



## COUNSELOR'S CORNER

# Navigating Non-Judicial Foreclosures

After *Bain v. Metropolitan Mortgage Group, Inc., et al.*

By Heidi C. Anderson, Lane Powell PC



In August, the Washington State Supreme Court weighed in on the role of Mortgage Electronic Registration Systems, Inc. (“MERS”) in Washington’s non-judicial foreclosure process, holding that MERS does not meet the definition of “beneficiary” in Washington’s Deed of Trust Act (“DTA”) RCW 61.24.005(2), because it does not hold promissory notes evidencing residential mortgage loans. *Bain v. Metro. Mortg. Group, Inc., et al.*, 175 Wn.2d 83, 285 P.3d 34 (2012). (In addition to MERS, *Bain* may have ramifications for servicers or agents initiating non-judicial foreclosures in Washington.) The result is that lenders must remain in the driver’s seat with regard to non-judicial foreclosures or risk invalidating efforts to realize upon real-property collateral.

Kristin Bain and Kevin Selkowitz purchased homes financed with loans secured by deeds of trust naming MERS as the beneficiary as nominee for the original lender and its succes-

sors and assigns. In both instances, the homeowners fell behind in paying their mortgages. MERS, in its capacity as beneficiary under the deeds of trust, assigned the deed of trust in one case and appointed a successor trustee that initiated non-judicial foreclosure under the Washington DTA in the other. *Bain* and Selkowitz each brought a lawsuit in federal court seeking injunctions to halt foreclosure for damages against MERS under Washington’s Consumer Protection Act (“CPA”) and for other relief.

In connection with the two lawsuits, Judge John C. Coughenour of the Federal District Court for the Western District of Washington asked the Washington State Supreme Court to answer three certified questions under state law: (1) whether MERS is a lawful beneficiary with the power to appoint trustees within Washington’s DTA if it does not hold the promissory note secured by the deed of

trust; (2) if MERS is not a lawful beneficiary, what is the “legal effect”; and (3) whether a homeowner has a cause of action under the Washington CPA, based upon MERS’ representation that it is a beneficiary.

In response to the first question, the Washington Supreme Court found that MERS is not a lawful beneficiary under the Washington DTA if it does not hold the note. The Court stated that “only the actual holder of the promissory note or other instrument evidencing the obligation may be a beneficiary with the power to appoint a trustee to proceed with a judicial foreclosure on real property.” The Court declined to answer the second question about the legal effect of MERS acting as unlawful beneficiary, stating that the answer would depend on the facts of each case. The Court partially answered the final question, finding that homeowners may have claims under Washington’s CPA, but requiring each homeowner to prove the elements of the claim and noting that the injury and causation elements of this claim would require a fact-specific inquiry in each case. The Court did state that “the mere fact MERS is listed on the deed of trust as a beneficiary is not itself an actionable injury.”

So what does *Bain* mean for lenders holding promissory notes secured by deeds of trust naming MERS as beneficiary?

## Lenders Must Initiate Foreclosure Process or Formally Appoint an Agent

First and foremost, *Bain* confirms that note holders must initiate the non-judicial foreclosure process instead of delegating that responsibility to a non-note holder nominee under its deed of trust, such as MERS. In fact, after the *Bain* decision was issued, Judge Coughenour confirmed that where a non-judicial foreclosure is carried out by the note holder, the issues in *Bain* are inapplicable, even where MERS was named a nominee under the deed of trust being enforced. *Florez v. OneWest Bank, F.S.B.*, 2012 WL 1118179 (W.D. Wash. 2012). (The *Bain* Court specifically stated that its findings with respect to MERS did not preclude judicial


► FORECLOSURES — continued on page 16



► **FORECLOSURES** — continued from page 15

foreclosure.) Accordingly, it is vital that the holder of the note at issue take steps to appoint a successor trustee before initiating non-judicial foreclosure proceedings, rather than relying on a trustee appointed by MERS.

Alternatively, lenders have the option of utilizing an agent to drive the non-judicial foreclosure process. Notably, *Bain* does not preclude the use of agents to represent a lender's interests with respect to a promissory note, including initiating the foreclosure process. After recognizing that "Washington law, and the deed of trust act itself, approves of the use of agents[,]” the Court explicitly stated: “nothing in this opinion should be construed to suggest an agent cannot represent the holder of a note.”

However, to the extent a note holder decides to utilize an agent for purposes of initiating a non-judicial foreclosure, it would be prudent to: (1) formally document the agency relationship, and (2) require that all documents issued by the agent in connection with the non-judicial foreclosure specify its role as an agent for the note holder. 



Heidi C. Anderson concentrates her practice in the financial institution and commercial finance industries, with an emphasis on bankruptcy and commercial litigation. Heidi can be reached at [andersonh@lanepowell.com](mailto:andersonh@lanepowell.com) or 206.223.2550.