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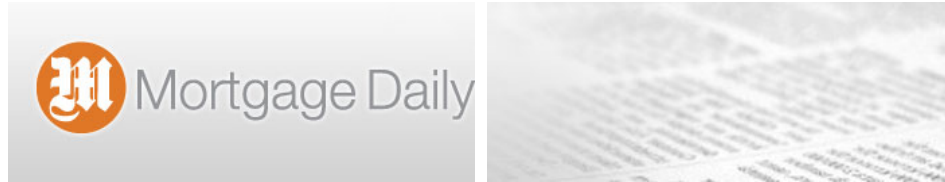
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Bankruptcy Ruling Benefits Foreclosing Parties

9th Circuit bars borrower's claims

Sept. 22, 2017

By **LAURA N. COUGHLIN** and **T. ROBERT FINLAY** [Wright, Finlay & Zak LLP](#)

The 9th Circuit Court of Appeals has barred claims due to the borrower's failure to amend include the claims in their bankruptcy schedules.

On Aug. 29, the 9th Circuit provided foreclosing parties some well-needed protection from borrower lawsuits in *Meyer v. Northwest Trustee Services*.⁽¹⁾ While the Meyer decision is unpublished and involved a foreclosure trustee, the rationale behind the ruling should apply to future litigation against trustees, servicers and investors in the 9th Circuit of the Federal Courts, which includes Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon and Washington.

In its decision, the Ninth Circuit declined to review the borrower's claims but instead determined that the borrowers were barred from bringing the claims against Northwest Trustee Services Inc. under the doctrine of judicial estoppel. The ruling sends the message to borrowers that, as soon as they learn of a potential claim during their bankruptcy, they must amend their schedules or disclosure statements to include the claim as an asset. If they don't, their subsequent claims could be barred by the doctrine of judicial estoppel.

Judicial estoppel prevents a party from claiming one set of circumstances and then later claiming a different inconsistent set to their advantage. Any potential claim a debtor has is an asset of the bankruptcy estate because if they prevail on those claims, the monies they receive could go toward paying their creditors. By failing to include a potential claim, debtors mislead the court and their creditors. Their failure to disclose the claim during the bankruptcy prevents them from bringing the claim at a later date when it is most advantageous to the debtor.

Factual History

In late 2005, Peter J. Meyer and Sharee L. Meyer executed a promissory note and deed of trust. The loan was later transferred into a securitized trust. **US Bank** was appointed the trustee of the trust and **Wells Fargo Bank, N.A.**, was the authorized servicer and custodian. Sometime in 2008, the Meyers defaulted on the loan.

In 2010, Northwest received a referral to foreclose along with the required beneficiary declaration, executed by Wells Fargo as attorney in fact for the beneficiary. The referral also included the loss mitigation declaration, signed by the same person but as an employee of America's Servicing Co.⁽²⁾

Northwest issued a notice of default relying on the information in the referral and the executed declarations. Northwest performed no additional inquiries into the authority of the person signing the declarations or the information contained in the referral. The NOD included language that Northwest was acting as an agent for the beneficiary. The NOD also listed the address for America's Servicing as the address for the owner of the note and for the servicer. The phone numbers provided for the owner of the note and the servicer were numbers for Wells Fargo.

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Believing the arrears listed in the NOD were incorrect, the Meyers contacted the numbers listed on the NOD. The Meyers assert that they were confused when the calls led to Wells Fargo (as opposed to America's Servicing), an entity they had not dealt with before.⁽³⁾ In August 2010, Northwest recorded the Notice of Trustee's Sale. The day before the scheduled foreclosure sale, the Meyers filed for Chapter 13 Bankruptcy.

In December 2010, an attorney for the Meyers sent a Qualified Written Response that as U.S. District Court Judge Martinez noted "raised no concerns about the identification of the note owner." America's Servicing responded to the Qualified Written Response providing the the contact information for US Bank, the trustee of the trust.

During the bankruptcy, the Meyers and US Bank stipulated to an order of relief from the stay on June 1, 2011. The loan was removed from the Meyers plan and the plan was confirmed. In May of 2012, Northwest recorded a new Notice of Trustee's Sale.

Adversary Proceeding

With another sale date looming, in July 2012, the Meyers filed an adversary complaint in the bankruptcy court. By October 2013, only Northwest remained as a defendant in the action and a three day bench trial commenced. The claims against Northwest were for violations of the *Deed of Trust Act*, the *Washington State Consumer Protection Act* and the *Fair Debt Collection Practices Act*.

During trial, Northwest asserted that the Meyers are barred from bringing these claims under the doctrine of judicial estoppel because they failed to include the claims as assets in their bankruptcy schedules. Judge Overstreet issued a memorandum decision finding for the Meyers on the *Deed of Trust Act* and *Washington State Consumer Protection Act* claims, denying relief under the *Fair Debt Collection Practices Act* and ignoring any argument regarding judicial estoppel.

At the time of Judge Overstreet's decision, it was not clear as to whether or not a claim for a violation of the *Deed of Trust Act* survives if a foreclosure was not completed. Judge Overstreet decided that a cause of action under the *Deed of Trust Act* was permitted under the current case law.⁽⁴⁾ Judge Overstreet held that due to Northwest's inclusion of language in the NOD asserting that it was acting as the agent for the beneficiary; Northwest not independently verifying the parties executing the declarations had authority to execute and the beneficiary was the actual owner of the note; and by failing to include the contact information for the owner of the note in the NOD, Northwest breached their duty to the Meyers under the *Deed of Trust Act*.⁽⁵⁾

According to Judge Overstreet, Northwest's failure to strictly comply with the *Deed of Trust Act* was an unfair and deceptive act giving rise to a *Washington State Consumer Protection Act* claim.⁽⁶⁾ Putting the final nail in the coffin, Judge Overstreet determined that but for Northwest's faulty NOD, the Meyers would not have been forced to act. The chain started with the Meyers being required to hire an attorney to send the Qualified Written Response, continued with the filing of the bankruptcy, extended to the cost of moving and paying for a rental, and also included lost wages for the time spent in mediations and hearings.

Northwest appealed to the U.S. District Court, Western Division.

On April 10, 2015, U.S. District Court Judge Martinez reversed Judge Overstreet's decision. Between Judge Overstreet's decision and Judge Martinez's reversal, the case law concerning the *Deed of Trust Act* changed considerably. In that time, it was established that there was no independent action under the *Deed of Trust Act* without a completed foreclosure sale but that a violation of the act could still be actionable under the *Washington State Consumer Protection Act*.⁽⁷⁾ Additionally, it was determined that a trustee's reliance on the beneficiary declarations in initiating a non-judicial foreclosure was not a violation under the *Deed of Trust Act* so long as there was no evidence conflicting the information in the declarations.⁽⁸⁾ Finally, there was no affirmative duty for a trustee to investigate if the beneficiary is the holder of the note.⁽⁹⁾

During the appeal, Northwest again argued that judicial estoppel barred the Meyers from bringing their claims against Northwest. The court denied this argument relying on the fact that at the time the Meyers filed for bankruptcy, the law underlying the claims did not exist.⁽¹⁰⁾ Therefore, to bar the claims would not be fair to the Meyers due to the constant shifting of *Deed of Trust Act* law. The court based their decision on what the Meyers knew at the time of filing their bankruptcy in 2010 and did not address any requirement for the Meyers to amend their schedules once the claims were known in 2012.

Instead, the district court reversed Judge Overstreet's decisions specifically as to each of the claims. The *Deed of Trust Act* claim was reversed based on Frias establishing there is no individual claim for a violation under the *Deed of Trust Act*. The *Washington State Consumer Protection Act* claim failed because the Meyers failed to establish all elements required for a *Washington State Consumer Protection Act* claim.⁽¹¹⁾ Most importantly, in light of the decision in Trujillo, the court determined that Northwest did not violate the *Deed of Trust Act* by relying on the beneficiary declarations. Finally, the District Court determined that the injury and damages either could not be proven to stem from Northwest's actions or simply were not recoverable under a *Washington State Consumer Protection Act* claim.

Meyers Ninth Circuit Appeal

Continuing the trend of ever changing *Deed of Trust Act* law, on Aug. 20, 2015, the Washington State Supreme Court reversed Trujillo in a decision referred to as Trujillo II.⁽¹²⁾ In Trujillo II, the Supreme Court

determined that the declaration of the noteholder was ambiguous because it stated that the beneficiary is the "actual holder of the promissory note or other obligation." (emphasis added). A trustee's reliance on an ambiguous declaration is a violation of the trustee's duty to the borrower and therefore a violation of the *Deed of Trust Act*. As a violation of the act, reliance on the declaration gives rise to a *Washington State Consumer Protection Act* claim. The beneficiary declaration used by Northwest to commence the Meyers' foreclosure also included this ambiguous language and could be deemed a violation of the *Deed of Trust Act*. Northwest would have to prove that they relied on additional information confirming the beneficiary was the owner of the note prior to the initiation of the foreclosure.

Though the Meyers brought forward ten issues for the appellate court to review, including the change in Trujillo II, the Ninth Circuit's majority memorandum decision is based solely on the issue of judicial estoppel. The Ninth Circuit finally agreed that the Meyers were barred from bringing claims against Northwest because they failed to amend their schedules after obtaining enough facts evidencing their potential claims against Northwest. Upon the filing of the adversary proceeding, the Meyers should have also amended their schedules in order to apprise the bankruptcy court and their creditors of the claims.

Although the decision involved a foreclosing trustee, the same rationale would apply to servicers, investors or any creditor in a bankruptcy. Once served with a complaint, a servicer, investor, trustee or their counsel, should first review a borrower's bankruptcy status and history. If, while they were in active bankruptcy, the borrower was aware of the facts giving rise to their claims, their action should be dismissed.

Ideally, the 9th Circuit would have published this decision so that it could be used as precedent on future matters. Nonetheless, the cases cited in the decision and its rationale can be used to protect foreclosing parties within the 9th Circuit.

(1) The decision is not precedent "except when relevant under the doctrine of law of the case or rules of claim preclusion or issue preclusion." Ninth Circuit rule 36-3.

(2) America's Servicing is a division of Wells Fargo.

(3) All payments had been going to America's Servicing as the servicer under the loan.

(4) *Walker v. Quality Loan Serv. Corp. of Wash.*, 176 Wn. App. 294, 308 P.3d 716 (2013); and *Bavand v. OneWest Bank, FSB*, 176 Wn. App. 475, 309 P.3d 636 (2013).

(5) The Court relied on *Klem v. Wash. Mut. Bank*, 176 Wn.2d 771, 295 P.3d 1179 (2013).

(6) Without a violation of a statute that specifically asserts that violation of that statute is a violation of the Washington State Consumer Protection Act, a party must prove: 1) an unfair or deceptive act or practice; 2) the act or practice occurred in trade or commerce; 3) the act or practice impacts the public interest; 4) the act or practice caused injury to the plaintiff in his business or property; and 5) the injury is causally linked to the unfair or deceptive act.

(7) *Frias v. Asset Foreclosure Servs., Inc.*, 181 Wn.2d 412, 334 P.3d 529 (2014).

(8) *Trujillo v. Nw. Tr. Servs., Inc.*, 181 Wn. App. 484, 326 P.3d 768 (2014) (Reliance on the declarations is not a violation absent conflicting evidence.)

(9) *Bavand v. Onewest Bank, FSB*, 587 F. App'x 392 (9th Cir. 2014).

(10) *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83, 285 P.3d 34 (2012); *Klem* (2013); *Walker* (2013); and *Bavand* (2013).

(11) As trustee, Northwest asserting they were acting as agent to the owner of the note in the NOD was not prejudicial because they were authorized to issue the NOD by statute and the Meyers failed to show prejudice or harm due to the language. Northwest's inclusion of America's Servicing's address and Wells Fargo's numbers on the NOD was merely a technical error and the Meyers failed to prove how the practice is likely to deceive the public or how they were deceived or prejudiced by it.

(12) *Trujillo v. Nw. Tr. Servs., Inc.*, 183 Wn.2d 820, 355 P.3d 1100 (2015).

Meyer v. Northwest Trustee Services.

Case No. 15-35560, 2017 U.S. App. LEXIS 16551 (9th Cir. 2017).

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