OREGON
CIVIL RIGHTS
NEWSLETTER

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Challenging Foreclosure in Oregon

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Introduction

Most introductions to issues regarding foreclosure start with the extent of the foreclosure problem. I'm not going to start with that. We all know how bad it is. I want to talk about what can be done.

Clients who come to me either have recently been through the foreclosure process and are now facing eviction or are facing a foreclosure sale in a few days. Some forward-thinking clients are severely behind on their mortgage payments and know that it is just a matter of time before the foreclosure process begins.

Most of my clients used to have high-paying jobs but are currently either unemployed or severely underemployed. For some, the situation was very bad but is now looking better. Most want a simple thing. They want someone with whom they can negotiate on their loan.

Meaningful negotiation would make a lot of sense for all parties involved. Interest rates are at a record low. Home values have plummeted. We all know that incomes have dropped**.** A reasonable solution would allow a homeowner to negotiate new terms with the lender, who would receive a reduced payment. Considering the expense of the foreclosure process, one would think that it would make a lot of sense to negotiate better terms to keep a homeowner in a house.

Welcome to the foreclosure process. Good sense has little to do with it. The number-one frustration for homeowners and their attorneys is the inability to find anyone with authority to talk to on the other side.

There are a lot of reasons the system doesn't work. Loans that used to be issued at your local bank and kept there are now sold several times over to other banks. They are also pooled and broken up into pieces by a process called *securitization*, and those pieces are sold to investors.

In addition, the entity with which the homeowner interacts is called the *loan servicer*. Loan servicers don't have an interest in the mortgage; they act as agents of lenders to receive payments and provide accounting details. In fact, loan servicers generally get paid more if there is a foreclosure than if there is a loan modification. (See "Why Servicers Foreclose, When They Should Modify, and Other Puzzles of Servicer Behavior," National Consumer Law Center, Oct. 2009.) This explains why the homeowner has a hard time talking to the loan servicer about loan modifications.

That is the current foreclosure landscape. The question is, what can you do about it?

Homeowners' attorneys have had success shining the light on the foreclosure process and asking important questions about basic issues, such as who has the right to foreclose.

The Oregon Trust Deed Act

Since the enactment of the Oregon Trust Deed Act (OTDA) in 1959, most foreclosures in Oregon have been non-judicial, meaning that they are completed without initiating a court proceeding. The OTDA governs non-judicial foreclosures. The OTDA's legislative history shows that the non-judicial foreclosure process was created to provide banks with a faster way to foreclose without worrying about the redemption period under a judicial foreclosure. The legislature also provided a balance in the OTDA by requiring lenders to follow a carefully prescribed process under the act, which outlines notice and recording procedures.

As a result, in a non-judicial foreclosure, lenders get to foreclose on a fast track without judicial oversight, but in return they must follow the rules precisely. The main case supporting this principle is *Staffordshire Investments, Inc. v. Cal-Western*, 209 Or. App. 528 (2006).

Some homeowners' attorneys have found success by arguing that lenders have not followed the rules under

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✦ In This Issue

Our Streets: The Police, The Public, & The Law
The OSB Civil Rights Section's 2012 Public Forum

Sarah Radcliffe
Legal Aid Services of Oregon

On April 24, 2012, the OSB Civil Rights Section presented its annual public forum. Entitled "Our Streets: The Police, The Public, & The Law," this year's forum covered a broad range of current issues related to police practices and accountability. Addressing the topics of mental health, public protest, homelessness, and racial profiling, the forum provided a unique opportunity for a diverse cross-section of the Portland community to share perspectives. Held at Portland State University, the audience included a mix of lawyers, activists, students, and city government workers.

Ashlee Albies, a civil rights attorney with Creighton & Rose PC, provided an overview of the First Amendment right to public protest and addressed the difference between protected political speech and civil disobedience.

Monica Goracke, a managing attorney with the Oregon Law Center, discussed the legal distinction between sleeping outside for political purposes and sleeping outside due to homelessness. She presented an argument that arresting the homeless for sleeping outside is cruel and unusual punishment in violation of the Eighth Amendment, which is the subject of current litigation against the city of Portland.

Dr. LeRoy Haynes, chair of the Albina Ministerial Alliance and a longtime civil rights advocate, placed today's civil rights struggles in historical context with a presentation on civil disobedience across cultures, movements, and eras.

Adrian Lee Brown, with the U.S. Attorney's Office, discussed the U.S. Department of Justice's investigation of the Portland Police Bureau's use of force. This pattern-and-practice investigation has focused specifically on cases involving alleged excessive force against people with mental illness.

Portland Police Chief Michael Reese and Senior Deputy Attorney for the City of Portland David Wobiril responded to questions regarding the federal Department of Justice investigation and the city's policies and practices regarding protests and use of force.

Diane Schwartz Sykes, with the Oregon Department of Justice, moderated the question-and-answer session.

A video recording of the forum will be available on the OSB Civil Rights Section website in July (see http://www.osbar.org/sections/civilrights/civil-index.html), and a copy can be ordered through Flying Focus Video Collective (http://www.flyingfocus.org). The OSB Civil Rights Section extends its thanks to the speakers and planners for this important and well-attended event. ✦

Sarah Radcliffe, chair of the Civil Rights Section, is a staff attorney with the Volunteer Lawyers Project at Legal Aid Services of Oregon, in Portland.

Save the Date!

Litigating Section 1983 Civil Rights Cases: Current Issues & Trends

Friday, October 19, 2012, 8:30 a.m. to 4:30 p.m.
Mark O. Hatfield United States Courthouse, Portland

CLE sponsored by the Federal Bar Association, the Oregon State Bar Civil Rights Section, and the Oregon Chapter of the National Bar Association

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The purpose of this publication is to provide information on current developments in civil rights and constitutional law. Readers are advised to verify sources and authorities.

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Supreme Court Update

Decided

***Blueford v. Arkansas*, No. 10-1320 (May 24, 2012)**

By a count of 6–3, the U.S. Supreme Court affirmed the ruling of the Supreme Court of Arkansas, holding that the double jeopardy clause of the Fifth Amendment does not prohibit the retrial of a criminal defendant on all counts even if the jury reported to the court during deliberations that it was unanimous against conviction on some counts.

Blueford was charged with capital murder, first-degree murder, manslaughter, and negligent homicide. During deliberations, the jury reported that it was unanimous against guilt on capital murder and first degree murder, but had not reached a verdict on the lesser included offenses. After being sent back for further deliberations, the jury could not reach a verdict on all counts, and the court declared a mistrial.

The state sought a retrial on all charges, and Blueford moved to dismiss the murder charges, arguing that the jury's report during deliberations represented a resolution of those charges. The Court disagreed, reasoning that the jury's report was not technically an acquittal, and there was no true resolution since the jury could have, consistent with the court's instructions to continue deliberating, reconsidered its position on the murder charges.

***Coleman v. Court of Appeals of Maryland*, No. 10-1016 (March 22, 2012)**

The Supreme Court affirmed the Fourth Circuit in this 4–3 decision, holding that congressional abrogation of state sovereign immunity in the Family Medical Leave Act's "self-care" provision is unconstitutional. For practical purposes, the Court's ruling precludes state employees from suing for damages when the state has violated the FMLA's "self-care" provision, which entitles a qualified employee to take unpaid leave due to the employee's own serious health condition.

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The Court reasoned that Congress had enacted the FMLA pursuant to its power under section 5 of the Fourteenth Amendment with a clear intent to abrogate state sovereign immunity, and that the other FMLA provisions were constitutional because they were "congruent and proportional" to remedying a pattern of state-level gender discrimination. Because Congress did not produce evidence that the self-care provision of the FMLA either was necessary to the family-care provisions or reduced employer discrimination against women, the Court held that the self-care provision lacked both congruence and proportionality to the harm it sought to remedy.

***Filarsky v. Delia*, No. 10-1018 (April 17, 2012)**

In this unanimous opinion, the Supreme Court reversed the Ninth Circuit, holding that a private individual temporarily working for the government is entitled to seek qualified immunity from a 42 U.S.C. § 1983 suit. Filarsky, the petitioner, was hired by the City of Rialto to investigate Delia's claim that his illness required an extended absence from work. After Filarsky ordered Delia to bring evidence to city officials for review, Delia brought suit.

The district court granted summary judgment to all individuals on the grounds of qualified immunity, and the Ninth Circuit affirmed with respect to all individuals except Filarsky. In holding that Filarsky was entitled to qualified immunity, the Supreme Court reasoned that common law regarding immunity did not distinguish between full-time public servants and private individuals engaged in public service, and immunity principles should be maintained absent legislative intent. The Court also noted that this decision serves a policy goal—ensuring that the government retains capable individuals.

***Rehberg v. Paulk*, No. 10-778 (April 2, 2012)**

The Supreme Court unanimously affirmed the Eleventh Circuit in this case, holding that a government official who testifies in a grand jury proceeding is entitled to the same absolute immunity from a 42 U.S.C. § 1983 claim for civil damages as a witness who testifies at a trial.

Rehberg, the petitioner, filed a federal complaint alleging that Paulk, an investigator for the district attorney's office, had knowingly provided false testimony in multiple grand jury proceedings. The Court reasoned that without immunity, a grand jury witness may refuse to testify or may modify his or her testimony for fear of being sued, and would thus impair the truth-seeking function of the grand jury process. The Court also held that civil penalties for perjury are sufficient to deter false testimony.

Finally, the Court noted that while a "complaining witness" is historically one who initiates a criminal proceeding, no grand jury witness has the power to initiate a prosecution. Thus, the Court reasoned that there is no workable standard for determining whether a particular grand jury witness is a "complaining witness" for purposes of immunity. As such, the Court held that Paulk was entitled to the same immunity as a trial witness.

***Zivotofsky v. Clinton*, No. 10-699 (March 26, 2012)**

In this 8–1 decision, the Court vacated the decision of the D.C. Circuit and held that Zivotofsky's claim for injunctive relief was not barred by the

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the OTDA. To understand their arguments, it is helpful to know that when a homeowner borrows money to purchase a property, two documents are signed. One is the promissory note (the note), which is the promise to pay the money back, and the other is the deed of trust, which is the security instrument that secures to the property the promise to pay. It is long-settled law that the security instrument follows the note. *See Carpenter v. Longan*, 83 U.S. 271 (1872); *West v. White,* 92 Or. App. 401, 404, *aff'd,* 307 Or. 296 (1988); *U.S. Nat'l Bank of Portland v. Holton,* 99 Or. 419, 427–429 (1921).

If a note is transferred (sold), it automatically assigns the deed of trust. Homeowners' attorneys have argued that under the OTDA this automatic assignment of the deed of trust must be recorded in county records before a non-judicial sale is held.

Under the Oregon Trust Deed Act there are three parties to the transaction: the grantor (borrower), the beneficiary (lender), and the trustee. The trustee's function is to either reconvey the deed of trust back to the grantor when the loan is paid off or hold a trustee's sale if the grantor defaults.

Failure to Record

The trustee's power of sale, the power to foreclose, arises from ORS 86.735, which has several requirements. The main arguments have been about ORS 86.735(1), which states:

> **86.735 Foreclosure by advertisement and sale.** 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

Addressing that provision in an early MERS case, Judge Owen Panner stated, "If there were transfers of the beneficial interest in the trust deed, defendants were required to record those transfers prior to initiating a non-judicial foreclosure in the manner provided in ORS 86.740 to 86.755. ORS 86.735(1)." *Hooker v. Northwest Trustee Services, Inc.,* No. 1:10-cv-3111- PA, Order at 9 (D. Or. May 25, 2011). The *Hooker* case is on appeal to the 9th Circuit.

Assertions that assignments of the deed of trust were not recorded arise primarily in two types of cases: MERS cases and securitized trust cases. There is no consensus among the courts on the law in this area.

MERS

Some people estimate that about 60% of the deeds in Oregon involve MERS. MERS is the Mortgage Electronic Registration Systems, Inc. and was created by lenders to track the transfers of notes. MERS is often listed as the nominal beneficiary in homeowners' deeds of trust. In addition, prior to a foreclosure sale, homeowners may find a recorded document that transfers the beneficial interest from MERS to another entity.

Can MERS be the beneficiary?

Under the Oregon Trust Deed Act, *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 . . . ." ORS 86.705(1).

A recent order by Judge Michael Simon in *James v. ReconTrust Company*, No. 3:11-cv-00324-ST (D. Or. Feb. 29, 2012) (*James II)*, provides the most thoughtful and thorough analysis of whether MERS can be a beneficiary under the OTDA.[1] In the order, Judge Simon explains that the beneficial interest is the right to receive payment, and the entity that has the right to receive payment is the noteholder. The *James* order states that MERS cannot hold the beneficial interest under the OTDA and thus cannot be the beneficiary.

In *James II* Judge Simon states:

> The short answer to the primary question presented in this case is that, in Oregon, under the definition of "beneficiary" set forth in the OTDA, only an original lender or a successor to the lender may be a beneficiary under a trust deed. Because MERS is neither a lender nor a lender's successor, it is not a beneficiary within the meaning of the Oregon statute, notwithstanding any contractual agreement among the parties in the loan and related security documents declaring that MERS is a beneficiary. This conclusion is based on a statutory interpretation of the OTDA in the context of Oregon's law of real estate finance.

If MERS can't be a beneficiary under Oregon's Trust Deed Act, then the beneficial interest cannot be transferred from MERS to another entity, and the beneficial interest remains with the original lender or its successor.

Judge Simon states in *James II*:

> Thus, the OTDA and Oregon case law establish that the beneficiary is a person named or otherwise designated in the trust deed as the person whose debt is secured by the trust deed. In the context of a note, the OTDA and Oregon case law demonstrate that this person (i.e. the beneficiary) is the noteholder, or the owner of the note; in other words, the beneficiary is the lender or the lender's successor.

As stated earlier, there is no consensus on the court on this issue. Cases can be found stating that MERS can be the beneficiary. In *Beyer v. Bank of America*, 800 F. Supp. 2d 1157 (D. Or. Aug. 2, 2011), the court notes that some courts have held that MERS was the beneficiary under Oregon law because "MERS is named in the trust deed as the beneficiary." *Id*. at 1160 (citing, e.g., *Bertrand v. SunTrust Mortgage, Inc.*, No. 09-cv-857-JO,

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2011 WL 1113421 (D. Or. Mar. 23, 2011) and *Burgett v. Mortgage Elec. Registration Sys., Inc.*, No. 09-cv-6244-HO, 2010 WL 4282105 (D. Or. Oct. 20, 2010)).

MERS and failure to record

In many cases involving MERS there is also an argument that the party seeking to foreclose did not record the assignments of the deed of trust as required under the OTDA.

MERS exists to track transfers of the ownership of notes. These transfers might not be in the public record, but they are capable of being found in discovery.

For example, when the note is transferred from A to B, there is an automatic assignment of the deed of trust that should be recorded. Often the public record contains only an assignment from MERS to C, and C is seeking to foreclose.

Judge Simon also discusses this issue in *James II*:

> As explained above, the noteholder, not MERS, is the beneficiary of the trust deed. Thus, NWMG, not MERS, was the initial beneficiary of the trust deed. Furthermore, while Defendants are correct that the OTDA does not require the recording of transfers of the note, Oregon law provides that the transfer of the note necessarily causes an assignment of the security instrument, even if the security instrument is not formally assigned. *Schleef v. Purdy,* 107 Or. 71, 78 (1923) ("transfer of the note, without any formal transfer of the mortgage, transfers the mortgage"); *see also First Nat'l Bank of Oregon v. Jack Mathis Gen. Contractor,* 274 Or. 315, 321 (1976) ("the assignment of a debt carries with it the security for the debt"); *West v. White,* 92 Or. App. 401, 404, *aff'd,* 307 Or. 296 (1988) (discussing a note secured by a trust deed, assignment of "a note carries with it a security interest in real property" (internal citation omitted).[22] When NWMG transferred the note to BACHLS, that transfer automatically and necessarily assigned and transferred NWMG's beneficial interest in the trust deed to BACHLS. ORS § 86.735(1) does not require the recording of the transfer of the note. It does, however, require the recording of the assignment of the beneficial interest in the trust deed.

James II, footnote 22:

> This is the rule not just in Oregon, but almost universally. "The transfer of the note carries with it the security, without any formal assignment or delivery, or even mention of the latter." *Carpenter v. Longan,* 83 U.S. 271, 275 (1872); *see also* G. Nelson and D. Whitman, REAL ESTATE FINANCE LAW § 5.27 (5th ed. 2007) ("The obligation is correctly regarded as the principal thing being transferred, with the interest in the land automatically attached to it in an extremely important, but subsidiary, capacity.").

Securitized Trusts

Even if a case doesn't involve MERS, it is possible that the foreclosing party failed to record the assignments of the deed of trust under ORS 86.735(1). Many home loans have been sold several times and securitized—or, pooled and sold off piece by piece by Wall Street.

One of the governing documents for these transactions is called a *pooling and servicing agreement* (PSA), and each securitized trust has one. When there is evidence of securitization in a chain of title,[2] there is most likely a failure to record the assignments of the deed of trust. That is because securitization by its nature involves the selling of the note from the issuer to the depositor, to the trust, and to the investor. Each stage is a sale of the note and therefore an assignment of the deed of trust. Most of these sales are never recorded in the county records department as required by the OTDA.

Arguments about a failure to record and MERS's beneficial interest are relevant only if a lender is pursuing a non-judicial foreclosure.

Judge John Acosta recently found that these failures to record assignments that occur in securitization do implicate the OTDA recording requirements: "For these reasons, the court finds that securitization inherently involves successive assignments to entities who hold beneficial interest in the loan and are, therefore, beneficiaries for the purpose of the OTDA recording requirements." *Bergquist v. Deutsche Bank National Trust Company as Trustee for Saxon Asset Securities Trust 2007-4,* No. 3:11-cv-01303-AC (D. Or. May 14, 2012) (decision on defendant's motion to dismiss).

Arguments about a failure to record and MERS's beneficial interest are relevant only if a lender is pursuing a non-judicial foreclosure. Only if the lender is proceeding non-judicially must assignments of the deed of trust be recorded.

Certification

It has been noted that hundreds of cases have been decided on the MERS and the failure-to-record issues, and there is a wide divergence of opinion at the state circuit court level and the federal district court level.

Chief Judge Ann Aiken, of the Federal District Court for the District of Oregon, has presented four cases for certification to the Oregon Supreme Court[3] to decide the questions whether MERS can be a beneficiary under the Oregon Trust Deed Act and whether the automatic assignments of the trust deed must be recorded prior to non-judicial foreclosure under the OTDA.

The Oregon Supreme Court's decision on whether to accept certification is expected at any time.

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Judicial Foreclosure

Lenders always have the option to pursue judicial foreclosure, and there have been rumors that lenders will increasingly choose this option. In judicial foreclosure, homeowners' arguments involve issues of standing, who is the real party in interest, and who has the right to foreclose on the note, as well as standard procedural equitable defenses.

It was recently stated at a CLE that the law in Oregon on judicial foreclosures is where the law on non-judicial foreclosures was three years ago.[4] Very few judicial-foreclosure cases have been argued by homeowners' attorneys. Much of the law on judicial foreclosures is quite old because lenders haven't used judicial foreclosure in significant numbers since the advent of the Oregon Trust Deed Act in 1959.

None of the arguments about failure to record are relevant to judicial foreclosures. However, judicial foreclosures do offer the homeowner an opportunity to make arguments against the foreclosure to a judge.

Other Arguments for Homeowners

Foreclosure cases several years ago involved fraud-type predatory loan activity and were brought under the Truth in Lending Act (TILA). The three-year statute of limitations for TILA rescission has limited the number of current cases because the predatory loan abuses were concentrated in the years before 2008. Other arguments homeowners could use involve violations of the Unlawful Trade Practice Act (ORS 646.608), which became available as a cause of action against lenders in foreclosure cases in March 2010; the Oregon Mortgage Lender Law (ORS Chapter 86A); and the Elderly Persons and Persons with Disabilities Abuse Prevention Act (ORS Chapter 124).

Recent Developments

Attorney Generals' National Mortgage Settlement. A national lawsuit was brought by several state attorneys general because of the fraudulent practices of several loan servicers. The settlement covers Bank of America, Chase, Citibank, Wells Fargo, GMAC, and Ally. It provides $29 million for housing counselors, requires lenders to provide borrowers with a single point of contact, prohibits dual tracking, and requires servicers to follow standards (not just guidelines). See http://nationalmortgagesettlement.com/ for more information.

Oregon Attorney General's Rules. In January (and again in February) the Oregon attorney general authorized temporary rules to implement ORS 646.608(1)(u), which allowed mortgage servicing abuses to be regulated under the Unlawful Trade Practices Act. The temporary rules expire July 24, 2012, but the attorney general's office is working on permanent rules, and meetings are scheduled for public comment. See http://www.doj.state.or.us/consumer/foreclosure_fraud.shtml and click on "Proposed Mortgage Servicing Rules."

Niday v. GMAC, Oregon Court of Appeals No. A147430. The first MERS case to get to the Oregon Court of Appeals was argued in January 2012. No decision has been issued yet.

The *Hooker* appeal. Many homeowners know the name *Hooker* because it was the first widely known case that was decided for homeowners against MERS. It is currently on appeal to the Ninth Circuit. The Oregon Department of Justice submitted an amicus brief. *Hooker v. Northwest Trustee Services, Inc.,* No. 1:10-cv-3111- PA (D. Or. May 25, 2011).

SB 1552. At the end of the February 2012 legislative session, the Oregon legislature passed Senate Bill 1552. The bill requires lenders to sit down with homeowners for a mandatory mediation with a neutral third-party mediator. It also adds notice procedures and changes the definition of a *residential trust deed*. The Oregon Department of Justice is working on rules to enforce the new law, which will affect foreclosures occurring after July 11, 2012.

Conclusion

Although homeowners raising challenges to foreclosures have been accused of asking for a free house, in my experience clients are asking for an acknowledgment of the changed circumstances of not just their lives but the whole economy. Resetting interest rates to current levels and loans to the current value of the house would go a long way toward solving the foreclosure problem. Doing so requires meaningful negotiation with the true owner of the note, and unfortunately a lawsuit often needs to be filed to get to that conversation. ✦

Anna Braun is an attorney for Salem Consumer Law LLC, a law firm she established in September 2011 (formerly Anna Braun Attorney at Law LLC). Her law firm concentrates on foreclosure defense, bankruptcy (including bankruptcy alternatives), and consumer law.

Endnotes

1. The order was issued February 29, 2012. The case is still in litigation.

2. For example, a recorded assignment may be from Saxon Asset Securities Trust 2007.

3. *Mirarabshahi v. ReconTrust Company,* U.S. District Court, No. 12-00010-HA; *Mayo v. ReconTrust Company,* U.S. District Court, No. 11-1533-PK; *Powell v. ReconTrust Company,* U.S. District Court, No. 11-1399-HZ; *Brandrup v. ReconTrust Company,* U.S. District Court, No. 11-1390-JE. (Homeowners in these cases are represented by the law firm Bowles Fernandez.)

4. Comment by Phil Goldsmith at the CLE titled "Handling a Foreclosure Case" held at the Oregon State Bar Center May 17–18, 2012. I highly recommend this CLE to anyone interested in this area of the law.

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FORECLOSURE IN OREGON CONTINUED FROM PAGE 6

The non-judicial foreclosure process from the borrower's perspective

- Homeowner receives a notice of sale from a loan servicer.
- Sale date is at least 120 days after the notice of sale is served or mailed.[1] Sometimes sale dates are postponed by oral proclamation. No written notice of the new sale date will be given.
- Lender can postpone the sale date for up to 180 days. This usually happens in 30-day increments. After 180 days, the foreclosure process must begin again.
- After the sale, a trustee's deed of sale is recorded with the county.
- The new owner of property can proceed with an eviction of the homeowner through a FED process,[2] which can begin 10 days after the sale under ORS 86.755(6)(a).

1. ORS 86.740(1). A notice of sale that provides inadequate time can be challenged.

2. Sales have been successfully challenged during the FED (forcible entry and wrongful detainer) process if the property was not purchased by a third-party bona fide purchaser under ORS 86.780. These cases include *Option One v. Wall*, 159 Or. App. 354 (1999); *U.S. Bank National Association N.A. v. Martha Flynn,* Columbia County Circuit Court, No. 11-8011 (2011); and *Wells Fargo v. Michelotti*, Hood River Circuit Court, No. 11-0015FD (2011).

If you'd like to write an article for this newsletter, please contact our editor at elise.gautier@comcast.net.

Things a homeowner should know:

- HUD-certified housing counselors can help homeowners begin the process of speaking to loan servicers about loan modifications. HUD does not charge for this counseling service. Visit HUD.gov or call 1-800-SAFENET.
- Homeowners should stay away from for-profit loan-audit firms. No one should pay up-front for loan counseling or the promise of a modification. See the Oregon Department of Justice website at http://www.doj.state.or.us/consumer/foreclosure_fraud.
- Oregon law protects homeowners from deficiencies in all foreclosures for first-lien residential trust deeds.
- Judicial foreclosure deficiency judgments can be the result if the homeowner or a family member is no longer in the house when the foreclosure begins. SB 1552, effective July 11, 2012, changes the operative date to the date of default.[1]
- Chapter 7 bankruptcies won't allow a homeowner to keep a house but may still be a good option, depending on the circumstances.
- Chapter 13 bankruptcy can be a solution for some homeowners if they have the income to propose a plan to cure arrearages within five years.
- Short sales and deed-in-lieu options are possible settlement options but may not help credit scores.[2]

1. After July 11, 2012, when SB 1552 takes effect, the definition of *residential trust deed* changes, and the important date is the date of default instead of the date foreclosure begins.

2. "There's no substantial difference in score impact between short sale, deed-in-lieu, settlement, and foreclosure." "Addressing the Credit Impacts of Foreclosure," Oct. 12, 2011, Federal Reserve Bank of San Francisco, webinar.

SUPREME COURT UPDATE CONTINUED FROM PAGE 3

political question doctrine.

Zivotofsky, a minor child born in Jerusalem to U.S. citizens, sought a passport and requested that his birthplace be recorded as "Jerusalem, Israel" pursuant to the Foreign Relations Authorization Act, which directs the secretary of state to identify a U.S. citizen born in Jerusalem as born in "Israel" on a passport. Upon signing the act, however, President George W. Bush stated that it was merely advisory because it interfered with the executive's sole constitutional authority to recognize foreign governments.

The State Department refused Zivotofsky's request and identified only "Jerusalem" on the passport. After Zivotofsky filed suit seeking injunctive relief, the district court held that his claim lacked subject matter jurisdiction because it raised a question dealing with the executive's power. The D.C. Circuit affirmed. The Supreme Court disagreed, finding that the political question doctrine was not preclusive because the central issue to be decided was whether Congress impermissibly interfered with the executive's authority. ✦

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Kyle Busse is a partner at Busse & Hunt, which represents employees in employment cases, including civil rights, discrimination, and fraud.

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Recent Decisions

Richard F. Liebman
Amy L. Angel
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***Collins v. Gee West Seattle LLC*,**
631 F.3d 1001 (9th Cir. 2011)

The Worker Adjustment and Retraining Notification Act (WARN) generally requires a business conducting a plant closure or mass layoff to provide 60 days' notice of the closure or layoff to affected employees, and calls for a back pay remedy if the employer fails to provide such notice. WARN does not, however, provide a remedy for employees who "voluntarily depart" employment. In this case, a split panel of the Ninth Circuit held that employees who quit because the employer was about to cease all operations did not "voluntarily depart" and were therefore entitled to back pay under WARN.

***Delodder v. Aerotek*, No. 10-56755,**
2012 WL 862819 (9th Cir. 2012)

The plaintiffs, a group of recruiting employees who worked for a staffing company, sought certification of a statewide class action alleging that the staffing company had misclassified them as administrative employees under the California Labor Code. The district court denied class certification, and the Ninth Circuit affirmed. The court held that individual factual issues about the specific job assignments that different recruiters performed outweighed the few commonalities the class members shared, most of which related to required trainings and generalized employment policies.

***Samper v. Providence St. Vincent Medical Center*,**
675 F.3d 1233 (9th Cir 2012)

The plaintiff was an intensive-care unit nurse who requested that her employer modify its attendance policy and allow her an unspecified number of unplanned absences in order to cope with her disability, fibromyalgia. The plaintiff's absences exceeded what was permitted, and the hospital ultimately terminated her. She filed suit, alleging a violation of the Americans with Disabilities Act (ADA) due to failure to accommodate.

In upholding the dismissal, the Ninth Circuit focused on (1) whether regular attendance was an essential function of the job and (2) whether an exemption from an attendance policy was a reasonable accommodation. The court held that while regular attendance may not be an essential function in all cases, it was in this instance, given the requirement that the plaintiff work as part of a team, the need for face-to-face interaction with clients, and the need for employees to work with items and equipment on site. As to the second issue, the court reasoned that because the plaintiff never quantified the number of absences she wished to take, the accommodation she wanted was to come and go as she pleased, which was unreasonable on its face.

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***Zeinali v. Raytheon Corp.*,**
636 F.3d 544 (9th Cir. 2011)

The plaintiff, an Iranian engineer employed by a military contractor, sued under state law, alleging that the defendant terminated him because of his national origin. The defendant contended that it terminated the plaintiff because the Department of Defense denied him a required security clearance. The defendant obtained summary judgment in the district court, primarily on the grounds that the court lacked jurisdiction to hear the plaintiff's claims under *Brazil v. U.S. Dept. of the Navy*, 66 F.3d 193, 196 (9th Cir. 1995), which holds that courts may not review security-clearance decisions in the context of workplace discrimination actions. Reversing, the Ninth Circuit held that adjudication of the plaintiff's claims did not require inquiry into the decision to deny him a security clearance, because he contended that the defendant did not terminate non-Iranian engineers who were denied the clearance. ✦

Rick Liebman and Amy Angel, partners at Barran Liebman LLP, represent employers in labor and employment law.

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