

ENFORCING THE OREGON TRUST DEED ACT

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mortgages were sold on the secondary market using MERS,⁷ but as housing prices continued to skyrocket the legal issues surrounding MERS and mortgage securitization remained unnoticed. The eventual collapse of the housing bubble exposed the legal problems with MERS and mortgage securitization. Mortgage lenders soon found themselves in the middle of a foreclosure crisis.

The Oregon Trust Deed Act (OTDA) requires lenders to record all deed of trust assignments before initiating nonjudicial foreclosures.⁸ Lenders have difficulty complying with this requirement because of their dependence on the MERS private recording system.⁹ Over the last several years, an increasing number of Oregon homeowners have challenged the legality of their pending nonjudicial foreclosures. Their claims for wrongful foreclosure stem from two basic arguments: (1) MERS cannot be a beneficiary under a deed of trust in Oregon because MERS does not meet the statutory definition of a beneficiary found at section 86.705(2)¹⁰ of the Oregon Revised Statutes, and (2) unrecorded assignments of their deed of trust prohibit the nonjudicial foreclosure remedy under section 86.735(1).

These issues have divided circuit and district court judges in Oregon, resulting in a number of conflicting opinions.¹¹ On April 6,

7. Christopher L. Peterson, *Two Faces: Demystifying the Mortgage Electronic Registration System's Land Title Theory*, 53 WM. & MARY L. REV. 111, 117 (2011).

8. OR. REV. STAT. § 86.735(1) (2011).

9. *Niday v. GMAC Mortg., LLC*, 284 P.3d 1157, 1169 (Or. Ct. App. 2012) (“A beneficiary that uses MERS to avoid publicly recording assignments of a trust deed cannot avail itself of a nonjudicial foreclosure process that requires that very thing—publicly recorded assignments.”).

10. OR. REV. STAT

2012, Federal District Court Chief Judge Ann Aiken certified four questions to the Oregon Supreme Court stemming from four wrongful foreclosure cases pending before her Court.¹² On July 18, 2012, the Oregon Court of Appeals ruled against MERS in *Niday v. GMAC Mortgage, LLC*, finding that MERS does not meet the statutory definition of a beneficiary, and cannot be used to circumvent the OTDA recording requirement.¹³ The following day, the Oregon Supreme Court accepted the four certified questions from the District Court.¹⁴ Oral arguments are currently scheduled for January 8, 2013,¹⁵ although a final decision may not be rendered until the

*3–5 (D. Or. Mar. 23, 2011); *Barker v. GMAC Mortg., LLC*, No. 3:11-cv-579-ST, 2011 WL 3360677, at *1 (D. Or. Aug. 3, 2011); *Neilson v. Wells Fargo Bank, N.A.*, No. CV 10-1516-MO, 2011 WL 3476523, at *1 (D. Or. Aug. 9, 2011); *Burgett v. MERS*, No. 09-6244-HO, 2010 WL 4282105, at *2 (D. Or. Oct. 20, 2010); *Rinegard Guirma v. Bank of Am., N.A.*, Civ. No. 10-1065-PK, 2010 WL 3945476, at *3–4 (D. Or. Oct. 6, 2010); *Ekerson v. Mortg. Elec. Registration Sys., Inc.*, No. 11-CV-178-HU, 2011 WL 597056, at *2–4 (D. Or. Feb. 11, 2011) (numerous circuit and district court judges in Oregon have held that MERS cannot be a beneficiary under the OTDA); *Buckland v. Aurora Loan Services, Josephine Cnty.* No. 10-CV-1023 (Or. Cir. Ct. Aug. 30, 2010); *Nigro v. Nw. Tr. Servs., Josephine Cnty.* No. 11-CV-0135 (Or. Cir. Ct. May 11, 2011); *Spencer v. Guaranty Bank, F.S.B., Deschutes Cnty.* No. 10-CV-0515-ST (Or. Cir. Ct. May 5, 2011); *Yovko v. Nw. Tr. Services, Wash. Cnty.* No. C-110703-CV (Or. Cir. Ct. Feb. 4, 2011); *Somers v. Deutsche Bank Nat’l Trust Co., Clackamas Cnty.* Nos. CV-11020133 and FE-110027 (Or. Cir. Ct. Feb. 4, 2011) (finding MERS can be a beneficiary under the OTDA and that only the assignment from MERS to the assignee needs to be recorded); *Rinegard Guirma v. Bank of Am., N.A.*, Civ. No. 10-1065-PK, 2010 WL 3945476, at *3–4 (D. Or. Oct. 6, 2010).

12. *Mirarabshahi v. ReconTrust Co.*, No. 3:12-cv-00010-HA (D. Or. filed Jan. 4, 2012); *Mayo v. ReconTrust Company*, No. 3:11-cv-01533-PK (D. Or. filed Dec. 21, 2011), *Powell v. ReconTrust Co.*, No. 3:11-cv-01399-HZ (D. Or. filed Jan. 8, 2012), and *Brandrup v. ReconTrust Co.*, No. 3:11-cv-01390-JE (D. Or. filed Nov. 17, 2011) (The four certified questions are: (1) May an entity such as MERS, that is neither a lender nor successor to a lender, be a “beneficiary” as that term is used in the Oregon Trust Deed Act? (2) May MERS be designated as beneficiary under the Oregon Trust Deed Act where the trust deed provides that MERS “holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS, as nominee for lender and Lender’s successors and assigns, has the right to exercise any or all of those interests”? (3) Does the transfer of a promissory note from the lender to a successor result in an automatic assignment of the securing trust deed that must be recorded prior to the commencement of nonjudicial foreclosure proceedings under ORS 86.735(1)? (4) Does the Oregon Trust Deed Act allow MERS to retain and transfer legal title to a trust deed as nominee for the lender, after the note secured by the trust deed is transferred from the lender to a successor or series of successors?).

13. *Niday*, 284 P.3d at 1167.

14. *Brandrup v. ReconTrust Co.* (Or. July 19, 2012) (No. S0-60281) (order accepting certified questions), *available at* http://media.oregonlive.com/business_impact/other/Order.pdf.

15. OREGON SUPREME COURT DOCKET, *BANDRUG V. RECONTRUST CO.*, SC NO. S060281, <http://www.ojd.state.or.us/records/sccalendar.nsf/0/1127f0663ada4c7688257a45005de182?Op>

following summer. Until then, in the wake of *Niday* and recent legislation requiring pre-foreclosure mediation, lenders appear reluctant to pursue any nonjudicial foreclosures in Oregon.¹⁶ For the time being, the entire foreclosure industry in Oregon has been forced to switch to judicial foreclosures as the state's High Court is now poised to weigh in on Oregon's nonjudicial process and the legislature scrambles to come up with a solution.

This article explains how the use of MERS as a named beneficiary violates the procedural requirements for foreclosure under the Oregon Trust Deed Act. This article further examines the implications of MERS's inability to serve as the beneficiary, concluding that, although MERS cannot be a beneficiary, MERS may likely serve as an agent of the initial and successive beneficiaries. In its agency capacity, MERS and its principals may comply with Oregon's procedures for nonjudicial foreclosure by recording all assignments of the deed of trust prior to initiating nonjudicial

sponsored entities began securitizing loans on a small scale in the early 1970s.²⁵ Soon thereafter, private financial institutions realized the profit potential from selling these securities, and modern securitization began.²⁶ Between 1990 and 2006, issuance of mortgage-backed securities increased by 678%.

Freddie Mac, Bank of America, JP Morgan Chase, Citibank, Wells Fargo, and other large lending institutions.³² MERS was intended to make securitization both faster and cheaper by avoiding the need to record assignments of security interests.³³ MERS saved its members hundreds of millions of dollars by establishing a parallel recording system to track the transfers of the mortgages.³⁴ MERS revolutionized the secondary market for mortgages by allowing for the rapid securitization of nearly two thirds of all U.S. home mortgages.³⁵

B. Oregon Real Estate Finance and Foreclosure

In Oregon, the two common forms of real estate security agreements are mortgages and trust deeds.³⁶ Until 1959, mortgages were the most common form.³⁷ Oregon mortgages are governed primarily by common law, with some statutory requirements in Oregon Revised Statutes chapters 86 and 88.³⁸ In a mortgage, the mortgagee holds the deed until the loan is fully paid by the borrower.³⁹ Upon full payment of the obligation, the deed is reconveyed to the mortgagor.⁴⁰

Upon a default by the mortgagor, the mortgagee accelerates the amount due and files a lawsuit to foreclose. In this process, commonly known as a judicial foreclosure, the mortgagee files a lawsuit against the mortgagor and asks the court to determine the priority of rights between the mortgagor and all junior lienholders.⁴¹

beneficial interest in loans, or servicing loans—are members of MERS and pay a fee to use the tracking system.”). *See generally* Peterson, *supra* note 7.

32. Howard Schneider, *MERS Aids Electronic Mortgage Market*, MORTGAGE BANKING, Jan. 1997, at 42.

33. Peterson, *supra* note 7, at 116.

34. Nolan Robinson, *The Case Against Allowing Mortgage Electronic Registration, Inc. (MERS) to Initiate Foreclosure Proceedings*, 32 CARDOZO L. REV. 1621, 1622 (2011) (“MERS functions as an electronic clearinghouse that allows lenders to circumvent the process of recording assignments and paying recording fees to the county clerk’s office.”). Note that

assignments of the deed of trust before foreclosing.⁵⁰ Including Oregon, 28 states have currently implemented statutory procedures allowing nonjudicial foreclosures, while the remaining states still require judicial foreclosures.⁵¹

C. MERS's Dilemma in Oregon

Mortgage bankers sought to legally implement the private MERS recording system by designating MERS as both (1) the beneficiary of the deed of trust, and (2) the nominee of the lender (noteholder).⁵² The cumbersome boilerplate language in all MERS deeds of trust evidences this two-faced assertion of MERS's legal status: "MERS' is Mortgage Electronic Registration Systems, Inc. MERS is a separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns. **MERS is the beneficiary under this Security Instrument.**"⁵³ MERS therefore claims to be both the beneficiary and the nominee of the lender.

In the wake of the subprime mortgage meltdown, our nation found itself in the midst of a foreclosure crisis.⁵⁴ The problems with MERS's legal assertions became

oversight during the formation of MERS has profound implications on real estate lending and foreclosures today. The remainder of this article examines in detail why MERS cannot be a beneficiary to Oregon deeds of trust and whether MERS may nevertheless comply with the Oregon Trust Deed Act's foreclosure prerequisites.

III. MERS CANNOT BE A BENEFICIARY

The language identifying MERS in deeds of trust reflects two very different legal identities. MERS claims to be both the

trust deed as *the person for whose benefit a trust deed is given*, or the person's successor in interest, and who is not the trustee unless the beneficiary is qualified to be a trustee under O[regon] R[evised] S[tatutes section] 86.790(1)(d).⁶²

As District Court Judge Simon noted in a recent opinion, this statutory definition can be segmented into 3 separate requirements: (1) a person named or otherwise designated in a trust deed; (2) as the person for whose benefit a trust deed is given, or the person's successor in interest; and (3) not the trustee unless qualified.⁶³ If MERS fails one of these three requirements, it does not meet the statutory definition of a beneficiary. The meaning of requirements one and three are plain and unambiguous.⁶⁴ MERS surely satisfies requirements one and three—MERS is always named or otherwise designated in trust deeds and is not the trustee. The issue then, is whether MERS meets the second requirement. Precisely stated, who “benefits” from a trust deed? Does MERS enjoy that benefit? The answer is not expressly found in section 86.705(2) of the Oregon Revised Statutes, because the statute does not declare what the benefit of a trust deed is and who enjoys that benefit. Furthermore, “benefit” is undefined altogether in the OTDA.

An examination of section 86.705(2) in the context of the entire OTDA leaves no room for ambiguity. It is obvious that “the ‘benefit’ of a trust deed is that it secures the repayment of the note.”⁶⁵ A “trust deed” is defined as: “[A] deed . . . that conveys an interest in real property to a trustee in trust *to secure the performance of an obligation* the grantor or other person named in the deed *owes to a beneficiary*.”⁶⁶ When a trust deed is issued to secure the obligation of a promissory note, the beneficiary of the trust deed is the person to whom repayment of the note is owed, or that person's successor in interest. This conclusion is supported by the fact that the legislature did not define the terms “lender,” or “noteholder” in the OTDA.⁶⁷ Had the legislature intended the beneficiary to be a separate and

62. *Id.* (emphasis added).

63. *Id.*

64. *Id.*

65. *Id.* at 1155–56; *West v. White*, 758 P.2d 424, 426 (Or. Ct. App. 1988) (“[A] beneficiary's interest under a trust deed . . . is . . . a lien on the land as security for the payment of the debt.”).

66. OR. REV. STAT. § 86.705(7) (2011) (emphasis added).

67. *James v. ReconTrust Co.*, 845 F. Supp. 2d 1145, 1157 (D. Or. 2012).

distinct entity from the noteholder, they would have defined noteholder in the statute.⁶⁸

The legislature clearly intended the beneficiary be the original noteholder or that person's successor(s) in interest. As Judge Simon correctly pointed out, other sections of the OTDA confirm that the legislature intended the "beneficiary" to be the noteholder.⁶⁹ Oregon Revised Statutes section 86.710 provides, in part: "Transfers in trust of an interest in real property may be made to secure the performance of *an obligation of a grantor*, or any other person named in the deed, *to a beneficiary*."⁷⁰ Section 86.720(1) provides, in part: "Within 30 days after performance of the obligation secured by the trust deed, *the beneficiary* shall . . . request . . . the trustee to reconvey the estate of real property described in the trust deed to the grantor."⁷¹

This assumes "the grantor owes the obligation to the beneficiary."⁷² Also, in describing telephone numbers to be included in foreclosure notices, the legislature again indicates that the beneficiary is the person who loaned the money: "Telephone numbers . . . must be toll-free numbers unless the beneficiary: (a) Made the loan with the beneficiary's own money; [and] (b) Made the

but not limited to (i) a true copy of the original note and (ii) documents showing the chain of title from the date of the original loan, including conveyances, endorsements and assignments of the deed of trust, a servicing agr

foreclosure process, because they were able to provide counterbalances to protect homeowners.¹⁰² The recording prerequisite was one of these counterbalances. The requirement was originally found at section 86.735(1)(a) of the Oregon Revised Statutes: “Before notice of sale may be given, the trust deed, all assignments, and any appointment of a successor trustee, *must be recorded.*”¹⁰³ Although the statute has been expanded, these original counterbalancing requirements remain the same today.

The text and legislative history of the Oregon Trust Deed Act clearly imply that the recording prerequisite, found at section 86.735(1), is intended to ensure that the bank asserting its right to foreclose the deed of trust actually has the authority to do so. This provision is a direct substitute for judicial oversight. In a judicial foreclosure, the plaintiff must prove its interest in the property to a judge. The legislature allowed banks to contractually negotiate the out of court private right of sale and foreclosure because the recording requirement served as a direct alternative to judicial inquiry. When the legislature allowed for the private right of sale, it understood that only someone who had the right to conduct such a sale through its contractual relationship with the borrower could assert this right. Only the lender and subsequent noteholders in contractual privity with the lender enjoy this right. The recording prerequisite is therefore the most important provision in the OTDA. Without the recording requirement, any imposter can walk in and claim a private right to foreclose without showing any evidence it is the party entitled to enforce the private right of sale.

This interpretation comports with the legislature’s overall intention in enacting the OTDA.¹⁰⁴ The legislature allowed for the private right of sale outside of the judicial system because the procedure for conducting the nonjudicial foreclosure included

was replaced with a strict notice requirement and a requirement to document the chain of title through duly recorded assignments of the deed of trust. Numerous Oregon courts have concluded this. In *Staffordshire Investments, Inc. v. Cal-Western Reconveyance Corporation*, the Oregon Court of Appeals found that:

The Act represents a well-coordinated statutory scheme to protect grantors from the unauthorized foreclosure and wrongful sale of property, while at the same time providing creditors with a quick and efficient remedy against a defaulting grantor. As discussed above, it confers upon a trustee the power to sell property securing an obligation under a trust deed in the event of default, without the necessity for judicial action. However, the trustee's power of sale is subject to strict statutory rules designed to protect the grantor.¹⁰⁵

Without these protections, the legislature would never have allowed deeds of trust to include a private right of sale. Using MERS to avoid recording assignments therefore violates an important legislative policy underlying the recording prerequisite.

Nevertheless, MERS and its members argue that assignments of the deed of trust by operation of law are somehow excluded from those contemplated by the recording requirement in the OTDA.¹⁰⁶ This argument may relate to a Minnesota Supreme Court case where that Court held assignments of the note were not assignments of the deed of trust for the purposes of a recording statute in that state.¹⁰⁷ That opinion, however, was based on a Minnesota statute that only

105. *Staffordshire Investments, Inc. v. Cal-Western Reconveyance Corp.*, 149 P.3d 150 (Or. Ct. App. 2006).

106. Brief on the Merits of Petitioner on Review at 2, *Niday v. GMAC Mortgage, LLC*, No. S060655, (Or. Nov. 8, 2012) (arguing that “the obligation in ORS 86.735(1) to record ‘any ass -1.D(gnme)14(s17(t)9dy)10.3(te)14([-1.D3(j) -1.D3(5(Pe)23(h)-1)14(h10.3((t)9dy))-10.-1)14(rPe)23(hus -1.D(g-1)14(eed 3.6(c)-14

trust generally.¹¹⁸ As previously mentioned, there are three parties to a deed of trust: the grantor, the beneficiary, and the trustee.¹¹⁹ The trustee holds legal title under a deed of trust for the benefit of the beneficiary.¹²⁰ The grantor retains equitable title. MERS holds neither legal nor equitable title.¹²¹

On March 27, 2012, the Oregon Department of Justice filed an amicus brief in an Oregon case currently before the Ninth Circuit Court of Appeals addressing this issue.¹²² Then-Attorney General John Kroger wrote:

Promissory note transfers shift the security interest in a trust deed from the deed's current beneficiary to a new beneficiary, and they thus qualify as 'assignments of the trust deed by

V. MERS AND AGENCY

MERS's failure as a beneficiary does not necessarily mean it cannot comply with the OTDA. If MERS is an agent for the initial lender (beneficiary) and all successive noteholders, MERS may be able to comply with Oregon nonjudicial foreclosure procedures.

A. Agency Relationships

MERS deeds of trust contain language identifying MERS as both the beneficiary and “nominee” for the lender: “‘MERS’ is Mortgage Electronic Registration Systems, Inc. MERS is a separate corporation that is acting solely as a *nominee for Lender and Lender’s successors and assigns*. MERS is the beneficiary under this Security Instrument.”¹²⁵ The term “nominee” is not defined in the OTDA. Black’s law dictionary defines nominee as “[a] person designated to act in place of another, usually in a very limited way,” or “[a] party who holds bare legal title for the benefit of others.”¹²⁶ Lenders appear to be using the word “nominee” to designate MERS as an agent.¹²⁷ Thus, deeds of trust specifically identify MERS as the agent of the initial lender, and homeowners expressly acknowledge that MERS is the nominee/agent of the initial lender when they sign the deed of trust.

MERS also identifies itself as the nominee for all successive noteholders.¹²⁸ However, the initial lender cannot appoint MERS as an agent for successive noteholders that do not yet exist. Once the successive noteholders do exist, MERS cannot, in its capacity as agent for the initial lender, appoint itself as agent for the successive noteholder. The original lender lacks capacity to do so, and MERS’s power cannot exceed that of its principal.¹²⁹ Therefore, Mofsystems, Inc.

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as real time notice of who owns the note, it would have required the deed of trust be recorded within a definite and limited period of time following the transfer of the note. On the contrary, it would be perfectly acceptable under the statute to record all assignments of the deed of trust the moment before a notice of default is entered.¹³⁵ The recording requirement is merely a prerequisite to the trustee's power of sale; it is not intended to generally identify the current noteholder upon an interested party's record inquiry.

The legislature also did not specify what kind of form of assignment instrumentTw[(deep)11.3gept d1

managed risk. Private securitization and the creation of MERS was the ultimate failure in risk management. MERS maximized short-term profits at the expense of the public record system, homeowners, and investors.

Notwithstanding the tremendous oversight and ignorance of state laws when MERS was created, Oregon's statutory procedure for nonjudicial foreclosures must be saved. The efficiency and cost savings of the nonjudicial foreclosure process encourage out-of-state lending in Oregon and lessen the burden on the state judicial system, thereby benefitting consumers and saving tax dollars. The legislature should amend the Oregon Trust Deed Act to allow lenders to satisfy the recording prerequisite by recording an affidavit of assignments prior to issuing a notice of default.

If MERS is allowed to act as a national mortgagee proxy, however, confidence in the American land title system will be destroyed. If courts and state legislators give financial institutions a green light to disregard recording laws meant to protect homeowners from fraudulent foreclosure, they certainly will not stand up for the public's interest the next time big banks ask for a free pass. MERS will undoubtedly continue to conjure up cute but baseless arguments for how it can serve as a beneficiary without recording assignments. In the end, although MERS may be considered an agent of the original and all successive noteholders, lenders should not be allowed to circumvent the Oregon Trust Deed Act's recording requirements.

In Shakespeare's *Measure for Measure*, Judge Angelo described the importance of enforcing laws in the face of strong opposition:¹³⁷

*We must not make a scarecrow of the law,
Setting it up to fear the birds of prey,
And let it keep one shape, till custom make it
Their perch and not their terror.*¹³⁸

Carefully contemplated laws with sound underlying policy should not be disregarded when their enforcement becomes tedious and inconvenient. When critical laws are ignored and unenforced, we

137. Although the antagonist Angelo in *Measure for Measure* was a merciless jurist whose rigid interpretation of the law provided for his villainous character, his colorful lines from the play remain a useful analogy to the importance of law enforcement. *See generally* WILLIAM SHAKESPEARE,

make a scarecrow of the law and provide those who seek to circumvent the law an opportunity to undermine the fundamental policies upon which the law was created. Such should not be the case with the Oregon Trust Deed Act.