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Court of Appeals No. 70592-0-1

**IN THE SUPREME COURT
OF THE STATE OF WASHINGTON**

ROCIO TRUJILLO,

Appellant,

v.

NORTHWEST TRUSTEE SERVICES, INC.

Respondent,

and

WELLS FARGO BANK, N.A.

Defendant.

**ANSWERING BRIEF OF RESPONDENT
NORTHWEST TRUSTEE SERVICES, INC.
TO THE *AMICUS CURIAE* BRIEF OF
THE WASHINGTON STATE ATTORNEY GENERAL**

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I. INTRODUCTION

Respondent Northwest Trustee Services, Inc. (“NWTS”) hereby responds as follows below to the Amicus Curiae Brief of the Washington State Attorney General (“WSAG”).

The WSAG conspicuously downplays its stance in *Brown v. Dep't of Commerce*, where the WSAG urges adoption of the Court of Appeals' holding on the principal issue of “ownership” Ms. Trujillo raised below. See Case No. 90652-1 (Sup. Ct.), Corrected Response Brief at 20-25.

Instead of supporting the Court of Appeals' conclusion, the WSAG offers generalized, unsupported assumptions concerning how trustees fulfill their obligations under the Deed of Trust Act (“DTA”), in addition to arguments based on a misapprehension of established precedent.

It is fallacious reasoning for the WSAG to assume that the beneficiary declaration is the only document examined during a foreclosure process, and that trustees completely defer to its contents before recording a sale notice. This mischaracterization pervades the WSAG's amicus brief and leaves no room for the reality that trustees typically possess substantial information regarding the beneficiary's identity from multiple sources.

When taken together, such information precludes the need for engaging in a self-directed “investigation” absent either concerns raised

during the process or errors apparent from a review of loan documents.

The circumstances of Ms. Trujillo's case do not warrant subjecting NWTS to liability under the Consumer Protection Act ("CPA"). This Court should reject the WSAG's reasoning, and instead affirm the published decision below.

II. RESPONSE ARGUMENT

A. Ms. Trujillo Did Not Allege "Ambiguity" in the Beneficiary Declaration or Assign Error to That Issue.

The WSAG repeatedly denounces "the trustee's improper reliance on an ambiguous beneficiary declaration," yet overlooks a key fact: Ms. Trujillo's Complaint contains no allegation concerning an "ambiguity" in the beneficiary declaration. CP 82-94; *cf.* Amicus Brief at 15-16. Ms. Trujillo pled that, because Wells Fargo was not the loan's "owner" -- which she mistakenly equates with investor -- NWTS "violated its duty of good faith by accepting the declaration...." *Id.*, ¶ 30.

Ms. Trujillo's Opening Brief also failed to assign error to any so-called "ambiguity" in the beneficiary declaration. Just the opposite, Ms. Trujillo's second Assignment of Error accepts the premise that the declaration in question identified Wells Fargo's proper capacity:

Did NWTS violate its duty of good faith under RCW 61.24.010(4) by recording a NOTS [Notice of Sale] after receiving a declaration from Wells *stating Wells was the actual holder of the Note?*

Case No. 70592-0-I, Opening Brief at 5 (emphasis added).¹

Notably, Ms. Trujillo's Opening Brief does not discuss the import of "ambiguous" language in the declaration. She strictly focused on arguing that the term "owner" in RCW 61.24.030(7) means a beneficiary must also be a loan's investor -- a position both NWTs and the WSAG disagree with. *See Brown v. Dep't of Commerce, supra*.

Consequently, the primary thrust of the WSAG's amicus brief, complaining about trustees' "deferral to the beneficiary's ambiguous declaration," raises an issue that *does not exist in this case*. Amicus Brief at 9, *inter alia*. Ms. Trujillo's appeal on limited grounds is not the appropriate vehicle to espouse an expansive scope of CPA liability.

B. The Purpose of a Beneficiary Declaration is to Protect the Trustee From Claims the Beneficiary is Acting in Error.

The WSAG argues that a beneficiary declaration "shields homeowners from the initiation of foreclosure by the wrong beneficiary...." Amicus Brief at 11.² But it actually does no such thing.

Since the DTA's inception in 1965, trustees can exercise their duties found in deeds of trust based on a lender's request to exercise the

¹ It was not until Ms. Trujillo retained counsel that the first reference to a "question" concerning RCW 62A.3-301 appeared in supplemental authority after all briefing had been submitted. *See* Case No. 70592-0-I, Additional Authorities (Mar. 6, 2014).

² The WSAG is also incorrect that a trustee's obligation to identify who has possession of a note arise "before initiating foreclosure proceedings." *Id.* While non-judicial foreclosure commences with the issuance of a Notice of Default, RCW 61.24.030(7)(a) specifically pertains to information known prior to recording a Notice of Trustee's Sale.

power of sale on its behalf. This fact still remains true and did not change when beneficiary declarations were created in 2009.

Critically, nothing in the DTA compels reliance solely on a beneficiary declaration to establish compliance with RCW 61.24.030(7)(a). *See, e.g., Lucero v. Cenlar FSB*, 2015 WL 520441, *3 (W.D. Wash. Feb. 9, 2015) (“[t]here is nothing magical or unique about the declaration: the beneficiary may declare that it is the beneficiary as many times as it wants, as long as it retains possession of the original note.”); *Singh v. Fed. Nat. Mortg. Ass’n*, 2014 WL 3739389, *6 (W.D. Wash. Jul. 28, 2014) (“RCW 61.24.030(7) does not require a beneficiary declaration, much less that the trustee provide the declaration to a borrower.”). Rather, RCW 61.24.030(7)(a) was added to the DTA as a *safe harbor for trustees* to proceed with foreclosure on owner-occupied properties in case the beneficiary was later discovered to be another entity.

As the Senate Bill Report to ESB 5810 observed, “the trustee’s proof of the beneficiary’s ownership of the promissory note *may* be in the form of the beneficiary’s declaration.... The trustee *may* rely on this declaration, unless the trustee violated its duty of good faith.”³

Similarly, the House Bill Report to ESB 5810 stated, “the trustee

³ Found at: <http://lawfilesexternal.leg.wa.gov/biennium/2009-10/Pdf/Bill%20Reports/Senate/5810.E%20SBR%20HA%2009.pdf> at 4 (emphasis added).

may rely on the beneficiary's declaration as evidence of proof, absent a violation of the trustee's duty of good faith."⁴ Indeed, the "proof" standard in RCW 61.24.030(7)(a) does not require confirmation of who has a note beyond all reasonable doubt.⁵

In other words, despite the WSAG's insistence that trustees must "investigate and confirm" the contents of a beneficiary declaration, trustees can satisfy RCW 61.24.030(7)(a) and identify the entity in possession of a note, *i.e.* the "owner," through a variety of different means based on a totality of the circumstances presented during the foreclosure process. *Cf.* Amicus Brief at 8.

For example, "[w]hen the trustee receives the deed of trust with a request for foreclosure, he will need to have a title examination report in

⁴ Found at <http://lawfilesexternal.wa.gov/biennium/2009-10/Pdf/Bill%20Reports/House/5810.E%20HBR%20APH%2009.pdf> at 4 (emphasis added).

⁵ A DTA-based foreclosure does not implicate judicial involvement. *Jackson v. Quality Loan Serv. Corp.*, -- Wn. App. --, 2015 WL 1542060, *4 (Div. 1, Apr. 6, 2015), citing *Felton v. Citizens Fed. Sav. & Loan Ass'n of Seattle*, 101 Wn.2d 416, 420, 424, 679 P.2d 928 (1984). However, by alleging a violation of RCW 61.24.030(7)(a) and demanding evidence to the contrary, Ms. Trujillo expects to shift the burden of demonstrating compliance with that provision onto NWTS. The germane quantum of "proof" is therefore a preponderance of the evidence. See *In re Levias*, 83 Wn.2d 253, 255, 517 P.2d 588 (1973), overruled on different grounds by *Matter of McLaughlin*, 100 Wn.2d 832, 676 P.2d 444 (1984) ("Traditionally, unless otherwise provided by statute or case law, the standard of proof used in the trial of civil matters has been a preponderance of the evidence."); accord *Addington v. Texas*, 441 U.S. 418, 423, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979) (there is "a continuum [of] three standards or levels of proof for different types of cases. At one end of the spectrum is the typical civil case involving a monetary dispute between private parties. Since society has a minimal concern with the outcome of such private suits, plaintiff's burden of proof is a mere preponderance of the evidence. The litigants thus share the risk of error in roughly equal fashion.").

hand before giving the statutory notice of sale. This is because the notice must be served, not only on the grantor or his successor, but also on certain persons whose identity can be ascertained only by examining the public land records.” Stoebuck and Weaver, 18 Wash. Prac., Real Estate § 20.11 (2d ed. 2015).⁶

Likewise, a copy of the note, a referral sent through a secure communication system with confidential financial data and identifying the foreclosing beneficiary, communications with a loan servicer regarding the beneficiary, a loss mitigation declaration from the beneficiary or its agent, and a borrower’s acquiescence to the beneficiary’s authority in a mediation referral each satisfy RCW 61.24.030(7)(a) assuming no inconsistencies appear on the face of information received.⁷

In sum, subjecting trustees to liability for merely receiving one declaration obtained during the foreclosure process – as the WSAG suggests – makes no sense as that declaration is but one of many significant documents provided to a trustee.

⁶ A title report will show a recorded assignment in favor of the foreclosing lender. If this assignment is missing, or the assignment is to a party other than the foreclosing lender, the trustee will be on notice of an issue to investigate. Here, however, the only assignment recorded prior to foreclosure was to Wells Fargo Bank, N.A. CP 35.

⁷ If the note does not name the foreclosing party as the payee, it must bear either a special indorsement in favor of that party or a blank indorsement. It is known that Ms. Trujillo’s Note was indorsed in blank. Case No. 13-2-06928-8 SEA (King Co. Super. Ct.), Dkt. No. 28, ¶ 6. Had there been a special indorsement to anyone other than Wells Fargo, this would be an irregularity requiring investigation.

C. Trustees are Not Required to “Gather” Proof or Conduct a *Sua Sponte* Investigation into the Beneficiary’s Identity.

The WSAG’s amicus brief further seeks to foist new duties onto trustees that do not exist in the DTA. In fact, a trustee’s duties under the DTA have historically been limited. See Joseph L. Hoffmann, Court Actions Contesting the Nonjudicial Foreclosure of Deeds of Trust in Washington, 59 Wash. L. Rev. 323, 340 (1984) (“Recent Washington case law indicates that the trustee’s duty is limited to performing the bare requirements listed in the... [DTA].”), citing *McPherson v. Purdue*, 21 Wn. App. 450, 585 P.2d 830 (1978) (trustee has no duty to disclose title defects to prospective purchasers at trustee’s sale); *Morrell v. Arctic Trading Co.*, 21 Wn. App. 302, 584 P.2d 983 (1978) (trustee has no duty to exercise “due diligence” in providing notice of trustee’s sale to grantor).

First, the WSAG mistakenly claims that trustees possess an “obligation to gather ‘proof.’” Amicus Brief at 6. However, the DTA contains no “gathering” requirement; it simply states that for residential property, “before the notice of trustee’s sale is recorded, transmitted, or served, the trustee shall *have* proof that the beneficiary is the owner of any promissory note or other obligation secured by the deed of trust.” RCW 61.24.030(7)(a) (emphasis added). *Having* the requisite proof may be accomplished in a number of different ways. *Lyons v. U.S. Bank Nat.*

Ass'n, 181 Wn. 2d 775, 789, 336 P.3d 1142 (2014). But no statutory provision compels the active “*gathering*” of this information.⁸

Second, the WSAG suggests that trustees must take “further steps to independently investigate” the receipt of a beneficiary declaration. Amicus Brief at 9. But the rule articulated in *Walker v. Quality Loan Serv. Corp.*, 176 Wn. App. 294, 308 P.3d 716 (2013) and affirmed in *Lyons* is that trustees must “adequately inform” themselves through a “*cursory* investigation” regarding the beneficiary’s right to foreclose. *See also Mickelson v. Chase Home Fin., LLC*, 2012 WL 3240241, *4 (W.D. Wash. Aug. 7, 2012) (“[g]ood faith extends only to ensuring that there are no obvious or known defects in the documents replacing the trustee.”).

In *Lyons*, this Court held that verifying the veracity of a beneficiary declaration should occur “if there is an indication that the... declaration might be ineffective....” 181 Wn.2d at 790; *see also id.* at 788 (“If Lyons’ allegations are true and *NWTS* knew about the conflicting information regarding their right to initiate foreclosure but did not look into this matter, there are issues....”) (emphasis added).

Absent circumstances of conflicting information known to a trustee

⁸ In the Washington Practice Series, Professors Stoebuck and Weaver explain the scope of a trustee’s duties in the order they are likely performed; no mention is made of obtaining a beneficiary declaration or conducting an investigation. 18 Wash. Prac., Real Estate § 20.8 (2d ed. 2015).

at the time of foreclosure, neither the DTA nor *Lyons* commands a *sua sponte detailed* investigation of some unknown form into the beneficiary's authority. See also, e.g., *Meyer v. U.S. Bank*, 2015 WL 1619048, *9 (W.D. Wash. Apr. 10, 2015), citing *Pelzel v. Nationstar Mortg., LLC*, 2015 WL 1331666, *6 (Div. 2, 2015) ("courts have... uniformly rejected the invitation to import a duty to verify the information contained in the beneficiary declaration into the trustee's duty of good faith."); accord *Hallquist v. United Home Loans, Inc.*, 715 F.3d 1040, 1048 (8th Cir. 2013), citing *Spires v. Edgar*, 513 S.W.2d 372, 378 (Mo. 1974).⁹

It is the Legislature's, and not the WSAG's, role to articulate prerequisites that must be completed before a trustee moves ahead with foreclosure. The DTA governs all parties affected by the foreclosure process, including trustees, and courts should not impose additional investigatory burdens of an undefined scope that are not found anywhere in the DTA or supported by case law.

D. DTA Violations Require Materiality and Prejudice.

The WSAG argues that NWTs' position on appeal introduces a "new 'prejudice' element" for Ms. Trujillo's claims. Amicus Brief at 16.

But a showing of prejudice must be maintained for a CPA claim

⁹ "[I]n the absence of unusual circumstances known to the trustee, he may, upon receiving a request for foreclosure from the creditor, proceed upon that advice without making any affirmative investigation and without giving... special notice to the debtor."

predicated on alleged DTA violations. It would be inapposite to require prejudice in a post-sale DTA action (as precedent does¹⁰), yet eliminate the same requirement for “DTA violations that could be compensable under the CPA.” *Frias v. Asset Foreclosure Servs., Inc.*, 181 Wn.2d 412, 430, 334 P.3d 529 (2014). The *same requisites* should apply to DTA-based claims regardless of the cause of action they are brought under.

Moreover, only a *material* DTA violation is actionable. See *Holiday Resort Comm. Ass’n v. Echo Lake Assoc., LLC*, 134 Wn. App. 210, 226, 135 P.3d 499 (2006) (CPA requires a showing that the practice misleads or misrepresents something of material importance.”). *Klem v. Wash. Mutual Bank* looks to federal law when defining an “unfair or deceptive act or practice” in the CPA context. 176 Wn.2d 771, 787, 295 P.3d 1179 (2013), *citing* 15 U.S.C. § 45(n). Federal law states that an act or practice is “deceptive” when it is *material*, likely to mislead a consumer, and the consumer’s interpretation is reasonable. 15 U.S.C. § 45(n) (emphasis added); *see also* 12 C.F.R. 227.1.

The requirement of materiality is also found in RCW 61.24.127, which restricts DTA-based claims to post-sale actions alleging a “failure of the trustee to *materially* comply with the provisions of [the DTA].”

¹⁰ See, e.g., *Colorado Structures, Inc. v. Blue Mountain Plaza, LLC*, 159 Wn. App. 654, 666, 246 P.3d 835 (2011); *Steward v. Good*, 51 Wn. App. 509, 754 P.2d 150, *review denied*, 111 Wn.2d 1004 (1988).

(Emphasis added); *accord Perry v. Nat'l Default Servicing Corp.*, 2010 WL 3325623, *3 (N.D. Cal. Aug. 20, 2010) (“In order for a defect in the notice of default to be material, it must cause prejudice.”).¹¹

The necessity for a DTA violation to cause *material prejudice* is evident in the Act’s provisions aimed not at protecting borrowers but, instead, at protecting third parties such as junior lienholders and bona fide purchasers. *See, e.g.*, RCW 61.24.060; RCW 61.24.080.

Strict construction of the DTA does not make every purported error in the foreclosure process unlawful under the CPA. *See Albice v. Premier Mortg. Servs. of Wash., Inc.*, 174 Wn.2d 560, 581, 276 P.3d 1277 (2012) (Stephens, J., concurring) (“While strict compliance is ideal, it is far from certain that failure to comply with every statutory mandate will prejudice the interestholder.”).¹² This Court should not allow Ms. Trujillo to escape showing materiality and prejudice when all her claims are *solely*

¹¹ Federal judges examining Washington law often find materiality and prejudice are necessary to prove DTA violations that form the basis of a borrower’s CPA claim. *See, e.g., Cagle v. Abacus Mortg., Inc.*, 2014 WL 4402136, *4 (W.D. Wash. Sept. 5, 2014) (dismissing CPA claim; finding “Plaintiff has failed to allege any prejudice resulting from MERS’ role.”); *Vawter v. Qual. Loan Serv. Corp.*, 2010 WL 5394893, *6 (W.D. Wash. Dec. 23, 2010) (dismissing CPA claim; finding “the timing error at issue could not be said to be “of material importance.”); *see also Mickelson v. Chase Home Fin., LLC*, 579 Fed. Appx. 598, 601 (9th Cir. 2014) (holding no prejudice to borrowers from any “failing” of the beneficiary declaration; rejecting “the Mickelsons’ DTA-based claims against NWTs, as well as any claim against them under Washington’s CPA.”).

¹² *Accord* 3 Sutherland Statutory Construction § 61:3 (7th ed. 2013), *citing United Cork Cos. v. Volland*, 365 Ill. 564, 572 (1937) (foreclosure case) (“The doctrine of strict construction was never meant to be applied as a pitfall to the unwary, in good faith pursuing the path marked by the statute, nor as an ambush from which an adversary can overwhelm him for an immaterial misstep.”).

based on the DTA, as those standards have long been required in order to establish a violation of that law. See, e.g., *Merry v. NWTS*, -- Wn. App. --, Slip Opin. No. 32474-5-III (Div. 3, Jun. 4, 2015) (plaintiff's claim of a material DTA violation was "formal, technical [and] nonprejudicial...", and would produce a "hypertechnical, inequitable result."); *Steward v. Good*, 51 Wn. App. 509, 517, 754 P.2d 150 (1988); *Koegel v. Prudential Mut. Sav. Bank*, 51 Wn. App. 108, 112, 752 P.2d 385 (1988).¹³

E. The CPA's Public Interest Element Cannot be Established by Showing the Mere Existence of Other Lawsuits With Different Factual Records.

The WSAG contends that Ms. Trujillo can easily establish the "public interest" prong for a CPA claim because "other lawsuits involve identical, ambiguous beneficiary declarations." Amicus Brief at 13.

First, and perhaps most critically for this appeal, Ms. Trujillo's Complaint pled a conclusory statement that *Wells Fargo's* "foreclosure activities... certainly impact the public interest." CP 93 (Compl., ¶ 53). There were no factual allegations in Ms. Trujillo's CPA cause of action connecting *NWTS'* activities to an act likely to injure the public. For this

¹³ In *Koegel*, the Notice of Default erroneously contained an "additional description of a plot that had been conveyed and was no longer part of the transaction." *Id.* at 110. Further, the Notice of Trustee's Sale "was sent only 25 days after the corrected notice of default," which is contrary to RCW 61.24.030. *Id.* at 111. Despite these clear instances of non-compliance with the DTA, the Court of Appeals found that a violation had not occurred because the errors were non-prejudicial.

reason alone, the dismissal of Ms. Trujillo's CPA claim can be affirmed. The WSAG's Amicus Brief overreaches to suggest that "only causation and injury" remain to prove a CPA violation when Ms. Trujillo *never alleged* a required element against NWTS. Amicus Brief at 13.

Second, as this Court held in *Hangman Ridge Stables, Inc. v. Safeco Title Ins. Co.*, it is "the likelihood that additional plaintiffs have been or will be injured in *exactly the same fashion* that changes a factual pattern from a private dispute to one that affects the public interest." 105 Wn.2d 778, 790, 719 P.2d 531 (1986) (emphasis added).¹⁴ As noted above, the presence or absence of a beneficiary declaration – regardless of its content – is not dispositive on the question of compliance with RCW 61.24.030(7)(a). Thus, it is an oversimplification to suggest the holdings of earlier cases *per se* demonstrate that Ms. Trujillo or different borrowers subject to foreclosure were injured just because NWTS received, but may not have relied on, a certain declaration.¹⁵

¹⁴ See also *Brown ex rel. Richards v. Brown*, 157 Wn. App. 803, 816, 239 P.3d 602, 609 (2010) (CPA claim defeated because of no evidence that Wells Fargo's actions had "the capacity to deceive a large portion of the public."); *McCrorey v. Fed. Nat. Mortg. Ass'n*, 2013 WL 681208 (W.D. Wash. Feb. 25, 2013) ("[t]he purpose of the CPA is to protect consumers from harmful practices, which is why plaintiff must allege an actual or potential impact on the general public, not merely a private wrong.").

¹⁵ Additionally, the use of beneficiary declarations referencing RCW 62A.3-301 has been virtually eliminated after the *Lyons* decision. Therefore, there is "little likelihood of repetition" concerning the presence of an "ambiguous" declaration in a trustee's file, and the public interest element fails on this basis as well. *Baker Boyer Nat. Bank v. Garver*, 43 Wn. App. 673, 685, 719 P.2d 583 (1986).

Third, the WSAG appears to have not considered the records and circumstances of the other cases cited in footnote 5 of its Amicus Brief. Those cases are not like this one.

In *Beaton*, the plaintiff did not make any contention about the beneficiary declaration in her original complaint. Only after NWTS submitted the document with its motion to dismiss did she amend her complaint to attack the contents. *Beaton v. JPMorgan Chase Bank, N.A.*, Case No. 11-00872-RAJ (W.D. Wash.), Dkt Nos. 1, 25, 55. Prior to the lawsuit, Ms. Beaton was certainly unaware of the beneficiary declaration, as it is not a public document. Also, NWTS had proof the *Beaton* note was acquired by Chase through a Purchase and Assumption Agreement with the FDIC; the beneficiary declaration only further corroborated this fact. *Id.*, Dkt. Nos. 58-1, 58-3.

In *Butler*, the plaintiff failed to pay her loan for six years, and then raised a “kitchen sink” of arguments regarding virtually every aspect of the foreclosure process. The evidence, however, was clear as to OneWest’s beneficiary status. *In re Butler*, Case No. 12-01209-MLB (Bankr. W.D. Wash.), Dkt. Nos. 37, 118, 119.

In *Mulcahy*, NWTS obtained a copy of the note with a special indorsement to Wells Fargo, and Wells Fargo was the entity that requested foreclosure commence. *Mulcahy v. Fed. Home Loan Mortg. Corp.*, Case

No. 13-01227-RSL (W.D. Wash.), Dkt. No. 30 at ¶¶ 5, 10. *Mulcahy* found that the “plaintiffs have not provided any evidence tending to show NWTS knew that an entity other than Wells Fargo possessed the note....” *Id.* at Dkt. No. 39.

In *Mickelson*, NWTS received two referrals from Chase – the beneficiary – to proceed with foreclosure on its behalf. *Mickelson v. Chase Home Fin., LLC*, Case No. 11-01445-MJP (W.D. Wash.), Dkt. No. 100, ¶¶ 6, 8, 13, 15. The plaintiffs further recognized the beneficiary’s identity, as they applied for and received a loan modification from Chase. *Id.*, Dkt. No. 43-4. The outcome in *Mickelson*, in NWTS’ favor and affirmed by the Ninth Circuit Court of Appeals, did not turn on the beneficiary declaration.

Here, given Ms. Trujillo’s concessions that she defaulted and Wells Fargo held the Note at all relevant times, this Court should not infer the existence of a public interest element into her deficient Complaint.

F. Insurance Case Law Does Not Control a Foreclosure Trustee’s Duties.

The WSAG urges the adoption of insurance case law to analyze a trustee’s duty of good faith. Amicus Brief at 13-15. However, a significant difference exists between foreclosure trustees and insurance carriers; the former is tasked with carrying out a lender’s request to

exercise the power of sale pursuant to a deed of trust and statutory scheme, while an insurer has a direct contractual relationship with its insured.

Further, an insurer must interpret and determine whether a contractual coverage provision applies or not. *See Safeco Ins. Co. of Am. v. Butler*, 118 Wn.2d 383, 392, 823 P.2d 499 (1992) (“The insurer’s duty to defend the insured is one of the main benefits of the insurance contract.”) An insurer’s bad faith arises when it places the insured in the position of performing that analysis instead. *Coventry Associates v. Am. States Ins. Co.*, 136 Wn.2d 269, 281, 961 P.2d 933 (1998).

By contrast, if a borrower defaults, a *lender* makes the only “interpretation” or “determination,” *i.e.*, whether property securing the loan’s repayment ought to be foreclosed. *See, e.g., Schroeder v. Excelsior Mgmt. Grp., LLC*, 177 Wn.2d 94, 112, 297 P.3d 677 (2013) (“[t]he simple fact is that if Schroeder’s property was primarily agricultural, then the trustee lacked the statutory power to foreclose nonjudicially.”); *Singh v. Fed. Nat. Mortg. Ass’n*, 2014 WL 504820, *6 (W.D. Wash. Feb. 7, 2014) (“The court cannot... change the basic truth that if a homeowner cannot pay her mortgage, she will ultimately lose her home.”).

As noted above, the DTA does not compel an automatic affirmative investigation into the beneficiary’s authority; RCW 61.24.030(7)(a) only calls for trustees to “have” sufficient proof through a

number of possible ways. RCW 61.24.030(7)(a) does not contemplate a borrower's involvement in what information a trustee receives.

Consequently, insurance case law should not offer guidance in analyzing the scope of duties governed under the DTA.

G. NWTS Should Not Face CPA Liability For Receiving a Beneficiary Declaration Due to a Reasonable Reliance on Decisions Prior to *Lyons*.

Even if a parallel can be drawn between foreclosure and insurance jurisprudence, this Court has found that “acts performed in good faith under an arguable interpretation of existing law do not constitute unfair conduct violative of the consumer protection law.” *Leingang v. Pierce Co. Med. Bureau, Inc.*, 131 Wn.2d 133, 155, 930 P.2d 288 (1997), citing *Perry v. Island Sav. & Loan Ass’n*, 101 Wn.2d 795, 684 P.2d 1281 (1984). *Leingang* held that the insurer “was relying on a reasonable interpretation of existing law to contend that the exclusion was valid,” as supported by the decisions of “at least four trial courts and two Court of Appeals decisions.” *Id.* at 155.¹⁶

Likewise, prior to *Lyons*, trustees in Washington *could* rely – but

¹⁶ The WSAG omits mention of a related finding in *Coventry*; as this Court observed: [o]f course, insurance companies, like every other organization, are going to make some mistakes. As long as the insurance company acts with honesty, bases its decision on adequate information, and does not overemphasize its own interests, an insured is not entitled to base a bad faith or CPA claim against its insurer on the basis of a *good* faith mistake.

136 Wn.2d at 279 (emphasis in original).

were not obligated to rely – on beneficiary declarations like the one produced here, because many decisions upheld their sufficiency for purposes of RCW 61.24.030(7)(a). *See, e.g., In re Brown*, 2013 WL 6511979 (B.A.P. 9th Cir. Dec. 12, 2013); *Mulcahy v. Fed. Home Loan Mortg. Corp.*, 2014 WL 1320144 (W.D. Wash. Mar. 28, 2014); *Bakhchinyan v. Countrywide Bank, N.A.*, 2014 WL 1273810 (W.D. Wash. Mar. 27, 2014) (reference to RCW 62A.3-301 permissible). Just as in *Leingang*, it cannot be an unfair or deceptive act to have followed reasonable judicial analyses of the law as they stood prior to *Lyons*.¹⁷

Lastly, this Court should reject the WSAG's argument that CPA liability should lie against trustees even when the beneficiary is properly foreclosing. It cannot be unfair or deceptive to take actions that are *true* or *accurate*, especially when a borrower cannot be deceived by the existence of a declaration provided privately to a trustee. *Cf. Fisher v. World-Wide Trophy Outfitters, Ltd.*, 15 Wn. App. 742, 551 P.2d 1398 (1976) (promises were deceptive because they did not become true).

¹⁷ The beneficiary declaration provided for Ms. Trujillo's loan was dated March 14, 2012, over two years before *Lyons* was decided in October 2014, and one year before *Beaton v. JPMorgan Chase Bank, N.A.*, 2013 WL 1282225 (W.D. Wash. Mar. 26, 2013). At that time, it appears only *Pavino v. Bank of Am.*, 2011 WL 834146 (W.D. Wash. Mar. 4, 2011) criticized a reference to RCW 62A.3-301 in the declaration. The WSAG's concern over the declaration's contents should not arise again, as stakeholders to the foreclosure process strive to maintain compliance with existing precedent. *See* n. 15, *supra*.

III. CONCLUSION

The WSAG's amicus brief supports a theoretical case, but not the issues found in Ms. Trujillo's Complaint and now before this Court.

The WSAG's position would allow defaulting borrowers to challenge a document that is not disclosed to them or publicly-recorded, and then wield it as a sword upon later being revealed during the course of litigation. That approach should not be authorized.

In sum, a beneficiary declaration is not the exclusive means of satisfying RCW 61.24.030(7)(a), and trustees can rely on other information to have sufficient knowledge of who has a secured note subject to enforcement. Facially accurate information should not be subject to some form of detailed investigation or give rise to CPA liability. The Court of Appeals' decision should be affirmed.

DATED this 8th day of June, 2015.

RCO LEGAL, P.S.



By: /s/ Joshua S. Schaer
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RECEIVED BY E-MAIL

THE SUPREME COURT OF WASHINGTON

ROCIO TRUJILLO,

Petitioner,

v.

NORTHWEST TRUSTEE SERVICES, INC.,

Respondent.

Case No. 90509-6

Court of Appeals No. 70592-0-I

DECLARATION OF SERVICE

The undersigned makes the following declaration:

1. I am now, and at all times herein mentioned was a resident of the State of Washington, over the age of eighteen years and not a party to this action; and I am competent to be a witness herein.

2. On June 8, 2015 I caused a copy of the **Answering Brief of Respondent Northwest Trustee Services, Inc. to the Amicus Curiae Brief of the Washington State Attorney General** to be served in the following in the manner noted below:

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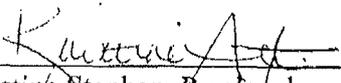
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6 I declare under penalty of perjury under the laws of the state of Washington that the
7 foregoing is true and correct.

8 Signed this 8th day of June, 2015.

9
10 
11 Kristine Stephan, Paralegal

OFFICE RECEPTIONIST, CLERK

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Rocio Trujillo (Appellant) v. Northwest Trustee Services, Inc. (Respondent), et al.
Supreme Court No. 90509-6
Court of Appeals No. 70592-0-I
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Please file the attached **Answering Brief of Respondent Northwest Trustee Services, Inc. to Amicus Curiae Brief of the Washington State Attorney General, and Declaration of Service.**

If there are any questions, please contact us. Thank you.

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