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The Ninth Circuit Bars Claims Against Trustee Due to the Borrower's Failure to Amend Include the Claims in their Bankruptcy Schedules

By Laura N. Coughlin, Esq., and T. Robert Finlay, Esq., Wright, Finlay & Zak, LLP

Spurred by the UTA's amicus efforts, the 9th Circuit recently provided foreclosure trustee's with some well-needed protection from borrower lawsuits. *Meyer v. Northwest Trustee Services,* No. 15-35560, 2017 U.S. App. LEXIS 16551 (9th Cir. 2017).[1] While the *Meyer* decision is unpublished, the rationale behind the ruling could arguable apply to future litigation against trustees in the 9th Circuit of the Federal Courts, which includes Alaska,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. ("NWTS") 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.

> "Once served with a complaint, a 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."

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 ("Meyers") 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. ("Wells Fargo") was the authorized servicer and custodian. Sometime in 2008, the Meyers defaulted on the loan.

In 2010, NWTS 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 Company ("ASC").[2] NWTS issued a notice of default ("NOD") relying on the information in the referral and the executed declarations. NWTS 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 NWTS was acting as an agent for the beneficiary. The NOD also listed the address for ASC 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 ASC), an entity they had not dealt with before.[3] In August 2010, NWTS recorded the Notice of Trustee's Sale ("NOTS"). 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 ("QWR") that as US District Court Judge Martinez noted "raised no concerns about the identification of the Note owner." ASC responded to the QWR 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, NWTS recorded a new NOTS.

Adversary Proceeding

With another sale date looming, in July 2012, the Meyers filed an adversary complaint in the bankruptcy court. By October 2013, only NWTS remained as a defendant in the action and a three day bench trial commenced. The claims against NWTS were for violations of the Deed of Trust Act ("DTA"), the Washington State Consumer Protection Act ("CPA"), and the Fair Debt Collection Practices Act ("FDCPA"). During trial, NWTS 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 DTA and CPA claims, denying relief under the FDCPA 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 DTA survives if a foreclosure was not completed. Judge Overstreet decided that a cause of action under the DTA was permitted under the current case law.[4] Judge Overstreet held that due to NWTS's inclusion of language in the NOD asserting that it was acting as the agent for the beneficiary; NWTS 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, NWTS breached their duty to the Meyers under the DTA.[5]

According to Judge Overstreet, NWTS's failure to strictly comply with the DTA was an unfair and deceptive act giving rise to a CPA claim.[6] Putting the final nail in the coffin, Judge Overstreet determined that but for NWTS'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 QWR, 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.

NWTS Appeal to the United States 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 DTA changed considerably. In that time, it was established that there was no independent action under the DTA without a completed foreclosure sale but that a violation of the DTA could still be actionable under the CPA.[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 DTA 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, NWTS again argued that judicial estoppel barred the Meyers from bringing their claims against NWTS. 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 DTA 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 DTA claim was reversed based on *Frias* establishing there is no individual claim for a violation under the DTA. The CPA claim failed because the Meyers failed to establish all elements required for a CPA claim.[11] Most importantly, in light of the decision in

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Trujillo, the court determined that NWTS did not violate the DTA by relying on the beneficiary declarations. Finally, the District Court determined that the injury and damages either could not be proven to stem from NWTS's actions or simply were not recoverable under a CPA claim.

Meyers Ninth Circuit Appeal

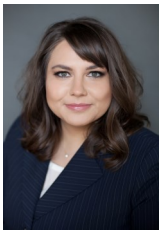
Continuing the trend of ever changing DTA law, on August 20, 2015, the Washington State Supreme Court reversed *Trujillo* in a decision referred to as *Trujillo II*.[12] In *Trujillo II*, the Supreme Court determined that the declaration of the noteholder was ambiguous because it stated that the beneficiary 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 DTA. As a violation of the DTA, reliance on the declaration gives rise to a CPA claim. The beneficiary declaration used by NWTS to commence the Meyers' foreclosure also included this ambiguous language and could be deemed a violation of the DTA. NWTS 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.

After briefing by both sides, Ann T. Marshall, Esq., with Anglin Flewelling Rasmussen Campbell & Trytten LLP (AFRCT) filed an amicus curie brief on behalf of the UTA. Despite the ten issues asserted by the Meyers, 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 Meyers were barred from bringing claims against NWTS because they failed to amend their schedules after obtaining enough facts evidencing their potential claims against NWTS. 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.

With this decision, trustees could nip some costly and frivolous actions by borrowers in the bud. Once served with a complaint, a 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 trustees in other matters 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]ASC is a division of Wells Fargo.
[3]All payments had been going to ASC 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 CPA, 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 liked 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, NWTS 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. NWTS's inclusion of ASC's address and Wells Fargo's numbers on the NOD was merely a tehnical 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).



Ms. Coughlin is an associate attorney with Wright, Finlay & Zak, focusing primarily on real estate litigation, including lender and servicer liability defense, wrongful foreclosure defense, fair debt collection practices defense, and title disputes. Ms. Coughlin regularly practices in state and federal courts throughout Washington State. She can be reached at lcoughlin@wrightlegal.net.

T. Robert Finlay, Esq. is a founding Partner with Wright Finlay & Zak, LLP and a member of the UTA, CMBA, MBA and ALFN. Mr. Finlay is the current Chair of the UTA's Legislative Committee and was its President for 2011 and 2012. He is licensed to practice in all courts in the State of California, including all of the U.S. District Courts within the State of California and the U.S. Court of Appeals, Ninth Circuit. Mr. Finlay can be reached at (949) 477-5056 or via email at rfinlay@wrightlegal.net.