, Conclusions of Law, and Order Denying Amended Petition for Declaratory and Injunctive Relief, *Brown v. Washington State Dep't of Commerce*, Thurston County Superior Court Case No. 13-2-01713-7.

seeking direct review due to the controlling role *Trujillo* played in that case.[19]

C. The Issues in *Trujillo* Extend Well Beyond Those Already Before This Court in the *Lyons* Case.

The issues in *Trujillo* overlap with, but do not duplicate, those in *Lyons*.[20] *Lyons* primarily concerns the contours of the trustee's duty of good faith under the current version of the DTA. Similar to *Trujillo*, *Lyons* addresses whether the trustee violated its duty of good faith when it knew or should have known that the owner of the note had changed since the beneficiary declaration was first issued, and whether the inclusion of additional UCC language rendered the beneficiary declaration facially defective.[21]

While *Trujillo* involves the same additional UCC language in the beneficiary declaration, and the same general question of whether a trustee may foreclose when it has reason to believe the beneficiary has been incorrectly designated, the *Trujillo* holding primarily focuses on the *meaning* of "beneficiary" under the DTA: holder *and* owner, or merely the person entitled to enforce under the UCC? This question is central to numerous non-judicial

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[19] Notice of Appeal to Supreme Court, *Brown v. Washington State Dep't of Commerce*, Thurston County Superior Court Case No. 13-2-01713-7.
[20] *Lyons v. U.S. Bank Nat'l Ass'n et al.*, Supreme Court No. 89132-0.
[21] *Opening Brief of Petitioner Lyons*, Supreme Court No. 89132-0 at 23-27.

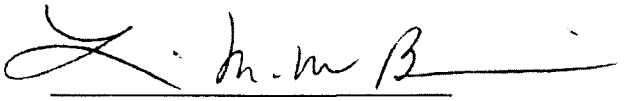
foreclosures, as well as determinations of beneficiary exemptions that dictate whether a homeowner can exercise her right to mediation under the FFA. For these reasons, this Court's review of *Trujillo* is critical, even with *Lyons* already under review.

III. CONCLUSION

For the foregoing reasons, *amicus curiae* The Northwest Justice Project respectfully requests that the Court grant the Petition for Review and clarify that under RCW 61.24.030(7)(a), a trustee does not have authority to proceed with foreclosure (1) when the trustee has reason to know that the claimed beneficiary does not own the note, or (2) in reliance on a beneficiary declaration that either does not comply with the DTA because it states that the claimed beneficiary is merely the "actual holder" ***or*** authorized to enforce the note under RCW 62.A-3-301.

DATED this 29th day of August, 2014.

NORTHWEST JUSTICE PROJECT



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DECLARATION OF SERVICE

I, Melanie Sprague, a legal assistant at Northwest Justice Project, certify under penalty of perjury under the laws of the State of Washington that on this day I caused a copy of the foregoing to be served by first-class mail, postage prepaid, upon the following counsel of record:

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