UPDATED SPECIAL REPORT OF THE WASHINGTON STATE BAR ASSOCIATION LEGAL OPINIONS COMMITTEE

Opinions on Deeds of Trust in Favor of Agents, Trustees and Nominees
[THIS SPECIAL REPORT UDATES AND REPLACES THE PRIOR SPECIAL REPORT ISSUED BY THE COMMITTEE ON July 12, 2011]
March 14, 2013

RCW 61.24.005(2) defines the "beneficiary" of a deed of trust to mean "[t]he holder of the instrument or document evidencing the obligations secured by the deed of trust, excluding persons holding the same as security for a different obligation." The statute does not expressly permit an agent, trustee, or nominee for the holder of the obligations to act as beneficiary, nor does the statute expressly prohibit it.

In sophisticated commercial financings, it is common for a deed of trust to name a beneficiary that may not be the holder of the secured obligations. For example, the named beneficiary may be the agent bank for a bank group or an indenture trustee for a group of bondholders. In residential mortgage lending and some smaller commercial property financings, it is common for entities like Mortgage Electronic Registration Systems, Inc. ("MERS"), acting as nominee of the lender, to be named as beneficiary.

There has recently been litigation in which borrowers of home loans have challenged the status of MERS acting as beneficiary of Washington deeds of trust on the theory that MERS is not the holder of the secured obligations and, therefore, cannot validly act as beneficiary of a Washington deed of trust.

In *Bain v. Metropolitan Mortgage Group, Inc., et al.*, 175 Wn.2d 83, 285 P.3d 34 (2012), the Washington Supreme Court responded to a question certified to it by the United States District Court for the Western District of Washington as to whether MERS was a lawful beneficiary under two deeds of trust where MERS was named as beneficiary but never held the notes evidencing the obligations secured by the deeds of trust. The Supreme Court stated that only the actual holder of the promissory note or other instrument evidencing the obligations secured by a deed of trust may be a beneficiary with the power to proceed with a nonjudicial foreclosure on real property, and concluded that MERS was an ineligible beneficiary under the Washington deed of trust act, RCW chapter 61.24, if it never held the promissory notes or other debt instruments that were secured by the deeds of trust in question. Although the Supreme Court stated that nothing in its opinion should be construed to suggest that an agent cannot represent the holder of a note, at least for some purposes, it found that there was no evidence in the record before it that MERS was acting on behalf of the note holder and thus could not act as beneficiary under contract or agency principles. The Supreme Court stated that nothing in its opinion should be interpreted as preventing the parties from proceeding with judicial foreclosures. However, the Supreme Court also stated that it did not consider that issue, which must await a proper case.

The *Bain* decision has created uncertainty as to the ability to foreclose or otherwise enforce a Washington deed of trust if the deed of trust names as beneficiary an agent, an indenture trustee, a nominee or any other representative or person other than the actual holder or holders of the instruments or documents evidencing the obligations secured by the deed of trust.

Given the uncertainty created by the *Bain* decision, it may be appropriate to include a qualification drawing attention to this issue in certain opinions (*e.g., an opinion covering a deed of trust that names an agent as beneficiary*). Such a qualification could be expressed as follows and added to the Washington statutes listed in paragraph D-3 of the Illustrative Opinion Letter form previously published by the Committee:[1]

> D-[3(v)] We call to your attention that RCW 61.24.005(2) defines the "beneficiary" of a deed of trust as "[t]he holder of the instrument or document evidencing the obligations secured by the deed of trust, excluding persons holding the same as security for a different obligation" and does not expressly provide for such holder or holders to appoint an agent, an indenture trustee, a nominee or any other representative to act as beneficiary. In *Bain v. Metropolitan Mortgage Group, Inc., et al*., 175 Wn.2d 83, 285 P.3d 34 (2012), the Washington Supreme Court responded to a question certified to it by the United States District Court for the Western District of Washington as to whether Mortgage Electronic Registration Systems, Inc. ("MERS") was a lawful beneficiary under two deeds of trust where MERS was named as beneficiary but never held the notes evidencing the obligations secured by the deeds of trust. The Supreme Court stated that only the actual holder of the promissory note or other instrument evidencing the obligations secured by a deed of trust may be a beneficiary with the power to proceed with a nonjudicial foreclosure on real property, and concluded that MERS was an ineligible beneficiary under the Washington deed of trust act, RCW chapter 61.24, if it never held the promissory notes or other debt instruments that were secured by the deeds of trust in question. Although the Supreme Court stated that nothing in its opinion should be construed to suggest that an agent cannot represent the holder of a note, at least for some purposes, it found that on the record before it MERS was not a beneficiary by contract or under agency principles. The Supreme Court stated that nothing in its opinion should be interpreted as preventing the parties from proceeding with judicial foreclosures. However, the Supreme Court also stated that it did not consider that issue, which must await a proper case. The *Bain* decision has created uncertainty as to the ability to foreclose or otherwise enforce a Washington deed of trust if the deed of trust names as beneficiary an agent, an indenture trustee, a nominee or any other representative or person other than the actual holder or holders of the instruments or documents evidencing the obligations secured by the deed of trust. Our opinion, as to the enforceability of the [Deed of Trust], is qualified by the

[1] Supplemental Report Covering Secured Lending Transactions, a Report of the Ad Hoc Committee on Third-Party Legal Opinions of the Business Law Section of the Washington State Bar Association ("Supplemental Report"), at pp. 6-7 (Oct. 2000).

effect of the *Bain* decision, and we express no opinion on the effect of the *Bain* decision.

Additionally, the Committee observes that any given transaction may involve unique circumstances warranting an approach different than including the foregoing qualification. Indeed, the Committee is aware that some Washington practitioners confronting this issue in the context of a particular transaction structure have crafted language to be used in addition to or in replacement of the foregoing qualification, and that others have opted instead to make certain additional assumptions (*e.g., "at the time of any foreclosure, the then-current beneficiary of the Deed of Trust will also be the holder of the promissory note or other evidence of the secured obligation"*), in order to address the concerns raised by the *Bain* decision. The Committee takes no formal position on possible alternative or additional measures as the Committee believes that the unique circumstances of particular transactions may make these measures appropriate, but is not prepared to catalog all possible approaches.