

Oregon and Washington Courts Create an Uncertain Future for Non-Judicial Foreclosures in the Region.

By: T. Robert Finlay, Esq., Wright, Finlay & Zak, LLP
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The recent holdings in *Bain*¹ and *Niday*² have brought into question the future of non-judicial foreclosures in Washington and Oregon. At a minimum, these decisions have brought non-judicial foreclosures to a screeching halt and left in doubt the validity of thousands of already completed foreclosures.

Beneficiary Defined

The Courts in both *Bain* and *Niday* emphasized the plain language of each State's Deed of Trust statute. In Oregon, the Appellate Court concentrated on the requirement that every assignment of a Deed of Trust must be recorded and that the beneficiary must be the entity who is owed the security interest. As a result, the Court found the very nature of MERS involvement in Oregon deeds of trust violated the Oregon Deed of Trust statute.

In Washington, the Supreme Court echoed the Oregon ruling and found that the beneficiary of a deed of trust must possess the note. As a result of both rulings, only a party that has strictly adhered to the literal language of each state's Deed of Trust Act may avail itself to the benefits of the non-judicial foreclosure process.

The key for each court was the definition of the "beneficiary" under their respective state's Deed of Trust Act. Neither court could move beyond the fact that MERS did not possess a beneficial interest in the note. Looking at the plain meaning of each statute, the Courts found that the lack of interest was fatal to MERS role. In Oregon, the Court specifically found that the beneficiary of a Deed of Trust in Oregon is defined as the entity "whom the secured obligation is owed." Similarly, the Justices in Washington found that "if MERS does not hold the note, it is not the lawful beneficiary." As a result, MERS cannot play a role in the non-judicial foreclosure process because it does not have authority to initiate proceedings as a beneficiary under the respective Deed of Trust Acts.

What Next?

The ultimate consequences of these rulings will not be known for months, if not years. However, we do anticipate there will be an immediate upswing in affirmative lawsuits in Washington as the Plaintiffs' Bar attempts to take advantage of the ruling in *Bain*. Especially because the *Bain* Court has expressly stated that a cause of action exists of Washington State's Consumer Protection Act, allowing for borrowers to seek treble damages and recovery of attorneys' fees. In fact, we have already seen one class action lawsuit filed in the U.S District Court for the Western District of Washington attacking all non-judicial

¹ Full copy can be found at: <http://www.courts.wa.gov/opinions/?fa=opinions.disp&filename=862061MAJ>

² Full Copy can be found at: <http://www.publications.ojd.state.or.us/Publications/A147430.pdf>

foreclosures in King County, WA over the last two years. The suit seeks recovery of damages under Washington State's Consumer Protection Act and for violations of the Deed of Trust Act.

We anticipate that the Court systems in each state will experience an initial flurry of individual and class action complaints attacking completed non-judicial foreclosures on loans involving MERS. The question will then be whether both states transition to judicial foreclosures. If that happens, there will be other unintended consequences as well. In Washington specifically, many delinquent homeowners will now potentially face deficiency judgments for the first time as lenders switch to judicial foreclosures.

For a full discussion of both the *Bains* and *Niday* cases, please feel free to contact Charlie Meyer at cmeyer@wrightlegal.net.

(Note – Wright, Finlay & Zak, is a mortgage-litigation firm specializing in representing servicers, investors and trustees in California, Nevada, Arizona, Washington and Oregon. The information provided in this article should not be relied on as legal advice.)

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