MERS Musings – James v. ReconTrust, Bank of America, et. al. Analyzed [Part One]

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"[The defendant banks] categorize [the plaintiff borrowers] as 'strategic defaulters' who are riding out their admitted default by raising frivolous legal challenges while continuing to live in the subject property rent-free until foreclosure of the Deed of Trust, knowing that they will be immunized by the OTDA from any deficiency judgment upon eventual foreclosure. – Hon. Janice M. Stewart, Magistrate Judge

[And the point is…? What seems to be forgotten is that this was the bargain the Big Banks cut with Oregon's consumers in 1959: In exchange for a fast-track foreclosure process, no judicial oversight, and no post-auction rights of redemption, Big Banks willingly agreed that their Bantam Borrowers would not be held liable for any deficiencies following the foreclosure of their homes. This arrangement was just fine for nearly 50 years. Having received exactly what they wished for, Big Banks can hardly be heard to now complain. Come on guys! Buck Up! Ooops, pardon the pun…I couldn't help myself! – PCQ]

Background of James v. ReconTrust and B of A et. al.In June, 2007, Mr. and Mrs. James obtained a purchase money loan for their home in Wilsonville, Oregon. The loan was obtained through Northwest Mortgage Group ("NWMG"). Their deed of trust identified NWMG as the "Lender," and MERS as the "Beneficiary." As is the situation in most of today's trust deeds, MERS is described as "acting solely as a nominee for Lender and Lender's successors and assigns…." At some later point in time, presumably shortly after the loan was made, NWMG endorsed the James' promissory note to Countrywide Bank (which ultimately became BAC Home Loans Servicing, L.P. ("BACHLS") and then merged into Bank of America, N.A. on July 1, 2011). Since the original lender, NWMG's, loan was fully repaid, it was no longer the "Lender" under the Note and Trust Deed – Countrywide was. As a part of Countrywide's securitization business, the Note and Trust Deed were ostensibly transferred to a Fannie Mae investment trust. Countrywide was fully repaid. However, the Note was never transferred to Fannie Mae, and no assignment of the James' Trust Deed to Fannie was ever recorded in the country records, as required under ORS 86.735(1). Accordingly,

the gist of the James' legal argument was that BAC Home Loan Servicing [fka, Countrywide] no longer held a security interest in their home, and therefore lacked the authority to foreclose. *[Note: As discussed below, this argument is made possible because MERS was appointed in the Trust Deed to act as the "nominal beneficiary" of record, such that – according to the banks – there was no further need to publicly record subsequent assignments of the trust deed. – PCQ]* In April 2010, the James became delinquent on their home loan. The following bank pre-foreclosure events occurred:

- On **July 8, 2010** MERS, acting as the named "Beneficiary" under the James' Trust Deed, assigned it to BAC Home Loan Servicing by one of MERS' ubiquitous "Assistant Secretaries". The signing and notarization occurred in Ventura, California.
- On **July 8, 2010**, the same MERS "Assistant Secretary", now acting as "Assistant Secretary" for BAC Home Loan Servicing, signed before the same Ventura notary, an Appointment of Successor Trustee form, naming ReconTrust (the wholly owned subsidiary of Bank of America) as the foreclosure trustee.
- Also on **July 8, 2010**, ReconTrust executed a Notice of Default and Election to Sell (the NOD"), which is the formal commencement of the foreclosure process. The NOD appears not to have been signed by the same person who signed both of the other assignment and appointment forms, but it was before the same Ventura notary.

[This process tells us that the entire pre-foreclosure protocol took place in essentially a large robo-signing boiler room where low-level signers, armed with multiple rubber stamps designating them as officers for MERS and various lenders, place scrawls purporting to be their signatures, as fast as they can, then deliver stacks of completed documents to another set of signers, armed with notary seals, for the sole purpose of committing fraud on the public foreclosure process. – PCQ]

The Court's Findings. Magistrate Judge Stewart, made the following findings in favor of the James.

- She rejected the banks' argument that the James did not have "clean hands" – an equitable defense[1] – since they were admittedly in default under their loan. Judge Stewart concluded that the James were merely attempting to enforce their legal *[as opposed to "equitable"]* rights, and therefore, the fact of their delinquency was irrelevant, since the Oregon trust deed law does not require that they allege their financial ability to cure their default.

- The Oregon trust deed foreclosure law, found at ORS 86.735, contains four elements that must be established by the banks:
    - The Trust Deed, any Assignments of Trust Deed and any Appointments of Successor Trustee must have been recorded in the country mortgage records where the property is located;
    - There was a default by the borrower owing the payment obligation secured by the Trust Deed;
    - The Trustee or Beneficiary has recorded a Notice of Default and Election to Sell the property to satisfy the obligation in default; and
    - No action may be instituted to recover the debt secured by the Trust Deed.

Since elements (2) – (4) were met in this case, Judge Stewart found that the only remaining issue was whether the James could establish noncompliance with the mandatory recording requirements of ORS 86.735(1). This resulted in the following inquiries:

Is MERS is a Sham Beneficiary?The James argued that MERS was a sham, and therefore lacked the power to assign the original lender's beneficial interest under the Trust Deed to BAC Home Loan Servicing. As a result, the said, BAC did not have the power to appoint ReconTrust as Successor Trustee to initiate and complete the foreclosure. This argument is based upon the definition of a trust deed "beneficiary" as used in ORS 86.705(1) of the Oregon Trust Deed Act ["OTDA"], which states that a "Beneficiary" means *"the person named or otherwise designated in a trust deed as the person for whose benefit a trust deed is given, or the person's successor in interest, and who shall not be the trustee unless the beneficiary is qualified to be a trustee…."* The James argued that "the person for whose benefit a trust deed is given" can *only* be the note holder [i.e. the original lender that funded the loan, Northwest Mortgage Group] – not MERS. Judge Stewart rejected this argument with the following observations:

"Nothing in Oregon law prohibits the Lender (NWNG) (sic) from designating MERS as its nominee or agent in the Deed of Trust. A nominee means "one designated to act for another as his representative in a rather limited sense" and "is used sometimes to signify an agent or trustee." It is a common occurrence in public land records and "has long been sanctioned as a legitimate practice." Plaintiffs fail to explain why MERS cannot act both as a designated beneficiary and a nominee for the lender." (Citations omitted.)

With all respect, I find the banks' argument disingenuous. I do not agree that the absence of a proscription is the same as "permission". In other words, just because the OTDA does not outlaw a practice, does not mean the practice is "legal." By this logic, a notary public could delegate their powers to a nominee, simply because there is no prohibition against it. How about an attorney-in-fact delegating his or her power to a "nominee"? The OTDA was created in 1959, over thirty years before MERS was even on the drawing board. Of course it wasn't expressly prohibited – no one ever thought that a "beneficiary" meant anything other than a person who is benefited.

And to say that an entity whose raison d'être is solely to act as a nominee for its member banks, is a "common occurrence," "has long been sanctioned" and is a "legitimate practice" is simply untrue. Courts, the Internal Revenue Service, Securities and Exchange Commission, and virtually all such entities, regularly peel back the veneer of a label and look at substance. American jurisprudence has long rejected arguments that "elevate form over substance." In fact, Judge Stewart herself, has recognized the fallibility of such specious thinking. [See, Ziniker v. Waldo, (2007), here. "Any attempt to differentiate between the two grounds would disregard the reason behind Judge Brown's decision and elevate form over substance."]

Sham transactions frequently employ a strawman or nominee, whose identity is used to conceal the real identity of others. From offshore accounts to money laundering, nominee are more frequently used for nefarious purposes, than legitimate ones. [**The banks' plea of legitimacy*** ***is based upon a Wikipedia approach to fact finding: If an event occurs with enough frequency, is in plain view, and is repeated enough times, there will always be those who come to believe it must be correct, thus turning "the exception" into "the rule". – PCQ]***

Judge Stewart gave binding effect to the provision of the James' Trust Deed that delegated to MERS the following broad authority to act as the Lender's agent: *"Trust 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 the Security Instrument. [Underscoring mine. – PCQ]*

Judge Stewart [surprisingly] relied upon Judge Michael W. Mosman's rationale when interpreting identical language in the recent Beyer decision, discussed here, which granted MERS the ability to exercise allrights and interests of the lender, *including the right to receive payment of the note secured by the trust deed,* if "(1) it is necessary to comply with law or custom, and (2) the statutes and trust deed do not otherwise prevent MERS from being a beneficiary." This "savings clause" in the trust deed was triggered because, in Judge Stewart's opinion, "…the trust deed repeatedly calls MERS the beneficiary, a statement that would not comply with law or custom unless MERS's powers were expanded to include the right to receive payment of the obligation." Do this mean that without the savings clause, MERS could not become the nominal beneficiary?

As I pointed out my recent post here, criticizing Judge Mosman's decision in Beyer, "Whatever the 'law and custom' provision in a trust deed is intended to mean – which is not entirely clear – it certainly can't be said to make legal today, what was illegal yesterday." In point of fact, this clause is nothing more than a "legal shim", used to fit MERS into an otherwise completed framework. Judge Mosman, and now Judge

Stewart, have both bought into the argument that it's OK to call MERS a "Beneficiary" under a trust deed – even though Oregon law does not do so – simply because the parties' contract (i.e. the Trust Deed") permits it if necessary to comply with "law and custom." By this rationale, black becomes white, simply because the law does not prohibit it. And I thought "shape-shifting" was a thing of legends….

Lastly, in furtherance of my suspicion that some courts are not thoroughly familiar with the MERS model, I notice that the standard clause in lender trust deeds delegate MERS' authority "…as nominee for Lender and Lender's successors and assigns…." To my knowledge, this clause has never been judicially addressed. However, we know that at best, MERS represents only 60% of all lender loans. We also know that MERS' rules are only binding on its "members." So how is it that some courts assume that once a loan is in the hands of a MERS member it remains with a MERS member throughout the life of the loan? If MERS insulates only members from the duty of recording their assignments, what about the other 40% of the lenders? Wouldn't a non-MERS member still be required to record its assignments pursuant to ORS 86.735(1)?

I make this point primarily because it underscores the nature of this sham delegation that purports to apply to ALL "successors and assigns" of the Lender, when, statistically, it cannot. Unfortunately, those courts that have bestowed upon MERS the title of "Beneficiary" and "Lender" seem never to have noticed this drafting sleight of hand. I submit this is because many in the judiciary, and elsewhere, are not fully familiar with what MERS is doing, i.e. creating an overly simplistic description of a subtly complex scheme and making it sound as if it works in every case. [To be continued….. – PCQ]

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[1] The doctrine of unclean hands is usually reserved for some improper or unethical conduct of a party seeking relief. There is a certain irony for the industry that brought us robo-signers, surrogate signers, bogus bank officers, and a complete disregard for Oregon's recording laws, to play this card. It reminds me of the bully in old-time wrestling, who waited until the ref's back was turned, and then committed his egregious fouls in full view of the screaming fans. Do the Big Banks think we don't see what they're doing?