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The 9th Circuit Finds Strict Compliance Not Required In The Oregon Trust Deed Act: Are We Out Of The Woods Yet?

By Wendy Walter, Esq., McCarthy Holthus, LLP

Oregon courts are seeing the next wave of challenges to the non-judicial foreclosure process. After the State Supreme Court ruled in *Brandrup*[1] and *Niday*[2] that assignments of a Trust Deed (occurring by operation of law) did not have to be recorded in order to be valid, many of the lawsuits pending - awaiting the outcome of those cases, were dismissed and refiled asserting a new cause of action: failure to "strictly comply" with the Trust Deed Act when issuing the notice of sale. Specifically, many plaintiffs claimed that the Notice of Sale used in the foreclosure failed to properly identify the correct beneficiary and therefore the foreclosure sale should be void.

The statute is and was potentially ambiguous. The current version of the statute requires that the notice of sale must "list the names of the grantor, trustee, and beneficiary *in the trust deed*..." (emphasis added). What isn't clear is whether this should be interpreted to mean the current beneficiary; the one who is has the power to non-judicially foreclose, or the beneficiary as was actually listed in the trust deed recorded with the county and presently subject to foreclosure. As we all know in default servicing, the original beneficiary in the trust deed is often not the foreclosing beneficiary and the beneficiary role can change several times throughout the life cycle of a mortgage loan. Most Trustees have chosen to follow the language in the statue as written and list the beneficiary stated *in* the original deed of trust.

This brings us to the recent 9th circuit opinion, *Woods v. U.S. Bank, NA* [3]. In *Woods*, the District Court dismissed the borrower's case, which alleged that the Notice of Sale contained the incorrect beneficiary. Although US Bank, NA as Trustee For The Harborview 2006-04 Trust Fund was the most recent assignee of the beneficial interest in the Trust Deed and had appointed the successor trustee, the Notice of Default and the Notice of Sale listed MERS as the beneficiary in the Trust Deed because MERS was in fact the original beneficiary stated in the trust deed.

> ***[T]he panel attempted to interpret the law in the same manner as the Oregon Supreme Court and took a nuanced approach to statutory interpretation, finding that a uniform strict compliance approach to all the sections of the OTDA [Oregon Trust Deed Act] would cause absurd results.***

Declining to rule on the merits of whether the Trust Deed Act was even violated (for the purposes of reviewing the District Court's ruling on the motion to dismiss, the court presumed the Notice of Sale did contain an incorrect beneficiary), the panel attempted to interpret the law in the same manner as the Oregon Supreme Court and took a nuanced approach to statutory interpretation, finding that a uniform strict compliance approach to all the sections of the OTDA would cause absurd results. According to the 9th Circuit panel, such interpretation would destroy the carefully struck balance achieved by the legislature to streamline foreclosure. The Court even went so far as to say that finding a strict compliance requirement might cause lenders to opt for the judicial foreclosure process to avoid the possibility that an alleged technical violation could be brought up post sale to avoid the trustee's deed issued. In order for a post-sale challenge to eviscerate a sale, the challenge must be based on lack of notice or some other "fundamental flaw in the foreclosure proceedings, such as the sale being completed without the borrower actually being in default."[4]

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On the same day the 9th circuit upheld the dismissal of the *Woods* case, it issued a similar ruling in Liu v. Northwest Trustee[5] and Romani v. Wells Fargo Bank[6]. Clearly, there are a lot of lawsuits pending asserting the strict compliance theory and the 9th circuit simply does not agree. Many of these cases are pending in the state court and one is pending before the Court of Appeals. Regardless of the ruling, it is anticipated that an appeal will be taken and the Oregon Supreme Court may yet be asked to issue the final opinion on this issue.

Though the *Woods* opinion may be helpful, it will not be the last word on how trustees should comply with ORS 86.771. That statute requires that the beneficiary "in the trust deed" be referenced on the Notice of Sale. If the beneficiary changes, does this statute (as suggested by the plaintiffs in these cases) require that the new beneficiary be named, even though it is not explicitly stated? *We* might not be out of the woods yet.

1 *Brandrup v. ReconTrust Co., N.A.*, 353 Or. 668, 303 P.3d 301 (2013)

2 *Niday v. GMAC Mortg., LLC*, 353 Or. 648, 302 P.3d 444 (2013)

3 *Woods v. United States Bank N.A.*, No. 13-36037, 2016 U.S. App. LEXIS 14128 (9th Cir. Aug. 3, 2016)

4 An interesting parallel can be drawn between the court's conclusion in Woods and the recent U.S. Supreme Court's ruling in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 194 L.Ed.2d 635, 26 Fla. L. Weekly Fed. S. 128 (2016) where the Court found that that the 9th Circuit's injury-in-fact consideration didn't consider the "concreteness" of the injury when analyzing an individual's claim that Spokeo violated the Fair Credit Reporting Act. The Supreme Court emphasized that in order to assess Article III standing, the court must consider the concrete and particularized nature of the injury. A statutory violation is not enough in neither the Spokeo FCRA case nor the Woods, OTDA case. Federal courts are clearly demanding more before entertaining such thin lawsuits.

5 *Liu v. Northwest*, No. 14-35202, 2016 U.S. App. LEXIS 14160 (9th Cir. Aug. 3, 2016)

6 *Romani v. Wells Fargo Bank, N.A.*, No. 14-35018, 2016 U.S. App. LEXIS 14157 (9th Cir. Aug. 3, 2016)

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