

## Los Angeles Targets Trustee to Clean-Up Housing Mess

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The People of the State of California and The City of Los Angeles (collectively, the "Plaintiff") are seeking to hold Deutsche Bank National Trust Company and Deutsche Bank Trust Company Americas, as trustee under hundreds of mortgaged-backed securitizations (collectively, the "Trustee"), liable for reparations on thousand of homes in the LA County area. In the complaint filed May 4, 2011 in Los Angeles Superior Court, the Plaintiff alleges that the Trustee disregarded its legal duties and responsibilities as property owner, resulting in the creation and maintenance of vacant nuisance properties and substandard occupied housing units.

Among the various remedies sought is an order requiring the Trustee to bring the more than 2000 residential foreclosed properties into compliance with applicable habitability, tenancy and nuisance laws. You can see a sampling of the conditions requiring repair at 200 of the foreclosed properties in the complaint. The Plaintiff also seeks to enjoin the Defendants from further violating the California Unfair Competition Law ("UCL") and the Los Angeles Municipal Code ("LAMC") section 11.00, subdivision (I), as well as civil penalties of \$2500 per day per violation of each of sections 17206 and 17206.1 of the UCL and the LAMC over a four-year period.

The critical element underlying the Plaintiff's theory of liability is that the Trustee is the "owner" of each of the properties as the term "owner" is used in the laws it seeks to enforce. In this regard, the Plaintiff seeks to exploit the common practice in securitization transactions whereby the trustee holds bare legal title to a property for the benefit of the trust. As such, the trustee is the fiduciary party charged with acting on behalf of the trust for the benefit of the beneficiaries, but it is a stretch to suggest that the trustee also has the benefits and burdens associated with ownership of said property. That isn't how such a trust operates.

A common law trust is not a legal entity per se and therefore must act through a trustee. Aside from its fiduciary duties to act in the best interests of the beneficiaries of the trust, a trustee's duties are dependent upon the terms of the contract creating the trust. The typical contract used to create mortgage-backed securities is a pooling and servicing agreement, and under the pooling and servicing agreement the trustee is not authorized or permitted to act like an owner of the trust property. In fact, a trustee typically has no duties regarding the day-to-day operations and administration of the trust and its property, nor any discretionary duties or financial responsibility relating to the trust or its property.

There is no doubt that the facts in the complaint are compelling. In these days of budget cuts, huge government deficits and municipalities on the brink of insolvency, the County of LA is a sympathetic plaintiff. Obviously, a significant price tag is associated with restoring these properties to a place where they will be habitable and/or salable.

However, the Plaintiff is trying to hold the Trustee responsible for cleaning up a huge mess on the basis of a technical requirement necessitated by the law of trusts, and not on the basis of the economic realities of the business arrangement. The complaint is yet another attempt to pin the costs to clean up the subprime mortgage mess on those considered by some to be "bad actors" in the market meltdown, but it seems destined to miss the mark.



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