

**SPECIAL REPORT OF THE WASHINGTON STATE BAR ASSOCIATION
LEGAL OPINIONS COMMITTEE**

Opinions on Deeds of Trust in Favor of Agents, Trustees and Nominees

July 12, 2011

RCW 61.24.005(2) defines the “beneficiary” of a deed of trust to mean “[t]he holder of the instrument or document evidencing the obligations secured by the deed of trust, excluding persons holding the same as security for a different obligation.” The statute does not expressly permit an agent, trustee or nominee for the holder of the obligations to act as beneficiary, nor does the statute expressly prohibit it.

In sophisticated commercial financings, it is common for a deed of trust to name a beneficiary that may not be the holder of the secured obligations. For example, the named beneficiary may be the agent bank for a bank group or an indenture trustee for a group of bondholders. In home lending and some smaller commercial property financings, it is common for Mortgage Electronic Registration Systems, Inc. (“MERS”), as nominee of the lender, to be named as the beneficiary.

There has recently been litigation in which borrowers of home loans have challenged MERS’ status as the beneficiary of Washington deeds of trust on the theory that MERS is not the holder of the secured obligations and, therefore, cannot validly act as beneficiary of a Washington deed of trust. The question was certified to the Washington Supreme Court by the King County Superior Court in the case of *Vinluan v. Fidelity National Title and Escrow Company, et al.*, Washington Supreme Court case no. 85637-1. Although the Supreme Court Commissioner declined to accept discretionary review of the question, his Ruling Denying Review filed April 25, 2011 stated that “whether MERS can be a deed of trust beneficiary under Washington law is an important issue that deserves resolution, probably by this court.” Thereafter, the United States District Court for the Western District of Washington entered an Order Certifying Question to the Washington Supreme Court in which it certified similar (if not identical) questions to the Supreme Court. *Bain v. Metro. Mortg. Group Inc., et al.*, No. C09-0149-JCC (W.D. Wash. June 27, 2011) (Coughenour, J.). As of the date of this special report, the Supreme Court has not ruled on the certified questions in the *Bain* case.

The Committee believes that, in a properly presented case, a Washington court considering the question should conclude under agency principles that the holder or holders of the obligations secured by a Washington deed of trust can appoint an agent, trustee or nominee to act as beneficiary under that deed of trust. In some situations (*e.g.*, widely held secured bond obligations), there is no practical alternative. However, in the absence of controlling statutory or decisional authority, there is a chance that a court could rule to the contrary or could rule on the MERS situation in a way that

unintentionally affects other types of representatives, such as agent banks and indenture trustees.

Given the uncertainty created by the *Vinluan* case, it might be appropriate to include a qualification drawing attention to this issue until the questions certified to the Washington Supreme Court by the *Bain* Court are decided. Such a qualification could be expressed as follows and added to the Washington statutes listed in paragraph D-3 of the Illustrative Opinion Letter form previously published by the Committee:¹

RCW 61.24.005(2) defines the “beneficiary” of a deed of trust as “[t]he holder of the instrument or document evidencing the obligations secured by the deed of trust, excluding persons holding the same as security for a different obligation” and does not expressly provide for such holder or holders to appoint an [agent] [indenture trustee] [nominee] to act as beneficiary. We express no opinion whether a deed of trust naming an [agent] [indenture trustee] [nominee] for the holder or holders as the beneficiary can be foreclosed nonjudicially.

As with the other qualifications set forth in paragraph D-3 of the Illustrative Opinion Letter, the Committee intends these qualifications to be advisory and customarily understood to apply, whether or not expressly set forth in the opinion letter.²

¹ Supplemental Report Covering Secured Lending Transactions, a Report of the Ad Hoc Committee on Third-Party Legal Opinions of the Business Law Section of the Washington State Bar Association (“Supplemental Report”), at pp. 6-7 (Oct. 2000).

² *See id.*, n. 42