

67005-1-I

**COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I**

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JOHN LEIPHEIMER

Plaintiff – Appellant,

vs.

RECONTRUST COMPANY, N.A., a Nevada corporation;  
COUNTRYWIDE HOME LOANS, INC, a New York corporation; BAC  
HOME LOANS SERVICING, L.P., a Texas corporation; LS TITLE OF  
WASHINGTON, MORTGAGE ELECTRONIC REGISTRATION  
SYSTEMS, INC., a Delaware Corporation;; and DOE defendants 1-20

Defendants – Respondents.

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**APPELLANT’S SUPPLEMENTAL BRIEF**

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**A. STATEMENT OF FACT**

Please refer to Appellant's Statement of Facts set forth in his Initial Brief, on file herein.

**B. BAIN OPINION**

*Bain v. Metropolitan Mortgage Group, Inc.*<sup>1</sup> (hereinafter "Bain") addressed three questions certified to the Washington Supreme Court by the Honorable John C. Coughenour:

1. Is Mortgage Electronic Registration Systems, Inc. (hereinafter "MERS"), a lawful "beneficiary" within the terms of Washington's deed of Trust Act, *RCW 61.24.005(2)*, if it never held the promissory note secured by the deed of trust?
2. If [not], what is the legal effect of MERS acting as an unlawful beneficiary under the terms of Washington's Deed of Trust Act?
3. Does a homeowner possess a cause of action under Washington's Consumer Protection Act against MERS, if MERS acts as an unlawful beneficiary under the terms of Washington's Deed of Trust Act?

As to the first question, the Washington Supreme Court was unequivocal and unanimous: MERS is an ineligible "beneficiary" under *RCW 61.24.005(2)*,

As to the second question, the Washington Supreme Court declined

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<sup>1</sup> The Bain decision was the result of two consolidated cases: *Bain v. Metropolitan Mortgage Group, Inc.*, Washington Supreme Court Case No. 86201-1, and *Selkowitz v. Litton Loan Servicing, LP*, Washington Supreme Court Case No. 86207-9, \_\_\_ Wn.2d \_\_\_, \_\_\_ P.3d. \_\_\_ (August 16, 2012). A copy of the Supreme Court's decision is attached hereto and incorporated herein by this reference at *Appendix "A"*.

to directly respond, given the record then before the Court. However, the Court suggests that borrowers have a number of potential causes of action, including, without limitation, quiet title (*Bain* at pages 31-32), violation of *RCW 19.86, et seq.* (*Bain* at pages 34-40), violation of the *RCW 61.24.010* (*Bain* at page 34, footnote 17), violation of *RCW 61.24.005(2)* (*Bain* at page 36), misrepresentation, fraud and irregularities in the proceedings (wrongful foreclosure) (*Bain* at pages 38-39), and violation of *15 USC 1692k* (*Bain* at page 39). Appellant has raised many of these causes of actions in his Complaint herein.

As to the third question, the Washington Supreme Court concluded that homeowners do have a Consumer Protection Claim against MERS if MERS acts as an ineligible beneficiary, provided that the elements of the claim are met. *Bain* at pages 34-40. The Court found the first three elements presumptively met, given the facts before it, leaving only the issues of injury and causation to the trial court. *Bain* at 38.

### **C. ASSIGNMENTS OF ERROR FOLLOWING *BAIN***

Initially it must be noted that the trial court decision upon which Appellant based this appeal was a grant of Respondents' Motion for Judgment on the Pleadings, brought pursuant to *CR 12(b)(6)*. CP 293-294, CP 480-481. Given that the *Bain* established that MERS is an "ineligible beneficiary", that a CPA action may arise in this context, that several other claims made by Appellant – including his claim for wrongful foreclosure ("irregularities in the

proceedings”), violation of 15 U.S.C. 1692 and quiet title - may be established during discovery, the underlying presumption by the trial court that these claims are invalid is now directly contrary to Washington law.

A dismissal of claims under *CR 12(e)* is appropriate only if “it appears beyond doubt that the plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief.” *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wash.2d 107, 120, 744 P.2d 1032 (1987) (quoting *Bowman v. John Doe Two*, 104 Wn.2d 181, 183, 704 P.2d 140 (1985)). See also *North Coast Enters, Inc. v. Factoria P’Ship*, 94 Wn.App. 855, 858-59, 974 P.2d 1257 (1999). Since all allegations of the non-moving party are presumed to be true, and a trial court may even consider “hypothetical facts not included in the record,” the trial court’s dismissal of Appellant’s claims must be vacated and the matter remanded back to the trial court in view of *Bain. Tenore v. AT&T Wireless Servs.*, 136 Wn.2d 322, 330, 962 P.2d 104 (1998).

### **1. Wrongful Foreclosure**

Appellant’s first assignment of error concerned the trial court’s granting judgment on the pleadings and dismissing appellant’s claim for wrongful foreclosure under *RCW 61.24*, by which borrowers are stripped of many of the traditional protections available under a mortgage. Lenders must strictly comply with the Deed of Trust Act. *Albice v. Premier Mortg. Services of Washington, Inc.*, 174, Wn.2d 560, 276 P.3d 1277 (2012) (citing *Udall v.*

*T.D. Escrow Servs., Inc.*, 159 Wn.2d 903, 915–16, 154 P.3d 882); *Koegel v. Prudential Mut. Sav. Bank*, 51 Wn.App. 108, 752 P.2d 385 (1988) (the statutes and Deeds of Trust must be strictly construed in favor of the borrower). The violations alleged by the Appellant warranted a denial of Respondents’ motion by the trial court prior to *Bain*, a position only strengthened following that decision.

Prior briefing concerned the issue of whether MERS could rightfully act as a “beneficiary” within the terms of *RCW 61.24.005(2)*. The Supreme Court was unequivocal and unanimously held that that MERS is an ineligible “beneficiary” under *RCW 61.24.005(2)*, if, as in the case before this Court, it never “held” or had an interest in the promissory note or other debt instrument secured by the subject Deed of Trust. If MERS has never been a lawful “beneficiary” within the terms of *RCW 61.24.005(2)*, then all action taken by MERS, including the Appointment of Successor Trustee of May 20, 2009, and any other action taken in reliance on that action, is necessarily unlawful and void, absent proof to the contrary.

It is important to note that in reference to an assumption of authority to act under a deed of trust, the *Bain* Court stated, “if MERS is not the beneficiary as contemplated by Washington law, it is unclear what rights, if any, it has to convey.” *Bain*, at 29. It was MERS’ execution of the Appointment of Successor Trustee that provided the successor trustee colorable authority to initiate a non-judicial foreclosure. *CP 27-28*.

Therefore, under *Bain*, there is at least an issue of fact related to whether MERS' had the authority to act on behalf of the true and lawful owner and holder of the subject obligation. The facts as currently known suggest the Appointment of Successor Trustee is legally void.

There is no evidence that MERS was ever the holder and owner of the subject obligation at any time relevant to this cause of action, much less on the date the Appointment of Successor Trustee was executed. Accordingly, MERS had no right to appoint a successor trustee *RCW 61.24.010(2)*, absent an express grant of authority from the true and lawful owner and holder of the subject Note and Deed of Trust. Therefore, MERS' appointment of Recontrust<sup>2</sup> was void and all action taken by Recontrust was unlawful.

Based upon the facts currently known, Countywide, the only entity who could establish its status as "beneficiary" within the terms of the statute, was defunct at the time the Appointment of Successor Trustee was executed. Accordingly, MERS was not only an ineligible "beneficiary" under *RCW*

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<sup>2</sup> As noted in appellant's brief Recontrust also violated its statutory duties under *RCW 61.24.010(4)*, Recontrust, as successor trustee, had a fiduciary duty to act in good faith in its dealings with Plaintiff, but instead recorded and relied upon documents it knew, or should have known, to be false and misleading. Under the fiduciary standard set out in *Cox v. Helenius, supra*, Recontrust should have requested some form of proof from MERS regarding possession of the underlying obligation. Recontrust failed to take any action to satisfy its fiduciary duty to ensure MERS was, in fact, the holder of the Note, the fiduciary obligation owed to Mr. Leipheimer was violated (or in the alternative the statutory requirement was violated).

61.24.005(2), but could not possibly have obtained the express authority from Countywide to execute the Appointment of Successor Trustee.

As to this issue of potential agency under the Deed of Trust itself, the *Bain* Court specifically rejected the argument that the language of the Deed of Trust adequately established an agency relationship that could even hypothetically allow MERS to act on behalf of the true note holder or owner, stating that, “MERS fails to identify the entities that control and are accountable for its actions. It has not established that it is an agent for a lawful principal.” *Bain* at 24. In this matter, the identity of the true owner and holder of the loan obligation is remains unknown. Yet, this did not stop MERS or Recontrust from pursuing foreclosure against Appellant, despite statutory requirements that obligated the trustee to have proof that the beneficiary is the owner of the obligation. *RCW 61.24.030(7)*. This recklessness is aggravated by the fact that Recontrust does not appear to be a qualified trustee. *RCW 61.24.010(1); 61.24.030(6)*. See the Consent Decree entered in the matter of *State of Washington v. Recontrust*, Western District of Washington Case No. 2:11-cv-1460 of August 14, 2012 is attached hereto and incorporated herein by this reference at *Appendix “B”*.

The problems noted above are not merely doctrinaire demands for adherence to trivial technicalities, but a matter of substantive and material procedural compliance under *RCW 61.24*. The *Bain* court held that “if the original lender had sold the loan, the purchaser (Fannie Mae in this case)

would need to establish ownership of that loan, either by demonstrating that it actually held the promissory note or by documenting the chain of transactions.” *Bain* at 30. In particular the *Bain* Court cited to some portions of the Act illustrating this point:

Among other things, “the trustee shall have proof that the beneficiary is the *owner* of the promissory note or other obligations secured by the deed of trust” before foreclosing on an owner-occupied home. RCW 61.24.030(7)(a), (8)(I).

*Bain*, at 9 (emphasis added).

A correct reading of the entire statute would impose a requirement of ownership in addition to possession of the note itself. Notably, the section cited by the Supreme Court is entitled “Requisites to Trustee's Sale” and is therefore arguably the most important section to ultimate resolution of any action challenging a non-judicial foreclosure in Washington State. The *Bain* Court also found that *RCW 61.24.070(2)* would make “little sense if the beneficiary does not hold the note“ as it would essentially enable a non-holder to bid using funds it held no legal right to claim. *Bain* at 18.

There is no reasonable way to read the provisions cited above in any other manner except that being the holder is a necessary, but not a sufficient, condition to conducting a non-judicial foreclosure. – ownership is also required. This is particularly so once the sale is challenged and supports the competing interests of the Deed of Trust Act as outlined in *Cox v. Helenius*, 103, Wn.2d 383, 693 P.2d 683 (1985). It is only reasonable to expect that the

persons or entities seeking to deprive a person of their home are legally entitled to possess that property upon establishment of default. It appears that none of the Respondents that acted against the Appellant had a valid legal basis to take action in this case.

Based upon *Bain*, it is clear that the trial court's dismissal of Appellant's claims for wrongful foreclosure was in error.

## **2. Washington Consumer Protection Act**

The elements of a valid claim under *RCW 19.86, et seq.* are: (1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, (3) affecting the public interest, (4) injury to a person's business or property, and (5) causation. *Hangman Ridge Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wash.2d 778, 719 P.2d 531 (1986).

The *Bain* decision clarified what a plaintiff must prove to prevail in a claim under *RCW 19.86* in the context of a non-judicial foreclosure. Significantly, the *Bain* Court ruled that the first three elements of a CPA claim are nearly presumptively met in MERS cases, having presumed these elements were met given facts nearly identical to those before this Court and common to similar cases ("The fact that MERS claims to be a beneficiary, when under a plain reading of the statute it was not, presumptively meets the deception element of a CPA action." *Bain* at 38.). In this case the central allegation is that entities claimed authority to act where those entities had no such authority, similar claims were found deceptive in other contexts. *Stephens v. Omni Ins.*

*Co.*, 138 Wash.App. 151, 159 P.3d 10 (2007); *Floersheim v. Fed. Trade Comm'n*, 411 F.2d 874, 876–77 (9th Cir.1969).

The *Bain* Court provided only a single paragraph in analyzing the public interest element, likely because the very purpose of MERS was to create a large secondary market for mortgages and by necessity has a large public impact and simply stating that MERS is involved in an “enormous number of mortgages in the country (and our state).” *Bain* at 36. Likewise, the *Bain* Court did not address the trade and commerce element, again because it is obvious that those actions met the criteria and occur in the regular trade of the defendants in that case (as do the actions in this matter).

As noted by the Court in *Bain*: “Further, if there have been misrepresentations, fraud, or **irregularities in the proceedings**, and if the homeowner borrower cannot locate the party accountable, and with authority to correct the irregularity, there certainly could be injury under the CPA.” *Bain* at 38-39. Under existing Washington case law, actionable “irregularities” may occur and relief may be sought either pre-sale or post-sale. See *Bain*; *Cox v. Helenius*, 103, Wn.2d 383, 693 P.2d 683 (1985); *Albice v. Premier Mortgage Service of Washington, Inc.*, *supra*. and *Udall v. T.D. Escrow Service, Inc.*, 51, Wn.App. 108, 752 P.2d 385 (1988).

As to the injury and causation elements of a CPA claim, the analysis set forth in *Panag v. Farmers Insurance Co.*, 166 Wn.2d 27, 204 P.3d 885

(2009) is the most useful to the present case, because it also involved improper efforts to collect on a debt. There the Washington Supreme Court held that:

Monetary damages need not be proved; unquantifiable damages may suffice. *Id.* (loss of goodwill); *Nw. Airlines, Inc. v. Ticket Exch., Inc.*, (proof of injury satisfied by "stowaway theory" where damages are otherwise unquantifiable in case involving deceptive brokerage of frequent flier miles); *Fisons*, (damage to professional reputation); *Sorrel v. Eagle Healthcare, Inc.*, (injury by delay in refund of money); *Webb v. Ray*, (loss of use of property)".

*Panag* at pages 58. (internal citations omitted)

Thus, "investigation expenses and other costs" establish injury and are compensable under a CPA claim. *Panag* at page 62. Other injuries may include injury to financial reputation or professional goodwill. *Physicians Insurance Exchange & Association V. Fisons, Corp.*, 122 Wn.2d 299, 858 P.2d 1054 (1993), citing to *Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 733 P.2d 208 (1987), *Mason v. Mortgage America, Inc.*, 114 Wn.2d 842, 792 P.2d 142 (1990), and *Rasor v. Retail Credit Co.*, 87 Wn.2d 516, 554 P.2d 1041 (1976) (holding that injury to one's credit reputation is constitutes injury).

Appellant has alleged damages and injuries as a result of Respondent's misconduct and is entitled to the opportunity to litigate his CPA claim and prove facts sufficient to establish both the injury and causation elements under *RCW 19.86*.

### **3. Fair Debt Collections Practices Act**

Under the analysis of *Bain*, it was error for the trial court to grant judgment on the pleadings and dismiss Appellant's claim for violation of the

Federal Fair Debt Collection Practices Act; as there are at a minimum factual issues to be resolved in order to properly dispose of the claims.

Respondents assert they are “debt collectors,” an argument discussed in more detail in Appellant’s Initial Brief. However, the *Bain* decision specifically addresses potential claims under the Federal Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692 *et seq.* (“FDCPA”). Addressed in the context of the CPA, the *Bain* Court stated:

Depending on the facts of a particular case, a borrower may or may not be injured by the disposition of the note, the servicing contract, or many other things, and MERS may or may not have a causal role. For example, in *Bradford v. HSBC Mortg. Corp.*, 799 F.Supp.2d 625 (E.D.Va., 2011), three different companies attempted to foreclose on Bradford’s property after he attempted to rescind a mortgage under the federal Truth in Lending Act, 15 USC 1635. All three companies claimed to hold the promissory note. Observing that “[i]f a defendant transferred the Note, or did not yet have possession or ownership of the Note at the time, but nevertheless engaged in foreclosure efforts, that conduct could amount to a [Fair Debt Collection Practices Act, 15 USC 1692k] violation,” the court allowed Bradford’s claim to proceed. *Id.* at 634-35. As amicus notes, “MERS concealment of loan transfers also could also deprive homeowners of other rights, “such as the ability to take advantage of the protections of the Truth in Lending Act and other actions that require the homeowner to sue or negotiate with the actual holder of the promissory note. AG Br. at 11 (citing 15 USC 1635(f); *Miguel v. Country Funding Corp.* 309 F.3d 1161, 1162-65 (9<sup>th</sup> Cir. 2002)).

*Bain* at 39-40.

In speaking approvingly of *Bradford*, the *Bain* Court sent an unmistakable signal that it agreed with other courts that have uniformly held that the FDCPA treats “assignees” as debt collectors if the debt sought to be collected was in default when acquired by the assignee, and as creditors if it

was not. *Schlosser v. Fairbanks Capital Corp.*, 323 F.3d 534, 536 (7<sup>th</sup> Cir. 2003); *See also Bailey v. Security Nat'l Servicing Corp.*, 154 F.3d 384, 387 (7<sup>th</sup> Cir. 1998); *Whitaker v. Ameritech Corp.*, 129 F.3d 952, 958 (7<sup>th</sup> Cir. 1997); *Pollice v. Nat'l Tax Funding, L.P.*, 225 F.3d 379, 403-404 (3d. Cir. 2000); *Wadlington v. Credit Acceptance Corp.*, 76 F.3d 103, 106-107 (6<sup>th</sup> Cir. 1996).

This is particularly relevant in circumstances similar to the present case where there is an allegation that assignment or appointment documents were executed fraudulently, resulting in unauthorized persons and entities engaging in collection activity. At the very least, there is an issue of material fact as to whether the Respondents were acting with adequate authority and whether the subject loan obligation was in default at the time of assignment.

#### **4. Quiet Title**

Finally, the trial court erred in granting judgment on the pleadings and dismissing Appellant's claim to quiet title there is a real possibility that the Note has been split from the Deed of Trust.

Appellant has argued that the separation of the Note from the Deed of Trust means that the foreclosure proceedings were irredeemably flawed and the Deed of Trust void as a result of MERS involvement in the subject transaction. The *Bain* Court did not go so far as to adopt this argument without question, but the Court did acknowledge that such circumstances could arise

Selkowitz argues that MERS and its allied companies have split the deed of trust from the obligation, making the deed of trust unenforceable. While that certainly *could* happen, given the record before us, we have no evidence that it did. If, for example, MERS is in fact an agent for the holder of the note, likely no split would have happened.

In the alternative, Selkowitz suggests the court create an equitable mortgage in favor of the noteholder. Pl.'s Opening Br. at 42 (Selkowitz). If in fact, such a split occurred, the *Restatement* suggests that would be an appropriate resolution. RESTATEMENT (THIRD) OF PROPERTY: MORTGAGES § 5.4 reporters' note, at 386 (1997) (citing *Lawrence v. Knap*, 1 Root (Conn.) 248 (1791)). But since we do not know whether or not there has been a split of the obligation from the security instrument, we have no occasion to consider this remedy.

*Bain*, at 14.

The separation of the Note from the Deed of Trust effectively renders the subject Deed of Trust void and unenforceable. *Restatement (Third) of Property (Mortgages)* Section 5.4, Comment e (1997) (“in general a mortgage is unenforceable if it is held by one who has no right to enforce the secured obligation”). The reason for this becomes clear after a thoughtful reading of the *Restatement (Third)* Section 5.4:

- (a) A transfer of the obligation secured by a mortgage also transfers the mortgage unless the parties to the transfer agree otherwise.
- (b) Except as otherwise required by the Uniform Commercial Code, a transfer of a mortgage also transfers the obligation the mortgage secures unless the parties to the transfer agree otherwise.
- (c) A mortgage may be enforced only by, or in behalf of, a person who is entitled to enforce the obligation the mortgage secures.

The Restatement seems to suggest two contrary positions, that the mortgage follows the obligation in section (a), while the obligation follows the

mortgage in section (b).<sup>3</sup> This apparently irreconcilable position is not inconsistent once it is realized that they are meant to be mutually exclusive scenarios. Reading it in this matter harmonizes neatly with section (c), in that there is to be one controlling transfer of interest in the obligation, while the mechanism may vary in any particular instance.

In the present case, the real possibility exists that the Note and Deed of Trust took separate paths. Instead of one being ignored while the other was properly transferred: MERS is the putative beneficiary under the Deed of Trust, while the Note is held by a separate and as yet unknown entity. This would render the subject Deed of Trust a nullity and an improper lien against Appellant's property, if MERS cannot demonstrate at trial any legal entitlement to the underlying obligation. Accordingly, this improper cloud on Appellant's property should be addressed by the trial court and should be cleared and title quieted in Appellant's favor if separation of the Note and Deed of Trust has occurred.

#### **D. CONCLUSION**

Appellant has consistently asserted that MERS is not a lawful beneficiary, within the terms of *RCW 61.24.005(2)*, because it never held the subject Promissory Note. This position has been affirmed by the Washington Supreme Court in *Bain*. It follows that if MERS did not have the authority to

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<sup>3</sup> Section (c) reinforces the prior discussion concerning the necessity of being a holder and an owner of the underlying loan obligation.

act, the Appointment of Successor Trustee is void. Accordingly, any act taken by any Respondent named herein or any other entity in reliance on the Appointment of Successor Trustee would also be void and subject to claims under the Washington Consumer Protection Act or Fair Debt Collections Practices Act. Each of these assertions is supported by the record, establishes causes of action for which relief can be granted and is supported by the *Bain* decision, filed August 16, 2012. Therefore, the trial court's dismissal of Appellant's claims was erroneous, should be reversed and this matter remanded for trial.

Furthermore, Appellant respectfully request an award of his costs and reasonable attorney's fees incurred on appeal, pursuant to *RAP 18.1* and the terms of the parties' Note and Deed of Trust.

**REPECTFULLY SUBMITTED** this 12<sup>th</sup> day of October, 2012.

**RICHARD LLEWELYN JONES, P.S.**

  
Richard Llewelyn Jones, WSBA No. 12904  
Attorney for Appellant

**E. APPENDIX**

Appendix "A" Conformed copy of *Bain* decision of August 16, 2012.

Appendix "B" Consent Decree of August 14, 2012.

# **APPENDIX A**

**FILE**

IN CLERK'S OFFICE

SUPREME COURT, STATE OF WASHINGTON

DATE AUG 16 2012

Madsen, C. J.  
CHIEF JUSTICE

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CERTIFIED FROM THE UNITED )  
STATES DISTRICT COURT FOR THE )  
WESTERN DISTRICT OF )  
WASHINGTON )

IN )

KRISTIN BAIN, )

Plaintiff, )

v. )

METROPOLITAN MORTGAGE GROUP, )  
INC., INDYMAC BANK, FSB; )  
MORTGAGE ELECTRONICS )  
REGISTRATION SYSTEMS; REGIONAL )  
TRUSTEE SERVICE; FIDELITY )  
NATIONAL TITLE; and DOE Defendants )  
1 through 20, inclusive, )

Defendants. )

\_\_\_\_\_  
KEVIN SELKOWITZ, an individual, )

Plaintiff, )

v. )

LITTON LOAN SERVICING, LP, a )  
Delaware limited partnership; NEW )  
CENTURY MORTGAGE CORPORA- )  
TION, a California corporation; QUALITY )  
LOAN SERVICE CORPORATION OF )

No. 86206-1  
(consolidated with No. 86207-9)

En Banc

Filed AUG 16 2012

WASHINGTON, a Washington corporation;) )  
FIRST AMERICAN TITLE INSURANCE ) )  
COMPANY, a Washington corporation; ) )  
MORTGAGE ELECTRONIC REGISTRA- ) )  
TION SYSTEMS, INC., a Delaware ) )  
corporation; and DOE Defendants 1 through ) )  
20, ) )  
 ) )  
Defendants. ) )  
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CHAMBERS, J. — In the 1990s, the Mortgage Electronic Registration System Inc. (MERS) was established by several large players in the mortgage industry. MERS and its allied corporations maintain a private electronic registration system for tracking ownership of mortgage-related debt. This system allows its users to avoid the cost and inconvenience of the traditional public recording system and has facilitated a robust secondary market in mortgage backed debt and securities. Its customers include lenders, debt servicers, and financial institutes that trade in mortgage debt and mortgage backed securities, among others. MERS does not merely track ownership; in many states, including our own, MERS is frequently listed as the “beneficiary” of the deeds of trust that secure its customers’ interests in the homes securing the debts. Traditionally, the “beneficiary” of a deed of trust is the lender who has loaned money to the homeowner (or other real property owner). The deed of trust protects the lender by giving the lender the power to nominate a trustee and giving that trustee the power to sell the home if the homeowner’s debt is not paid. Lenders, of course, have long

been free to sell that secured debt, typically by selling the promissory note signed by the homeowner. Our deed of trust act, chapter 61.24 RCW, recognizes that the beneficiary of a deed of trust at any one time might not be the original lender. The act gives subsequent holders of the debt the benefit of the act by defining “beneficiary” broadly as “the holder of the instrument or document evidencing the obligations secured by the deed of trust.” RCW 61.24.005(2).

Judge John C. Coughenour of the Federal District Court for the Western District of Washington has asked us to answer three certified questions relating to two home foreclosures pending in King County. In both cases, MERS, in its role as the beneficiary of the deed of trust, was informed by the loan servicers that the homeowners were delinquent on their mortgages. MERS then appointed trustees who initiated foreclosure proceedings. The primary issue is whether MERS is a lawful beneficiary with the power to appoint trustees within the deed of trust act if it does not hold the promissory notes secured by the deeds of trust. A plain reading of the statute leads us to conclude that only the actual holder of the promissory note or other instrument evidencing the obligation may be a beneficiary with the power to appoint a trustee to proceed with a nonjudicial foreclosure on real property. Simply put, if MERS does not hold the note, it is not a lawful beneficiary.

Next, we are asked to determine the “legal effect” of MERS not being a lawful beneficiary. Unfortunately, we conclude we are unable to do so based upon the record and argument before us.

Finally, we are asked to determine if a homeowner has a Consumer Protection Act (CPA), chapter 19.86 RCW, claim based upon MERS representing that it is a beneficiary. We conclude that a homeowner may, but it will turn on the specific facts of each case.

#### FACTS

In 2006 and 2007 respectively, Kevin Selkowitz and Kristin Bain bought homes in King County. Selkowitz's deed of trust named First American Title Company as the trustee, New Century Mortgage Corporation as the lender, and MERS as the beneficiary and nominee for the lender. Bain's deed of trust named IndyMac Bank FSB as the lender, Stewart Title Guarantee Company as the trustee, and, again, MERS as the beneficiary. Subsequently, New Century filed for bankruptcy protection, IndyMac went into receivership,<sup>1</sup> and both Bain and Selkowitz fell behind on their mortgage payments. In May 2010, MERS, in its role as the beneficiary of the deeds of trust, named Quality Loan Service Corporation as the successor trustee in Selkowitz's case, and Regional Trustee Services as the trustee in Bain's case. A few weeks later the trustees began foreclosure proceedings. According to the attorneys in both cases, the assignments of the promissory notes were not publically recorded.<sup>2</sup>

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<sup>1</sup> The FDIC (Federal Deposit Insurance Corporation), in IndyMac's shoes, successfully moved for summary judgment in the underlying cases on the ground that there were no assets to pay any unsecured creditors. Doc. 86, at 6 (Summ. J. Mot., noting that "the [FDIC] determined that the total assets of the IndyMac Bank Receivership are \$63 million while total deposit liabilities are \$8.738 billion."); Doc. 108 (Summ. J. Order).

<sup>2</sup> According to briefing filed below, Bain's "[n]ote was assigned to Deutsche Bank by former defendant IndyMac Bank, FSB, and placed in a mortgage loan asset-backed trust pursuant to a

Both Bain and Selkowitz sought injunctions to stop the foreclosures and sought damages under the Washington CPA, among other things.<sup>3</sup> Both cases are now pending in Federal District Court for the Western District of Washington. *Selkowitz v. Litton Loan Servicing, LP*, No. C10-05523-JCC, 2010 WL 3733928 (W.D. Wash. Aug. 31, 2010) (unpublished). Judge Coughenour certified three questions of state law to this court. We have received amici briefing in support of the plaintiffs from the Washington State attorney general, the National Consumer Law Center, the Organization United for Reform (OUR) Washington, and the Homeowners' Attorneys, and amici briefing in support of the defendants from the Washington Bankers Association (WBA).

#### CERTIFIED QUESTIONS

1. Is Mortgage Electronic Registration Systems, Inc., a lawful "beneficiary" within the terms of Washington's Deed of Trust

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Pooling and Servicing Agreement dated June 1, 2007." Doc. 149, at 3. Deutsche Bank filed a copy of the promissory note with the federal court. It appears Deutsche Bank is acting as trustee of a trust that contains Bain's note, along with many others, though the record does not establish what trust this might be.

<sup>3</sup> While the merits of the underlying cases are not before us, we note that Bain contends that the real estate agent, the mortgage broker, and the mortgage originator took advantage of her known cognitive disabilities in order to induce her to agree to a monthly payment they knew or should have known she could not afford; falsified information on her mortgage application; and failed to make legally required disclosures. Bain also asserts that foreclosure proceedings were initiated by IndyMac before IndyMac was assigned the loan and that some of the documents in the chain of title were executed fraudulently. This is confusing because IndyMac was the original lender, but the record suggests (but does not establish) that ownership of the debt had changed hands several times.

Act, Revised Code of Washington section 61.24.005(2), if it never held the promissory note secured by the deed of trust?  
[Short answer: No.]

2. If so, what is the legal effect of Mortgage Electronic Registration Systems, Inc., acting as an unlawful beneficiary under the terms of Washington's Deed of Trust Act?  
[Short answer: We decline to answer based upon what is before us.]

3. Does a homeowner possess a cause of action under Washington's Consumer Protection Act against Mortgage Electronic Registration Systems, Inc., if MERS acts as an unlawful beneficiary under the terms of Washington's Deed of Trust Act?  
[Short answer: The homeowners may have a CPA action but each homeowner will have to establish the elements based upon the facts of that homeowner's case.]

Order Certifying Question to the Washington State Supreme Ct. (Certification) at 3-4.

#### ANALYSIS

"The decision whether to answer a certified question pursuant to chapter 2.60 RCW is within the discretion of the court." *Broad v. Mannesmann Anlagenbau, A.G.*, 141 Wn.2d 670, 676, 10 P.3d 371 (2000) (citing *Hoffman v. Regence Blue Shield*, 140 Wn.2d 121, 128, 991 P.2d 77 (2000)). We treat the certified question as a pure question of law and review de novo. See, e.g., *Parents Involved in Cmty Schs v. Seattle Sch. Dist. No. 1*, 149 Wn.2d 660, 670, 72 P.3d 151 (2003) (citing *Rivett v. City of Tacoma*, 123 Wn.2d 573, 578, 870 P.2d 299 (1994)).

## DEEDS OF TRUST

Private recording of mortgage-backed debt is a new development in an old and long evolving system. We offer a brief review to put the issues before us in context.

A mortgage as a mechanism to secure an obligation to repay a debt has existed since at least the 14th century. 18 WILLIAM B. STOEBUCK & JOHN W. WEAVER, WASHINGTON PRACTICE: REAL ESTATE: TRANSACTIONS § 17.1, at 253 (2d ed. 2004). Often in those early days, the debtor would convey land to the lender via a deed that would contain a proviso that if a promissory note in favor of the lender was paid by a certain day, the conveyance would terminate. *Id.* at 254. English law courts tended to enforce contracts strictly; so strictly, that equity courts began to intervene to ameliorate the harshness of strict enforcement of contract terms. *Id.* Equity courts often gave debtors a grace period in which to pay their debts and redeem their properties, creating an “equitable right to redeem the land during the grace period.” *Id.* The equity courts never established a set length of time for this grace period, but they did allow lenders to petition to “foreclose” it in individual cases. *Id.* “Eventually, the two equitable actions were combined into one, granting the period of equitable redemption and placing a foreclosure date on that period.” *Id.* at 255 (citing GEORGE E. OSBORNE, HANDBOOK ON THE LAW OF MORTGAGES §§ 1-10 (2d ed. 1970)).

In Washington, “[a] mortgage creates nothing more than a lien in support of the debt which it is given to secure.” *Pratt v. Pratt*, 121 Wash. 298, 300, 209 P.

535 (1922) (citing *Gleason v. Hawkins*, 32 Wash. 464, 73 P. 533 (1903)); *see also* 18 STOEBUCK & WEAVER, *supra*, § 18.2, at 305. Mortgages come in different forms, but we are only concerned here with mortgages secured by a deed of trust on the mortgaged property. These deeds do not convey the property when executed; instead, “[t]he statutory deed of trust is a form of a mortgage.” 18 STOEBUCK & WEAVER, *supra*, § 17.3, at 260. “More precisely, it is a three-party transaction in which land is conveyed by a borrower, the ‘grantor,’ to a ‘trustee,’ who holds title in trust for a lender, the ‘beneficiary,’ as security for credit or a loan the lender has given the borrower.” *Id.* Title in the property pledged as security for the debt is not conveyed by these deeds, even if “on its face the deed conveys title to the trustee, because it shows that it is given as security for an obligation, it is an equitable mortgage.” *Id.* (citing GRANT S. NELSON & DALE A. WHITMAN, REAL ESTATE FINANCE LAW § 1.6 (4th ed. 2001)).

When secured by a deed of trust that grants the trustee the power of sale if the borrower defaults on repaying the underlying obligation, the trustee may usually foreclose the deed of trust and sell the property without judicial supervision. *Id.* at 260-61; RCW 61.24.020; RCW 61.12.090; RCW 7.28.230(1). This is a significant power, and we have recently observed that “the [deed of trust] Act must be construed in favor of borrowers because of the relative ease with which lenders can forfeit borrowers’ interests and the lack of judicial oversight in conducting nonjudicial foreclosure sales.” *Udall v. T.D. Escrow Servs., Inc.*, 159 Wn.2d 903, 915-16, 154 P.3d 882 (2007) (citing *Queen City Sav. & Loan Ass’n v.*

*Mannhalt*, 111 Wn.2d 503, 514, 760 P.2d 350 (1988) (Dore, J., dissenting)).

Critically under our statutory system, a trustee is not merely an agent for the lender or the lender's successors. Trustees have obligations to all of the parties to the deed, including the homeowner. RCW 61.24.010(4) ("The trustee or successor trustee has a duty of good faith to the borrower, beneficiary, and grantor."); *Cox v. Helenius*, 103 Wn.2d 383, 389, 693 P.2d 683 (1985) (citing GEORGE E. OSBORNE, GRANT S. NELSON & DALE A. WHITMAN, REAL ESTATE FINANCE LAW § 7.21 (1979) ("[A] trustee of a deed of trust is a fiduciary for both the mortgagee and mortgagor and must act impartially between them.")).<sup>4</sup> Among other things, "the trustee shall have proof that the beneficiary is the owner of any promissory note or other obligation secured by the deed of trust" and shall provide the homeowner with "the name and address of the owner of any promissory notes or other obligations secured by the deed of trust" before foreclosing on an owner-occupied home. RCW 61.24.030(7)(a), (8)(l).

Finally, throughout this process, courts must be mindful of the fact that "Washington's deed of trust act should be construed to further three basic

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<sup>4</sup> In 2008, the legislature amended the deed of trust act to provide that trustees did not have a fiduciary duty, only the duty of good faith. LAWS OF 2008, ch. 153, § 1, codified in part as RCW 61.24.010(3) ("The trustee or successor trustee shall have no fiduciary duty or fiduciary obligation to the grantor or other persons having an interest in the property subject to the deed of trust."). This case does not offer an opportunity to explore the impact of the amendment. A bill was introduced into our state senate in the 2012 session that, as originally drafted, would require every assignment be recorded. S.B. 6070, 62d Leg., Reg. Sess. (Wash. 2012). A substitute bill passed out of committee convening a stakeholder group "to convene to discuss the issue of recording deeds of trust of residential real property, including assignments and transfers, amongst other related issues" and report back to the legislature with at least one specific proposal by December 1, 2012. SUBSTITUTE S.B. 6070, 62d Leg., Reg. Sess. (Wash. 2012).

objectives.” *Cox*, 103 Wn.2d at 387 (citing Joseph L. Hoffmann, Comment, *Court Actions Contesting the Nonjudicial Foreclosure of Deeds of Trust in Washington*, 59 WASH. L. REV. 323, 330 (1984)). “First, the nonjudicial foreclosure process should remain efficient and inexpensive. Second, the process should provide an adequate opportunity for interested parties to prevent wrongful foreclosure. Third, the process should promote the stability of land titles.” *Id.* (citation omitted) (citing *Peoples Nat’l Bank of Wash. v. Ostrander*, 6 Wn. App. 28, 491 P.2d 1058 (1971)).

#### MERS

MERS, now a Delaware corporation, was established in the mid 1990s by a consortium of public and private entities that included the Mortgage Bankers Association of America, the Federal National Mortgage Association (Fannie Mae), the Federal Home Loan Mortgage Corporation (Freddie Mac), the Government National Mortgage Association (Ginnie Mae), the American Bankers Association, and the American Land Title Association, among many others. *See In re MERSCORP, Inc. v. Romaine*, 8 N.Y.3d 90, 96 n.2, 861 N.E.2d 81, 828 N.Y.S.2d 266 (2006); Phyllis K. Slesinger & Daniel McLaughlin, *Mortgage Electronic Registration System*, 31 IDAHO L. REV. 805, 807 (1995); Christopher L. Peterson, *Foreclosure, Subprime Mortgage Lending, and the Mortgage Electronic Registration System*, 78 U. CIN. L. REV. 1359, 1361 (2010). It established “a central, electronic registry for tracking mortgage rights . . . [where p]arties will be able to access the central registry (on a need to know basis).” Slesinger & McLaughlin, *supra*, at 806. This was intended to reduce the costs, increase the

efficiency, and facilitate the securitization of mortgages and thus increase liquidity.

Peterson, *supra*, at 1361.<sup>5</sup> As the New York high court described the process:

The initial MERS mortgage is recorded in the County Clerk's office with "Mortgage Electronic Registration Systems, Inc." named as the lender's nominee or mortgagee of record on the instrument. During the lifetime of the mortgage, the beneficial ownership interest or servicing rights may be transferred among MERS members (MERS assignments), but these assignments are not publicly recorded; instead they are tracked electronically in MERS's private system.

*Romaine*, 8 N.Y.3d at 96. MERS "tracks transfers of servicing rights and beneficial ownership interests in mortgage loans by using a permanent 18-digit number called the Mortgage Identification Number." Resp. Br. of MERS at 13 (*Bain*) (footnote omitted). It facilitates secondary markets in mortgage debt and servicing rights, without the traditional costs of recording transactions with the local county records offices. *Slesinger & McLaughlin, supra*, at 808; *In re Agard*, 444 B.R. 231, 247 (Bankr. E.D.N.Y. 2011).

Many loans have been pooled into securitization trusts where they, hopefully, produce income for investors. *See, e.g., Pub. Emps' Ret. Sys. of Miss. v. Merrill Lynch & Co.*, 277 F.R.D. 97, 102-03 (S.D.N.Y. 2011) (discussing process of pooling mortgages into asset backed securities). MERS has helped overcome

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<sup>5</sup> At oral argument, counsel for Bain contended the reason for MERS's creation was a study in 1994 concluding that the mortgage industry would save \$77.9 million a year in state and local filing fees. Wash. Supreme Court oral argument, *Bain v. Mortg. Elec. Registration Sys.*, No. 86206-1 (Mar. 15, 2012), at approx. 44 min., *audio recording by TVW*, Washington's Public Affairs Network, available at <http://www.tvw.org>. While saving costs was certainly a motivating factor in its creation, efficiency, secondary markets, and the resulting increased liquidity were other major driving forces leading to MERS's creation. *Slesinger & McLaughlin, supra*, at 806-07.

what had come to be seen as a drawback of the traditional mortgage financing model: lack of liquidity. MERS has facilitated securitization of mortgages bringing more money into the home mortgage market. With the assistance of MERS, large numbers of mortgages may be pooled together as a single asset to serve as security for creative financial instruments tailored to different investors. Some investors may buy the right to interest payments only, others principal only; different investors may want to buy interest in the pool for different durations. *Mortg. Elec. Registration Sys., Inc. v. Azize*, 965 So. 2d 151, 154 n.3 (Fla. Dist. Ct. App. 2007); Dustin A. Zacks, *Standing in Our Own Sunshine: Reconsidering Standing, Transparency, and Accuracy in Foreclosures*, 29 QUINNIPIAC L. REV. 551, 570-71 (2011); Chana Joffe-Walt & David Kestenbaum, *Before Toxie Was Toxic*, NAT'L PUB. RADIO (Sept. 17, 2010, 12:00 A.M.)<sup>6</sup> (discussing formation of mortgage backed securities). In response to the changes in the industries, some states have explicitly authorized lenders' nominees to act on lenders' behalf. *See, e.g., Jackson v. Mortg. Elec. Registration Sys., Inc.*, 770 N.W.2d 487, 491 (Minn. 2009) (noting MINN. STAT. § 507.413 is "frequently called 'the MERS statute'"). As of now, our state has not.

As MERS itself acknowledges, its system changes "a traditional three party deed of trust [into] a four party deed of trust, wherein MERS would act as the contractually agreed upon beneficiary for the lender and its successors and

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<sup>6</sup> Available at <http://www.npr.org/blogs/money/2010/09/16/129916011/before-toxie-was-toxic>.

assigns.” MERS Resp. Br. at 20 (Bain). As recently as 2004, learned commentators William Stoebuck and John Weaver could confidently write that “[a] general axiom of mortgage law is that obligation and mortgage cannot be split, meaning that the person who can foreclose the mortgage must be the one to whom the obligation is due.” 18 STOEBUCK & WEAVER, *supra*, § 18.18, at 334. MERS challenges that general axiom. Since then, as the New York bankruptcy court observed recently:

In the most common residential lending scenario, there are two parties to a real property mortgage—a mortgagee, *i.e.*, a lender, and a mortgagor, *i.e.*, a borrower. With some nuances and allowances for the needs of modern finance this model has been followed for hundreds of years. The MERS business plan, as envisioned and implemented by lenders and others involved in what has become known as the mortgage finance industry, is based in large part on amending this traditional model and introducing a third party into the equation. MERS is, in fact, neither a borrower nor a lender, but rather purports to be both “mortgagee of record” and a “nominee” for the mortgagee. MERS was created to alleviate problems created by, what was determined by the financial community to be, slow and burdensome recording processes adopted by virtually every state and locality. In effect the MERS system was designed to circumvent these procedures. MERS, as envisioned by its originators, operates as a replacement for our traditional system of public recordation of mortgages.

*Agard*, 444 B.R. at 247.

Critics of the MERS system point out that after bundling many loans together, it is difficult, if not impossible, to identify the current holder of any particular loan, or to negotiate with that holder. While not before us, we note that

this is the nub of this and similar litigation and has caused great concern about possible errors in foreclosures, misrepresentation, and fraud. Under the MERS system, questions of authority and accountability arise, and determining who has authority to negotiate loan modifications and who is accountable for misrepresentation and fraud becomes extraordinarily difficult.<sup>7</sup> The MERS system may be inconsistent with our second objective when interpreting the deed of trust act: that “the process should provide an adequate opportunity for interested parties to prevent wrongful foreclosure.” *Cox*, 103 Wn.2d at 387 (citing *Ostrander*, 6 Wn. App. 28).

The question, to some extent, is whether MERS and its associated business partners and institutions can both replace the existing recording system established by Washington statutes and still take advantage of legal procedures established in those same statutes. With this background in mind, we turn to the certified questions.

#### I. DEED OF TRUST BENEFICIARIES

Again, the federal court has asked:

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<sup>7</sup> MERS insists that borrowers need only know the identity of the servicers of their loans. However, there is considerable reason to believe that servicers will not or are not in a position to negotiate loan modifications or respond to similar requests. See generally Diane E. Thompson, *Foreclosing Modifications: How Servicer Incentives Discourage Loan Modifications*, 86 WASH. L. REV. 755 (2011); Dale A. Whitman, *How Negotiability Has Fouled Up the Secondary Mortgage Market, and What To Do About It*, 37 PEPP. L. REV. 737, 757-58 (2010). Lack of transparency causes other problems. See generally *U.S. Bank Nat'l Ass'n v. Ibanez*, 458 Mass. 637, 941 N.E.2d 40 (2011) (noting difficulties in tracing ownership of the note).

1. Is Mortgage Electronic Registration Systems, Inc., a lawful “beneficiary” within the terms of Washington’s Deed of Trust Act, Revised Code of Washington section 61.24.005(2), if it never held the promissory note secured by the deed of trust?

Certification at 3.

A. Plain Language

Under the plain language of the deed of trust act, this appears to be a simple question. Since 1998, the deed of trust act has defined a “beneficiary” as “the holder of the instrument or document evidencing the obligations secured by the deed of trust, excluding persons holding the same as security for a different obligation.” LAWS OF 1998, ch. 295, § 1(2), codified as RCW 61.24.005(2).<sup>8</sup> Thus, in the terms of the certified question, if MERS never “held the promissory note” then it is not a “lawful ‘beneficiary.’”

MERS argues that under a more expansive view of the act, it meets the statutory definition of “beneficiary.” It notes that the definition section of the deed of trust act begins by cautioning that its definitions apply “*unless the context*

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<sup>8</sup> Perhaps presciently, the Senate Bill Report on the 1998 amendment noted that “[p]ractice in this area has departed somewhat from the strict statutory requirements, resulting in a perceived need to clarify and update the act.” S.B. REP. on Engrossed Substitute S.B. 6191, 55th Leg., Reg. Sess. (Wash. 1998). The report also helpfully summarizes the legislature’s understanding of deeds of trust as creating three-party mortgages:

**Background:** A deed of trust is a financing tool created by statute which is, in effect, a triparty mortgage. The real property owner or purchaser (the grantor of the deed of trust) conveys the property to an independent trustee, who is usually a title insurance company, for the benefit of a third party (the lender) to secure repayment of a loan or other debt from the grantor (borrower) to the beneficiary (lender). The trustee has the power to sell the property nonjudicially in the event of default, or, alternatively, foreclose the deed of trust as a mortgage.

*Id.* at 1.

*clearly requires otherwise.*” Resp. Br. of MERS at 19 (Bain) (quoting RCW 61.24.005). MERS argues that “[t]he context here requires that MERS be recognized as a proper ‘beneficiary’ under the Deed of Trust [Act]. The context here is that the Legislature was creating a more efficient default remedy for lenders, not putting up barriers to foreclosure.” *Id.* It contends that the parties were legally entitled to contract as they see fit, and that the “the parties contractually agreed that the ‘beneficiary’ under the Deed of Trust was ‘MERS’ and it is in that context that the Court should apply the statute.” *Id.* at 20 (emphasis omitted).

The “unless the context clearly requires otherwise” language MERS relies upon is a common phrase that the legislative bill drafting guide recommends be used in the introductory language in all statutory definition sections. *See* STATUTE LAW COMM., OFFICE OF THE CODE REVISER, BILL DRAFTING GUIDE 2011.<sup>9</sup> A search of the unannotated Revised Code of Washington indicates that this statutory language has been used over 600 times. Despite its ubiquity, we have found no case—and MERS draws our attention to none—where this common statutory phrase has been read to mean that the *parties* can alter statutory provisions by contract, as opposed to the act itself suggesting a different definition might be appropriate for a specific statutory provision. We have interpreted the boilerplate: “The definitions in this section apply throughout the chapter unless the context

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<sup>9</sup> Available at [http://www.leg.wa.gov/CodeReviser/Pages/bill\\_drafting\\_guide.aspx](http://www.leg.wa.gov/CodeReviser/Pages/bill_drafting_guide.aspx) (last visited Aug. 7, 2012).

clearly requires otherwise” language only once, and then in the context of determining whether a general court-martial qualified as a prior conviction for purposes of the Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW. *See State v. Morley*, 134 Wn.2d 588, 952 P.2d 167 (1998). There, the two defendants challenged the use of their prior general courts-martial on the ground that the SRA defined “conviction” as “an adjudication of guilt pursuant to Titles 10 or 13 RCW.” *Morley*, 134 Wn.2d at 595 (quoting RCW 9.94A.030(9)). Since, the defendants reasoned, their courts-martial were not “pursuant to Titles 10 or 13 RCW,” they should not be considered criminal history. We noted that the SRA frequently treated out-of-state convictions (which would also not be pursuant to Titles 10 or 13 RCW) as convictions and rejected the argument since the specific statutory context required a broader definition of the word “convictions” than the definition section provided. *Id.* at 598. MERS has cited no case, and we have found none that holds that *extrastatutory* conditions can create a context where a different definition of defined terms would be appropriate. We do not find this argument persuasive.

MERS also argues that it meets the statutory definition itself. It notes, correctly, that the legislature did not limit “beneficiary” to the holder of the promissory note: instead, it is “the holder of the *instrument or document* evidencing the obligations secured by the deed of trust.” RCW 61.24.005(2) (emphasis added). It suggests that “instrument” and “document” are broad terms and that “in the context of a residential loan, undoubtedly the Legislature was

referring to all of the loan documents that make up the loan transaction □ *i.e.*, the note, the deed of trust, and any other rider or document that sets forth the rights and obligations of the parties under the loan,” and that “obligation” must be read to include any financial obligation under any document signed in relation to the loan, including “attorneys’ fees and costs incurred in the event of default.” Resp. Br. of MERS at 21-22 (Bain). In these particular cases, MERS contends that it is a proper beneficiary because, in its view, it is “indisputably the ‘holder’ of the Deed of Trust.” *Id.* at 22. It provides no authority for its characterization of itself as “indisputably the ‘holder’” of the deeds of trust.

The homeowners, joined by the Washington attorney general, do dispute MERS’ characterization of itself as the holder of the deeds of trust. Starting from the language of RCW 61.24.005(2) itself, the attorney general contends that “[t]he ‘instrument’ obviously means the promissory note because the only other document in the transaction is the deed of trust and it would be absurd to read this definition as saying that “‘beneficiary means the holder of the deed of trust secured by the deed of trust.’” Br. of Amicus Att’y General (AG Br.) at 2-3 (quoting RCW 61.24.005(2)). We agree that an interpretation “beneficiary” that has the deed of trust securing itself is untenable.

Other portions of the deed of trust act bolster the conclusion that the legislature meant to define “beneficiary” to mean the actual holder of the promissory note or other debt instrument. In the same 1998 bill that defined “beneficiary” for the first time, the legislature amended RCW 61.24.070 (which

had previously forbidden the trustee alone from bidding at a trustee sale) to provide:

(1) The trustee may not bid at the trustee's sale. Any other person, including the beneficiary, may bid at the trustee's sale.

(2) The trustee shall, at the request of the beneficiary, credit toward the beneficiary's bid all or any part of the monetary obligations secured by the deed of trust. If the beneficiary is the purchaser, any amount bid by the beneficiary in excess of the amount so credited shall be paid to the trustee in the form of cash, certified check, cashier's check, money order, or funds received by verified electronic transfer, or any combination thereof. If the purchaser is not the beneficiary, the entire bid shall be paid to the trustee in the form of cash, certified check, cashier's check, money order, or funds received by verified electronic transfer, or any combination thereof.

LAWS OF 1998, ch. 295, § 9, codified as RCW 61.24.070. As Bain notes, this provision makes little sense if the beneficiary does not hold the note. Bain Reply to Resp. to Opening Br. at 11. In essence, it would authorize the non-holding beneficiary to credit to its bid funds to which it had no right. However, if the beneficiary is defined as the entity that holds the note, this provision straightforwardly allows the noteholder to credit some or all of the debt to the bid. Similarly, in the commercial loan context, the legislature has provided that "[a] beneficiary's acceptance of a deed in lieu of a trustee's sale under a deed of trust securing a commercial loan exonerates the guarantor from any liability for the debt secured thereby except to the extent the guarantor otherwise agrees as part of the deed in lieu transaction." RCW 61.24.100(7). This provision would also make

little sense if the beneficiary did not hold the promissory note that represents the debt.

Finding that the beneficiary must hold the promissory note (or other “instrument or document evidencing the obligation secured”) is also consistent with recent legislative findings to the Foreclosure Fairness Act of 2011, LAWS OF 2011, ch. 58, § 3(2). The legislature found:

[(1)] (a) The rate of home foreclosures continues to rise to unprecedented levels, both for prime and subprime loans, and a new wave of foreclosures has occurred due to rising unemployment, job loss, and higher adjustable loan payments;

.....

(2) Therefore, the legislature intends to:

.....

(b) Create a framework *for homeowners and beneficiaries to communicate with each other* to reach a resolution and avoid foreclosure whenever possible; and

(c) Provide a process for foreclosure mediation.

LAWS OF 2011, ch. 58, § 1 (emphasis added). There is no evidence in the record or argument that suggests MERS has the power “to reach a resolution and avoid foreclosure” on behalf of the noteholder, and there is considerable reason to believe it does not. Counsel informed the court at oral argument that MERS does not negotiate on behalf of the holders of the note.<sup>10</sup> If the legislature intended to authorize nonnoteholders to act as beneficiaries, this provision makes little sense. However, if the legislature understood “beneficiary” to mean “noteholder,” then this provision makes considerable sense. The legislature was attempting to create a

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<sup>10</sup> Wash. Supreme Court oral argument, *supra*, at approx. 34 min., 58 sec.

framework where the stakeholders could negotiate a deal in the face of changing conditions.

We will also look to related statutes to determine the meaning of statutory terms. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 11-12, 43 P.3d 4 (2002). Both the plaintiffs and the attorney general draw our attention to the definition of “holder” in the Uniform Commercial Code (UCC), which was adopted in the same year as the deed of trust act. *See* LAWS OF 1965, Ex. Sess., ch. 157 (UCC); LAWS OF 1965, ch. 74 (deed of trust act); Selkowitz Opening Br. at 13; AG Br. at 11-12. Stoebuck and Weaver note that the transfer of mortgage backed obligations is governed by the UCC, which certainly suggests the UCC provisions may be instructive for other purposes. 18 *STOEBUCK & WEAVER, supra*, § 18.18, at 334. The UCC provides:

“Holder” with respect to a negotiable instrument, means the person in possession if the instrument is payable to bearer or, in the case of an instrument payable to an identified person, if the identified person is in possession. “Holder” with respect to a document of title means the person in possession if the goods are deliverable to bearer or to the order of the person in possession.

Former RCW 62A.1-201(20) (2001).<sup>11</sup> The UCC also provides:

“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

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<sup>11</sup> Several portions of chapter 61.24 RCW were amended by the 2012 legislature while this case was under our review.

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.

RCW 62A.3-301. The plaintiffs argue that our interpretation of the deed of trust act should be guided by these UCC definitions, and thus a beneficiary must either actually possess the promissory note or be the payee. *E.g.*, Selkowitz Opening Br. at 14. We agree. This accords with the way the term “holder” is used across the deed of trust act and the Washington UCC. By contrast, MERS’s approach would require us to give “holder” a different meaning in different related statutes and construe the deed of trust act to mean that a deed of trust may secure itself or that the note follows the security instrument. Washington’s deed of trust act contemplates that the security instrument will follow the note, not the other way around. MERS is not a “holder” under the plain language of the statute.

#### B. Contract and Agency

In the alternative, MERS argues that the borrowers should be held to their contracts, and since they agreed in the deeds of trust that MERS would be the beneficiary, it should be deemed to be the beneficiary. *E.g.*, Resp. Br. of MERS at 24 (Bain). Essentially, it argues that we should insert the parties’ agreement into the statutory definition. It notes that another provision of Title 61 RCW specifically allows parties to insert side agreements or conditions into mortgages. RCW 61.12.020 (“Every such mortgage, when otherwise properly executed, shall be deemed and held a good and sufficient conveyance and mortgage to secure the

payment of the money therein specified. The parties may insert in such mortgage any lawful agreement or condition.”).

MERS argues we should be guided by *Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034 (9th Cir. 2011). In *Cervantes*, the Ninth Circuit Court of Appeals affirmed dismissal of claims for fraud, intentional infliction of emotional distress, and violations of the federal Truth in Lending Act and the Arizona Consumer Fraud Act against MERS, Countrywide Home Loans, and other financial institutions. *Id.* at 1041. We do not find *Cervantes* instructive. *Cervantes* was a putative class action that was dismissed on the pleadings for a variety of reasons, the vast majority of which are irrelevant to the issues before us. *Id.* at 1038. After dismissing the fraud claim for failure to allege facts that met all nine elements of a fraud claim in Arizona, the Ninth Circuit observed that MERS’s role was plainly laid out in the deeds of trust. *Id.* at 1042. Nowhere in *Cervantes* does the Ninth Circuit suggest that the parties could contract around the statutory terms.

MERS also seeks support in a Virginia quiet title action. *Horvath v. Bank of N.Y., N.A.*, 641 F.3d 617, 620 (4th Cir. 2011). After Horvath had become delinquent in his mortgage payments and after a foreclosure sale, Horvath sued the holder of the note and MERS, among others, on a variety of claims, including a claim to quiet title in his favor on the ground that various financial entities had by “splitting . . . the pieces of his mortgage . . . ‘caused the Deeds of Trust [to] split from the Notes and [become] unenforceable.’” *Id.* at 620 (alterations in original)

(quoting complaint). The Fourth Circuit rejected Horvath's quiet title claim out of hand, remarking:

It is difficult to see how Horvath's arguments could possibly be correct. Horvath's note plainly constitutes a negotiable instrument under Va. Code Ann. § 8.3A-104. That note was endorsed in blank, meaning it was bearer paper and enforceable by whoever possessed it. See Va. Code Ann. § 8.3A-205(b). And BNY [(Bank of New York)] possessed the note at the time it attempted to foreclose on the property. Therefore, once Horvath defaulted on the property, Virginia law straightforwardly allowed BNY to take the actions that it did.

*Id.* at 622. There is no discussion anywhere in *Horvath* of any statutory definition of "beneficiary." While the opinion discussed transferability of notes under the UCC as adopted in Virginia, there is only the briefest mention of the Virginia deed of trust act. Compare *Horvath*, 641 F.3d at 621-22 (citing various provisions of VA. CODE ANN. Titles 8.1A, 8.3A (UCC)), with *id.* at 623 n.3 (citing VA. CODE ANN. § 55-59(7) (discussing deed of trust foreclosure proceedings)). We do not find *Horvath* helpful.

Similarly, MERS argues that lenders and their assigns are entitled to name it as their agent. *E.g.*, Resp. Br. of MERS at 29-30 (Bain). That is likely true and nothing in this opinion should be construed to suggest an agent cannot represent the holder of a note. Washington law, and the deed of trust act itself, approves of the use of agents. See, *e.g.*, former RCW 61.24.031(1)(a) (2011) ("A trustee, beneficiary, or authorized agent may not issue a notice of default . . . until . . . ." (emphasis added)). MERS notes, correctly, that we have held "an agency relationship results from the manifestation of consent by one person that another

shall act on his behalf and subject to his control, with a correlative manifestation of consent by the other party to act on his behalf and subject to his control.” *Moss v. Vadman*, 77 Wn.2d 396, 402-03, 463 P.2d 159 (1970) (citing *Matsumura v. Eilert*, 74 Wn.2d 369, 444 P.2d 806 (1968)).

But *Moss* also observed that “[w]e have repeatedly held that a prerequisite of an agency is *control* of the agent by the principal.” *Id.* at 402 (emphasis added) (citing *McCarty v. King County Med. Serv. Corp.*, 26 Wn.2d 660, 175 P.2d 653 (1946)). While we have no reason to doubt that the lenders and their assigns control MERS, agency requires a specific principal that is accountable for the acts of its agent. If MERS is an agent, its principals in the two cases before us remain unidentified.<sup>12</sup> MERS attempts to sidestep this portion of traditional agency law by pointing to the language in the deeds of trust that describe MERS as “acting solely as a nominee for Lender and Lender’s successors and assigns.” Doc. 131-2, at 2 (Bain deed of trust); Doc. 9-1, at 3 (Selkowitz deed of trust.); *e.g.*, Resp. Br. of MERS at 30 (Bain). But MERS offers no authority for the implicit proposition that the lender’s nomination of MERS as a nominee rises to an agency relationship with successor noteholders.<sup>13</sup> MERS fails to identify the entities that control and are

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<sup>12</sup>At oral argument, counsel for MERS was asked to identify its principals in the cases before us and was unable to do so. Wash. Supreme Court oral argument, *supra*, at approx. 23 min., 23 sec.

<sup>13</sup>The record suggests, but does not establish, that MERS often acted as an agent of the loan servicer, who would communicate the fact of a default and request appointment of a trustee, but is silent on whether the holder of the note would play any controlling role. Doc. 69-2, at 4-5 (describing process). For example, in Selkowitz’s case, “the Appointment of Successor Trustee” was signed by Debra Lyman as assistant vice president of MERS Inc. Doc. 8-1, at 17. There was no evidence that Lyman worked for MERS, but the record suggests she is 1 of 20,000 people who have been named assistant vice president of MERS. See Br. of Amicus National

accountable for its actions. It has not established that it is an agent for a lawful principal.

This is not the first time that a party has argued that we should give effect to its contractual modification of a statute. *See Godfrey v. Hartford Ins. Cas. Co.*, 142 Wn.2d 885, 16 P.3d 617 (2001); *see also Nat'l Union Ins. Co. of Pittsburgh, Pa. v. Puget Sound Power & Light*, 94 Wn. App. 163, 177, 972 P.2d 481 (1999) (holding a business and a utility could not contract around statutory uniformity requirements); *State ex rel. Standard Optical Co. v. Superior Court*, 17 Wn.2d 323, 329, 135 P.2d 839 (1943) (holding that a corporation could not avoid statutory limitations on scope of practice by contract with those who could so practice); *cf. Vizcaino v. Microsoft Corp.*, 120 F.3d 1006, 1011-12 (9th Cir. 1997) (noting that Microsoft's agreement with certain workers that they were not employees was not binding). In *Godfrey*, Hartford Casualty Insurance Company had attempted to pick and chose what portions of Washington's uniform arbitration act, chapter 7.04A RCW, it and its insured would use to settle disputes. *Godfrey*, 142 Wn.2d at 889. The court noted that parties were free to decide whether to arbitrate, and what issues to submit to arbitration, but "once an issue is submitted to arbitration . . . Washington's [arbitration] Act applies." *Id.* at 894. By submitting to arbitration, "they have activated the entire chapter and the policy embodied therein, not just

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Consumer Law Center at 9 n.18 (citing Christopher L. Peterson, *Two Faces: Demystifying the Mortgage Electronic Registration System's Land Title Theory*, 53 WM. & MARY L. REV. 111, 118 (2011)). Lender Processing Service, Inc., which processed paperwork relating to Bain's foreclosure, seems to function as a middleman between loan servicers, MERS, and law firms that execute foreclosures. Docs. 69-1 through 69-3.

the parts that are useful to them.” *Id.* at 897. The legislature has set forth in great detail how nonjudicial foreclosures may proceed. We find no indication the legislature intended to allow the parties to vary these procedures by contract. We will not allow waiver of statutory protections lightly. MERS did not become a beneficiary by contract or under agency principals.

### C. Policy

MERS argues, strenuously, that as a matter of public policy it should be allowed to act as the beneficiary of a deed of trust because “the Legislature certainly did not intend for home loans in the State of Washington to become unsecured, or to allow defaulting home loan borrowers to avoid non-judicial foreclosure, through manipulation of the defined terms in the [deed of trust] Act.” Resp. Br. of MERS at 23 (Bain). One difficulty is that it is not the plaintiffs that manipulated the terms of the act: it was whoever drafted the forms used in these cases. There are certainly significant benefits to the MERS approach but there may also be significant drawbacks. The legislature, not this court, is in the best position to assess policy considerations. Further, although not considered in this opinion, nothing herein should be interpreted as preventing the parties to proceed with judicial foreclosures. That must await a proper case.

### D. Other Courts

Unfortunately, we could find no case, and none have been drawn to our attention, that meaningfully discusses a statutory definition like that found in RCW 61.24.005(2). MERS asserts that “the United States District Court for the Western

District of Washington has recently issued a series of opinions on the very issues before the Court, finding in favor of MERS.” Resp. Br. of MERS at 35-36 (Bain) (citing *Daddabbo v. Countrywide Home Loans, Inc.*, No. C09-1417RAJ, 2010 WL 2102485 (W.D. Wash. May 20, 2010) (unpublished); *St. John v. Nw Tr. Ser., Inc.*, No. C11-5382BHS, 2011 WL 4543658 (W.D. Wash. Sept. 29, 2011, Dismissal Order) (unpublished); *Vawter v. Quality Loan Servicing Corp. of Wash.*, 707 F. Supp. 2d 1115 (W.D. Wash. 2010)). These citations are not well taken. *Daddabbo* never mentions RCW 61.24.005(2). *St. John* mentions it in passing but devotes no discussion to it. 2011 WL 4543658, at \*3. *Vawter* mentions RCW 61.24.005(2) once, in a block quote from an unpublished case, without analysis. We do not find these cases helpful.<sup>14</sup>

Amicus WBA draws our attention to three cases where state supreme courts have held MERS could exercise the rights of a beneficiary. Amicus Br. of WBA at 12 (Bain) (citing *Trotter v. Bank of N.Y. Mellon*, No. 38022, 2012 WL 206004 (Idaho Jan. 25, 2012) (unpublished), *withdrawn and superseded by* 152 Idaho 842,

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<sup>14</sup> MERS string cites eight more cases, six of them unpublished that, it contends, establishes that other courts have found that MERS can be beneficiary under a deed of trust. Resp. Br. of MERS (Selkowitz) at 29 n.98. The six unpublished cases do not meaningfully analyze our statutes. The two published cases, *Gomes v. Countrywide Home Loans, Inc.*, 192 Cal. App. 4th 1149, 121 Cal. Rptr. 3d 819 (2011), and *Pantoja v. Countrywide Home Loans, Inc.*, 640 F. Supp. 2d 1177 (N.D. Cal. 2009), are out of California, and neither have any discussion of the California statutory definition of “beneficiary.” The Fourth District of the California Court of Appeals in *Gomes* does reject the plaintiff’s theory that the beneficiary had to establish a right to foreclose in a nonjudicial foreclosure action, but the California courts are split. Six weeks later, the third district found that the beneficiary was required to show it had the right to foreclose, and a simple declaration from a bank officer was insufficient. *Herrera v. Deutsche Bank Nat’l Trust Co.*, 196 Cal. App. 4th 1366, 1378, 127 Cal. Rptr. 3d 362 (2011).

275 P.3d 857 (2012); *Residential Funding Co. v. Saurman*, 490 Mich. 909, 805 N.W.2d 183 (2011); *RMS Residential Props., LLC v. Miller*, 303 Conn. 224, 226, 32 A.3d 307 (2011)). *But see Agard*, 444 B.R. at 247 (collecting contrary cases); *Bellistri v. Ocwen Loan Servicing, LLC*, 284 S.W.3d 619, 623-24 (Mo. App. 2009) (holding MERS lacked authority to make a valid assignment of the note). But none of these cases, on either side, discuss a statutory definition of “beneficiary” that is similar to ours, and many are decided on agency grounds that are not before us. We do not find them helpful either.

We answer the first certified question “No,” based on the plain language of the statute. MERS is an ineligible “‘beneficiary’ within the terms of the Washington Deed of Trust Act,” if it never held the promissory note or other debt instrument secured by the deed of trust.

## II. EFFECT

The federal court has also asked us:

2. If so, what is the legal effect of Mortgage Electronic Registration Systems, Inc., acting as an unlawful beneficiary under the terms of Washington’s Deed of Trust Act?

We conclude that we cannot decide this question based upon the record and briefing before us. To assist the certifying court, we will discuss our reasons for reaching this conclusion.

MERS contends that if it is acting as an unlawful beneficiary, its status should have no effect: “All that it would mean is that there was a technical violation of the Deed of Trust Act that all parties were aware of when the loan was

originally entered into.” Resp. Br. of MERS at 41 (Bain). “At most . . . MERS would simply need to assign its legal interest in the Deed of Trust to the lender before the lender proceeded with foreclosure.” *Id.* at 41-42. The difficulty with MERS’s argument is that if in fact MERS is not the beneficiary, then the equities of the situation would likely (though not necessarily in every case) require the court to deem that the real beneficiary is the lender whose interests were secured by the deed of trust or that lender’s successors.<sup>15</sup> If the original lender had sold the loan, that purchaser would need to establish ownership of that loan, either by demonstrating that it actually held the promissory note or by documenting the chain of transactions. Having MERS convey its “interests” would not accomplish this.

In the alternative, MERS suggests that, if we find a violation of the act, “MERS should be required to assign its interest in any deed of trust to the holder of the promissory note, and have that assignment recorded in the land title records, before any non-judicial foreclosure could take place.” Resp. Br. of MERS at 44 (Bain). But if MERS is not the beneficiary as contemplated by Washington law, it is unclear what rights, if any, it has to convey. Other courts have rejected similar suggestions. *Bellistri*, 284 S.W.3d at 624 (citing *George v. Surkamp*, 336 Mo. 1,

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<sup>15</sup> See 18 STOEUBUCK & WEAVER, *supra*, § 17.3, at 260 (noting that a deed of trust “is a three-party transaction in which land is conveyed by a borrower, the ‘grantor,’ to a ‘trustee,’ who holds title in trust for a lender, the ‘beneficiary,’ as security for credit or a loan the lender has given the borrower”); see also *U.S. Bank Nat’l Ass’n v. Ibanez*, 458 Mass. 637, 941 N.E.2d 40 (2011) (holding bank had to establish it was the mortgage holder at the time of foreclosure in order to clear title through evidence of the chain of transactions).

9, 76 S.W.2d 368 (1934)). Again, the identity of the beneficiary would need to be determined. Because it is the repository of the information relating to the chain of transactions, MERS would be in the best position to prove the identity of the holder of the note and beneficiary.

Partially relying on the *Restatement (Third) of Property: Mortgages* § 5.4 (1997), Selkowitz suggests that the proper remedy for a violation of chapter 61.24 RCW “should be rescission, which does not excuse Mr. Selkowitz from payment of any monetary obligation, but merely precludes non-judicial foreclosure of the subject Deed of Trust. Moreover, if the subject Deed of Trust is void, Mr. Selkowitz should be entitled to quiet title to his property.” Pl.’s Opening Br. at 40 (Selkowitz). It is unclear what he believes should be rescinded. He offers no authority in his opening brief for the suggestion that listing an ineligible beneficiary on a deed of trust would render the deed void and entitle the borrower to quiet title. He refers to cases where the lack of a grantee has been held to void a deed, but we do not find those cases helpful. In one of those cases, the New York court noted, “No mortgagee or obligee was named in [the security agreement], and no right to maintain an action thereon, or to enforce the same, was given therein to the plaintiff or any other person. It was, *per se*, of no more legal force than a simple piece of blank paper.” *Chauncey v. Arnold*, 24 N.Y. 330, 335 (1862). But the deeds of trust before us names all necessary parties and more.

Selkowitz argues that MERS and its allied companies have split the deed of trust from the obligation, making the deed of trust unenforceable. While that

certainly *could* happen, given the record before us, we have no evidence that it did. If, for example, MERS is in fact an agent for the holder of the note, likely no split would have happened.

In the alternative, Selkowitz suggests the court create an equitable mortgage in favor of the noteholder. Pl.'s Opening Br. at 42 (Selkowitz). If in fact, such a split occurred, the *Restatement* suggests that would be an appropriate resolution. RESTATEMENT (THIRD) OF PROPERTY: MORTGAGES § 5.4 reporters' note, at 386 (1997) (citing *Lawrence v. Knap*, 1 Root (Conn.) 248 (1791)). But since we do not know whether or not there has been a split of the obligation from the security instrument, we have no occasion to consider this remedy.

Bain specifically suggests we follow the lead of the Kansas Supreme Court in *Landmark National Bank v. Kesler*, 289 Kan. 528, 216 P.3d 158 (2009). In *Landmark*, the homeowner, Kesler, had used the same piece of property to secure two loans, both recorded with the county. *Id.* Kesler went bankrupt and agreed to surrender the property. *Id.* One of the two lenders filed a petition to foreclose and served both Kesler and the other recorded lender, but not MERS. *Id.* at 531. The court concluded that MERS had no interest in the property and thus was not entitled to notice of the foreclosure sale or entitled to intervene in the challenge to it. *Id.* at 544-45; accord *Mortg. Elec. Registration Sys., Inc. v. Sw Homes of Ark., Inc.*, 2009 Ark. 152, 301 S.W.3d 1 (2009). Bain suggests we follow *Landmark*, but *Landmark* has nothing to say about the effect of listing MERS as a beneficiary.

We agree with MERS that it has no bearing on the case before us. Resp. Br. of MERS at 39 (Bain).

Bain also notes, albeit in the context of whether MERS could be a beneficiary without holding the promissory note, that our Court of Appeals held that “[i]f the obligation for which the mortgage was given fails for some reason, the mortgage is unenforceable.” Pl. Bain’s Opening Br. (Bain Op. Br.) at 34 (quoting *Fid. & Deposit Co. of Md. v. Ticor Title Ins. Co.*, 88 Wn. App. 64, 68, 943 P.2d 710 (1997)). She may be suggesting that the listing of an erroneous beneficiary on the deed of trust should sever the security interest from the debt. If so, the citation to *Fidelity* is not helpful. In *Fidelity*, the court was faced with what appeared to be a scam. William and Mary Etter had executed a promissory note, secured by a deed of trust, to Citizen’s National Mortgage, which sold the note to Affiliated Mortgage Company. Citizen’s also *forged* the Eppers’ name on *another* promissory note and sold it to another buyer, along with what appeared to be an assignment of the deed of trust, who ultimately assigned it to Fidelity. The buyer of the forged note recorded its interests first, and Fidelity claimed it had priority to the Eppers’ mortgage payments. The Court of Appeals properly disagreed. *Fidelity*, 88 Wn. App. at 66-67. It held that forgery mattered and that Fidelity had no claim on the Eppers’ mortgage payments. *Id.* at 67-68. It did *not* hold that the forgery relieved the Eppers of paying the mortgage to the actual holder of the promissory note.

MERS states that any violation of the deed of trust act “should not result in a void deed of trust, both legally and from a public policy standpoint.” Resp. Br. of MERS at 44. While we tend to agree, resolution of the question before us depends on what actually occurred with the loans before us and that evidence is not in the record. We note that Bain specifically acknowledges in her response brief that she “understands that she is going to have to make up the mortgage payments that have been missed,” which suggests she is not seeking to clear title without first paying off the secured obligation. Pl. Bain’s Reply Br. at 1. In oral argument, Bain suggested that if the holder of the note were to properly transfer the note to MERS, MERS could proceed with foreclosure.<sup>16</sup> This may be true. We can answer questions of law but not determine facts. We, reluctantly decline to answer the second certified question on the record before us.

### III. CPA ACTION

Finally, the federal court asked:

3. Does a homeowner possess a cause of action under Washington’s Consumer Protection Act against Mortgage Electronic Registration Systems, Inc., if MERS acts as an unlawful beneficiary under the terms of Washington’s Deed of Trust Act?

Certification at 4. Bain contends that MERS violated the CPA when it acted as a beneficiary. Bain Op. Br. at 43.<sup>17</sup>

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<sup>16</sup> Wash. Supreme Court oral argument, *supra*, at approx. 8 min., 24 sec.

<sup>17</sup> The trustee, Quality Loan Service Corporation of Washington Inc., has asked that we hold that no cause of action under the deed of trust act or the CPA “can be stated against a trustee that

To prevail on a CPA action, the plaintiff must show “(1) unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or property; (5) causation.” *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986). MERS does not dispute all the elements. Resp. Br. of MERS at 45; Resp. Br. of MERS (Selkowitz) at 37. We will consider only the ones that it does.

#### A. Unfair or Deceptive Act or Practice

As recently summarized by the Court of Appeals:

To prove that an act or practice is deceptive, neither intent nor actual deception is required. The question is whether the conduct has “the *capacity* to deceive a substantial portion of the public.”

*Hangman Ridge*, 105 Wn.2d at 785. Even accurate information may be deceptive “if there is a representation, omission or practice that is likely to mislead.” *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 50, 204 P.3d 885 (2009) (quoting *Sw. Sunsites, Inc. v. Fed. Trade Comm’n*, 785 F.2d 1431, 1435 (9th Cir. 1986)). Misrepresentation of the material terms of a transaction or the failure to disclose material terms violates the CPA. *State v. Ralph Williams’ N.W. Chrysler Plymouth, Inc.*, 87 Wn.2d, 298, 305–09, 553 P.2d 423 (1976).

Whether particular actions are deceptive is a question of law that we review de novo. *Leingang v. Pierce County Med. Bureau*, 131 Wn.2d 133, 150, 930 P.2d 288 (1997).

*State v. Kaiser*, 161 Wn. App. 705, 719, 254 P.3d 850 (2011). MERS contends that the only way that a plaintiff can meet this first element is by showing that its

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relies in good faith on MERS’ apparent authority to appoint a successor trustee, as beneficiary of the deed of trust.” Br. of Def. Quality Loan Service at 4 (Selkowitz). As this is far outside the scope of the certified question, we decline to consider it.

conduct was deceptive and that the plaintiffs cannot show this because “MERS fully described its role to Plaintiff through the very contract document that Plaintiff signed.” Resp. Br. of MERS at 46 (Selkowitz). Unfortunately, MERS does not elaborate on that statement, and nothing on the deed of trust itself would alert a careful reader to the fact that MERS would *not* be holding the promissory note.

The attorney general of this state maintains a consumer protection division and has considerable experience and expertise in consumer protection matters. As amicus, the attorney general contends that MERS is claiming to be the beneficiary “when it knows or should know that under Washington law it must hold the note to be the beneficiary” and seems to suggest we hold that claim is *per se* deceptive and/or unfair. AG Br. at 14. This contention finds support in *Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.*, 162 Wn.2d 59, 170 P.3d 10 (2007), where we found a telephone company had committed a deceptive act as a matter of law by listing a surcharge “on a portion of the invoice that included state and federal tax charges.” *Id.* at 76. We found that placement had “the capacity to deceive a substantial portion of the public” into believing the fee was a tax. *Id.* (emphasis omitted) (quoting *Hangman Ridge*, 105 Wn.2d at 785). Our attorney general also notes that the assignment of the deed of trust that MERS uses purports to transfer its beneficial interest on behalf of *its own* successors and assigns, not on behalf of any principal. The assignment used in Bain’s case, for example, states:

FOR VALUE RECEIVED, the undersigned, Mortgage Electronic Registration Systems, Inc. AS NOMINEE FOR ITS SUCCESSORS AND ASSIGNS, by these presents, grants, bargains, sells, assigns, transfers, and sets over unto INDYMAC FEDERAL BANK, FSB all beneficial interest under that certain Deed of Trust dated 3/9/2007.

Doc. 1, Ex. A to Huelsman Decl. This undermines MERS's contention that it acts only as an agent for a lender/principal and its successors and it "conceals the identity of whichever loan holder MERS purports to be acting for when assigning the deed of trust." AG Br. at 14. The attorney general identifies other places where MERS purports to be acting as the agent for its own successors, not for some principal. *Id.* at 15 (citing Doc. 1, Ex. B). Many other courts have found it deceptive to claim authority when no authority existed and to conceal the true party in a transaction. *Stephens v. Omni Ins. Co.*, 138 Wn. App. 151, 159 P.3d 167 (2007); *Floersheim v. Fed. Trade Comm'n*, 411 F.2d 874, 876-77 (9th Cir. 1969). In *Stephens*, an insurance company that had paid under an uninsured motorist policy hired a collections agency to seek reimbursement from the other parties in a covered accident. *Stephens*, 138 Wn. App. at 161. The collection agency sent out aggressive notices that listed an "amount due" and appeared to be collection notices for debt due, though a careful scrutiny would have revealed that they were effectively making subrogation claims. *Id.* at 166-68. The court found that "characterizing an unliquidated [tort] claim as an 'amount due' has the capacity to deceive." *Id.* at 168.

While we are unwilling to say it is per se deceptive, we agree that characterizing MERS as the beneficiary has the capacity to deceive and thus, for

the purposes of answering the certified question, presumptively the first element is met.

#### B. Public Interest Impact

MERS contends that plaintiffs cannot show a public interest impact because, it contends, each plaintiff is challenging “MERS’s role as the beneficiary under Plaintiff’s Deed of Trust in the context of the foreclosure proceedings on Plaintiff’s property.” Resp. Br. of MERS at 40 (Selkowitz) (emphasis omitted). But there is considerable evidence that MERS is involved with an enormous number of mortgages in the country (and our state), perhaps as many as half nationwide. John R. Hooge & Laurie Williams, *Mortgage Electronic Registration Systems, Inc.: A Survey of Cases Discussing MERS’ Authority to Act*, NORTON BANKR. L. ADVISORY No. 8, at 21 (Aug. 2010). If in fact the language is unfair or deceptive, it would have a broad impact. This element is also presumptively met.

#### C. Injury

MERS contends that the plaintiffs can show no injury caused by its acts because whether or not the noteholder is known to the borrower, the loan servicer is and, it suggests, that is all the homeowner needs to know. Resp. Br. of MERS at 48-49 (Bain); Resp. Br. of MERS at 41 (Selkowitz). But there are many different scenarios, such as when homeowners need to deal with the holder of the note to resolve disputes or to take advantage of legal protections, where the homeowner does need to know more and can be injured by ignorance. Further, if there have been misrepresentations, fraud, or irregularities in the proceedings, and if the

homeowner borrower cannot locate the party accountable and with authority to correct the irregularity, there certainly could be injury under the CPA.<sup>18</sup>

Given the procedural posture of these cases, it is unclear whether the plaintiffs can show any injury, and a categorical statement one way or another seems inappropriate. Depending on the facts of a particular case, a borrower may or may not be injured by the disposition of the note, the servicing contract, or many other things, and MERS may or may not have a causal role. For example, in *Bradford v. HSBC Mortg. Corp.*, 799 F. Supp. 2d 625 (E.D. Va. 2011), three different companies attempted to foreclose on Bradford's property after he attempted to rescind a mortgage under the federal Truth in Lending Act, 15 U.S.C. § 1635. All three companies claimed to hold the promissory note. Observing that "[i]f a defendant transferred the Note, or did not yet have possession or ownership of the Note at the time, but nevertheless engaged in foreclosure efforts, that conduct could amount to an [Fair Debt Collection Practices Act, 15 U.S.C. § 1692k] violation," the court allowed Bradford's claim to proceed. *Id.* at 634-35. As amicus notes, "MERS' concealment of loan transfers also could also deprive homeowners of other rights," such as the ability to take advantage of the protections of the Truth in Lending Act and other actions that require the

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<sup>18</sup> Also, while not at issue in these cases, MERS's officers often issue assignments without verifying the underlying information, which has resulted in incorrect or fraudulent transfers. See Zacks, *supra*, at 580 (citing Robo-Signing, Chain of Title, Loss Mitigation, and Other Issues in Mortgage Servicing: Hearing Before Subcomm. on H. and Cmty. Opportunity H. Fin. Servs. Comm., 111th Cong. 105 (2010) (statement of R.K. Arnold, President and CEO of MERSCORP, Inc.)). Actions like those could well be the basis of a meritorious CPA claim.

homeowner to sue or negotiate with the actual holder of the promissory note. AG Br. at 11 (citing 15 U.S.C. § 1635(f); *Miguel v. Country Funding Corp.*, 309 F.3d 1161, 1162-65 (9th Cir. 2002)). Further, while many defenses would *not* run against a holder in due course, they could against a holder who was not in due course. *Id.* at 11-12 (citing RCW 62A.3-302, .3-305).

If the first word in the third question was “may” instead of “does,” our answer would be “yes.” Instead, we answer the question with a qualified “yes,” depending on whether the homeowner can produce evidence on each element required to prove a CPA claim. The fact that MERS claims to be a beneficiary, when under a plain reading of the statute it was not, presumptively meets the deception element of a CPA action.

#### CONCLUSION

Under the deed of trust act, the beneficiary must hold the promissory note and we answer the first certified question “no.” We decline to resolve the second question. We answer the third question with a qualified “yes;” a CPA action may be maintainable, but the mere fact MERS is listed on the deed of trust as a beneficiary is not itself an actionable injury.

WE CONCUR:

Madsen, C. J.

[Signature]

[Signature]

Fairhurst, J.

Chambers, J.

[Signature]

Steen, J.

Wiggins, J.

Conrad, J.

## **APPENDIX B**

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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

STATE OF WASHINGTON,

Plaintiff,

v.

RECONTRUST COMPANY, N.A.,

Defendant.

No. 2:11-cv-1460

CONSENT DECREE

**I. JUDGMENT SUMMARY**

- 1.1 Judgment Creditor State of Washington
- 1.2 Judgment Debtor ReconTrust Company, N.A.
- 1.3 Principal Judgment Amount \$1,090,000
- 1.4 Post Judgment Interest Rate: 12% per annum
- 1.5 Attorneys for Judgment Creditor: James T. Sugarman,  
Assistant Attorney General
- 1.6 Attorneys for Judgment Debtor: John S. Devlin, III  
Lane, Powell, PC
- 1.7 Plaintiff State of Washington, having conducted an investigation and commenced

this action pursuant to RCW 19.86, the Consumer Protection Act ("CPA"); and

1           1.8     Defendant ReconTrust Company, National Association (“ReconTrust”), a Califor-  
2     nia corporation, having been served with the Summons and Complaint; and Washington, appear-  
3     ing by and through its attorneys, Robert M. McKenna, Attorney General and James T. Sugarman,  
4     Assistant Attorney General; and Defendant, appearing by and through its attorney John S. Devlin,  
5     III, Lane, Powell, PC; and

6           1.9     Washington and Defendant having agreed on a basis for the settlement of the mat-  
7     ters alleged in the Complaint and to the entry of this Consent Decree against Defendant without  
8     the need for trial or adjudication of any issue of law or fact; and

9           1.10    Defendant, by entering into this Consent Decree, does not admit the allegations of  
10    the Complaint other than those facts deemed necessary to the jurisdiction of this Court; and

11          1.11    Washington and Defendant agree this Consent Decree does not constitute evi-  
12    dence or an admission regarding the existence or non-existence of any issue, fact, or violation of  
13    any law alleged by Washington; and

14          1.12    Defendant recognizes and states this Consent Decree is entered into voluntarily  
15    and that no promises, representations, or threats have been made by the Attorney General’s Office  
16    or any member, officer, agent, or representative thereof to induce it to enter into this Consent De-  
17    cree, except for the promises and representations provided herein; and

18          1.13    Defendant waives any right it may have to appeal from this Consent Decree or to  
19    otherwise contest the validity of this Consent Decree; and

20          1.14    Defendant further agrees this Court shall retain jurisdiction of this action and ju-  
21    risdiction over Defendant for the purpose of implementing and enforcing the terms and conditions  
22    of this Consent Decree and for all other purposes related to this matter; and

23          1.15    Defendant further agrees its payments made or due pursuant to this Consent De-  
24    cree are not amenable to discharge in bankruptcy and it shall not seek or support its discharge in  
25    bankruptcy, nor oppose its being determined not amenable to discharge in bankruptcy; and  
26

1 1.16 Defendant further agrees its payments made or due pursuant to this Consent De-  
2 cree are not preferential transfers of assets and it shall not make nor support arguments to the con-  
3 trary in bankruptcy court or elsewhere.

4 The Court, finding no just reason for delay;

5 **NOW, THEREFORE**, it is hereby **ORDERED, ADJUDGED, AND DECREED** as fol-  
6 lows:

7 **II. GENERAL**

8 2.1 This Court has jurisdiction of the subject matter of this action and of the parties.

9 2.2 This Consent Decree or the fact of its entry does not constitute evidence or an ad-  
10 mission by any party regarding the existence or non-existence of any issue, fact, or violation  
11 of any law alleged by Washington. To the contrary, Defendant has denied and continues to deny  
12 any and all wrongdoing of any kind whatsoever and retains, and does not waive, any and all de-  
13 fenses Defendant may have with respect to such matters.

14 2.3 This Consent Decree fully and finally resolves and forever discharges all claims  
15 and causes of action under the CPA and the Deeds of Trust Act that the State of Washington has  
16 filed or may in the future file against ReconTrust arising out of or relating to the facts and matters  
17 described in the Complaint, except that ReconTrust's material failure to comply with this Consent  
18 Decree shall permit the Attorney General of Washington to take such further action against Re-  
19 conTrust as provided for herein.

20 **III. INJUNCTION**

21 3.1 The injunctive provisions of this Consent Decree shall apply to Defendant solely  
22 in its capacity as foreclosure trustee and to its successors and assigns.

23 3.2 Defendant represents that it is no longer doing business as a foreclosure trustee  
24 under deeds of trust with respect to property located within the State of Washington, except to the  
25 extent that such property has already been subject to a foreclosure sale and Defendant is engaged  
26 in post-foreclosure activities.

1           3.3    If at any time in the future Defendant returns to operating as a foreclosure trustee  
2 in the state of Washington, it shall not conduct non-judicial foreclosure proceedings involving  
3 residential property unless it:

4           a.       Maintains a physical presence and street address where personal service  
5 of process may be made, with telephone service at that address. For pur-  
6 poses of this Consent Decree only, physical presence in this context means  
7 maintaining an office that:

8           i.       is within the geographic boundaries of the state of Washington;

9           ii.      is open during normal business hours;

10          iii.     is staffed by a person or persons capable of responding to a borrow-  
11 er's or grantor's questions concerning a non-judicial foreclosure  
12 and directing the borrower or grantor to another person or persons  
13 capable of responding to questions concerning the borrower's de-  
14 fault;

15          iv.     is authorized to accept payments of the amount necessary to reins-  
16 tate the note and deed of trust or to direct the borrower to another  
17 person or persons (whether located in the State of Washington or  
18 otherwise) capable of reasonably promptly accepting such pay-  
19 ments, provided that directing a borrower out-of-state does not pre-  
20 judice the borrower's right to reinstate their loan; and

21          v.       is authorized, where appropriate and where warranted by the facts,  
22 to postpone, reschedule or cancel foreclosure sales or to direct the  
23 borrower to another person or persons (whether located in the State  
24 of Washington or otherwise) capable of reasonably promptly, where  
25 appropriate and where warranted by the facts, postponing, resche-  
26 duling or canceling foreclosure sales.

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- b. Discloses, in notices required by the Deed of Trust Act, including notices of foreclosure and notices of trustee's sale, but excluding notices of default, the street address and telephone number for the office that constitutes the "physical presence" required by the Deed of Trust Act.
- c. Does not misidentify the owner of the promissory note or other obligation secured by the deed of trust or the entity authorized to exercise the rights of the owner, in any notices required by the Deed of Trust Act.
- d. Identifies in the notice of default the name and actual address of the owner of any promissory note or other obligation secured by the deed of trust, and the name, address, and telephone number of a party acting as a servicer of the obligations secured by the deed of trust.
- e. Provides, upon the request of the deed of trust grantor or borrower or its representative, (i) copies of documentation sufficient to show the note owner has an enforceable interest in the mortgage or deed of trust and/or (ii) copies of documentation sufficient to show that the entity claiming to be the beneficiary is the owner of the promissory note; provided, however, that for purposes of this Consent Judgment, a copy of the declaration described in RCW 61.24.030(7)(a), when made in good faith and without notice as to its inaccuracy, shall be deemed sufficient proof that the entity claiming to be the beneficiary is the owner of the promissory note. If any such documents are unavailable, Defendant shall provide documents and sworn statements sufficient to establish the note owner's authority to enforce the security interest.
- f. Ensures that any demand for fees or response to a reinstatement amount request is accurate and contains only actual costs and fees incurred and that

1 such demand or amount is authorized by a term of the promissory  
2 note and/or deed of trust and is not prohibited by the Deed of Trust Act.

3 g. Acts consistent with its statutory duty of good faith toward the borrower,  
4 beneficiary and grantor and its duty to act independently when enforcing  
5 the deed of trust provisions. For purposes of this Consent Judgment only,  
6 it is a breach of the duty of good faith to enter into an agreement with a  
7 note owner, beneficiary or its agent wherein Defendant agrees to stop or  
8 postpone a foreclosure only when approved by the noteholder, beneficiary  
9 or agent, or to otherwise defer solely to a single party when acting as a  
10 trustee.

11 3.4 Defendant may not act as foreclosure trustee where it is also the beneficiary of the  
12 deed of trust.

13 3.5 Defendant may not describe in its notice of trustee's sale defaults that may have,  
14 but did not actually, occur.

15 3.6 Defendant shall immediately cease operating as a foreclosure trustee with respect  
16 to property in the State of Washington until it is in compliance with the requirements of the  
17 Washington Deed of Trust Act, RCW 61.24, *et seq.*; provided, however, that Defendant may con-  
18 tinue to engage in lawful post-sale activities described in Paragraph 3.2, above, for properties that  
19 have been sold at foreclosure prior to the entry of this Order. Defendant shall inform its respec-  
20 tive directors, successors, assigns, officers, and management level employees having responsibili-  
21 ties with respect to the subject matter of this Consent Decree, by announcing this Consent Decree  
22 to them and by making its terms and conditions available to them.

23 **IV. MONETARY PAYMENT**

24 4.1 Pursuant to RCW 19.86.080, Washington shall recover and Defendant shall pay  
25 the Plaintiff the amount of \$1,090,000 for costs and reasonable attorney's fees incurred by Wash-  
26 ington in pursuing this matter, for monitoring and potential enforcement of this Consent Decree,  
and for future enforcement of RCW 19.86. Upon payment of this amount to Washington, Bank

1 of America Corporation and its affiliated entities shall receive credit in the amount of \$1,090,000  
2 against any obligations to make cash payments to the State of Washington pursuant  
3 to a consensual settlement of the current multistate loan-servicing related investigation by the Of-  
4 fice of the Attorney General.

5 4.2 In any successful action to enforce this Consent Decree against Defendant, Defen-  
6 dant shall bear Washington's reasonable costs, including reasonable attorneys' fees.

7 4.3 Defendant's failure to pay attorneys' fees and costs to Washington as required  
8 by this Consent Decree shall be a material breach of the Consent Decree.

9 **V. TERMS OF PAYMENT**

10 5.1 Within 30 days of entry of this Consent Decree, or at such other time as agreed to  
11 by Washington in writing, Defendant shall pay a total of \$1,090,000 to the State of Washington.  
12 Interest shall accrue at the rate of twelve percent (12%) per annum until such payment is made in  
13 full.

14 5.2 Defendant shall make all payments owed pursuant to this Consent Decree by  
15 bank cashier's check payable to the Attorney General - State of Washington, and shall mail or  
16 deliver such payments to the Office of the Attorney General, Consumer Protection Division, 800  
17 5th Avenue, Suite 2000, Seattle, Washington 98104-3188, Attention: Cynthia Lockridge, un-  
18 less otherwise agreed to in writing by Washington.

19 5.3 Defendant's failure to timely make payments as required by this Consent De-  
20 cree, without written agreement by Washington, shall be a material breach of this Consent De-  
21 cree.

22 **VI. ENFORCEMENT**

23 6.1 Defendant shall be in full compliance with all requirements and obligations this  
24 Consent Decree imposes on Defendant at the time it is entered by the Court, other than the mone-  
25 tary payment obligation set forth in Paragraph 4.1, above.  
26

1           6.2     If Defendant violates a material condition of this Consent Decree, and if Defendant  
2 does not cure the violation after notice by Washington, Washington may seek the imposition of  
3 additional conditions, civil penalties, restitution, injunctive relief, attorney's fees, costs and such  
4 other remedies as the Court may deem appropriate against Defendant at an evidentiary hearing in  
5 which Defendant has an opportunity to be heard, if the Court finds by a preponderance of evi-  
6 dence that Defendant has violated a material condition of this Consent Decree.

7           6.3     Jurisdiction is retained by this Court for the purpose of enabling any party to this  
8 Consent Decree to apply to the Court, to the extent permitted herein, for enforcement of com-  
9 pliance with this Consent Decree, to punish violations thereof, or otherwise address the provisions  
10 of this Consent Decree.

11           6.4     Nothing in this Consent Decree shall grant any third-party beneficiary or other  
12 rights to any person not a party to this Consent Decree. For the avoidance of doubt, nothing in  
13 this Consent Decree confers any right or ability to sue to any trust grantor or borrower, nor does  
14 this Consent Decree create any obligation on the part of any party to such trust grantor or borrow-  
15 er.

16           6.5     Nothing in this Consent Decree shall be construed to limit or bar any other go-  
17 vernmental entity or person from pursuing other available remedies against Defendant or any oth-  
18 er person.

19           6.6     Under no circumstances shall this Consent Decree, or the name of the State of  
20 Washington, this Court, the Office of the Attorney General, the Consumer Protection Division, or  
21 any of their employees or representatives be used by Defendant or any of its respective owners,  
22 members, directors, successors, assigns, transferees, officers, agents, servants, employees, repre-  
23 sentatives, and all other persons or entities in active concert or participation with Defendant, in  
24 connection with any selling, advertising, or promotion of products or services, or as an endorse-  
25 ment or approval of Defendant's acts, practices, or conduct of business.

26

1           6.7     Washington shall be permitted, upon advance notice of twenty days to Defendant,  
2 to access, inspect and/or copy business records or documents in possession, custody or under con-  
3 trol of Defendant to monitor compliance with this Consent Decree, provided that the inspection  
4 and copying shall avoid unreasonable disruption of Defendant's business activities. Washington  
5 shall not disclose any information described in this Paragraph 6.7 ("Confidential Information")  
6 unless such disclosure is required by law. In the event that Washington receives a request under  
7 the Public Records Act, subpoena, or other demand for production that seeks the disclosure of  
8 Confidential Information, Washington shall notify Defendant as soon as practicable, and in no  
9 event more than ten (10) calendar days, after receiving such request and shall allow Defendant a  
10 reasonable time, not less than ten (10) calendar days, from the receipt of such notice to seek a  
11 protective order relating to the Confidential Information or to otherwise resolve any disputes re-  
12 lating to the production of the Confidential Information before Washington discloses any Confi-  
13 dential Information. Nothing in this Consent Decree shall affect State of Washington's com-  
14 pliance with the Public Records Act, RCW 42.56.

15           6.8     To monitor compliance with this Consent Decree, Washington shall be permitted  
16 to serve interrogatories pursuant to the provisions of CR 26 and CR 33 and to question Defendant  
17 or any officer, director, agent, or employee of Defendant by deposition pursuant to the provisions  
18 of CR 26 and CR 30 provided that Washington attempts in good faith to schedule the deposition  
19 at a time convenient for the deponent and his or her legal counsel.

20           6.9     This Consent Decree in no way limits Washington from conducting any lawful  
21 non-public investigation to monitor Defendant's compliance with this Consent Decree or to in-  
22 vestigate other alleged violations of the CPA, which may include but is not limited to interview-  
23 ing customers or former employees of Defendant.

24           6.10    This Consent Decree shall be binding upon and inure to the benefit of Recon-  
25 Trust's successors and assigns. ReconTrust, and its successors and assigns, shall notify the At-  
26 torney General's Office at least thirty (30) days prior to any change-in-control of ReconTrust that

1 would change the identity of the corporate entity responsible for compliance obligations arising  
2 under this Consent Decree, including, but not limited to, dissolution, assignment, sale, merger, or  
3 other action that would result in the emergence of a successor corporation; the creation or dissolu-  
4 tion of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order;  
5 the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Pro-  
6 vided, however, that, with respect to any proposed change in the corporation about which Defen-  
7 dant, and its successors and assigns, learn less than thirty (30) days prior to the date such action is  
8 to take place, Defendant and its successors and assigns, shall notify the AG as soon as is practica-  
9 ble after obtaining such knowledge.

10         6.11 The injunctive provisions described in Paragraphs 3.2-3.5, above, shall apply to  
11 any bona fide purchaser of the foreclosure trustee business of ReconTrust (the "Purchaser") in the  
12 Purchaser's capacity as foreclosure trustee, but only with respect to any foreclosure referrals that  
13 the Purchaser receives from Bank of America, N.A. in the State of Washington after the closing  
14 of the sale of ReconTrust's foreclosure trustee business to the Purchaser. This Consent Decree  
15 shall not otherwise apply to any activities of the Purchaser, including, for the avoidance of doubt,  
16 any foreclosure referrals that the Purchaser receives from another person or entity in the State of  
17 Washington or any other business conducted by the Purchaser in the State of Washington other  
18 than the business referred to in the foregoing sentence. For the avoidance of doubt, nothing in  
19 this Consent Decree shall release any claims that the State of Washington has or may have against  
20 the Purchaser, except for any claims that the State of Washington may assert against the Purchas-  
21 er based on any theory of successor liability, vicarious liability, de facto merger, fraudulent con-  
22 veyance, or other similar claim or theory for the obligations, exposures, or liabilities of Recon-  
23 Trust with respect to the claims released in this Consent Decree (such claims, "Successor Liabili-  
24 ty Claims"). The Purchaser is hereby released and forever discharged from any Successor Lia-  
25 bility Claims. The Purchaser shall not be deemed a successor, assign, or transferee for purposes  
26 of this Consent Decree.



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understood that Washington may thereupon assert any claims arising out of or relating to the facts and matters described in the Complaint notwithstanding the release of claims in Paragraph 2.3, above, or any release of claims in the multistate settlement referenced in Paragraph 4.1, above.

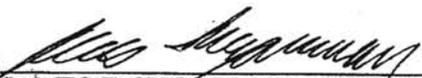
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DONE IN OPEN COURT this \_\_\_\_ day of \_\_\_\_\_, 20\_\_.

\_\_\_\_\_  
JUDGE

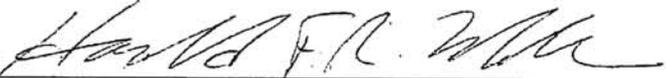
Presented By:

ROBERT M. MCKENNA  
Attorney General

By:   
JAMES T. SUGARMAN, WSBA #39107  
Assistant Attorney General  
Attorneys for Plaintiff State of Washington

Notice of Presentment Waived and  
Approved as to Form by:

For ReconTrust Company, N.A.

By:   
HAROLD F.R. MILLER  
Printed Name

**DECLARATION OF SERVICE**

The undersigned declares under penalty of perjury under the laws of the State of Washington, that the following is true and correct:

That on October 12, 2012, I arranged for service of the forgoing Supplemental Brief on the following parties:

Office of the Clerk  
Court of Appeals, Division I  
One Union Square  
600 University St.  
Seattle, WA 98101-4170

Facsimile  
 Messenger  
 U.S. Mail  
 Overnight Mail

John S. Devlin, III  
Lane Powell PC  
1420 Fifth Avenue, Suite 4100.  
Seattle, WA 98101-2338

Facsimile  
 Messenger  
 U.S. Mail  
 Overnight Mail

Timothy C. DeFors  
Lane Powell PC  
1420 Fifth Avenue, Suite 4100.  
Seattle, WA 98101-2338

Facsimile  
 Messenger  
 U.S. Mail  
 Overnight Mail

**DATED** this 12<sup>th</sup> day of October, 2012

  
\_\_\_\_\_  
Susan Rodriguez  
Legal Assistant to Richard Jones

01/10 11:30 AM