

ENFORCING THE OREGON TRUST DEED ACT

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I. INTRODUCTION

In the real estate world, the years leading up to the 2008 financial crisis were characterized by massive financial irresponsibility exacerbated by a regulation vacuum. The nation's biggest financial institutions securitized millions of loosely underwritten home loans into mortgaged-backed securities and sold them to unknowing investors. The result, now widely recognized, was the overnight collapse of AAA-rated portfolios collateralized with toxic subprime loans. As of March 2012, nearly 20% of all Oregon homeowners were under water on their mortgages.¹

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1. Elliot Njus, *More Oregon, Portland-area Mortgages Underwater at Year's End*, THE OREGONIAN (Mar. 1, 2012), http://www.oregonlive.com/frontporch/index.ssf/2012/03/more_portlandarea_oregon_home.html (note that "under water" refers to a state of negative equity, where the loan against the

For most of the last five decades, real estate lenders have diligently complied with Oregon's statutory requirements for nonjudicial foreclosure. Traditionally, every time a home loan was sold on the secondary mortgage market, lenders recorded a deed of trust assignment in the local county records.² This practice guaranteed a complete legal chain of title at the time of foreclosure—making nonjudicial foreclosure a quick, reliable enforcement method without the need for judicial oversight. Oregon's nonjudicial foreclosure regime theoretically encourages lending to less-qualified credit applicants by ensuring a more cost-effective remedy upon default.³ Since their creation in 1959, nonjudicial foreclosures have been the predominant method for foreclosing real property in Oregon.

Widespread changes in mortgage banking practices during the housing boom undercut this once-reliable foreclosure method. Once mortgage bankers and Wall Street financiers realized the enormous profit potential in the secondary market for home loans, mortgage securitization by private investment banks intensified.⁴ As the market for home loans burgeoned and Americans increasingly signed up for home ownership, the mortgage banking industry collectively decided the decades-old practice of recording assignments each time a loan was sold was too expensive and paperwork intensive.⁵ They developed an electronic database named "Mortgage Electronic Registration Systems, Inc." (MERS) to save time and money in the securitization process.⁶ An estimated 60% of all current U.S. home

home exceeds the market value of the home).

2. *Niday v. GMAC Mortg., LLC*, 284 P.3d 1157, 1161 (Or. Ct. App. 2012) ("In the first few decades after the OTDA was enacted, real estate loans in Oregon fit neatly into [this] scheme: A lender originated a home loan; as security for the loan, a borrower executed a trust deed that named the lender as the beneficiary; and assignments of the trust deed from the lender beneficiary, if any, were recorded in the mortgage records of the county in which the home was located.").

3. *Hearing Before the S. Judiciary Comm.*, 1957 Leg., 49th Sess. (Or. 1957) (Indeed, the Oregon legislature enacted the Oregon Trust Deed Act mainly to "create a more favorable climate for investment funds.").

4. Michael Simkovic, *Competition and Crisis in Mortgage Securitization* (Jan. 9, 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1924831##.

5. *Niday*, 284 P.3d, at 1162 ("The public recording of numerous bundled mortgage and trust deed assignments was both cumbersome and expensive for buyers and sellers of mortgage backed securities.").

6. Phyllis K. Slesinger & Daniel McLaughlin, *Mortgage Electronic Registration System*, 31 ID. L. REV. 805, 812–13 (1995) (describing a study funded by the mortgage banking industry that described how much money could be saved by avoiding county recording fees); *Niday*, 284 P.3d at 1162.

mortgages were sold on the secondary market using MERS,⁷ but as housing prices continued to skyrocket the legal issues surrounding MERS and mortgage securitization remained unnoticed. The eventual collapse of the housing bubble exposed the legal problems with MERS and mortgage securitization. Mortgage lenders soon found themselves in the middle of a foreclosure crisis.

The Oregon Trust Deed Act (OTDA) requires lenders to record all deed of trust assignments before initiating nonjudicial foreclosures.⁸ Lenders have difficulty complying with this requirement because of their dependence on the MERS private recording system.⁹ Over the last several years, an increasing number of Oregon homeowners have challenged the legality of their pending nonjudicial foreclosures. Their claims for wrongful foreclosure stem from two basic arguments: (1) MERS cannot be a beneficiary under a deed of trust in Oregon because MERS does not meet the statutory definition of a beneficiary found at section 86.705(2)¹⁰ of the Oregon Revised Statutes, and (2) unrecorded assignments of their deed of trust prohibit the nonjudicial foreclosure remedy under section 86.735(1).

These issues have divided circuit and district court judges in Oregon, resulting in a number of conflicting opinions.¹¹ On April 6,

7. Christopher L. Peterson, *Two Faces: Demystifying the Mortgage Electronic Registration System's Land Title Theory*, 53 WM. & MARY L. REV. 111, 117 (2011).

8. OR. REV. STAT. § 86.735(1) (2011).

9. Niday v. GMAC Mortg., LLC, 284 P.3d 1157, 1169 (Or. Ct. App. 2012) (“A beneficiary that uses MERS to avoid publicly recording assignments of a trust deed cannot avail itself of a nonjudicial foreclosure process that requires that very thing—publicly recorded assignments.”).

10. OR. REV. STAT. § 86.705(2) (2011) (Until its amendment in 2010, the definition of a beneficiary was found in Oregon Revised Statute section 86.705(1) (2009)).

11. Numerous circuit and federal district court judges in Oregon have held that MERS cannot be a beneficiary under the OTDA. *James v. ReconTrust Co.*, 845 F. Supp. 2d 1145 (D. Or. 2012) (finding that the original lender is the beneficiary under the OTDA and MERS cannot be a beneficiary under the OTDA); *Hooker v. Nw. Tr. Services, Inc.*, Civ. No. 10-3111-PA, 2011 WL 2119103 (D. Or. May 25, 2011) (declining to find that MERS can be a “beneficiary” under the OTDA); *In re McCoy*, 446 B.R. 453, 457 (D. Or. 2011); *U.S. Bank v. Flynn, Columbia Cnty.* No. 11-8011 (Or. Cir. Ct. Feb. 16, 2011); *Enderlin v. GMAC Mortg., LLC*, Civ. No. 11-0114-E-2, 2 (Or. Cir. Ct. June 10, 2011); *In re Allman, Bankr. No. 08-31282-elp7*, 2010 WL 3366405, *9–10 (D. Or. Aug. 24, 2010). *But see Beyer v. Bank of Am.*, 800 F. Supp. 2d 1157, 1162 (D. Or. 2011) (finding that MERS may serve as a beneficiary and stating that “at most [plaintiffs] can show that [the use of MERS] creates a complex payment arrangement for receiving the benefit of the obligation between MERS and the lenders’ successors”); *Sovereign v. Deutsche Bank, No.*, 3:11-CV-995-BR, 2011 WL 5592392, at *5 (D. Or. Nov. 15, 2011); *Bertrand v. SunTrust Mtg.*, Civ. No. 09-857-JO, 2011 WL 1113421, at

2012, Federal District Court Chief Judge Ann Aiken certified four questions to the Oregon Supreme Court stemming from four wrongful foreclosure cases pending before her Court.¹² On July 18, 2012, the Oregon Court of Appeals ruled against MERS in *Niday v. GMAC Mortgage, LLC*, finding that MERS does not meet the statutory definition of a beneficiary, and cannot be used to circumvent the OTDA recording requirement.¹³ The following day, the Oregon Supreme Court accepted the four certified questions from the District Court.¹⁴ Oral arguments are currently scheduled for January 8, 2013,¹⁵ although a final decision may not be rendered until the

*3–5 (D. Or. Mar. 23, 2011); *Barker v. GMAC Mortg., LLC*, No. 3:11-cv-579-ST, 2011 WL 3360677, at *1 (D. Or. Aug. 3, 2011); *Neilson v. Wells Fargo Bank, N.A.*, No. CV 10-1516-MO, 2011 WL 3476523, at *1 (D. Or. Aug. 9, 2011); *Burgett v. MERS*, No. 09-6244-HO, 2010 WL 4282105, at *2 (D. Or. Oct. 20, 2010); *Rinegard Guirma v. Bank of Am., N.A.*, Civ. No. 10-1065-PK, 2010 WL 3945476, at *3–4 (D. Or. Oct. 6, 2010); *Ekerson v. Mortg. Elec. Registration Sys., Inc.*, No. 11-CV-178-HU, 2011 WL 597056, at *2–4 (D. Or. Feb. 11, 2011) (numerous circuit and district court judges in Oregon have held that MERS cannot be a beneficiary under the OTDA); *Buckland v. Aurora Loan Services, Josephine Cnty.* No. 10-CV-1023 (Or. Cir. Ct. Aug. 30, 2010); *Nigro v. Nw. Tr. Servs., Josephine Cnty.* No. 11-CV-0135 (Or. Cir. Ct. May 11, 2011); *Spencer v. Guaranty Bank, F.S.B., Deschutes Cnty.* No. 10-CV-0515-ST (Or. Cir. Ct. May 5, 2011); *Yovko v. Nw. Tr. Services, Wash. Cnty.* No. C-110703-CV (Or. Cir. Ct. Feb. 4, 2011); *Somers v. Deutsche Bank Nat'l Trust Co., Clackamas Cnty.* Nos. CV-11020133 and FE-110027 (Or. Cir. Ct. Feb. 4, 2011) (finding MERS can be a beneficiary under the OTDA and that only the assignment from MERS to the assignee needs to be recorded); *Rinegard Guirma v. Bank of Am., N.A.*, Civ. No. 10-1065-PK, 2010 WL 3945476, at *3–4 (D. Or. Oct. 6, 2010).

12. *Mirarabshahi v. ReconTrust Co.*, No. 3:12-cv-00010-HA (D. Or. filed Jan. 4, 2012); *Mayo v. ReconTrust Company*, No. 3:11-cv-01533-PK (D. Or. filed Dec. 21, 2011), *Powell v. ReconTrust Co.*, No. 3:11-cv-01399-HZ (D. Or. filed Jan. 8, 2012), and *Brandrup v. ReconTrust Co.*, No. 3:11-cv-01390-JE (D. Or. filed Nov. 17, 2011) (The four certified questions are: (1) May an entity such as MERS, that is neither a lender nor successor to a lender, be a “beneficiary” as that term is used in the Oregon Trust Deed Act? (2) May MERS be designated as beneficiary under the Oregon Trust Deed Act where the trust deed provides that MERS “holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS, as nominee for lender and Lender’s successors and assigns, has the right to exercise any or all of those interests”? (3) Does the transfer of a promissory note from the lender to a successor result in an automatic assignment of the securing trust deed that must be recorded prior to the commencement of nonjudicial foreclosure proceedings under ORS 86.735(1)? (4) Does the Oregon Trust Deed Act allow MERS to retain and transfer legal title to a trust deed as nominee for the lender, after the note secured by the trust deed is transferred from the lender to a successor or series of successors?).

13. *Niday*, 284 P.3d at 1167.

14. *Brandrup v. ReconTrust Co.* (Or. July 19, 2012) (No. S0-60281) (order accepting certified questions), *available at* http://media.oregonlive.com/business_impact/other/Order.pdf.

15. OREGON SUPREME COURT DOCKET, *BANDRUG V. RECONTRUST CO.*, SC NO. S060281, <http://www.ojd.state.or.us/records/sccalendar.nsf/0/1127f0663ada4c7688257a45005de182?Op>

following summer. Until then, in the wake of *Niday* and recent legislation requiring pre-foreclosure mediation, lenders appear reluctant to pursue any nonjudicial foreclosures in Oregon.¹⁶ For the time being, the entire foreclosure industry in Oregon has been forced to switch to judicial foreclosures as the state's High Court is now poised to weigh in on Oregon's nonjudicial process and the legislature scrambles to come up with a solution.

This article explains how the use of MERS as a named beneficiary violates the procedural requirements for foreclosure under the Oregon Trust Deed Act. This article further examines the implications of MERS's inability to serve as the beneficiary, concluding that, although MERS cannot be a beneficiary, MERS may likely serve as an agent of the initial and successive beneficiaries. In its agency capacity, MERS and its principals may comply with Oregon's procedures for nonjudicial foreclosure by recording all assignments of the deed of trust prior to initiating nonjudicial foreclosures.

II. BACKGROUND

A. *Mortgage Securitization and MERS*

Financed real estate transactions involve two distinct legal documents: (1) a promissory note,¹⁷ which documents the obligation to repay the loan; and (2) a security agreement, which secures repayment of the loan to the real property.¹⁸ Mortgage securitization is the process of collateralizing marketable securities (mortgage backed securities or MBS) with pools of real estate promissory notes.¹⁹ When promissory notes are bundled together to collateralize securities, the pools of notes are legally organized as trusts.²⁰

enDocument.

16. Elliot Njus, *Foreclosure Filings Plummet as Oregon Mediation Program Takes Effect*, THE OREGONIAN (Aug. 9, 2012), http://www.oregonlive.com/front-porch/index.ssf/2012/08/foreclosure_filings_plummet_as.html.

17. OR. REV. STAT. § 73 (2011) (promissory notes are generally governed by Article III of the Uniform Commercial Code, codified in Oregon Revised Statutes section 73).

18. GRANT S. NELSON & DALE A. WHITMAN, REAL ESTATE TRANSFER, FINANCE, AND DEVELOPMENT 100 (8th ed. 2009).

19. Simkovic, *supra* note 4, at 253–84.

20. I.R.C. § 47 (2008) (Securitized trusts are organized as “special purpose vehicles” (SPV) and “qualified special purpose entities” (QSPE) to shield the assets of the trust from the possibility of becoming an asset of an originating lender's bankruptcy estate. This is known as “bankruptcy remoteness.” Under the 1986 Tax Reform Act, if all of the interest in the

Promissory notes pledged to collateralize MBS trusts are sold multiple times before they become assets of the trusts.²¹ Each one of these transfers is an outright sale of the note.²² Every time the note is sold, the beneficial interest in the underlying security agreement is automatically assigned to the new noteholder by operation of law.²³ The importance of the relationship between the note and security interest cannot be overstated in the context of securitization. The deed of trust assignments were traditionally recorded in the local land records to give public notice of a noteholder's secured interest in the property.

According to the American Securitization Forum, securitization of mortgages increases the availability of credit to home purchasers by decreasing the cost of credit and spreading risk.²⁴ Government

mortgages is transferred to the certificate holders, the trust qualifies as a "Real Estate Mortgage Investment Conduit" (REMIC). REMIC qualification is essential to the securitization process because REMICS are pass-through taxation vehicles that provide for a single taxable event. Typical mortgage pools consist of 1,000 to 5,000 loans. This means that millions of dollars of cash payments are transferred from a servicer through the REMIC and finally to the certificate holders without being taxed. This special tax structure saves the investors literally billions of dollars.).

21. The notes may take any number of different paths before finding their way into an MBS trust. While a complete, industry-wide audit of the structure of these complex transactions could fill many volumes, a general and simplified discussion suffices for the purpose of this article. Assets are generally transferred from the original lender to a warehouse, which bundles thousands of notes together into a loan portfolio. The entire portfolio is then sold to a "transferor" or "depositor," which begins the securitization. Eventually, each asset is risk-rated and then transferred into the MBS trust, where the notes are held by a custodian acting as a bailee.

22. I.R.C. § 860(A)-(G) (These transfers must be true conveyances of the note in order to qualify as a REMIC.).

23. *Carpenter v. Longan*, 83 U.S. 271, 274-75 (1872) ("[T]he note and mortgage are inseparable; the former as essential, the latter as an incident. An assignment of the note carries the mortgage with it, while an assignment of the latter alone is a nullity."); *First Nat'l Bank of Or. v. Jack Mathis Gen. Contractor*, 546 P.2d 754, 758 (Or. 1976) ("the assignment of a debt carries with it the security for the debt"); *Beauchamp v. Jordan*, 157 P.2d 504, 507 (Or. 1945) ("[T]he transfer of the notes effected a transfer of [the] mortgages."); *Rutherford v. Eyre & Co.*, 148 P.2d 530, 534 (Or. 1944) ("the mortgages were but incidents to the notes, and endorsement and delivery of the notes carried the mortgages with them"); *Schleef v. Purdy*, 214 P. 137, 140 (Or. 1923) ("[T]ransfer of the note, without any formal transfer of the mortgage, transfers the mortgage"); *U.S. Nat'l Bank of Portland v. Holton*, 195 P. 823, 826 (Or. 1921) ("It has always been the law of this state that the assignment of the note carries the mortgage The assignment of a mortgage independent of the debt which it is given to secure, is an unmeaning ceremony."); *West v. White*, 758 P.2d 424, 426 (Or. Ct. App. 1988) ("[A] note carries with it a [trust deed] in real property."). See also *RESTATEMENT (THIRD) OF PROPERTY: MORTGAGES* §§ 5.4(a), (c) (1997) ("[A] transfer of an obligation secured by a mortgage also transfers the mortgage unless the parties to the transfer agree otherwise.").

24. Faten Sabry & Chudozie Okongwu, *Study of the Impact of Securitization on*

sponsored entities began securitizing loans on a small scale in the early 1970s.²⁵ Soon thereafter, private financial institutions realized the profit potential from selling these securities, and modern securitization began.²⁶ Between 1990 and 2006, issuance of mortgage-backed securities increased by 678%.²⁷ As the housing bubble took form in the early 2000s, mortgage securitization increased dramatically.²⁸ By the end of 2007, the market held over \$7 trillion in outstanding mortgage backed securities.²⁹ As millions of new loans were securitized, mortgage bankers found themselves buried in paperwork, because each transfer of the note required a recording of the underlying assignment of the security interest. The mortgage bankers quickly realized they needed a process for streamlining the transfers of mortgages to save time and money.³⁰ Their solution was MERS.

MERS tracks the beneficial interest in security instruments and changes in loan servicers.³¹ It was conceived in 1995 by Fannie Mae,

Consumers, Investors, Financial Institutions and the Capital Markets, 7–14 (NERA Economic Consulting 2009), http://www.americansecuritization.com/uploadedFiles/ASF_NERA_Report.pdf.

25. See Sabry & Okongwu, *supra* note 24, at 23 (describing how Government sponsored enterprises (GSEs) Federal National Mortgage Association (Fannie Mae) and Federal Home Loan Mortgage Corporation (Freddie Mac) began securitizing conforming mortgages in the early 1970s to improve the availability of credit for home loans and increase home ownership)). Note that GSEs may only purchase loans that conform to FHA guidelines—known as conforming loans.

26. See Simkovic, *supra* note 4, at 7; Sabry & Okongwu, *supra* note 24, at 27 (The market for securitization of non-conforming conventional loans by private financial institutions is believed to have begun in 1977 in an SEC-registered offering sponsored by Bank of America.).

27. 2 MORTGAGE MARKET STATISTICAL ANNUAL 3–7 (Inside Mortgage Finance Publications 2007).

28. Simkovic, *supra* note 4, at 7.

29. SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION, STATISTICS: U.S. MORTGAGE-RELATED AND OUTSTANDING, <http://www.sifma.org/uploadedFiles/Research/Statistics/StatisticsFiles/SF-US-Mortgage-Related-SIFMA.xls> (last visited Oct. 30, 2012).

30. Slesinger & McLaughlin, *supra* note 6, at 807.

31. *Cervantes v. Countrywide Home Loans*, 656 F.3d 1034, 1038–39 (9th Cir. 2011) (“MERS is a private electronic database, operated by MERSCORP, Inc., that tracks the transfer of the ‘beneficial interest’ in home loans, as well as any changes in loan servicers. After a borrower takes out a home loan, the original lender may sell all or a portion of its beneficial interest in the loan and change loan servicers. The owner of the beneficial interest is entitled to repayment of the loan. For simplicity, we will refer to the owner of the beneficial interest as the ‘lender.’ The servicer of the loan collects payments from the borrower, sends payments to the lender, and handles administrative aspects of the loan. Many of the companies that participate in the mortgage industry—by originating loans, buying or investing in the

Freddie Mac, Bank of America, JP Morgan Chase, Citibank, Wells Fargo, and other large lending institutions.³² MERS was intended to make securitization both faster and cheaper by avoiding the need to record assignments of security interests.³³ MERS saved its members hundreds of millions of dollars by establishing a parallel recording system to track the transfers of the mortgages.³⁴ MERS revolutionized the secondary market for mortgages by allowing for the rapid securitization of nearly two thirds of all U.S. home mortgages.³⁵

B. Oregon Real Estate Finance and Foreclosure

In Oregon, the two common forms of real estate security agreements are mortgages and trust deeds.³⁶ Until 1959, mortgages were the most common form.³⁷ Oregon mortgages are governed primarily by common law, with some statutory requirements in Oregon Revised Statutes chapters 86 and 88.³⁸ In a mortgage, the mortgagee holds the deed until the loan is fully paid by the borrower.³⁹ Upon full payment of the obligation, the deed is reconveyed to the mortgagor.⁴⁰

Upon a default by the mortgagor, the mortgagee accelerates the amount due and files a lawsuit to foreclose. In this process, commonly known as a judicial foreclosure, the mortgagee files a lawsuit against the mortgagor and asks the court to determine the priority of rights between the mortgagor and all junior lienholders.⁴¹

beneficial interest in loans, or servicing loans—are members of MERS and pay a fee to use the tracking system.”). *See generally* Peterson, *supra* note 7.

32. Howard Schneider, *MERS Aids Electronic Mortgage Market*, MORTGAGE BANKING, Jan. 1997, at 42.

33. Peterson, *supra* note 7, at 116.

34. Nolan Robinson, *The Case Against Allowing Mortgage Electronic Registration, Inc. (MERS) to Initiate Foreclosure Proceedings*, 32 CARDOZO L. REV. 1621, 1622 (2011) (“MERS functions as an electronic clearinghouse that allows lenders to circumvent the process of recording assignments and paying recording fees to the county clerk’s office.”). Note that trust deed assignment costs vary between \$31 and \$47 in Oregon, depending on the county.

35. *Id.* at 1621. *See* Jackson v. Mortg. Elec. Registration Sys., 770 N.W.2d 487, 491–92 (Minn. 2009).

36. Oregon also allows land-sale contracts. *See generally* Security Bank v. Chiapuzio, 747 P.2d 335 (Or. 1987).

37. Niday v. GMAC Mortg., LLC, 284 P.3d 1157, 1157 (Or. Ct. App. 2012).

38. James v. ReconTrust Co., 845 F. Supp. 2d 1145, 1150 (D. Or. 2012).

39. NELSON & WHITMAN, *supra* note 18, at 100.

40. *Id.*

41. Judicial foreclosures are governed in part by Oregon Revised Statutes section

The court instructs the sheriff to sell the property at public auction, and distribute the proceeds according to the priority of the liens.⁴² However, before the sale the homeowner and all junior lienholders enjoy a redemption period during which they can exercise their equitable right of redemption.⁴³ The property remains unmarketable during this period.⁴⁴ If the disbursed proceeds are insufficient to fully satisfy a lien, the lienholder can sue the borrower for the deficiency. However under Oregon's anti-deficiency statute, a mortgagee cannot obtain a deficiency judgment after foreclosing a residential trust deed.⁴⁵

In 1959, the Oregon legislature passed the Oregon Trust Deed Act (OTDA) to simplify and speed up the foreclosure process.⁴⁶ Unlike a mortgage, which involves a mortgagor (borrower) and a mortgagee (lender), a trust deed involves three parties: a grantor (borrower), a "beneficiary," and a trustee.⁴⁷ The trustee holds legal title for the benefit of the beneficiary until either the loan is fully paid or the home is purchased at a foreclosure sale.⁴⁸ The OTDA simplified the foreclosure process for lenders by creating a private right of sale and a statutory framework for foreclosure outside the purview of the court. The beneficiary of a trust deed can choose to foreclose a trust deed by a common law judicial foreclosure, or a nonjudicial foreclosure under the OTDA.⁴⁹ Although nonjudicial foreclosures are faster and less expensive, there are statutory prerequisites to nonjudicial foreclosures that are not required for judicial foreclosures, including the requirement to record all

88.010.

42. OR. REV. STAT. § 88.010 (2011).

43. The equitable right of redemption is the legal right of the borrower to repurchase the property after it has been foreclosed. See NELSON AND WHITMAN, *supra* note 18, at 111–15 (describing the development of the common law equitable right of redemption).

44. *Id.*

45. OR. REV. STAT. § 86.770(2) (2011). A "residential trust deed" is defined by Oregon Revised Statutes section 86.705(3) as: a trust deed on property upon which are situated four or fewer residential units and one of the residential units is occupied as the principal residence of the grantor, the grantor's spouse or the grantor's minor or dependent child at the time a trust deed foreclosure is commenced.

46. S. JUDICIARY COMMITTEE MINUTES, 50th Assembly (Or. Feb. 19, 1957).

47. Ronald Brady Tippetts, *Mortgages-Trust Deeds in Oregon*, 44 OR. L. REV. 149, 149 (1965).

48. OR. REV. STAT. § 86.705(7) (2011).

49. OR. REV. STAT. § 86.710 (2011); Kerr v. Miller, 977 P.2d 438, 451 (Or. Ct. App. 1999).

assignments of the deed of trust before foreclosing.⁵⁰ Including Oregon, 28 states have currently implemented statutory procedures allowing nonjudicial foreclosures, while the remaining states still require judicial foreclosures.⁵¹

C. *MERS's Dilemma in Oregon*

Mortgage bankers sought to legally implement the private MERS recording system by designating MERS as both (1) the beneficiary of the deed of trust, and (2) the nominee of the lender (noteholder).⁵² The cumbersome boilerplate language in all MERS deeds of trust evidences this two-faced assertion of MERS's legal status: "MERS' is Mortgage Electronic Registration Systems, Inc. MERS is a separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns. **MERS is the beneficiary under this Security Instrument.**"⁵³ MERS therefore claims to be both the beneficiary and the nominee of the lender.

In the wake of the subprime mortgage meltdown, our nation found itself in the midst of a foreclosure crisis.⁵⁴ The problems with MERS's legal assertions became more apparent as an increasing number of Oregonians lost their homes via the nonjudicial foreclosure process. The main problem with MERS is it claims to be the beneficiary to Oregon deeds of trust and acts as the beneficiary throughout nonjudicial foreclosure proceedings, but MERS does not fit the statutory definition of a beneficiary found in section 86.705(2) of the Oregon Revised Statutes.⁵⁵ The result of this monumental

50. OR. REV. STAT. § 86.735 (2011).

51. NELSON & WHITMAN, *supra* note 18, at 641; Niday v. GMAC Mortg., LLC, 284 P.3d 1157, 1157 (Or. Ct. App. 2012).

52. For a state by state comparison, see REALTYTRAC, <http://www.realtytrac.com/foreclosure-laws/foreclosure-laws-comparison.asp> (last visited Sept. 23, 2012).

53. DEED OF TRUST, [http://www.docstoc.com/docs/5563829/Oregon-Deed-of-Trust-\(MERS\)](http://www.docstoc.com/docs/5563829/Oregon-Deed-of-Trust-(MERS)) (last visited Nov. 8, 2012) (emphasis in original). Typical deed of trust forms also include the following language: "The beneficiary of this Security Instrument is MERS (solely as nominee for Lender and Lender's successors and assigns) and the successors and assigns of MERS . . . Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property, and to take any action required of lender including, but not limited to, releasing and canceling this Security Instrument."

54. Kerry E. Grace, *Foreclosures Surged 64% in 2008*, WALL ST. J., Jan. 14, 2009, at 1.

55. *See generally* Niday, 284 P.3d at 1157.

oversight during the formation of MERS has profound implications on real estate lending and foreclosures today. The remainder of this article examines in detail why MERS cannot be a beneficiary to Oregon deeds of trust and whether MERS may nevertheless comply with the Oregon Trust Deed Act's foreclosure prerequisites.

III. MERS CANNOT BE A BENEFICIARY

The language identifying MERS in deeds of trust reflects two very different legal identities. MERS claims to be both the beneficiary to the deed of trust and the lender's agent at the same time.⁵⁶ MERS relies on its beneficiary status to claim the beneficial interest in the deed of trust throughout the securitization process. Therefore, there are no assignments to record. A relatively simple statutory analysis shows that MERS cannot be the deed of trust beneficiary in Oregon.

The term "beneficiary" is statutorily defined in the OTDA in section 86.705(2) of the Oregon Revised Statutes. Defining the term invokes Oregon's well-established three-step methodology for statutory interpretation, set forth by the Oregon Supreme Court in *Portland General Electric Co. v. Bureau of Labor & Industries* and modified in *State v. Gaines*.⁵⁷ The first step is to analyze the text and context of the statute as a whole.⁵⁸ The second step is to consider the legislative history.⁵⁹ If the first two steps are not conclusive and ambiguity remains, "the court may resort to general maxims of statutory construction to aid in resolving the remaining uncertainty."⁶⁰

The text and context should first be considered.⁶¹ Section 86.705(2) provides:

"Beneficiary" means a person named or otherwise designated in a

56. Peterson, *supra* note 7, at 118 ("On the one hand, MERS purports to be acting as a 'nominee'—a form of an agent. On the other hand, MERS also claims to be an actual mortgagee, which is to say an owner of the real property right to foreclose upon the security interest. That a company cannot be both an agent and a principal with respect to the same right is axiomatic.")

57. *Portland Gen. Elec. Co. v. Bureau of Labor & Indus.*, 859 P.2d 1143, 1145–47 (Or. 1993); *State v. Gaines*, 206 P.2d 1042, 1050–51 (Or. 2009).

58. *Gaines*, 206 P.2d at 1050; *State v. Smith*, 268 P.3d 644, 647 (Or. Ct. App. 2011) ("Context includes other provisions of the statute.")

59. *Gaines*, 206 P.2d at 1050–51.

60. *Id.* at 1051.

61. *James v. ReconTrust Co.*, 845 F. Supp. 2d 1145, 1155 (D. Or. 2012).

trust deed as *the person for whose benefit a trust deed is given*, or the person's successor in interest, and who is not the trustee unless the beneficiary is qualified to be a trustee under O[regon] R[evised] S[tatutes section] 86.790(1)(d).⁶²

As District Court Judge Simon noted in a recent opinion, this statutory definition can be segmented into 3 separate requirements: (1) a person named or otherwise designated in a trust deed; (2) as the person for whose benefit a trust deed is given, or the person's successor in interest; and (3) not the trustee unless qualified.⁶³ If MERS fails one of these three requirements, it does not meet the statutory definition of a beneficiary. The meaning of requirements one and three are plain and unambiguous.⁶⁴ MERS surely satisfies requirements one and three—MERS is always named or otherwise designated in trust deeds and is not the trustee. The issue then, is whether MERS meets the second requirement. Precisely stated, who “benefits” from a trust deed? Does MERS enjoy that benefit? The answer is not expressly found in section 86.705(2) of the Oregon Revised Statutes, because the statute does not declare what the benefit of a trust deed is and who enjoys that benefit. Furthermore, “benefit” is undefined altogether in the OTDA.

An examination of section 86.705(2) in the context of the entire OTDA leaves no room for ambiguity. It is obvious that “the ‘benefit’ of a trust deed is that it secures the repayment of the note.”⁶⁵ A “trust deed” is defined as: “[A] deed . . . that conveys an interest in real property to a trustee in trust *to secure the performance of an obligation* the grantor or other person named in the deed *owes to a beneficiary*.”⁶⁶ When a trust deed is issued to secure the obligation of a promissory note, the beneficiary of the trust deed is the person to whom repayment of the note is owed, or that person's successor in interest. This conclusion is supported by the fact that the legislature did not define the terms “lender,” or “noteholder” in the OTDA.⁶⁷ Had the legislature intended the beneficiary to be a separate and

62. *Id.* (emphasis added).

63. *Id.*

64. *Id.*

65. *Id.* at 1155–56; *West v. White*, 758 P.2d 424, 426 (Or. Ct. App. 1988) (“[A] beneficiary's interest under a trust deed . . . is . . . a lien on the land as security for the payment of the debt.”).

66. OR. REV. STAT. § 86.705(7) (2011) (emphasis added).

67. *James v. ReconTrust Co.*, 845 F. Supp. 2d 1145, 1157 (D. Or. 2012).

distinct entity from the noteholder, they would have defined noteholder in the statute.⁶⁸

The legislature clearly intended the beneficiary be the original noteholder or that person's successor(s) in interest. As Judge Simon correctly pointed out, other sections of the OTDA confirm that the legislature intended the "beneficiary" to be the noteholder.⁶⁹ Oregon Revised Statutes section 86.710 provides, in part: "Transfers in trust of an interest in real property may be made to secure the performance of *an obligation of a grantor*, or any other person named in the deed, *to a beneficiary*."⁷⁰ Section 86.720(1) provides, in part: "Within 30 days after performance of the obligation secured by the trust deed, *the beneficiary* shall . . . request . . . the trustee to reconvey the estate of real property described in the trust deed to the grantor."⁷¹

This assumes "the grantor owes the obligation to the beneficiary."⁷² Also, in describing telephone numbers to be included in foreclosure notices, the legislature again indicates that the beneficiary is the person who loaned the money: "Telephone numbers . . . must be toll-free numbers unless the beneficiary: (a) Made the loan with the beneficiary's own money; [and] (b) Made the loan for the beneficiary's own investment[.]"⁷³

The recent passage of Senate Bill 1552 on March 5, 2012 reaffirms the Oregon legislature's intended definition of beneficiary.⁷⁴ Senate Bill 1552 establishes mandatory pre-foreclosure mediation with the goal of seeking a "Foreclosure Avoidance Measure."⁷⁵ "Foreclosure Avoidance Measure" is "an agreement between *a beneficiary and a grantor to modify an obligation* secured by a trust deed[.]"⁷⁶ The bill requires the beneficiary or its agent to appear at the mediation in person and bring the following documentation:

(A) grantor's complete payment history; (B) evidence that the beneficiary is the real party in interest on the obligation, including

68. *Id.*

69. *Id.* at 1156–57.

70. OR. REV. STAT. § 86.710 (2011); *James*, 845 F. Supp. 2d at 1156.

71. OR. REV. STAT. § 86.720(1) (2011) (emphasis added).

72. *James*, 845 F. Supp. 2d at 1157.

73. OR. REV. STAT. § 86.737(4) (2011). *See also James v. ReconTrust Co.*, 845 F. Supp. 2d 1145, 1157 (D. Or. 2012).

74. S.B. 1552, 76th Leg., Reg. Sess. (Or. 2012).

75. *Id.* at § 2.

76. *Id.* at § 2(1) (emphasis added).

but not limited to (i) a true copy of the original note and (ii) documents showing the chain of title from the date of the original loan, including conveyances, endorsements and assignments of the deed of trust, a servicing agreement the beneficiary has with another person, or an agreement by which *the beneficiary* pledges as collateral all or a portion *of its ownership interest in the note* for a security the beneficiary issued or sold[.]⁷⁷

One can safely assume that, given the recent legal controversy surrounding MERS, had the Oregon legislature intended for the term “beneficiary” to mean anything other than “noteholder,” they would not have used the term beneficiary to describe the noteholder throughout the most extensive amendment to the OTDA since its passing.

The benefit of the trust deed is not given to MERS. MERS is not the noteholder or the noteholder’s successor in interest. In fact, MERS is never mentioned in promissory notes. MERS does not receive payment from borrowers,⁷⁸ and does not benefit from repayment of loans.⁷⁹ MERS loses nothing in the event of a default and receives no consideration from either the grantor or the trustee.

Nevertheless, many circuit and district court judges have been persuaded by the argument that MERS is a beneficiary because the

77. *Id.* at § 2(4)(b)(A)–(B).

78. On April 7, 2010, William C. Hultman, who at the time was an attorney and treasurer for MERS, gave a deposition regarding the nature of MERS. He was asked the following questions and gave the following answers:

Q: Let me break the question down then. Does MERS have an ownership interest in the promissory note that the [plaintiffs] signed?

A: If you mean ownership interest in the sense that are we entitled to any of the proceeds of the promissory note, the answer is no.

Dep. of William Hultman at 138, *Bank of N.Y. v. Ukepe*, No. F-10209-08 (N.J. Super. Ct. Ch. Div. 2008), *available at* <http://www.scribd.com/doc/36521121/Full-Deposition-of-William-Hultman-Secretary-and-Treasurer-of-MERSCORP>.

Q: Did MERS pay anything for whatever interest it claims to have in the [plaintiff’s] promissory note?

A: We were granted a security interest in the promissory note. That’s our interest. We did not receive—we did not pay anything for it. It was granted to us by the borrower.

Q: And if you recall your answers earlier, you have no entitlement to any payments under the note, is that correct?

A: That’s correct.

Id. at 151.

79. *Id.*

parties named MERS as the beneficiary in the deed of trust.⁸⁰ This interpretation defies rules of statutory interpretation by ignoring the requirement that the beneficiary is the person for whose benefit the deed of trust was given.⁸¹ This interpretation renders the definition meaningless, because parties could designate whomever they wish to be the beneficiary.⁸²

A similar line of faulty reasoning, advanced by lenders and adopted by some Oregon courts, relies on the conclusion that MERS is the beneficiary because the parties contractually agreed that MERS is the beneficiary.⁸³ This assertion, however, fails to acknowledge that “beneficiary” is a statutorily defined term, and parties cannot redefine it through contract.⁸⁴ Other Oregon Courts have held that MERS is a beneficiary because it receives a benefit from the deed of trust in the form of payments.⁸⁵ This is certainly untrue.⁸⁶ It is well-understood that MERS does not receive any payments at any point during or after the securitization of a loan.⁸⁷ MERS is simply a

80. See, e.g., *Bertrand v. SunTrust Mortg.*, Civ. No. 09-857-JO, 2011 WL 1113421, at *3–5 (D. Or. Mar. 23, 2011); *Burgett v. MERS*, No. 09-6244-HO, 2010 WL 4282105, at *2 (D. Or. Oct. 20, 2010) (“the trust deed specifically designates MERS as the beneficiary”); *Yovko v. Nw. Tr. Servs.*, Wash. Cnty. No. C-110703-CV (Or. Cir. Ct. Apr. 25, 2011).

81. See *James v. ReconTrust Co.*, 845 F. Supp. 2d 1145, 1160 (D. Or. 2012) (“[MERS’s] interpretation fails to give effect to the latter part of the definition.”).

82. *Id.* at 1161. See also *State v. Cloutier*, 261 P.3d 1234, 1251 (Or. 2011) (“an interpretation that renders a statutory provision meaningless should give us pause”); *State v. Garcias*, 690 P.2d 497, 500 (1984) (“This court endeavors to avoid interpreting a statute in a manner which will produce absurd results.”).

83. See, e.g., *Spencer v. Guar. Bank, F.S.B., Deschutes Cnty.* No. 10-CV-0515-ST (Or. Cir. Ct. May 5, 2011) (holding that the borrower is contractually bound to designation of MERS as the beneficiary).

84. *James*, 845 F. Supp. 2d at 1162 (“Under Oregon law, the provisions of the OTDA, including its definitions, form part of the trust deed agreement between the parties.”). See also *Ocean Accident & Guar. Corp. v. Albina Marine Iron Works*, 260 P. 229, 230 (Or. 1927) (“The law of the land applicable thereto is a part of every valid contract.”); *Rehart v. Clark*, 448 F.2d 170, 173 (9th Cir. 1971) (“[E]xisting laws are read into contracts in order to fix the rights and obligations of the parties.”). In the event that a provision of the OTDA conflicts with a term of the trust deed, the OTDA provision, rather than the private contract, controls. See 11 RICHARD A. LORD, WILLISTON ON CONTRACTS § 30:24 (4th ed. 2012). If the parties intend to invoke the OTDA to govern their rights and responsibilities, they may not contract around its definitions. Cf. *U.S. v. Lupton*, 620 F.3d 790, 799–800 (7th Cir. 2010) (In bench trials, courts alone determine the meaning of statutes and contractual terms.).

85. *Beyer v. Bank of Am.*, 800 F. Supp. 2d 1157, 1161–62 (D. Or. 2011) (finding that MERS may serve as a beneficiary and that “at most [plaintiffs] can show that [MERS] creates a complex payment arrangement for receiving the benefit of the obligation between MERS and the lenders’ successors”).

86. See *supra* note 78 (describing deposition answers disclaiming right to payments).

87. *Id.*

database. It has few employees, and certainly does not accept payments from homeowners. Thus, although MERS purports to be the beneficiary in deeds of trust, it completely fails to meet Oregon's statutory definition of a beneficiary and cannot serve as one.

IV. THE RECORDING PREREQUISITE IS SOUND POLICY

In *Niday*, the Oregon Court of Appeals held that foreclosing banks could not rely on MERS as a named beneficiary to avoid recording transfers of a beneficial interest in deeds of trust prior to nonjudicial foreclosures.⁸⁸ MERS argues that the legislature did not intend for the assignments of the beneficial interest in deeds of trust, by operation of law, pursuant to sales of promissory notes to require to be recorded. MERS argues that these sorts of assignments are therefore exempted from the recording prerequisite of Oregon Revised Statutes section 86.735(1).

The Supreme Court should examine the legislature's justification in requiring lenders to record all assignments of the deed of trust prior to a nonjudicial foreclosure. The relevant text of the OTDA is found at section 86.735:

The trustee may foreclose a trust deed by advertisement and sale in the manner provided in ORS 86.740 to 86.755 if:

(1) The trust deed, *any assignments of the trust deed by the trustee or the beneficiary and any appointment of a successor trustee are recorded in the mortgage records in the counties in which the property described in the deed is situated*, **and**

(2) There is a default by the grantor or other person owing an obligation, the performance of which is secured by the trust deed, or by their successors in interest with respect to any provision in the deed which authorizes sale in the event of default of such provision; **and**

(3) The trustee or beneficiary has filed for record in the county clerk's office in each county where the trust property, or some part of it, is situated, a notice of default containing the information required by ORS 86.745 and containing the trustee's or beneficiary's election to sell the property to satisfy the obligation;

88. *Niday v. GMAC Mortg., LLC*, 284 P.3d 1157, 1169 (Or. Ct. App. 2012).

and

(4) No action has been instituted to recover the debt or any part of it then remaining secured by the trust deed⁸⁹

The word “if” in the first sentence of the statute and the word “and” at the end of each of the first three subsections indicate that each of the four subsections is a prerequisite to the trustee’s power of sale. The trustee’s power of sale does not exist until all four prerequisites are satisfied. The first is the recording prerequisite. It requires three distinct recordings: (1) the original deed of trust (2) any assignments of the deed of trust by the trustee or the beneficiary, and (3) any appointment of successor trustee. In Oregon practice, the original deed of trust is rarely left unrecorded. The appointment of successor trustee is also recorded with high regularity, but MERS often records the appointment of successor trustee in its own name, not as an agent of the actual beneficiary.⁹⁰

With few exceptions, the original beneficiary and all successive beneficiaries fail to record assignments of the deed of trust during the securitization process.⁹¹ This failure to record is far from unforeseeable, considering the entire purpose of MERS’s formation was to circumvent the recording of assignments to save time and money.⁹² Therefore, MERS’s failure to comply with the intent of the legislature appears to be clear from a brief examination of the text. Nevertheless, MERS argues that the presence of the word “any” immediately before “assignments” indicates that only written assignment forms in existence before the power of sale is exercised need to be recorded, and if there are no assignment forms, there is nothing to record.⁹³ This argument impliedly seeks to insert either of the words “existing” or “written” between the words “any” and “assignments.” Such an interpretation violates legislative directives

89. OR. REV. STAT. § 86.735 (2011) (emphasis added).

90. If MERS is a valid agent of the noteholder beneficiary at the time of the appointment, then MERS may record the appointment as an agent. If, however, MERS is not a valid agent of the then-current beneficiary, then MERS lacks authority to execute and record the appointment at all.

91. All four cases from which the District Court certified questions to the state Supreme Court involve banks that failed to record these assignments. *See supra*, note 12.

92. *See Slesinger & McLaughlin, supra* note 6.

93. Brief on the Merits of Petitioner on Review at 2, *Niday v. GMAC Mortg., LLC*, No. S060655 (Or. Nov. 8, 2012)

on statutory construction by “insert[ing] what has been omitted.”⁹⁴ Nevertheless, given the importance of these determinations on the Oregon mortgage lending industry, the history of the OTDA should be examined to assist in clarifying the legislature’s intent.

The legislature first passed a bill authorizing the use of trust deeds and nonjudicial foreclosures in 1957.⁹⁵ Then-Governor Robert D. Holmes vetoed the bill.⁹⁶ A virtually unchanged version of the law, however, was passed and enacted into law in 1959.⁹⁷ The main purpose for allowing trust deeds and nonjudicial foreclosures was to make lending and foreclosing easier in Oregon.⁹⁸ The use of trust deeds and the statutory procedure for foreclosing outside of court encouraged out-of-state lenders to lend more money in Oregon, thus increasing the availability of home loans for Oregonians.⁹⁹ The bill mirrored similar statutes in neighboring California, Washington, Hawaii, and Idaho.¹⁰⁰ It was intended to make Oregon more competitive for regional lending dollars.¹⁰¹

The legislature agreed to the creation of this extraordinary new

94. Portland Gen. Elec. Co. v. Bureau of Labor & Indus., 859 P.2d 1143, 1146 (Or. 1993).

95. *A Survey of Oregon Legislation Enacted in 1957*, 37 OR. L. REV. 67, 81 (1957).

96. Tippetts, *supra* note 47.

97. *Id.*

98. S. JUDICIARY COMMITTEE MINUTES, 49th Assembly, at 4 (Or. Feb. 19, 1957); S. COMMITTEE ON FINANCIAL AFFAIRS PUBLIC HEARING, 50th Assembly, at 1 (Or. Feb. 12, 1959).

99. H. JUDICIAL COMMITTEE MINUTES, 50th Assembly, at 1 (Or. April 16, 1959) (“Jack Mahaffy, home building contractor in Multnomah County, stated that investors from the Midwest have indicated that they would be happy to invest money in Oregon if and when our state has trust deeds . . . Philip Hammond, Portland Realty Board, Mortgage Loan Association, stated that many money lending institutions which invest money in California will not lend in Oregon.”). *See generally* S. COMMITTEE ON FINANCIAL AFFAIRS PUBLIC HEARING, 50th Assembly (Feb. 12, 1959). The original bill contained a provision that allowed homeowners to opt-out of the nonjudicial foreclosure procedure and instead elect the traditional judicial foreclosure. This provision, however, was removed in 1961. Tippetts, *supra* note 47, at 150 (Discussing how, when given the option, “any debtor would undoubtedly elect the additional safeguards provided by judicial foreclosure under the mortgage statutes. Thus the 1959 act was unattractive to finance groups, and little more than a needless complication of mortgage law.”).

100. S. COMMITTEE ON FINANCIAL AFFAIRS PUBLIC HEARING, *supra* note 99, at 1 (Discussing how Idaho, California, Washington, and Hawaii all had similar laws, and that Idaho’s statute was taken from Oregon’s proposed 1957 bill.). The relevant Idaho statute is sections 345–54 of the Idaho Session Laws, passed in 1957.

101. *See* Tippetts, *supra* note 47; S. COMMITTEE ON FINANCIAL AFFAIRS PUBLIC HEARING, *supra* note 99, at 1–2 (Various lending industry representatives spoke in favor of the bill.).

foreclosure process, because they were able to provide counterbalances to protect homeowners.¹⁰² The recording prerequisite was one of these counterbalances. The requirement was originally found at section 86.735(1)(a) of the Oregon Revised Statutes: “Before notice of sale may be given, the trust deed, all assignments, and any appointment of a successor trustee, *must be recorded.*”¹⁰³ Although the statute has been expanded, these original counterbalancing requirements remain the same today.

The text and legislative history of the Oregon Trust Deed Act clearly imply that the recording prerequisite, found at section 86.735(1), is intended to ensure that the bank asserting its right to foreclose the deed of trust actually has the authority to do so. This provision is a direct substitute for judicial oversight. In a judicial foreclosure, the plaintiff must prove its interest in the property to a judge. The legislature allowed banks to contractually negotiate the out of court private right of sale and foreclosure because the recording requirement served as a direct alternative to judicial inquiry. When the legislature allowed for the private right of sale, it understood that only someone who had the right to conduct such a sale through its contractual relationship with the borrower could assert this right. Only the lender and subsequent noteholders in contractual privity with the lender enjoy this right. The recording prerequisite is therefore the most important provision in the OTDA. Without the recording requirement, any imposter can walk in and claim a private right to foreclose without showing any evidence it is the party entitled to enforce the private right of sale.

This interpretation comports with the legislature’s overall intention in enacting the OTDA.¹⁰⁴ The legislature allowed for the private right of sale outside of the judicial system because the procedure for conducting the nonjudicial foreclosure included requirements for notice and proving a legitimate chain of title by means of recorded assignments. The equitable right of redemption

102. Tippetts, *supra* note 47, at 150. See H. JUDICIAL COMMITTEE MINUTES, *supra* note 100, at 2 (Arthur Lewis of the Multnomah County Bar Association expressed concern over requirements for recording trust deeds in county records.).

103. OR. REV. STAT. § 86.735(1)(a) (1963) (emphasis added).

104. See S. JUDICIARY COMMITTEE MINUTES, 49th Assembly, at 2–3 (Or. March 8, 1957) (various senators propose changes to the drafted bill to further protect homeowners). See also MINUTES OF THE MEETING OF THE JUDICIARY COMMITTEE, 49th Assembly (Or. May 8, 1957) (Various representatives discuss their concerns over the level of protection for debtors.).

was replaced with a strict notice requirement and a requirement to document the chain of title through duly recorded assignments of the deed of trust. Numerous Oregon courts have concluded this. In *Staffordshire Investments, Inc. v. Cal-Western Reconveyance Corporation*, the Oregon Court of Appeals found that:

The Act represents a well-coordinated statutory scheme to protect grantors from the unauthorized foreclosure and wrongful sale of property, while at the same time providing creditors with a quick and efficient remedy against a defaulting grantor. As discussed above, it confers upon a trustee the power to sell property securing an obligation under a trust deed in the event of default, without the necessity for judicial action. However, the trustee's power of sale is subject to strict statutory rules designed to protect the grantor.¹⁰⁵

Without these protections, the legislature would never have allowed deeds of trust to include a private right of sale. Using MERS to avoid recording assignments therefore violates an important legislative policy underlying the recording prerequisite.

Nevertheless, MERS and its members argue that assignments of the deed of trust by operation of law are somehow excluded from those contemplated by the recording requirement in the OTDA.¹⁰⁶ This argument may relate to a Minnesota Supreme Court case where that Court held assignments of the note were not assignments of the deed of trust for the purposes of a recording statute in that state.¹⁰⁷ That opinion, however, was based on a Minnesota statute that only

105. *Staffordshire Investments, Inc. v. Cal-Western Reconveyance Corp.*, 149 P.3d 150 (Or. Ct. App. 2006).

106. Brief on the Merits of Petitioner on Review at 2, *Niday v. GMAC Mortgage, LLC*, No. S060655, (Or. Nov. 8, 2012) (arguing that “the obligation in ORS 86.735(1) to record ‘any assignment[] of the trust deed’ as a condition of nonjudicial foreclosure requires recordation only of an existing written assignment, executed and acknowledged with the same formality as required in deeds and mortgages of real property. By contrast, ‘transfer’ of a trust deed by operation of law through transfer of the underlying promissory note is not an ‘assignment’ of the trust deed under ORS 86.735(1) that must be recorded to foreclose nonjudicially. There is a difference between ‘transfer’ of a note by assignment and transfer by indorsement and delivery. ‘Transfer’ of a note may occur by delivery without indorsement, but requires a formal assignment of the note (which is typically combined with a formal trust deed assignment), whereas negotiation by indorsement and delivery makes the recipient a ‘holder,’ and person entitled to enforce the Note within the meaning of the Uniform Commercial Code (and formerly under the Negotiable Instruments Law).”).

107. *Jackson v. Mortg. Elec. Registration Sys.*, 770 N.W.2d 487 (Minn. 2009) (While the case explicitly refers to mortgages, these mortgages are foreclosable by advertisement, much like Oregon deeds of trust at issue here).

required the *legal* interest in deeds of trust to be recorded prior to foreclosure. In that case, MERS successfully argued that, although noteholders hold equitable title, MERS holds legal title to mortgages,¹⁰⁸ and therefore assignments of the deed of trust were not required. This argument, however, is inapplicable to Oregon mortgages and deeds of trust.

Following a real estate mortgage transaction, an important distinction is made between legal and equitable title.¹⁰⁹ Legal title refers to the ownership interest in the deed.¹¹⁰ Equitable title refers to the ownership interest in the use and enjoyment of the property.¹¹¹ Equitable title always remains with the debtor/mortgagor.¹¹² There are two distinct theories, however, about which party holds legal title to mortgaged property.¹¹³ In lien-theory states, the mortgagee is regarded as holding only a lien interest in the property; the mortgagor thus holds both legal and equitable title to the property.¹¹⁴ However in title theory states, the mortgagee holds legal title to the property, while the equitable title to the property remains with the mortgagor.¹¹⁵ This distinction among different states becomes relevant as MERS often purports to hold legal title to trust deeds.¹¹⁶

Unlike Minnesota, Oregon is a lien-theory state,¹¹⁷ so both legal and equitable title remain with the borrower upon execution of a mortgage. The same is true for Oregon deeds of trust and deeds of

108. *Id.* at 501.

109. NELSON & WHITMAN, *supra* note 18, at 358–60. *See also* RESTATEMENT (THIRD) OF PROPERTY: MORTGAGES § 4.1 cmt. a (1997).

110. NELSON & WHITMAN, *supra* note 18, at 358–60.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.* at 359–60.

115. *Id.* at 358–59.

116. *See, e.g.,* Niday v. GMAC Mortg., LLC, 284 P.3d 1157, 1166–68 (Or. Ct. App. 2012).

117. Sam Paulsen Masonry Co. v. Higley, 557 P.2d 676, 678 (Or. 1976) (“The provisions relating to trust deeds . . . do not provide that trust deeds are to be considered as distinct from mortgages with respect to liens of this nature. Thus, a trust deed is considered a mortgage on real property A mortgage of real property creates only a lien or encumbrance and does not abrogate the mortgagor’s title to the property.”). *See also* West v. White, 758 P.2d 424, 426 (Or. Ct. App. 1988) (A “mortgage conveys no legal or equitable interest in fee or for life to the mortgagee, but merely creates a lien which constitutes security for the debt and grants the mortgagee, upon the mortgagor’s default, the right to have the property sold to satisfy the debt Similarly, a trust deed “is merely a lien on the land as security for the payment of the debt.”); Kerr v. Miller, 977 P.2d 438, 444 (Or. Ct. App. 1999); James v. ReconTrust Co., 845 F. Supp. 2d 1145, 1148 (D. Or. 2012).

trust generally.¹¹⁸ As previously mentioned, there are three parties to a deed of trust: the grantor, the beneficiary, and the trustee.¹¹⁹ The trustee holds legal title under a deed of trust for the benefit of the beneficiary.¹²⁰ The grantor retains equitable title. MERS holds neither legal nor equitable title.¹²¹

On March 27, 2012, the Oregon Department of Justice filed an amicus brief in an Oregon case currently before the Ninth Circuit Court of Appeals addressing this issue.¹²² Then-Attorney General John Kroger wrote:

Promissory note transfers shift the security interest in a trust deed from the deed's current beneficiary to a new beneficiary, and they thus qualify as 'assignments of the trust deed by . . . the beneficiary.' As a result, 86.735(1) requires [deed of trust transfers] to be recorded before a nonjudicial foreclosure can commence.¹²³

No Oregon caselaw supports MERS's proposition that assignments of the beneficial interest in deeds of trust are somehow exempted from the recording prerequisites. Such an interpretation would render the statute meaningless, and run afoul of the legislature's directive to construe statutes to give each section effect.¹²⁴

118. Kerr v. Miller, 977 P.2d 438, 444 (Or. Ct. App. 1999) ("A trust deed securing the sale of property is deemed a mortgage. OR. REV. STAT. § 86.715. With respect to mortgages, Oregon is a 'lien theory' state, meaning that a mortgage on real estate does not convey legal or equitable title or interest to the holder of the mortgage (mortgagee). Instead, the mortgagee has only a lien on the property. O[R.] R[EV.] S[TAT.] § 86.010.").

119. Tippetts, *supra*, note 47, at 149 (describing the parties to a deed of trust in detail).

120. *Niday*, 284 P.3d at 1167 (quoting Newman v. Randall, 753 P.2d 435, 437 (Or. Ct. App. 1988) ("A person holding legal title to land who sells it by land sale contract thereby vests the equitable title in the vendee. The vendor retains the legal title as security and *as a trustee* for the vendee.")) (emphasis in original), *rev. den.* 758 P.2d 346 (Or. 1988).

121. *See id.*

122. Brief of Amicus Curiae State of Oregon, Supporting Appellees' Brief and Affirmance of the District Court's Judgment, *Hooker v. Northwest Trustee Services*, No.11-35534, 2012 WL 1134166 (9th Cir. Mar. 27, 2012).

123. *Id.* at *2.

124. OR. REV. STAT. § 174.010 (2011) ("[S]uch construction is, if possible, to be adopted as will give effect to all [provisions in a statute].").

V. MERS AND AGENCY

MERS's failure as a beneficiary does not necessarily mean it cannot comply with the OTDA. If MERS is an agent for the initial lender (beneficiary) and all successive noteholders, MERS may be able to comply with Oregon nonjudicial foreclosure procedures.

A. Agency Relationships

MERS deeds of trust contain language identifying MERS as both the beneficiary and “nominee” for the lender: “‘MERS’ is Mortgage Electronic Registration Systems, Inc. MERS is a separate corporation that is acting solely as a *nominee for Lender and Lender’s successors and assigns*. MERS is the beneficiary under this Security Instrument.”¹²⁵ The term “nominee” is not defined in the OTDA. Black’s law dictionary defines nominee as “[a] person designated to act in place of another, usually in a very limited way,” or “[a] party who holds bare legal title for the benefit of others.”¹²⁶ Lenders appear to be using the word “nominee” to designate MERS as an agent.¹²⁷ Thus, deeds of trust specifically identify MERS as the agent of the initial lender, and homeowners expressly acknowledge that MERS is the nominee/agent of the initial lender when they sign the deed of trust.

MERS also identifies itself as the nominee for all successive noteholders.¹²⁸ However, the initial lender cannot appoint MERS as an agent for successive noteholders that do not yet exist. Once the successive noteholders do exist, MERS cannot, in its capacity as agent for the initial lender, appoint itself as agent for the successive noteholder. The original lender lacks capacity to do so, and MERS’s power cannot exceed that of its principal.¹²⁹ Therefore, MERS cannot

125. DEED OF TRUST, *supra* note 53 (MERS deed of trust forms) (emphasis added).

126. BLACK’S LAW DICTIONARY 1076 (8th ed. 2004).

127. *See* Landmark Nat’l Bank v. Kesler, 216 P.3d 158, 165–66 (Kan. 2010) (“[MERS] appear[s] to have defined the word [nominee] in much the same way that the blind men of Indian legend described an elephant—their description depended on which part they were touching at any given time.”). It also is not surprising that MERS does not just use the word “agent.” After all, using the word “agent” would leave people relatively unconfused and clear as to what MERS was purporting to be.

128. “MERS is the nominee for . . . Lender’s successors and assigns” is typically found on page 2 of MERS Deed of Trust forms.

129. Agent’s duties cannot exceed those of the principal. RESTATEMENT (THIRD) OF AGENCY §3.07(4) (2006) (“When a principal that is not an individual ceases to exist or commences a process that will lead to cessation of its existence or when its powers are

be the agent of successive noteholders unless those noteholders separately appoint MERS as their agent.

MERS claims that successive noteholders appoint MERS as their agent when they enter into MERS membership agreements. All banks that use the MERS system to track loans purportedly enter into a membership agreement with MERS. However, there is nothing in the membership agreements that expressly appoint MERS as an agent or nominee of its members.¹³⁰ Furthermore, in many cases, at one or more points during the securitization process, the note is transferred to a noteholder that is not a MERS member. In these cases, MERS may not rely on its membership agreements to support the existence of an agency relationship with successive noteholders.

Another important principle of agency law, however, supports the existence of an agency relationship between MERS and each of the successive noteholders in a securitization chain of title, regardless of whether each successive noteholder is a MERS member. If a principal ratifies the acts of the purported agent, then an agency relationship is assumed to exist.¹³¹ Notwithstanding these arguments, some courts have rejected MERS's common agency theory.¹³² Ultimately whether or not an agency relationship exists between MERS and each successive noteholder is an issue of fact that may vary significantly from one case to another.

B. MERS Can Comply With the Recording Prerequisite

If MERS is an agent of the initial lender and each successive noteholder, MERS can comply with the underlying policy of the recording prerequisite by recording a memorandum of the series of

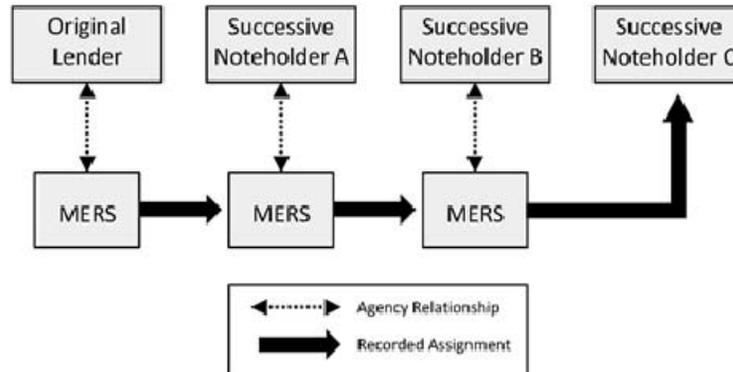
suspended, the agent's actual authority terminates except as provided by law."). *See also id.* at § 2.02 (defining scope of actual agency).

130. *In re Agard*, 444 B.R. 231, 253 (E.D.N.Y. Feb. 10, 2011) ("According to MERS, the principal/agent relationship among itself and its members is created by the MERS rules of membership and terms and conditions, as well as the Mortgage itself. However, none of the documents expressly creates an agency relationship or even mentions the word "agency." MERS would have this Court cobble together the documents and draw inferences from the words contained in those documents."), *rev'd in part sub nom.* *Agard v. Select Portfolio Servicing, Inc.*, BR 810-77338-reg, 2012 WL 1043690 (E.D.N.Y. Mar. 28, 2012).

131. RESTATEMENT (THIRD) OF AGENCY § 4.01(1) (2006) ("Ratification is the affirmance of a prior act done by another, whereby the act is given effect as if done by an agent acting with actual authority."); RESTATEMENT (THIRD) OF AGENCY § 4.02(1) (2006) ("[R]atification retroactively creates the effects of actual authority.").

132. *In re Agard*, 444 B.R. at 254 ("MERS's theory that it can act as a 'common agent' for undisclosed principals is not supported by the law.").

assignments from itself as an agent of the original lender to itself as an agent of each successive noteholders, as illustrated below.



MERS should be allowed to record a single “Affidavit of Assignments,” which specifies all assignments of the deed of trust since the origination of the loan, including the names of the successive noteholders and the dates the notes were transferred. If the MERS database is accurately tracking all of these note transfers, MERS should easily be able to reduce its data to a recordable affidavit of assignments.¹³³ If MERS demonstrates all assignments in the public record, then a presumption of compliance with Oregon Revised Statutes section 86.735(1) should arise.

Although Oregon Revised Statutes section 86.735(1) requires all assignments be recorded prior to foreclosure, it does not require assignments be recorded at the time the assignment takes place. The statute does not require assignments of the deed of trust to be recorded within any specific time frame following the transfer of the note.¹³⁴ If the legislature intended the recording requirement to serve

133. MERS already has these reports. Every time a new loan enters the MERS system, the loan is assigned a “MERS Identification Number” (MIN). MERS has produced “MIN Summaries” in litigation. These summaries show transfer activity for each note, and contain all the information that should be in the public record.

134. However, amending the statute in the future to require prompt recording would be sound policy in Oregon for other reasons. For example, under the Oregon Condominium Act, when a condominium owner is in default, a condominium association may achieve priority over a first mortgagee of record in order to foreclose its lien by notifying the mortgagee that the borrower is in default and it intends to enforce its security interest in the condominium. OR. REV. STAT. § 100.450(7) (2011). Currently, however, Oregon condominium associations lack the ability to locate and serve the mortgagee of record with notice due to the MERS

as real time notice of who owns the note, it would have required the deed of trust be recorded within a definite and limited period of time following the transfer of the note. On the contrary, it would be perfectly acceptable under the statute to record all assignments of the deed of trust the moment before a notice of default is entered.¹³⁵ The recording requirement is merely a prerequisite to the trustee's power of sale; it is not intended to generally identify the current noteholder upon an interested party's record inquiry.

The legislature also did not specify what kind of form of assignment instrument must be used. MERS should be allowed to record an affidavit of assignments on behalf of successive noteholders in a single instrument, rather than a series of successive assignments. MERS currently records an assignment, from itself to the final noteholder, under the assumption that it is a beneficiary. To bring its procedures in compliance with the OTDA recording requirement, MERS only needs to change this recorded document to evidence the chain of assignments from itself to itself as an agent for the various noteholders throughout the securitization process. Although this solution rests on an assumption that MERS can prove agency relationships with all successive noteholders, it would seemingly eliminate the need for additional recorded assignments while compelling MERS to comply with the legislative intent of showing a proper chain of title prior to foreclosure. If MERS and the foreclosing noteholders are unable or unwilling to do so, however, they should not be allowed to foreclose under chapter 86, and should instead be required to foreclose judicially by showing possession and indorsement of the promissory note.

VI. CONCLUSION

Every Christmas season, without exception, my family and I spend an evening watching the classic film *It's a Wonderful Life*.¹³⁶ The film reminds me that once upon a time homeowners actually had a personal relationship with their local banks and lenders carefully

private recording system and lack of publicly recorded assignments.

135. See *Barnett v. BAC Home Loan Servicing, L.P.*, 772 F. Supp. 2d 1328, 1335 (D. Or. 2011) (“[T]rust deed statutes therefore clearly contemplate that assignments of the beneficial interests in obligations and security rights will occur and may, in fact, not have been recorded prior to foreclosure. The legislature was clearly aware such assignments occurred and nowhere provided that assignments needed to be recorded to maintain rights under the lien statutes *except where foreclosure by sale was pursued.*”) (emphasis added).

136. *IT'S A WONDERFUL LIFE* (RKO Radio Pictures 1946).

managed risk. Private securitization and the creation of MERS was the ultimate failure in risk management. MERS maximized short-term profits at the expense of the public record system, homeowners, and investors.

Notwithstanding the tremendous oversight and ignorance of state laws when MERS was created, Oregon's statutory procedure for nonjudicial foreclosures must be saved. The efficiency and cost savings of the nonjudicial foreclosure process encourage out-of-state lending in Oregon and lessen the burden on the state judicial system, thereby benefitting consumers and saving tax dollars. The legislature should amend the Oregon Trust Deed Act to allow lenders to satisfy the recording prerequisite by recording an affidavit of assignments prior to issuing a notice of default.

If MERS is allowed to act as a national mortgagee proxy, however, confidence in the American land title system will be destroyed. If courts and state legislators give financial institutions a green light to disregard recording laws meant to protect homeowners from fraudulent foreclosure, they certainly will not stand up for the public's interest the next time big banks ask for a free pass. MERS will undoubtedly continue to conjure up cute but baseless arguments for how it can serve as a beneficiary without recording assignments. In the end, although MERS may be considered an agent of the original and all successive noteholders, lenders should not be allowed to circumvent the Oregon Trust Deed Act's recording requirements.

In Shakespeare's *Measure for Measure*, Judge Angelo described the importance of enforcing laws in the face of strong opposition:¹³⁷

*We must not make a scarecrow of the law,
Setting it up to fear the birds of prey,
And let it keep one shape, till custom make it
Their perch and not their terror.*¹³⁸

Carefully contemplated laws with sound underlying policy should not be disregarded when their enforcement becomes tedious and inconvenient. When critical laws are ignored and unenforced, we

137. Although the antagonist Angelo in *Measure for Measure* was a merciless jurist whose rigid interpretation of the law provided for his villainous character, his colorful lines from the play remain a useful analogy to the importance of law enforcement. *See generally* WILLIAM SHAKESPEARE, *MEASURE FOR MEASURE*.

138. WILLIAM SHAKESPEARE, *MEASURE FOR MEASURE* act 2, sc. 1.

make a scarecrow of the law and provide those who seek to circumvent the law an opportunity to undermine the fundamental policies upon which the law was created. Such should not be the case with the Oregon Trust Deed Act.