

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Feb 14, 2012, 3:37 pm
BY RONALD R. CARPENTER
CLERK

86206-1

RECEIVED BY E-MAIL

NO. 10-5523-JCC

SUPREME COURT OF THE STATE OF WASHINGTON

KRISTIN BAIN,

Petitioner,

v.

METROPOLITAN MORTGAGE GROUP INC, et al.,

Respondents.

BRIEF OF AMICUS CURIAE
ATTORNEY GENERAL OF STATE OF WASHINGTON IN
SUPPORT OF PETITIONER

ROBERT M. MCKENNA
Attorney General

JAMES T. SUGARMAN
Assistant Attorney General
WSBA #39107
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
(206) 389-2514

BY RONALD R. CARPENTER
CLERK

2012 FEB 24 P 2:43

FILED
SUPREME COURT
STATE OF WASHINGTON

ORIGINAL

TABLE OF CONTENTS

I. INTEREST OF AMICUS1

II. ISSUES ADDRESSED BY AMICUS1

 A. Question 1: MERS is Not a Lawful Beneficiary Under
 the Deed of Trust Act.....2

 1. Severing the Note from the Deed of Trust Creates
 Havoc in the Marketplace.....6

 B. Question 3. By Acting As an Unlawful Beneficiary,
 Certain Acts and Practices by MERS Violate the
 Consumer Protection Act.....13

 1. MERS Acts Are Unfair or Deceptive.....13

 2. MERS Acts in Trade or Commerce.....17

 3. MERS Acts Impact the Public Interest.....18

 4. MERS Acts Injure Consumers.18

 5. MERS' Business Practices Cause Consumer Injury.19

III. CONCLUSION20

TABLE OF AUTHORITIES

Cases

<i>Beckman v. Ward</i> , 174 Wash. 326, 24 P.2d 1091 (1933)	6
<i>Bowers v. Transamerica Title Ins. Co.</i> , 100 Wn.2d 581, 675 P.2d 193 (1983)	16
<i>Bradford v. HSBC Mortg. Corp.</i> , 799 F. Supp. 2d 625 (E.D. Va. 2011)	10
<i>Brown v. Household Realty Corp.</i> , 146 Wn. App. 157, 189 P.3d 233 (2008)	12
<i>Christenson v. Raggio</i> , 47 Wash. 468, 92 P. 348 (1907)	6
<i>Commonwealth by Packel v. Tolleson</i> , 14 Pa.Cmwth. 72, 321 A.2d 664 (Pa.Cmwth. 1974)	16
<i>Cox v. Helentus</i> , 103 Wn.2d 383, 693 P.2d 683 (1985)	12
<i>Dunn v. Neu</i> , 179 Wash. 351, 37 P.2d. 883 (1934)	7
<i>Dwyer v. J.I. Kislak Mortgage</i> , 103 Wn. App. 542, 13 P.3d 240 (2000)	16
<i>Erickson v. Kendall</i> , 112 Wash. 26, 191 P. 842 (1920)	7
<i>Escalante v Sentry Inc. Co.</i> , 49 Wn. App. 375, 743 P.2d 832 (1987)	17
<i>Evergreen Collectors v. Holt</i> , 60 Wn. App. 151, 803 P.2d 10 (1991)	16

<i>Experience Hendrix, L.L.C. v. HendrixLicensing.com, LTD,</i> 766 F. Supp. 2d 1122 (W.D. Wash. 2011).....	16
<i>Fidelity & Deposit Co. of Md. v. TICOR Title Insur. Co.,</i> 88 Wn. App 64, 943 P.2d 710 (1997).....	7, 10
<i>Floersheim v. Federal Trade Comm'n,</i> 411 F.2d 874 (9th Cir. 1969).....	16
<i>Godfrey v. Hartford Cas. Ins. Co.,</i> 142 Wn.2d 885, 16 P.3d 617 (2001).....	5, 6
<i>Hangman Ridge Training Stables v. Safeco,</i> 105 Wn.2d 778, 719 P.2d 531 (1986).....	13, 18
<i>Harris v. OSI Financial Services, Inc.,</i> 595 F. Supp. 2d 885 (N.D.Ill. 2009).....	11
<i>HSBC Bank v. Antrobus,</i> 872 N.Y.S.2d 691 (N.Y. Sup. 2008).....	10
<i>Impac v. Credit Suisse Boston LLC,</i> No.: 06-56024, 2008 Westlaw 731050 (9th Cir. 2008).....	7
<i>In re Columbia Pac. Mortgage, Inc.,</i> 22 Bankr. 753 (W.D. Wash. 1982).....	7
<i>In re Foreclosure Cases,</i> 521 F. Supp. 2d 650 (N.D. Ohio 2007).....	10
<i>In re Kemp,</i> 440 B.R. 624 (Bankr. D. NJ. 2010).....	8
<i>Ivan's Tire Service v. Goodyear Tire,</i> 10 Wn. App. 110, 517 P. 2d 229 (1973).....	13
<i>Jackson v. MERS,</i> 770 N.W.2d 487 (Minn. 2009).....	4, 10
<i>Kennebec, Inc. v. Bank of the West,</i> 88 Wn.2d 718, 565 P.2d 812 (1977).....	6

<i>Kinkopf v. Triborough Bridge & Tunnel Authority</i> , 1 Misc.3d 417, 764 N.Y.S.2d 549 (N.Y. City Civ. Ct. 2003).....	16
<i>Lomayaktewa v. Hathaway</i> , 520 F.2d 1324 (9th Cir. 1975)	11
<i>Mason v. Mortgage America, Inc.</i> , 114 Wn.2d 842, 792 P.2d 142 (1990).....	19
<i>Miguel v. Country Funding Corp.</i> , 309 F.3d 1161 (9th Cir. 2002)	11
<i>Mortgage Electronic Registration Systems, Inc. v. Nebraska Dept. of Banking and Finance</i> , 704 N.W.2d 784 (Neb. 2005)	3, 4, 10, 14, 15
<i>Nordstrom, Inc. v. Tampourlos</i> , 107 Wn.2d 735, 733 P.2d 208 (1987).....	13, 18
<i>Panag v. Farmers Ins. Co. of Washington</i> , 66 Wn.2d 27, 204 P.3d 885 (2009).....	19
<i>Pennsylvania. Dep't of Banking v. NCAS of Delaware, LLC</i> , 995 A.2d 422 (Pa. Comm. Ct. 2010)	13
<i>Plein v. Lackey</i> , 149 Wn.2d 214, 67 P.3d 1061 (2003).....	12
<i>Price v. Northern Bond & Mortgage Co.</i> , 161 Wash. 690, 297 P. 786 (1931)	4, 7
<i>Public Employees' Retirement System of Mississippi v. Merrill Lynch & Co., Inc.</i> , 277 F.R.D. 97 (S.D.N.Y. 2011).....	8
<i>Rodgers v. Seattle-First Nat'l Bank</i> , 40 Wn. App. 127, 697 P.2d 1009 (1985).....	7, 11
<i>Ruscalleda v. HSBC Bank USA</i> , 43 So.3d 947 (Fla. Dist. Ct. App. 2010)	10

<i>Salois v. Mutual of Omaha Ins. Co.</i> , 90 Wn.2d 355, 581 P.2d 1351 (1978).....	17
<i>Scott v. Cingular Wireless</i> , 160 Wn.2d 843, 161 P.3d 1000 (2007).....	6
<i>Sign-O-Lite Signs, Inc. v. DeLaurenti Florests, Inc.</i> , 64 Wn. App. 553, 825 P.2d 714 (1992).....	19
<i>Sorrel v. Eagle Healthcare, Inc.</i> , 110 Wn. App. 290, 38 P. 3d 1024 (2002).....	19
<i>State v. Kaiser</i> , 161 Wn. App. 705, 254 P.3d 850 (2011).....	14
<i>State v. Morley</i> , 134 Wn.2d 588, 952 P.2d 167 (1998).....	5
<i>Stephens v. Omni Ins. Co.</i> , 138 Wn. App. 151, 159 P.3d 10 (2007).....	13, 16, 18
<i>Testo v. Russ Dunmire Oldsmobile, Inc.</i> , 16 Wn. App. 39, 554 P.2d 349 (1976).....	16
<i>Texas v. American Blastfax, Inc.</i> , 164 F. Supp. 2d 892 (W.D. Tex. 2001).....	16
<i>Thepvongsa v. Regional Trustee Service Corp.</i> , No. 10-cv-1045, 2011 WL 307364, (W.D. Wash. Jan. 26, 2011)....	9, 10
<i>Washington Dept. of Rev. v. Security Pac. Bank of Wash., N.A.</i> , 109 Wn. App. 795, 38 P.3d 354 (2002).....	8
<i>Wells Fargo Bank v. Farmer</i> , 867 N.Y.S.2d 21 (N.Y. Sup. 2008).....	10
<i>Young Americans for Freedom v. Gorton</i> , 91 Wn.2d 204, 588 P.2d 195 (1978).....	1
<i>Zolfaghari v. Sheikholeslami</i> , 943 F.2d 451 (4th Cir. 1991).....	7

Statutes

15 U.S.C. § 1635(f).....	11
RCW 7.04	5
RCW 19.86.010(2).....	17, 18
RCW 19.86.080	1
RCW 19.86.093	18
RCW 31.04.015(7).....	15
RCW 31.04.015(26).....	15
RCW 31.04.035	15
RCW 61.24.005(2).....	1, 2
RCW 61.24.030(7).....	4
RCW 61.24.030(8)(1).....	4
RCW 61.24.130	12
RCW 61.24.130(2).....	12
RCW 61.24.135	13
RCW 61.24.172(2).....	1
RCW 62A.3-302	11
RCW 62A.3-302(a)(2)	12
RCW 62A.3-305	11
RCW 62A.3-602(a)(H).....	7

Other Authorities

Adam Ashcraft & Til Schuermann, *Understanding the Securitization of Subprime Mortgage Credit*, Federal Reserve Bank of New York, (March 2008), http://www.newyorkfed.org/research/staff_reports/sr318.pdf..... 8

Dale Whitman, *How Negotiability Has Fouled Up the Secondary Mortgage Market, and What To Do About It*, 37 Pepp. L. Rev. 738 (2010)..... 8

Diane E. Thompson, *Foreclosing Modifications: How Servicer Incentives Discourage Loan Modifications*, 86 Wash. L. Rev. 755 (2011)..... 17

Fraud Scheme Characteristic, Fannie Mae, <https://www.efanniemae.com/utility/legal/pdf/fraudsohchar.pdf> (last visited Feb. 14, 2012)..... 6

Kurt Eggert, *Held Up in Due Course: Predatory Lending, Securitization, and the Holder in Due Course Doctrine*, 35 Creighton L. Rev. 503 (2002)..... 8

Mortgage-Backed Securities, U.S. Securities and Exchange Commission, <http://www.sec.gov/answers/mortgagesecurities.htm> (last visited Feb. 14, 2012); 8

Wash. Practice, Real Estate § 18.18 (2d ed.)..... 11

Regulations

16 C.F.R. § 321.3(o).(2011)..... 16

I. INTEREST OF AMICUS

Amicus Curiae is the Attorney General of Washington. The Attorney General's constitutional and statutory powers include the submission of *amicus curiae* briefs on matters affecting the public interest.¹ This matter requires an interpretation of the Washington Deed of Trust Act ("DTA"), RCW 61.24.005(2). The Attorney General is charged with enforcing the Deed of Trust Act,² and is currently involved in litigation and enforcement actions regarding mortgage lending and foreclosures in the State of Washington.³ In addition, this matter concerns whether the actions of Respondent Mortgage Electronic Registration Systems, Inc. (MERS) falls within the Consumer Protection Act. The Attorney General enforces the Consumer Protection Act, RCW 19.86 on behalf of the public.⁴

II. ISSUES ADDRESSED BY AMICUS

The Attorney General files this brief with respect to Certified Questions 1 and 3. We do not address Question 2 because we believe it is too broad to be answered generically.

¹ See *Young Americans for Freedom v. Gorton*, 91 Wn.2d 204, 212, 588 P.2d 195 (1978).

² RCW 61.24.172(2).

³ See, e.g., *State of Washington v. ReconTrust*, W.D.Wash. No.: 2:11-cv-1460-JLR.

⁴ RCW 19.86.080.

(1) MERS is not 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.

(3) Homeowners may possess a cause of action under Washington's Consumer Protection Act against MERS when MERS acts as an unlawful beneficiary under the terms of Washington's Deed of Trust Act.

A. Question 1:

The federal court asks: (1) Is 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?

This question is immediately answered by the plain language of the Deed of Trust Act – a "beneficiary" is defined as the "holder" of the promissory note. RCW 61.24.005(2). Thus, if MERS never "held the promissory note" then it is not a lawful beneficiary. The DTA unambiguously defines "beneficiary" as: "Beneficiary means the holder of the instrument or document evidencing the obligations secured by the deed of trust." *Id.* The "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.’”⁵

The State agrees with Plaintiffs Bain and Selkowitz that MERS violated the statutory language of the Deed of Trust Act, the law of Negotiable Instruments, and the common law principles of real property, which all provide that the legal status of the note is determinative of the power to enforce the note. MERS maintains that there is no statutory or public policy reason for preventing it from expanding the definition of beneficiary to a party that holds only the deed of trust. MERS *Selkowitz* Response Br. at 12. The State files this *Amicus* Petition to provide the Court with both statutory and public policy reasons why the MERS system conceals the true owner of the promissory note and why this is damaging to a free, fair and transparent mortgage marketplace.

In *Mortgage Electronic Registration Systems, Inc. v. Nebraska Dept. of Banking and Finance*, 704 N.W.2d 784, 787 (Neb. 2005), MERS and the Court describe its role in the marketplace:

MERS argues that ... it only holds legal title to members' mortgages in a nominee capacity and is contractually prohibited from exercising any rights with respect to the mortgages (i.e., foreclosure) without the authorization of the members. Further, MERS argues that it does not own the promissory notes secured by the mortgages and has no right to payments made on the notes. MERS explains that it

⁵ Respondent MERS advocates for this absurd interpretation in pages 13 – 15 of its Response in *Selkowitz*.

merely “immobilizes the mortgage lien while transfers of the promissory notes and servicing rights continue to occur.”

Id. (emphasis added). Therefore, the very purpose of MERS is to hold onto the security interest while ownership of the loan passes from party to party.⁶ This role is contrary to Washington’s fundamental principle of real property finance law that “the note is considered the obligation, and the mortgage but an incident of the note which passes with it.” *Price v. Northern Bond & Mortgage Co.*, 161 Wash. 690, 695, 297 P. 786 (1931).

It is not just decades of case law that rely on the note and the security instrument transferring together. The Deed of Trust Act (DTA) assumes it throughout its provisions. The DTA states that “the trustee shall have proof that the beneficiary is the owner of any promissory note” prior to foreclosing. RCW 61.24.030(7). The DTA also requires the trustee to disclose in the Notice of Default the name and address of the owner of the promissory note. RCW 61.24.030(8)(l).

MERS maintains that because the definition section of the DTA contains the phrase “[t]he definitions in this section apply throughout this chapter unless the context clearly requires otherwise,” MERS may expand the definition of “beneficiary” to cover parties that do not hold the note but instead hold the deed of trust. MERS *Selkowitz Resp.* at 12. The

⁶ *See also, Jackson v. MERS*, 770 N.W.2d 487 (Minn. 2009) (“By acting as the nominal mortgagee of record for its members, MERS has essentially separated the promissory note and the security instrument, allowing the debt to be transferred without an assignment of the security instrument.” *Id.* at 494.)

definition of beneficiary is not ambiguous, and the phrase “unless the context clearly requires otherwise” only means that a definition will not be applied to yield an absurd result. The phrase is not intended to provide an opportunity to disregard the plain language of the DTA.⁷

MERS contends that it may circumvent the DTA requirements by creating a deed of trust that uses a third party “nominee” as the beneficiary.⁸ However, in plenary statutes such as the DTA, where the legislature has expressed Washington’s public policy on how foreclosures shall occur, parties may not vary the terms by contract.

An analogous situation arose regarding Washington’s former Arbitration Act.⁹ In *Godfrey v. Hartford Cas. Ins. Co.*, 142 Wn.2d 885, 16 P.3d 617 (2001), the Court examined the Act and determined that the defendants would not be allowed to contractually alter its terms. The Court held that because the Act was an expression of public policy by the Legislature it must be applied as a whole and without “common law” alternatives to its provisions.¹⁰ Not only would this violate the legislature’s stated public policy, but also because the parties would be invoking the powers of the state to enforce the arbitration decision, they

⁷ *State v. Morley*, 134 Wn.2d 588, 598, 952 P.2d 167 (1998) (this phrase means the definition section “should not be blindly applied.”)

⁸ The term nominee is not found in the DTA, negotiable instruments law or Washington real property law generally.

⁹ RCW 7.04.

¹⁰ *Godfrey*, 142 Wn.2d at 896.

must provide the rights and responsibilities contained in the statutory procedure to arrive at that decision.¹¹

The DTA is also a comprehensive expression of public policy.¹² Like arbitration decisions, a nonjudicial foreclosure is likely to require state powers to enforce the result through an eviction action. The Legislature has set forth in enormous detail how nonjudicial foreclosures may proceed and parties should not be allowed to vary these procedures by contract.

1. Severing the Note from the Deed of Trust Creates Havoc in the Marketplace.

The practice of severing the note from the security interest has a history of causing havoc in Washington's mortgage marketplace. An early example of the problem was a scam that has come to be known as "double selling."¹³ A lender makes a loan secured by a home and sells the loan to an investor. The lender then sells the same loan again to a different investor, or more loans secured by the same mortgage.¹⁴

¹¹ *Id* at 897, ("[T]hey brought into play the jurisdiction and power of the courts as set forth in the [Arbitration Act]. By so doing, they have activated the entire chapter and the policy embodied therein, not just the parts that are useful to them.") *See also* *Scott v. Cingular Wireless*, 160 Wn.2d 843, 851, 161 P.3d 1000 (2007) (A contractual agreement "that violates public policy may be void and unenforceable.")

¹² *Kennebec, Inc. v. Bank of the West*, 88 Wn.2d 718, 725, 565 P.2d 812 (1977) ("In 1965 the legislature, in enacting what is codified as RCW 61.24, again changed the public policy of this state." *Id.*) (citation omitted).

¹³ *See, Fraud Scheme Characteristic, Fannie Mae*, <https://www.efanniemae.com/utility/legal/pdf/fraudschchar.pdf> (last visited Feb. 14, 2012).

¹⁴ *Christenson v. Raggio*, 47 Wash. 468, 92 P. 348 (1907); *Beckman v. Ward*, 174 Wash. 326, 24 P.2d 1091 (1933); *Fidelity & Deposit Co. of Md. v. TICOR Title*

Alternatively, a lender will only sell the note to an investor once, but conceal the transfer and direct the borrower to keep paying him. The lender wrongfully keeps the money, leaving an investor who believes she has a defaulted loan on which she can foreclose, and a borrower who believes he has a satisfied loan on which the security interest should be released.¹⁵

These schemes result in two or more innocent parties that have fulfilled their contractual duties but are denied their contractual benefits. The Court is left to pick a winner among the parties and must resort to using procedural failures that would otherwise be non-actionable. As an example, the Court has said that borrowers who pay off their loans without knowing the owner of the loan should take the risk of loss if another asserts the same debt.¹⁶ The Court has also said that a party that has recorded a mortgage but not received a note has priority over an earlier assignee of the note who did not record the mortgage.¹⁷

Insur. Co., 88 Wn. App. 64, 943 P.2d 710 (1997); see also *Zolfaghar v. Sheikholeslami*, 943 F.2d 451 (4th Cir. 1991) (discussing national lender that sold the same mortgages more than once to several different investors); *Impao v. Credit Suisse Boston LLC*, No.: 06-56024, 2008 Westlaw 731050 (9th Cir. 2008) (same).

¹⁵ *Erickson v. Kendall*, 112 Wash. 26, 191 P. 842 (1920); *Dunn v. Neu*, 179 Wash. 351, 37 P.2d. 883 (1934); *Rodgers v. Seattle-First Nat'l Bank*, 40 Wn. App. 127, 697 P.2d 1009 (1985); *Price v. Northern Bond & Mortgage Co.*, 161 Wash. 690, 297 P. 786 (1931).

¹⁶ *Rodgers*, 40 Wn. App. at 132, (It is "long-settled law that one paying a note, either negotiable or nonnegotiable, should demand production of it upon payment or risk having to pay again to the assignee.") (citing *In re Columbia Pac. Mortgage, Inc.*, 22 Bankr. 753 (W.D. Wash. 1982); RCW 62A.3-602(a)(ii) (a loan is only considered paid to the extent that the payment is "to a person entitled to enforce the instrument."))

¹⁷ *Price*, 161 Wash. 690.

Under MERS and the securitization process, what was once a sporadic problem has become a systemic and unmanageable one. In the present mortgage market, the note, or at least ownership of the loan,¹⁸ is transferred from the originating lender to an entity called a sponsor that buys hundreds of loans to form a securitization trust. The sponsor then transfers the loan to a depositor who then transfers the loan to a securitization trust where it sits as an asset for investment products.¹⁹ Investors can purchase certificates in the trust that entitle them to a stream of payments based on the borrowers' payments on their loans.²⁰ Sometimes even this is not the end of the loan's journey. If a borrower defaults in the first few months, the trust can often make the sponsor buy it back, and sometimes the sponsor can make the originator buy it back. The trust can also force a buyback of loans later if the sponsor or originator

¹⁸ There is evidence that some lenders never transferred promissory notes at all. *E.g. In re Kemp*, 440 B.R. 624, 628 (Bankr. D. NJ. 2010) (bank officer testifies that it was customary for originating bank to maintain possession of the original note when the loan was sold.); Dale Whitman, *How Negotiability Has Fouled Up the Secondary Mortgage Market, and What To Do About It*, 37 *Pepp. L. Rev.* 738, 757-758 (2010).

¹⁹ See Kurt Eggert, *Held Up in Due Course: Predatory Lending, Securitization, and the Holder in Due Course Doctrine*, 35 *Creighton L. Rev.* 503, 538 (2002); *Mortgage-Backed Securities*, U.S. Securities and Exchange Commission, <http://www.sec.gov/answers/mortgagesecurities.htm> (last visited Feb. 14, 2012); *Washington Dept. of Rev. v. Security Pac. Bank of Wash., N.A.*, 109 *Wn. App.* 795, 38 P.3d 354 (2002).

²⁰ See *Public Employees' Retirement System of Mississippi v. Merrill Lynch & Co., Inc.*, 277 F.R.D. 97, 102, n. 3-7 (S.D.N.Y. 2011); Adam Ashcraft & Til Schuermann, *Understanding the Securitization of Subprime Mortgage Credit*, Federal Reserve Bank of New York, 5 (March 2008), http://www.newyorkfed.org/research/staff_reports/sr318.pdf.

misrepresented the quality of the loan.²¹ These “putback” cases now involve disputed ownership of loans worth billions of dollars.²² Some loans are purchased from lenders that have liquidated, further complicating the status of the holder.²³

With this system in place some parties cannot even locate the note or trace the path of its ownership. For example, in *Thepvongsa v. Regional Trustee Service Corp.*, No. 10-cv-1045, 2011 WL 307364, (W.D. Wash. Jan. 26, 2011) (Unpublished Opinion) a *pro se* plaintiff attempted to unravel what happened to his two loans after they were originated. Although the Court had the MERS deed of trust before it and a subsequent assignment of the deed of trust, similar to *Bain*, the Court could not determine whether the defendants had the authority to foreclose, stating:

In the absence of a complete record of all relevant documents, including the promissory notes, and all purported transfers of the notes ... the Court cannot

²¹ See, *Bank of New York Mellon v. Walnut Place LLC*, -- F.Supp. 2d --, 2011 WL 4953907, 1 (S.D.N.Y. 2011); *Syncora Guarantee Inc. v. Countrywide Home Loans, Inc.* 935 N.Y.S. 2d 858, 860 (N.Y. Sup. 2012).

²² E.g. *Bank of New York Mellon v. Walnut Place, LLC*, S.D.N.Y No.: 11-cv-5988, which involves 530 different securitization trusts. See, Alison Frankel, *Banks beware: Time is ripe for MBS breach-of-contract suits*, Reuters Edition U.S. Blog, (Sept. 19, 2011), <http://blogs.reuters.com/alison-frankel/2011/09/19/banks-beware-time-is-ripe-for-mbs-breach-of-contract-suits/>. (Identifying suits regarding trusts with face values of over \$100 billion in loans); *Former Colonial Bank Mortgage Lending Supervisor Pleads Guilty to Fraud Scheme*, U.S. Department of Justice, (Mar. 16, 2011), <http://www.justice.gov/opa/pr/2011/March/11-crm-339.html> (describing how mortgage lender double sold loans and sold non-existent loans to investors.)

²³ *Jackson v. MERS*, 770 N.W.2d 487, 492 (Minn. 2009); Paul Kiel, *Internal Doc Reveals GMAC Filed False Document in Bid to Foreclose*, Pro Publica, (July 27, 2011), <http://www.propublica.org/article/gmac-mortgage-whistleblower-foreclosure/single>

determine who held the promissory note and under what authority the default and sale was to occur. Additionally, pursuant to the DTA, the beneficiary or trustee was required to provide ... the name and address of the owner of any promissory notes or other obligations secured by the deed of trust. RCW 61.24.030(8)(1).

*Id.*²⁴ Because they are stripped of the deed of trust and any public records, lost promissory notes may be commonplace. This is alarming because the overwhelming majority of foreclosures never face judicial scrutiny to sort through ownership of the note. The party demanding foreclosure sale may or may not be the owner, and the foreclosure proceeds may or may not be sent to satisfy the debt.²⁵ The homeowner has no way to be sure other than filing suit and engaging in discovery, which for many foreclosed-upon homeowners would be financially impossible. Given MERS' practice of "immobilizing the mortgage lien while transfers of the promissory notes ... continue to occur",²⁶ it is practically impossible for a

²⁴See also, *Bradford v. HSBC Mortg. Corp.*, 799 F. Supp. 2d 625, 628 (E.D. Va. 2011) (homeowner faced with three defendants each claiming the other is the holder of the promissory note and MERS will not identify noteholder); *Jackson v. MERS*, 770 N.W.2d 487 (Minn. 2009) ("A side effect of the MERS system is that a transfer of [the] loan between two MERS members is unknown to those outside the MERS system [E]ach named plaintiff in this case has been unable to obtain information about the current owner of his or her indebtedness several of the original lenders for the named plaintiffs have gone out of business." *Id.* at 491); *In re Foreclosure Cases*, 521 F. Supp. 2d 650, 654 (N.D. Ohio 2007). *HSBC Bank v. Antrobus*, 872 N.Y.S.2d 691 (N.Y. Sup. 2008); *Wells Fargo Bank v. Farmer*, 867 N.Y.S.2d 21 (N.Y. Sup. 2008).

²⁵See, *Fidelity & Deposit Co. of Md. v. TICOR Title Insur. Co.*, 88 Wn. App 64; *Ruscalleda v. HSBC Bank USA*, 43 So.3d 947, 949 (Fla. Dist. Ct. App. 2010) (two banks foreclosing on the same note).

²⁶*Mortgage Electronic Registration Systems, Inc. v. Nebraska Dept. of Banking and Finance*, 704 N.W.2d 784, 787 (Neb. 2005).

borrower to comply with the "long-settled law" that a borrower must be certain he is paying the note holder or risk having to pay it twice.²⁷

MERS' concealment of loan transfers also deprives homeowners of other rights. The federal Truth in Lending Act allows homeowners to rescind their loan transaction for certain violations of that Act.²⁸ But the homeowner can not rescind against an agent of a loan holder.²⁹ Further, most other suits seeking to rescind require the presence of the actual owner of the debt.³⁰

Borrowers must also know what happened to their promissory note to determine whether the owner is a holder in due course.³¹ Those who have contract claims or recoupment claims stemming from the original loan transaction cannot assert those claims against a holder in due course.³² However, depending on how and when the note was transferred, the current assignee may not have this status. For example, if the loan is

²⁷ *Rodgers*, 40 Wn. App. 127.

²⁸ 15 U.S.C. § 1635(f).

²⁹ *Miguel v. Country Funding Corp.*, 309 F.3d 1161, 1162-65 (9th Cir. 2002) ("While the Bank's servicing agent ... received notice of cancellation within the relevant three-year period, no authority supports the proposition that notice to [the loan servicer] should suffice for notice to the Bank.") *Id.* at 1165; *Harris v. OSI Financial Services, Inc.*, 595 F. Supp. 2d 885, 897 (N.D.Ill. 2009) (Rescission is void because, while the original note owner received the rescission notice, the assignee did not.)

³⁰ *See Lomayaktewa v. Hathaway*, 520 F.2d 1324, 1325 (9th Cir. 1975) ("No procedural principle is more deeply imbedded in the common law than that, in an action to set aside a ... contract, all parties who may be affected by the determination of the action are indispensable.")

³¹ RCW 62A.3-302. Washington mortgage loans may use a negotiable instrument or a non-negotiable instrument as the writing evidencing the debt. *See Wash. Practice, Real Estate* § 18.18 (2d ed.)

³² RCW 62A.3-305.

transferred after the borrower has defaulted, the current transferee would not be a holder in due course.³³ MERS' practice is to not transfer the loan until the foreclosure process is started so note holder status will always be a potential issue.

Once a defaulted borrower determines who the real note holder is the borrower must use the DTA's injunctive process to assert his or her claims.³⁴ The DTA contains the only legal process borrowers may use to stop a foreclosure, and if their claims are not asserted before sale their claims are forever waived, and title to the property will not be restored.³⁵ Under this process homeowners only have from five days to six months to learn the holder of their note and assert their claims.³⁶

Stated succinctly, the use of MERS as a placeholder beneficiary while the loan flies from owner to owner has brought chaos to the mortgage marketplace and stopped the efficient processing of foreclosures. This Court would bring certainty to the marketplace by interpreting the DTA in a manner that insures that the path of transfer of promissory notes is transparent, and that notes are enforced by their holder, not the assignee of a nonholder.

³³ RCW 62A.3-302(a)(2).

³⁴ RCW 61.24.130.

³⁵ *Brown v. Household Realty Corp.*, 146 Wn. App. 157, 163, 189 P.3d 233 (2008) (stating that the DTA is the only means to stop a foreclosure), (citing, *Cox v. Helenius*, 103 Wn.2d 383, 388, 693 P.2d 683 (1985); *Plein v. Lackey*, 149 Wn.2d 214, 67 P.3d 1061 (2003).

³⁶ RCW 61.24.130(2).

B. Question 3. By Acting As an Unlawful Beneficiary, Certain Acts and Practices by MERS Violate the Consumer Protection Act.

The Deed of Trust Act (DTA) creates two statutory *per se* violations of the CPA: collusion among bidders at a foreclosure sale and bad faith mediation practices.³⁷ However, the existence of statutory *per se* violations does not grant immunity to the parties from the broader CPA prohibitions against other unfair or deceptive practices. These are analyzed like any other business practice, under the five elements of *Hangman Ridge Training Stables v. Safeco*, 105 Wn.2d 778, 719 P.2d 531 (1986).³⁸

1. MERS Acts Are Unfair or Deceptive

The CPA does not define “unfair” or “deceptive.” Instead, courts have developed standards on a case-by-case basis.³⁹

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. Even accurate information may be deceptive if there is a representation, omission or practice

³⁷ RCW 61.24.135.

³⁸ *Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 742-43, 733 P.2d 208 (1987) (“While we have eschewed the use of judicially created *per se* violations ... we nevertheless recognize that certain acts, by their very nature, must fulfill certain prongs of the *Hangman Ridge* test.”); *Stephens v. Omni Ins. Co.*, 138 Wn. App. 151, 177, 159 P.3d 10 (2007) (“This is not a case where the public interest element is satisfied *per se* by a ... specific legislative declaration of public interest impact. Whether the public has an interest is therefore an issue to be determined by the trier of fact.”); see *Pennsylvania, Dep’t of Banking v. NCAS of Delaware, LLC*, 995 A.2d 422, 442 (Pa. Comm. Ct. 2010) (acts not specifically incorporated by *per se* language can still be a CPA violation).

³⁹ *Ivan’s Tire Service v. Goodyear Tire*, 10 Wn. App. 110, 517 P. 2d 229 (1973).

that is likely to mislead. Misrepresentation of the material terms of a transaction or the failure to disclose material terms violates the CPA. Whether particular actions are deceptive is a question of law that we review de novo.

State v. Kaiser, 161 Wn. App. 705, 719, 254 P.3d 850 (2011) (citations omitted).

In its deeds of trust, MERS states that it is “the beneficiary under this Security Instrument” (Bain Dkt. 147, 3), when it knows or should know that under Washington law it must hold the note to be the beneficiary. MERS states in its Assignment of Deed of Trust that:

FOR VALUE RECEIVED, the undersigned, Mortgage Electronic Registration Systems, Inc. [MERS] 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.

(Dkt. 1 Ex. A to Huelsman Decl.) What MERS is claiming in this document is that MERS is the nominee of its own successors and assigns, not that it is the nominee of the lender or the nominee of successors to the lender. MERS is claiming that it has its own authority to assign the deed of trust, without reference to a principal. This is contrary to MERS’ assertion that it is an agent acting for the actual holder of the loan.⁴⁰ It also conceals the identity of whichever loan holder MERS purports to be acting for when assigning the deed of trust. This provides MERS with

⁴⁰ MERS Response in *Selkowitz* at 29; *Nebraska Dept. of Banking and Finance*, 704 N.W.2d at 787 (MERS is prohibited from exercising mortgage powers without the authorization of a principal).

considerable flexibility to find a party to foreclose but is a misrepresentation of its status and authority. This odd language is not an isolated error on MERS' part. It uses the same language in its Appointment of Successor Trustee where it states that: "[MERS] as Nominee For Its Successors And Assigns is the beneficiary under that certain deed of trust dated 3/9/2007." (Dkt. 1 Ex. B to Huelsman Decl.) Once again, MERS attempts to characterize itself not just as a nominee of the lender but as the beneficiary with its own authority to appoint new beneficiaries, without the demand of a principal, and then act as that new beneficiary's nominee.

The Assignment of Deed of Trust contains another misrepresentation. MERS states that it is also assigning "the Note or Notes ... [and] the money due." (Dkt. 1 Ex. A to Huelsman Decl.) This contradicts MERS' steadfast position that it never holds or owns the note, never collects money due, and has no interest in the debt.⁴¹ Thus, MERS is misrepresenting its authority to transfer the note as well as the deed of trust.

It is a classic CPA violation for a business to make statements that confuse the public as to their identity, affiliation, authority or status. In

⁴¹ MERS must take this position to avoid being licensed and regulated as a mortgage lender or servicer, RCW 31.04.015(7), (26) and 31.04.035; *see also, Nebraska Dept. of Banking and Finance*, 704 N.W.2d at 787 (MERS has no right to the Note or its payments).

particular, it is deceptive to claim some authority to take a legal act when one does not have that authority.⁴² It is also deceptive to conceal the true party to a transaction,⁴³ and, it is deceptive to conceal material information that a business is bound to disclose.⁴⁴ The DTA clearly requires that MERS disclose the actual note holder in the Notice of Default, RCW 61.24.030(8)(1). MERS contends that it does not conceal the identity of the true note holder. MERS *Selkowitz* Response, at n. 118. However, its explanation is not convincing. MERS does not state straightforwardly that it discloses the identity of the note holder in the forms required by the Deed of Trust Act. Instead, it says it runs an Internet website that identifies “100% of loan servicers”, and that “97% of the...MERS System members disclose their investor identity.” MERS does not claim, and cannot claim, that a servicer is the same as a note

⁴² *Stephens*, 138 Wn. App. at 177 (deceptive to mischaracterize the legal status of a debt); *Experience Hendrix, L.L.C. v. Hendrix Licensing.com, LTD*, 766 F. Supp. 2d 1122, 1147 (W.D. Wash. 2011) (deceptive to falsely claim licensing authority); *Dwyer v. J.I. Kislak Mortgage*, 103 Wn. App. 542, 547, 13 P.3d 240 (2000) (deceptive to mischaracterize a fee as legally required); *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 592, 675 P.2d 193 (1983) (deceptive to falsely claim authority to practice law); *Evergreen Collectors v. Holt*, 60 Wn. App. 151, 803 P.2d 10 (1991) (deceptive to falsely claim authority to collect attorney fees); see also, *Texas v. American Blastfax, Inc.*, 164 F. Supp. 2d 892, 894 (W.D. Tex. 2001) (deceptive for business to claim it could lawfully fax ads when it could not).

⁴³ 16 C.F.R. § 321.3(o) (2011) (FTC Rule makes it deceptive to falsely claim to be current mortgage lender); *Floersheim v. Federal Trade Comm'n*, 411 F.2d 874, 876-77 (9th Cir. 1969) (deceptive to conceal that act is by debt collector not government or third party); *Kinkopf v. Triborough Bridge & Tunnel Authority*, 1 Misc.3d 417, 432, 764 N.Y.S.2d 549, 560 (N.Y. City Civ. Ct. 2003) (deceptive to conceal true party to contract); *Commonwealth by Packel v. Tolleson*, 14 Pa. Cmwlth. 72, 125, 321 A.2d 664, 694 (Pa. Cmwlth. 1974) (deceptive to falsely state that one is the owner of a company).

⁴⁴ *Testo v. Russ Dunmire Oldsmobile, Inc.*, 16 Wn. App. 39, 51, 554 P.2d 349 (1976).

holder. Loan servicers are rarely the note holder.⁴⁵ It is unclear what MERS means when it says that 97% of its members disclose their investor identity or whether this is the same as saying 97% of its loans disclose the current owner of the note. Whatever is meant by these statements, it is not equivalent to having a public record of who owns the loan and how they received that interest, as was available before the advent of MERS. MERS' failure to accurately reveal the note holders and the chain of transfers remains one its most important legal failings and is the subject of several state Attorney General actions.⁴⁶

2. MERS Acts in Trade or Commerce.

The CPA broadly defines "trade" and "commerce" to include "the sale of assets or services, and any commerce directly or indirectly affecting the people of the State of Washington." RCW 19.86.010(2). Trade or commerce includes acts after the sale of a good or service and does not require a consumer relationship between the parties.⁴⁷ MERS claims to hold interests in Washington real property, it takes acts in furtherance of collecting on mortgage debts including filing documents in

⁴⁵ See Diane E. Thompson, *Foreclosing Modifications: How Servicer Incentives Discourage Loan Modifications*, 86 Wash. L. Rev. 755 (2011).

⁴⁶ *State of Delaware v. MERS*, Del. Chancery Ct. No.: 6987-CS (alleging that MERS unlawfully obscures true owner of note); *State of New York v. MERS, et al.*, Supreme Ct of NY (alleging the MERS system is riddled with inaccuracies and prevents homeowners and the public from tracking ownership); *Commonwealth of Mass v. Bank of America, MERSCORP, Inc. et al.* Super. Ct. Suffolk Cty No.: 11-4363 (alleging MERS fails to identify the holder of the mortgage when foreclosing).

⁴⁷ *Salois v. Mutual of Omaha Ins. Co.*, 90 Wn.2d 355, 359-60, 581 P.2d 1351 (1978); *Escalante v Sentry Inc. Co.*, 49 Wn. App. 375, 387, 743 P.2d 832 (1987).

county land title records, and it charges for its services. Therefore, it is engaging in trade of commerce within the meaning of RCW 19.86.010(2).

3. MERS Acts Impact the Public Interest.

A recent amendment to the CPA allows a claimant to establish the public interest element if the act injured other persons; had the capacity to injure other persons, or has the capacity to injure other persons RCW 19.86.093.⁴⁸ In this matter, the certified questions assume that MERS is acting uniformly in acting as beneficiary without holding the note and that this is MERS' generalized business practice. It immobilizes the deed of trust to allow successive transfers of the promissory note. It appears as the beneficiary on deeds of trust without holding the note, and it uses form assignments in its Assignments of Deeds of Trust and Appointments of Successor Trustees. These practices are uniform and repeated and thus have the capacity to injure others.⁴⁹

4. MERS Acts Injure Consumers.

The test under *Hangman Ridge* is not whether homeowners' or others have been damaged, it is whether they have been injured.⁵⁰ Injury under the CPA does not have to involve direct loss of money. *Id.* It is

⁴⁸ Also, *Hangman Ridge*, 105 Wn.2d at 789-90.

⁴⁹ *Stephens*, 138 Wn. App. at 178.

⁵⁰ *Tampourlos*, 107 Wn.2d at 740, ("RCW 19.86.090 ... uses the term "injured" rather than suffering "damages." This distinction makes it clear that no monetary damages need be proven, and that nonquantifiable injuries, such as loss of goodwill would suffice for this element of the *Hangman Ridge* test. This is bolstered by the fact that the act allows for injunctive relief, clearly implying that injury without monetary damages will suffice.")

enough that the act has deprived a person of some property.⁵¹ Temporary loss of title to real property can be sufficient.⁵² Injury may be presumed when the consumer has to take time or expend money to remediate his or her status due to a CPA violation.⁵³

5. MERS' Business Practices Cause Consumer Injury.

There are many scenarios where MERS causes consumer injury through its misrepresentations regarding its authority to foreclose and its concealment of the true holder of the note. If homeowners have to make calls, visit offices, send letters, or consult with an attorney to determine who owns their notes because MERS does not disclose this critical information, then MERS has caused that injury.⁵⁴ If homeowners miss the deadline to file for a DTA injunction because they can not locate the note holder and therefore lose their claims, they have been injured. If consumers pay their loan to the mortgagee identified by MERS through its assignment, but the debt is actually held by another, they can be injured if the note goes unsatisfied. The use of MERS causes consumer injury where it makes it impossible to find the note or where MERS has allowed

⁵¹ *Sorrel v. Eagle Healthcare, Inc.*, 110 Wn. App. 290, 38 P. 3d 1024 (2002) ("Sufficient injury to satisfy the fourth and fifth elements of a Consumer Protection Act claim is established when a plaintiff is deprived of the use of his property as a result of an unfair or deceptive act or practice.")

⁵² *Mason v. Mortgage America, Inc.*, 114 Wn.2d 842, 854, 792 P.2d 142 (1990).

⁵³ *Panag v. Farmers Ins. Co. of Washington*, 166 Wn.2d 27, 204 P.3d 885 (2009).

⁵⁴ *Sign-O-Lite Signs, Inc. v. DeLaurenti Florests, Inc.*, 64 Wn. App. 553, 825 P.2d 714 (1992); *Panag*, 166 Wn.2d 27.

the note to be lost or destroyed because consumers will not know the party entitled to enforce it and how it obtained its enforcement power. Because the Note is the essential document to the transaction, any deprivation of its use can be injurious, not just to homeowners but to subsequent title holders and loan investors, and MERS causes these injuries through its actions.

III. CONCLUSION

This Court should answer certified question 1 by finding that MERS is not a lawful beneficiary under RCW 61.24.005(2). The Court should answer certified question 3 by finding that homeowners may possess a cause of action under Washington's Consumer Protection Act, RCW 19.86.020.

RESPECTFULLY SUBMITTED this 5th day of March, 2012.

ROBERT M. MCKENNA
Attorney General


JAMES T. SUGARMAN
Assistant Attorney General
WSBA #39107
Attorneys for Amicus Curiae
Attorney General of Washington

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Feb 14, 2012, 3:37 pm
BY RONALD R. CARPENTER
CLERK

NO. 10-5523-JCC

RECEIVED BY E-MAIL

SUPREME COURT
STATE OF WASHINGTON

KRISTIN BAIN,

Petitioner,

v.

METROPOLITAN MORTGAGE
GROUP INC. et al.,

Respondents.

DECLARATION OF
SERVICE

LESLI ASHLEY declares as follows:

I certify that on February 14, 2012, I cause to be filed with the Supreme Court, via electronic filing, the MOTION FOR PERMISSION TO AMICUS CURIAE BRIEF and BRIEF OF AMICUS CURIAE, and caused to be delivered, via US Mail and/or electronic service, true and accurate copies to:

Melissa Huelsman
Law Office of Melissa Huelsman
705 Second Avenue, Suite 1050
Seattle, WA 98104-1741
MHuelsman@predatorylendinglaw.com
com

Richard Llewelyn Jones
Richard Llewelyn Jones, P.S.
2050 112th Avenue NE, Suite 230
Bellevue, WA 98004
rlj@mjlpc.com

Denise Hamel
Socius Law Group
601 Union Street, Suite 4950
Seattle, WA 98101
dhamel@sociuslaw.com

Richard Spoonemore
Sirianni, Youtz, Meler &
Spoonemore
999 Third Avenue, Suite 3650
Seattle, WA 98104
rspoonemore@sylaw.com

ORIGINAL

Joel Wright
William Louis Cameron Lee Smart,
P.S.
701 Pike Street, Suite 1800
Seattle, WA 98104
jw@leesmart.com

Ann T. Marshall
Kennard M. Goodman
Bishop White Marshall & Weibel
PS
720 Olive Way, Suite 1301
Seattle, WA 98101-1834
amarshall@bwmlegal.com
kgoodman@bwmlegal.com

Heidi E. Buck
Routh Crabtree Olsen, P.S.
3535 Factoria Blvd SE, Suite 200
Bellevue, WA 98006
Hbuck@rcolegal.com

Mary Stearns
McCarthy & Holthus LLP
19735 - 10th Avenue NE, Suite
N200
Poulsbo, WA 98370
Marystearns@q.com

Robert Norman Jr.
Charles Thomas Meyer
Houser & Allison
9970 Research Drive
Irving, CA 92618
bnorman@houser-law.com
cmeyer@houser-law.com

Douglas Davies
Davies Law Group
701 Fifth Avenue, Suite 4200
Seattle, WA 98104
doug@davieslawgroup.com

Russ Wuehler
DLA Piper LLP (US)
701 5th Ave Ste 7000
Seattle, WA 98104-7044
russell.wuehler@dlapiper.com

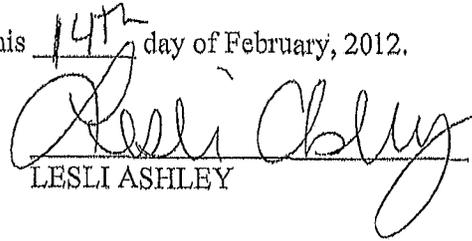
///

///

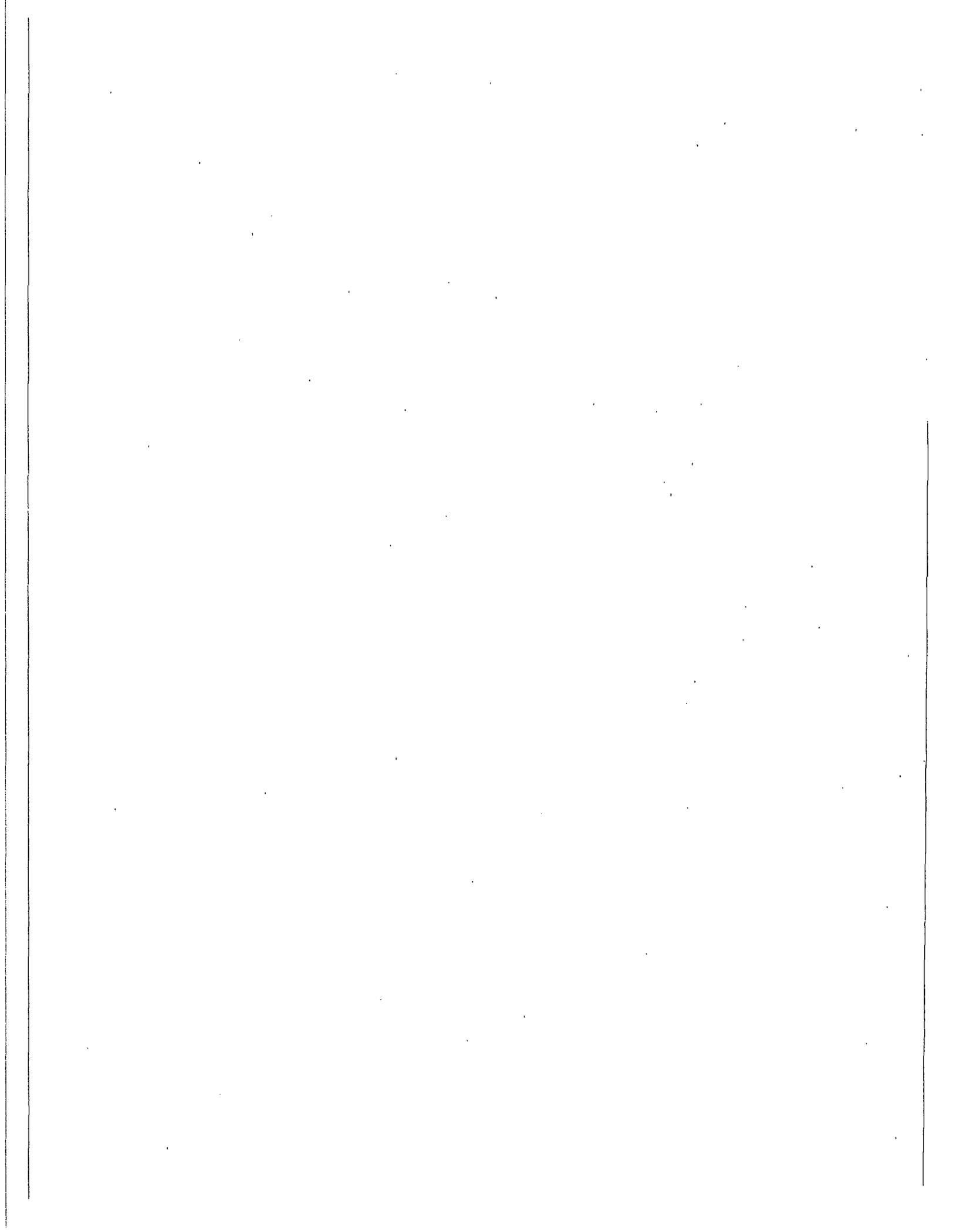
///

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

Executed in Seattle, WA, this 14th day of February, 2012.



LESLI ASHLEY



OFFICE RECEPTIONIST, CLERK

To: Ashley, Lesli (ATG)
Cc: Sugarman, James (ATG)
Subject: RE: Baln v. Metropolitan Mortgage Group Inc. et al., Cause No. 10-5523-JCC

Rec. 2-14-12

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Ashley, Lesli (ATG) [<mailto:LesliC@ATG.WA.GOV>]
Sent: Tuesday, February 14, 2012 3:36 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Sugarman, James (ATG)
Subject: Baln v. Metropolitan Mortgage Group Inc. et al., Cause No. 10-5523-JCC

On behalf of James Sugarman:

Case Name: Bain v. Metropolitan Mortgage Group Inc. et al.

Case Number: 10-5523-JCC

Name, Phone number, Bar number and email address of person filing the document: James T. Sugarman, 206-389-2514, WSBA #39107, James.Sugarman@atg.wa.gov

Attached please find a Motion to File Amicus Curiae and Brief of Amicus Curiae. Thank you.

<<AmicusBrief.2012-02-14.pdf>> <<AmicusMot.2012-02-14.pdf>> <<AmicusDecService.2012-02-14.pdf>>

Lesli Ashley

Legal Assistant 3

Consumer Protection Division

Office of Attorney General

(206) 389-2104 - Seattle

(253) 597-3882 - Tacoma

Lesli.Ashley@atg.wa.gov

Please print only when necessary

This communication may contain privileged or other confidential information. If you know or believe that you have received it in error, please advise the sender by reply e-mail and immediately delete the message and any attachments without copying or disclosing the contents.