

McDonnell Property Analytics
City of Seattle Review of Mortgage Documents

APPENDIX “I”

Definitions of Terms

DEFINITIONS OF TERMS

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Definitions of Terms Used as the Basis for Establishing Protocols and Practical Applications for Classifying Assignments Deed of Trust/Mortgage

ABSOLUTE ASSIGNMENT¹

An assignment that leaves the assignor no interest in the assigned property or right.

ABSOLUTE NULLITY²

(17c) *Civil law*. 1) An act that is incurably void because it is against public policy, law, or order. • Absolute nullity can be invoked by any party or by the court. See La.Civ.Code arts. 7, 2030. 2) The quality, state, or condition of such a nullity.

ALPHA DOCUMENT³

“Alpha” is the first letter of the Greek alphabet. For each Casefile we refer to the “alpha document” as the Assignment Deed of Trust/Mortgage filed of record with the King County Recorder’s Office during the first half of 2013 affecting properties within the Seattle City limits involving Mortgage Electronic Registration Systems, Inc. because these are the subject of our study, even though they will never be recorded first in the chain of title. (See also “Source Document”)

APPOINTMENT OF SUCCESSOR TRUSTEE

An “Appointment of Successor Trustee” is the name designated by the King County Recorder’s Office to index deeds of conveyance by which a lawful beneficiary transfers the powers, rights and responsibilities granted to the original trustee under a Deed of Trust to another.

¹ See *Black’s Law Dictionary*, 143 (10th ed. 2014).

² See *Black’s Law Dictionary*, 1236 (10th ed. 2014).

³ Defined by McDonnell Property Analytics to promote a consistent understanding of the terms we use in our report.

RCW 61.24.010(2) – If a trustee is not appointed in the deed of trust, or upon the resignation, incapacity, disability, absence, or death of the trustee, or the election of the beneficiary to replace the trustee, the beneficiary shall appoint a trustee or a successor trustee. Only upon recording the appointment of a successor trustee in each county in which the deed of trust is recorded, the successor trustee shall be vested with all powers of an original trustee.

ASSIGNEE⁴

- 1) Someone to whom property rights or powers are transferred by another.
 - Use of the term is so widespread that it is difficult to ascribe positive meaning to it with any specificity. Courts recognize the protean nature of the term and are therefore often forced to look to the intent of the assignor and assignee in making the assignment — rather than to the formality of the use of the term assignee — in defining rights and responsibilities. — Also termed *assign*.

ASSIGNMENT⁵

- 1) The transfer of rights or property. 2) The rights or property so transferred.

“An *assignment* is a transfer or setting over of property, or of some right or interest therein, from one person to another; the term denoting not only the *act* of transfer, but also the instrument by which it is effected. In these senses the word is variously applied in law.” Alexander M. Burrill, *A Treatise on the Law and Practice of Voluntary Assignments for the Benefit of Creditors* § 1, at 1 (James Avery Webb ed., 6th ed. 1894).

“Negotiability differs from assignment, with which it has obvious affinities, in at least two respects. In the first place no notice need be given of the transfer of a negotiable instrument, and in the second place the transfer of such an instrument is not subject to equities. Thus whereas an assignor only transfers his rights subject to any defences which could be pleaded against him, a transfer of a negotiable instrument to someone in good faith passes a good title, free from any such defences. For instance a person who receives a cheque in good faith obtains a good title, even though the cheque may have been stolen. It is not, of course, any document which has the attributes of negotiability. Only those documents recognized by the custom of trade to be transferable by delivery (or endorsement) are negotiable. Other documents can only be transferred by

⁴ See *Black’s Law Dictionary*, 142 (10th ed. 2014).

⁵ See *Black’s Law Dictionary*, 142-143 (10th ed. 2014).

assignment.” P.S. Atiyah, *An Introduction to the Law of Contract* 278-79 (3d ed. 1981).

ASSIGNMENT DEED OF TRUST/MORTGAGE

An “Assignment Deed of Trust/Mortgage” is the name designated by the King County Recorder’s Office to index deeds of conveyance that purport to transfer preexisting rights in real property situated within its jurisdiction from the beneficiary/mortgagee of record to another.

In the State of Washington, RCW 61.16 provides for assignment of deeds of trust by means of a signed and acknowledged written instrument. Assignments of deeds of trust are subject to Washington’s recording act, which provides that an unrecorded assignment “is void as against any subsequent purchaser or mortgagee in good faith and for a valuable consideration from the same vendor.” (*See* RCW 65.08.070. *See* also related definitions in RCW 65.08.060)⁶

The recording statutes speak in terms of mortgages and do not refer to deeds of trust. However, except as otherwise provided in RCW 61.24, all Washington laws relating to mortgages apply equally to deeds of trust. (*See* RCW 61.24.020)

ASSIGNOR⁷

Someone who transfers property rights or powers to another by assignment. — Also spelled *assigner*.

BAIN V. METRO. MORTG. GRP., INC.⁸

On August 16, 2012, in the matter of *Bain v. Metro. Mortg. Grp., Inc.*, the Washington Supreme Court answered three certified questions presented by the Federal District Court for the Western District of Washington as follows: [285 P.3d 37-38]

⁶ Attribution is given here to Washington Appleseed’s publication: *Foreclosure Manual for Judges: a reference guide to foreclosure law in Washington State*. (*See* Section 2.3 Assignments, 2.32 Recording Act.) (Available here for a contribution of \$50 at: <http://www.waappleseed.org/#!/publications/c1tsl>)

Washington Appleseed is an organization that is part of a network of Appleseed Centers across the United States and Mexico, that works to address social and economic problems in the State of Washington by developing new public policy initiatives, challenging unjust laws, and helping people better understand and fully exercise their rights. Learn more at www.WaAppleseed.org.

⁷ *See Black’s Law Dictionary*, 144 (10th ed. 2014).

⁸ *See Bain v. Metro. Mortg. Grp., Inc.*, 175 Wash.2d 83, 285 P.3d 34 (Wash., 2012)

CERTIFIED QUESTIONS

- Is Mortgage Electronic Registration Systems, Inc., a lawful “beneficiary” within the terms of Washington's Deed of Trust Act, Revised Code of Washington section 61.24.005(2), if it never held the promissory note secured by the deed of trust?
— [Short answer: No.]
- If so, what is the legal effect of Mortgage Electronic Registration Systems, Inc., acting as an unlawful beneficiary under the terms of Washington's Deed of Trust Act?
— [Short answer: We decline to answer based upon what is before us.]
- Does a homeowner possess a cause of action under Washington's Consumer Protection Act against Mortgage Electronic Registration Systems, Inc., if MERS acts as an unlawful beneficiary under the terms of Washington's Deed of Trust Act?
— [Short answer: The homeowners may have a CPA action but each homeowner will have to establish the elements based upon the facts of that homeowner's case.]

The gravamen of the Supreme Court’s decision in *Bain* is summarized as follows:

[285 P.3d 35]... The primary issue was whether MERS was a lawful beneficiary with the power to appoint trustees within the deed of trust act if it did not hold the promissory notes secured by the deeds of trust. A plain reading of the applicable statute leads the Supreme Court to conclude 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 nonjudicial foreclosure on real property. "Simply put, if MERS does not hold the note, it is not a lawful beneficiary."

BENEFICIARY

RCW 61.24.005(2) – “Beneficiary” means the 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.

BORROWER

RCW 61.24.005(3) – “Borrower” means a person or a general partner in a partnership, including a joint venture, that is liable for all or part of the obligations secured by the deed of trust under the instrument or other document that is the principal evidence of such obligations, or the person's successors if they are liable for those obligations under a written agreement with the beneficiary.

BREEDER DOCUMENT

Breeder documents are documents used for access to other forms of legitimate identification, such as a driver's license, for the purpose of establishing a false identity.⁹

For example, in identity theft cases the birth certificate is often referred to as the breeder document because once fabricated, an imposter can use it to acquire a driver's license, Social Security Number, bank account, passport, etc. and obtain rights and privileges of citizenship to which s/he is not legally entitled.

Translating this concept over to the realm of foreclosure fraud, the most common breeder document is the fraudulent assignment of mortgage which purports to grant a title interest in the underlying real property to the fraudster, and serves as the basis for obtaining other documents necessary to extinguish the property owner's rights and transfer full legal and equitable title as well as possession to the fraudster.

CASEFILE

Casefile in this context refers to the documents and data gathered from the King County Recorder's Office, the Assessor's Office, and outside sources necessary to conduct the City of Seattle Review of Mortgage Documents. Each Casefile is comprised of the "alpha" document (Assignment Deed of Trust/Mortgage), the source document (Deed of Trust), and all other documents in the chain of title that relate to the source document, e.g., an Appointment of Successor Trustee, a Deed of Full Reconveyance, a Notice of Trustee's Sale, Trustee's Deed, etc.

CHAIN OF TITLE¹⁰

1) The ownership history of a piece of land, from its first owner to the present one. — Also termed *line of title*; *string of title*. 2) The ownership history of commercial paper, traceable through the indorsements.

- For the holder to have good title, every prior negotiation must have been proper. If a necessary indorsement is missing or forged, the chain of title is broken and no later transferee can become the holder.

⁹ See USLegal definition of Breeder Document: <http://definitions.uslegal.com/b/breeder-document/>

¹⁰ See *Black's Law Dictionary*, 278 (10th ed. 2014).

CONSPIRACY¹¹

An agreement by two or more persons to commit an unlawful act, coupled with an intent to achieve the agreement's objective, and (in most states) action or conduct that furthers the agreement; a combination for an unlawful purpose. 18 USCA § 371.

CONSUMER PROTECTION ACT¹²

The Washington Legislature enacted the Consumer Protection Act (CPA), [RCW ch. 19.86] which is modeled after the Federal Trade Commission Act (FTC). The law provides: "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful."

RCW 19.86.920 Purpose – The legislature hereby declares that the purpose of this act is to complement the body of federal law governing restraints of trade, unfair competition and unfair, deceptive, and fraudulent acts or practices in order to protect the public and foster fair and honest competition.

CONVEYANCE

RCW 65.08.060(3) – The term “conveyance” includes every written instrument by which any estate or interest in real property is created, transferred, mortgaged or assigned or by which the title to any real property may be affected, including an instrument in execution of a power, although the power be one of revocation only, and an instrument releasing in whole or in part, postponing or subordinating a mortgage or other lien; except a will, a lease for a term of not exceeding two years, and an instrument granting a power to convey real property as the agent or attorney for the owner of the property. “To convey” is to execute a “conveyance” as defined in this subdivision.

DEED

1) Something that is done or carried out; an act or action. 2) A written instrument by which land is conveyed. 3) At common law, any written instrument that is signed, sealed, and delivered and that conveys some interest in property.¹³

RCW 64.04.020 – Requisites of a deed. Every deed shall be in writing, signed by the party bound thereby, and acknowledged by the party before some person authorized by *this act to take acknowledgments of deeds. [1929 c 33 § 2; RRS § 10551. Prior: 1915 c 172 § 1; 1888 p 50 § 2; 1886 p 177 § 2; Code 1881 § 2312; 1854 p 402 § 2.] *Reviser's note: The language "this act" appears in 1929 c 33, which is codified in RCW 64.04.010-64.04.050, 64.08.010-64.08.070, 64.12.020, and 65.08.030.

¹¹ See *Black's Law Dictionary*, 375 (10th ed. 2014).

¹² See RCW 19.86, et seq.

¹³ See *Black's Law Dictionary*, 501 (10th ed. 2014).

DEED OF RECONVEYANCE

A deed conveying title to real property from a trustee to a grantor when a loan is repaid.¹⁴

RCW 61.24.110(1) – Reconveyance by trustee. The trustee of record shall reconvey all or any part of the property encumbered by the deed of trust to the person entitled thereto on written request of the beneficiary, or upon satisfaction of the obligation secured and written request for reconveyance made by the beneficiary or the person entitled thereto.

DEED OF TRUST

A deed conveying title to real property to a trustee as security until the grantor repays a loan.¹⁵

The majority of what are commonly referred to as residential “mortgages” in Washington State are actually deeds of trust. A deed of trust is a comparatively recent statutory creation that is effectively a three-party mortgage. The real property owner (the “grantor”) conveys the property to an independent party (the “trustee”) for the benefit of a third party (the “beneficiary”) to secure the repayment of a debt or other obligation (again, typically evidenced by a promissory note) from the grantor to the beneficiary. The trustee must be one of several categories of persons or entities specified in the Deed of Trust Act.¹⁶

For practical purposes, the most important difference between a deed of trust and a more traditional mortgage is that a deed of trust may be foreclosed non-judicially. In the event of default, the trustee has the power to sell the property non-judicially if requested to do so by the beneficiary. This power is commonly referred to as the “trustee’s power of sale”... Alternatively, the deed of trust can be foreclosed judicially, in the same manner as a mortgage. Foreclosing on a deed of trust judicially creates the same rights to a deficiency judgment, and rights against guarantors, as would be present in the judicial foreclosure of a mortgage that was not secured by a deed of trust.¹⁵

¹⁴ *See Black’s Law Dictionary*, 502 (10th ed. 2014).

¹⁵ *See Black’s Law Dictionary*, 502 (10th ed. 2014).

¹⁶ *See Foreclosure Manual for Judges: a reference guide to foreclosure law in Washington State.* (*See* Section 1.1.3 Deeds of Trust.)

DEED OF TRUST ACT¹⁷

The Deed of Trust Act (DTA or Act) was enacted in Washington in 1965.¹⁸ The DTA has since been amended several times in response to specific issues that have arisen in its application. The DTA was intended to bring Washington mortgage practice into the “modern” era of finance.¹⁹ The Act has provided a relatively simple and efficient method of creating a mortgage lien on real property and foreclosing the lien in the event of borrower default in residential and commercial transactions.³ The most recent amendments to the DTA have attempted to provide additional consumer protection elements to the non-judicial foreclosure process to assist homeowners. It is not clear whether these amendments will succeed in providing any meaningful relief to homeowners with mortgages or whether the amendments will only delay and complicate the foreclosure process.

FALSE²⁰

1) Untrue <a false statement>. 2) Deceitful; lying <a false witness>. 3) Not genuine; inauthentic <>false coinage>. 4.) Wrong; erroneous<>false step>.

FALSE DOCUMENTS

RCW 40.16.030 – Offering false instrument for filing or record.

Every person who shall knowingly procure or offer any false or forged instrument to be filed, registered, or recorded in any public office, which instrument, if genuine, might be filed, registered or recorded in such office under any law of this state or of the United States, is guilty of a class C felony and shall be punished by imprisonment in a state correctional facility for not more than five years, or by a fine of not more than five thousand dollars, or by both. [2003 c 53 § 216; 1992 c 7 § 36; 1909 c 249 § 97; RRS § 2349.]

FORGERY

RCW 9A.60.020 – Forgery.

¹⁷ This explanation of the Deed of Trust Act was taken from a white paper titled *Washington Deed Of Trust Act And Recent Developments* which was prepared for the Continuing Legal Education Seminar At The Annual Conference of the Senior Lawyer Section of the Washington State Bar Association On May 11, 2010 Scott B. Osborne, The Summit Law Group. The paper may be viewed in its entirety at: <http://www.jdsupra.com/legalnews/washington-deed-of-trust-act-changes-a-66785/>.

¹⁸ Laws of 1965; ch. 74, codified as Chpt. 61.24 RCW.

¹⁹ “By enacting the Deed of Trust Act, with its private sale provisions, Washington has . . . taken a substantial step in modernizing its archaic real property realization procedures.” Gose, *The Trust Deed Act in Washington*, 41 Wash. L. Rev. 94, 104 (1966).

²⁰ See *Black’s Law Dictionary*, 718 (10th ed. 2014).

- A person is guilty of forgery if, with intent to injure or defraud:
- He or she falsely makes, completes, or alters a written instrument or;
- He or she possesses, utters, offers, disposes of, or puts off as true a written instrument which he or she knows to be forged.
- In a proceeding under this section that is related to an identity theft under RCW 9.35.020, the crime will be considered to have been committed in any locality where the person whose means of identification or financial information was appropriated resides, or in which any part of the offense took place, regardless of whether the defendant was ever actually in that locality.
- Forgery is a class C felony. [2011 c 336 § 382; 2003 c 119 § 5; 1975-'76 2nd ex.s. c 38 § 13; 1975 1st ex.s. c 260 §9A.60.020 .]

FRAUD

RCW 9A.60.010 – Definitions.

The following definitions and the definitions of RCW 9A.56.010 are applicable in this chapter unless the context otherwise requires:

- (1) "Complete written instrument" means one which is fully drawn with respect to every essential feature thereof;
- (2) "Incomplete written instrument" means one which contains some matter by way of content or authentication but which requires additional matter in order to render it a complete written instrument;
- (3) To "falsely alter" a written instrument means to change, without authorization by anyone entitled to grant it, a written instrument, whether complete or incomplete, by means of erasure, obliteration, deletion, insertion of new matter, transposition of matter, or in any other manner;
- (4) To "falsely complete" a written instrument means to transform an incomplete written instrument into a complete one by adding or inserting matter, without the authority of anyone entitled to grant it;
- (5) To "falsely make" a written instrument means to make or draw a complete or incomplete written instrument which purports to be authentic, but which is not authentic either because the ostensible maker is fictitious or because, if real, he or she did not authorize the making or drawing thereof;
- (6) "Forged instrument" means a written instrument which has been falsely made, completed, or altered;
- (7) "Written instrument" means:

- Any paper, document, or other instrument containing written or printed matter or its equivalent; or
- Any access device, token, stamp, seal, badge, trademark, or other evidence or symbol of value, right, privilege, or identification. [2011 c 336 § 381; 1999 c 143 § 38; 1987 c 140 § 5; 1975-'76 2nd ex.s. c 38 § 12; 1975 1st ex.s. c 260 § 9A.60.010.]

GRANTOR

RCW 61.24.005(7) – “Grantor” means a person, or its successors, who executes a deed of trust to encumber the person's interest in property as security for the performance of all or part of the borrower's obligations.

GRANTOR/GRANTEE

RCW 65.04.015(5) – “Grantor/grantee” for recording purposes means the names of the parties involved in the transaction used to create the recording index. There will always be at least one grantor and one grantee for any document. In some cases, the grantor and the grantee will be the same individual(s), or one of the parties may be the public.

HOLDER²¹

1) Someone who has legal possession of a negotiable instrument and is entitled to receive payment on it. 2) A person with legal possession of a document of title or an investment security. 3) Someone who possesses or uses property.

INVALID

1) Not legally binding. 2) Without basis in fact.²²

The opposite of *valid*. (*See* the definition for *valid* herein.)

INVALID ASSIGNMENT DEED OF TRUST/MORTGAGE²³

An assignment is a transfer of some right or interest from an assignor to an assignee that confers a complete right in the subject matter to the assignee.[i] In other words, an assignment is a manifestation to another person by the owner of a right expressing his/her intention to transfer his/her right to such other person or to a third person. However, not every transfer of interest is considered as an assignment.[ii]

²¹ *See Black's Law Dictionary*, 848 (10th ed. 2014).

²² *See Black's Law Dictionary*, 952 (10th ed. 2014).

²³ *See* US Legal, Inc., *Validity of Assignments* at: <http://assignments.uslegal.com/validity-of-assignments/#sthash.j9TsbcrA.dpuf>.

Assignments which are not contrary to any express law, public policy or good morals are considered to be valid and an assignment is regarded as invalid if the same is against public policy. For example, an assignment by a public officer of the unearned salary, wages, or fees of his/her office is void as against public policy.[iii]

Whereas, an assignment of wages to be earned under an existing employment made in good faith and for a valuable consideration is valid.[iv] Similarly, an assignment of wages earned in the future, under an existing contract is a valid one.[v] However, an assignee cannot insist upon his/her right to affirm a contract of assignment by holding to the judgment and at the same time disaffirm the same by claiming the consideration paid from the assignor.

Obtaining an assignment through fraudulent means invalidates the assignment. Fraud destroys the validity of everything into which it enters. It vitiates the most solemn contracts, documents, and even judgments.[vi] If an assignment is made with the fraudulent intent to delay, hinder, and defraud creditors, then it is void as fraudulent in fact. In such case the innocence of the creditors named in the deed will not save it from condemnation if fraudulent in fact on the part of the grantor.[vii] The intentional withholding of assets from the assignee is regarded as a fraud upon the rights of creditors and it is sufficient to render the assignment void.[viii]

The motives that prompted an assignor to make the transfer will be considered as immaterial and will constitute no defense to an action by the assignee, if an assignment is considered as valid in all other ways.[ix] The motives that induce a party to make a contract, whether justifiable or censurable will have no influence on its validity.[x] However, an illegal motive cannot justly be ascribed to the proper exercise of a legal right.[xi] The primary purpose or motive with which a voluntary transfer of property is made by a party indebted at the time is immaterial.[xii]

[i] *In re Chalk Line Mfg.*, 181 B.R. 605 (Bankr. N.D. Ala. 1995)

[ii] *In re Ashford*, 73 B.R. 37 (Bankr. N.D. Tex. 1987)

[iii] *Fox v. Miller*, 173 Tenn. 453 (Tenn. 1938)

[iv] *Walker v. Rich*, 79 Cal. App. 139 (Cal. App. 1926)

[v] *Duluth, S.S. & A. R. Co. v. Wilson*, 200 Mich. 313 (Mich. 1918)

[vi] *International Milling Co. v. Priem*, 179 Wis. 622 (Wis. 1923)

[vii] *Luckemeyer v. Seltz*, 61 Md. 313 (Md. 1884)

[viii] *White v. Benjamin*, 3 Misc. 490 (N.Y. Super. Ct. 1893)

[ix] *Marshall v. Staley*, 528 P.2d 964 (Colo. Ct. App. 1974)

[x] *Leahy v. Ortiz*, 38 Tex. Civ. App. 314 (Tex. Civ. App. 1905)

[xi] *Bates v. Simmons*, 62 Wis. 69 (Wis. 1885)

[xii] *Westminster Sav. Bank v. Sauble*, 183 Md. 628 (Md. 1944)

INVESTOR²⁴

The owner of the legal, beneficial, or equitable indebtedness secured by a Mortgage or deed of trust, or owner's designee.

LEGAL TITLE²⁵

A title that evidences apparent ownership but does not necessarily signify full and complete title or a beneficial interest. • Before the Statute of Uses (1536), a legal title was enforceable only in a court of law, not chancery.

MAIL FRAUD²⁶

An act of fraud using the U.S. Postal Service, as in making false representations through the mail to obtain an economic advantage. 18 USCA §§ 1341-1347.

MERS²⁷

Mortgage Electronic Registration Systems, Inc. (MERS) is a wholly-owned subsidiary of MERSCORP Holdings, and its sole purpose is to serve as mortgagee in the land records for loans registered on the MERS® System and MERS® Commercial. MERS is a nominee for the lender and subsequent buyers ("beneficial owners") of a mortgage loan and serves as a common agent²⁸ for the mortgage industry.

²⁴ *See* MERS® System Procedures Manual– Release 27.0, Glossary, page 203.

²⁵ *See Black's Law Dictionary*, 1713 (10th ed. 2014).

²⁶ *See Black's Law Dictionary*, 776 (10th ed. 2014).

²⁷ *See* MERS website, Frequently Asked Questions at: <http://www.mersinc.org/about-us/faq>

²⁸ But *see Bain v. Metro. Mortg. Grp., Inc.*, 175 Wash.2d 83, 285 P.3d 34 (Wash., 2012) in which the Supreme Court of Washington found that: [285 P.3d 45-46]

If MERS is an agent, its principals in the two cases before us remain unidentified. [FN12] MERS attempts to sidestep this portion of traditional agency law by pointing to the language in the deeds of trust that describe MERS as "acting solely as a nominee for Lender and Lender's successors and assigns." Doc. 131–2, at 2 (Bain deed of trust); Doc. 9–1, at 3 (Selkowitz deed of trust.); e.g., Resp. Br. of MERS at 30 (Bain). But MERS offers no authority for the implicit proposition that the lender's nomination of MERS as a nominee rises to an agency relationship with successor noteholders.¹³ MERS fails to identify the entities that control and are accountable for its actions. It has not established that it is an agent for a lawful principal.

MERSCORP HOLDINGS, INC. ²⁷

MERSCORP Holdings, Inc. is a privately held corporation that owns and manages the MERS® System and all other MERS® products. It is a member-based organization made up of thousands of lenders, servicers, sub-servicers, investors and government institutions.

MERS SIGNING OFFICER ²⁹

An individual appointed by MERS through the issuance of a Corporate Resolution and granted limited authority to take certain actions in the name of MERS as enumerated in the Corporate Resolution. Signing Officers were formerly known as MERS “Certifying Officers.”

MERS® SYSTEM ²⁷

The MERS® System is a national electronic database that tracks changes in mortgage servicing rights and beneficial ownership interests in loans secured by residential real estate.

All MERS mortgages (or deeds of trust) registered on the MERS® System are recorded in the public land records. The MERS® System is not a system of public record, nor a replacement for the public land records. No interests in those mortgages (or deeds of trust) are transferred on the MERS® System; they are only tracked.

MIN NUMBER ³⁰

The Mortgage Identification Number (MIN) is an 18-digit number that uniquely identifies a mortgage loan registered on the MERS® System. A MIN is permanently assigned to a mortgage at registration and cannot be duplicated or reused. To process information on the MERS® System, you must enter the MIN.

The 18-digit mortgage identification number (“MIN”) required for each loan registered on the MERS® System must be placed in a visible location on the cover page (or first page if there is no cover page) of each of the following documents: (a) mortgage or deed of trust, (b) any other Security Instrument, (c) assignment of Security Instrument to or from MERS, (d) lien release or reconveyance and (e) any other instrument recorded in the public land records in which MERS has a legal interest.

²⁹ See MERS® System Procedures Manual– Release 27.0, Glossary, page 204.

³⁰ See MERS® System Procedures Manual – Release 27.0; Effective Date, February 23, 2015 available at: <https://mersinc.org/join-mers-docman/978-mers-system-procedures-final/file>.

MOM²⁷

A loan secured by a **MERS as Original Mortgagee** Security Instrument. The language written into a MOM Security Instrument establishes MERS as the Mortgagee and Nominee for the Lender, its successors and assigns.

MORTGAGE³¹

- 1) A conveyance of title to property that is given as security for the payment of a debt or the performance of a duty and that will become void upon payment or performance according to the stipulated terms. — Also termed (archaically) *dead pledge*.
- 2) A lien against property that is granted to secure an obligation (such as a debt) and that is extinguished upon payment or performance according to stipulated terms.
- 3) An instrument (such as a deed or contract) specifying the terms of such a transaction.
- 4) Loosely, the loan on which such a transaction is based.
- 5) The mortgagee’s rights conferred by such a transaction.
- 6) Loosely, any real-property security transaction including a deed of trust.

MORTGAGE LOAN³²

(1846) A loan secured by a mortgage or deed of trust on real property.

MORTGAGE NOTE³³

(1841) A note evidencing a loan for which real property has been offered as a security.

NEMO DAT QUOD NON HABET³⁴

The baseline principle of our system of property regarding transfers of ownership is *nemo dat quod non habet* – “no one can give that which he does not have.” The phrase, in a closely related variant, traces back at least as far as the Digest of Justinian (Digest 50.54), who gives credit to the Roman jurist Ulpian (Ad Edictum 46). In other words, if I own something because someone transferred it to me – by sale, gift, bequest, etc. – I normally have only that which the previous owner had and nothing more. This is sometimes called the “derivation”

³¹ See *Black’s Law Dictionary*, 1163 (10th ed. 2014).

³² See *Black’s Law Dictionary*, 1078 (10th ed. 2014).

³³ See *Black’s Law Dictionary*, 1226 (10th ed. 2014).

³⁴ See Merrill and Smith’s *Casebook: Property: Principles and Policies*, Chapter 8 (2nd ed. 2012) authored by Thomas W. Merrill and Henry E. Smith; published by West Academic: <http://www.merrillandsmithproperty.com/>.

principle: The transferee's rights derive from those of the transferor. See Douglas G. Baird & Thomas H. Jackson, *Cases, Problems, and Materials on Security Interests in Personal Property* 3-8 (2d ed. 1987). Willingness to buy the Brooklyn Bridge is considered a symbol of gullibility because we assume everyone knows about the principle of *nemo dat* and would have to be out of their mind to think that the offeror actually has the rights to sell. Jeanne L. Schroeder, *Is Article 8 Finally Ready This Time? The Radical Reform of Secured Lending On Wall Street*, 1994 *Colum. Bus. L. Rev.* 291, 296 & n.6.

Nemo dat is also related to the principle of "first in time is first in right." Here the classic problem is someone, A, who transfers his or her interest to B and then turns around, and out of mistake or worse, transfers to C. Who owns the property? According to the *nemo dat* principle, it would be B, because A had rights to transfer when A transferred to B. Now B has the rights. When A later transfers to C, A has no rights to transfer and hence by *nemo dat* C gets nothing. Of course C could sue A, but A in such situations will often (not coincidentally) have fled the jurisdiction or be judgment-proof. There are situations in which C could prevail over B, but *nemo dat* and its first-in-time implications are the baseline.

The *nemo dat* principle rests on a vision of a chain of transactions. Current owners must be able to trace their ownership back in time through a series of legitimate transfers (ideally) to an act of legitimate original acquisition. Later we consider ways in which the law cuts off the need for this tracing to an ultimate root of title. But the tracing itself can prove to be quite complicated.

NOMINEE

A person or entity designated to act for another as representative in a limited sense; the agency relationship specifically expressed in the terms of the Fannie Mae / Freddie Mac Uniform Security Instruments identifying Mortgage Electronic Registration Systems, Inc. as Original Mortgagee (MOM).³⁵

NULLITY³⁶

1. Something that is legally void <the forged commercial transfer is a nullity>.

- **Absolute nullity.** (17c) *Civil law.* 1) An act that is incurably void because it is against public policy, law, or order. • Absolute nullity can be invoked by any party or by the court. *See* La.Civ.Code arts. 7, 2030. 2) The quality, state, or condition of such a nullity.

³⁵ *See* MERS® System Procedures Manual – Release 27.0; Glossary, page 206; Effective Date, February 23, 2015 available at: <https://mersinc.org/join-mers-docman/978-mers-system-procedures-final/file>.

³⁶ *See Black's Law Dictionary*, 1236 (10th ed. 2014).

- **Relative nullity.** (1821) Civil law. 1) A legal nullity that can be cured by confirmation because the object of the nullity is valid. • Relative nullity may be invoked only by those parties for whose interest it was established. *See* La.Civ.Code art. 2031. 2) The quality, state, or condition of such a nullity.

PUBLIC POLICY³⁷

The collective rules, principles, or approaches to problems that affect the commonwealth or (esp.) promote the general good; specif., principles and standards regarded by the legislature or by the courts as being of fundamental concern to the state and the whole of society <against public policy>. • Courts sometimes use the term to justify their decisions, as when declaring a contract void because it is “contrary to public policy.”

More narrowly, the principle that a person should not be allowed to do anything that would tend to injure the public at large.

RECORDING STATUTE³⁸

The State of Washington’s recording statute is codified at Chapter 65.04.

RELATIVE NULLITY³⁹

(1821) Civil law. 1) A legal nullity that can be cured by confirmation because the object of the nullity is valid. • Relative nullity may be invoked only by those parties for whose interest it was established. *See* La.Civ.Code art. 2031. 2) The quality, state, or condition of such a nullity.

ROBOSIGNING

In a series of reports released on March 12, 2012 by the Office of the Inspector General for the U.S. Department of Housing and Urban Development (“HUD-OIG”),⁴⁰ the term “robo signing” was defined as:

³⁷ *See Black’s Law Dictionary*, 1426 (10th ed. 2014).

³⁸ *See* RCW 65.04 Duties of county auditor. (65.04.015 to 65.04.140).

³⁹ *See Black’s Law Dictionary*, 1236 (10th ed. 2014).

⁴⁰ **Summary:** As part of the Office of Inspector General’s (OIG) nationwide effort to review the foreclosure practices of the five largest Federal Housing Administration (FHA) mortgage servicers (Bank of America, Wells Fargo Bank, CitiMortgage, JP Morgan Chase, and Ally Financial, Incorporated) we reviewed CitiMortgage’s foreclosure and claims processes. In addition to this memorandum, OIG issued separate memorandums for each of the other four reviews. OIG performed these reviews due to reported allegations made in the fall of 2010 that national mortgage servicers

We have defined the term “robo signing” as the practice of an employee or agent of the servicer signing documents automatically without a due diligence review or verification of the facts.

Robo-signing and other fraudulent mortgage servicer practices have gained widespread attention in the wake of the foreclosure crisis, but it has been standard industry practice for mortgage servicers filing foreclosure actions to submit false affidavits, fraudulently backdated documents and other fraudulent documents in court for, at least, the past fifteen years.⁴¹

Unfortunately, these practices have become the norm as mortgage companies have bypassed the steps that are legally required to foreclose on a home.⁴² In addition to false affidavits, mortgage servicers have also fabricated mortgage assignments and other documents on behalf of entities that no longer even exist.⁴³

In his testimony at a Hearing Before the Committee on the Judiciary, H.R., 111th Cong. 126 (Dec. 2 & 15, 2010), James A. Kowalski, Jr., Law Offices of James A. Kowalski, Jr.,

were engaged in widespread questionable foreclosure practices involving the use of foreclosure “mills” and a practice known as “robo signing” of sworn documents in thousands of foreclosures throughout the United States. (See: http://www.hudoig.gov/reports/featured_reports.php)

⁴¹ *Foreclosed Justice: Causes and Effects of the Foreclosure Crisis*: Hearing Before the Comm. on the Judiciary, H.R., 111th Cong. 126 (Dec. 2 & 15, 2010) (Testimony of James A. Kowalski, Jr., Law Offices of James A. Kowalski, Jr., PL, Jacksonville, FL 1-2) (Kowalski Test.) (emphasis omitted).

For further testimony and reports detailing these practices over the past decade, see, for example, Congressional Oversight Panel, November Oversight Report: Examining the Consequences of Mortgage Irregularities for Financial Stability and Foreclosure Mitigation 46-49 (2010), available at <http://cybercemetery.unt.edu/archive/cop/20110402010313/http://cop.senate.gov/documents/cop-111610-report.pdf> (COP Report); *Foreclosed Justice: Causes and Effects of the Foreclosure Crisis*: Hearing Before the Comm. on the Judiciary, H.R., 111th Cong. 292, (Dec. 2 & 15, 2010) (Testimony of Thomas A. Cox, Esq., Volunteer Program Coordinator, Maine Attorneys Saving Homes 3-16), available at <http://judiciary.house.gov/hearings/pdf/Cox101202.pdf> (Cox Test.); *Robo-Signing, Chain of Title, Loss Mitigation, and Other Issues in Mortgage Servicing*: Hearing Before the Subcomm. on Hous. & Cmty. Opportunity of the H. Comm. On Fin. Servs., 111th Cong. 229 (Nov. 18, 2010) (Testimony of Julia Gordon, Senior Policy Counsel, Center for Responsible Lending 11) (Gordon Test.) available at <http://www.responsiblelending.org/mortgage-lending/policylegislation/congress/Gordon-Waters-testimony-final.pdf>.

⁴² See COP Report at 10-13, 46-47; Interagency Review at 7; Kowalski Test. at 1-4; Cox Test. at 3-7.

⁴³ (See Paul Kiel, Internal Doc Reveals GMAC Filed False Document in Bid to Foreclose (July 27, 2011, 1:07 PM), <http://www.propublica.org/article/gmac-mortgage-whistleblower-foreclosure/single>.)

PL, Jacksonville, FL, who has taken extensive depositions of robo-signers over a period of years, explained to the Committee how robo-signing works:

[M]ost of the servicers use —Signing Officers— rows of individuals who sit before reams of documents prepared by others, with not even a modest wink at the business records exception to the hearsay rule, and who sign the documents only to have the document transported across the business campus to rows of notaries, who attest to the signatures without ever complying with the basics of their state's notary laws.⁴⁴

SECURITIZE⁴⁵

To convert (assets) into negotiable securities for resale in the financial market, allowing the issuing financial institution to remove assets from its books, and thereby improve its capital ratio and liquidity, and to make new loans with the security proceeds if it so chooses.

SECURITY INSTRUMENT⁴⁶

Pursuant to 24 CFR 242.1 [Title 24 Housing and Urban Development; Subtitle B Regulations Relating to Housing and Urban Development; Chapter II Office of Assistant Secretary for Housing Federal Housing Commissioner, Department of Housing and Urban Development; Subchapter B Mortgage and Loan Insurance Programs under National Housing Act and Other Authorities; Part 242 Mortgage Insurance for Hospitals; Subpart A General Eligibility Requirements], the term Security Instrument means “a mortgage, deed of trust, and any other security for the indebtedness, and shall be deemed to be the mortgage as defined by the National Housing Act, as amended, implementing regulations, and HUD directives.”

SOURCE DOCUMENT⁴⁷

The “Source Document” in our study is the Deed of Trust or Mortgage which is the root of the “Alpha Document” and the object of the Assignment Deed of Trust/Mortgage. (*See* also “Alpha Document”)

⁴⁴ Available at <http://judiciary.house.gov/index.cfm/2010/12/hearing-on-foreclosed-justice-causes-and-effects-of-the-foreclosure-crisis-part-ii-0>

⁴⁵ *See Black’s Law Dictionary*, 1559 (10th ed. 2014).

⁴⁶ *See* <http://definitions.uslegal.com/s/security-instrument-hud/>

⁴⁷ Defined by McDonnell Property Analytics to promote a consistent understanding of the terms we use in our report.

STATUTE OF FRAUDS

2) A statute (based on the English Statute of Frauds) designed to prevent fraud and perjury by requiring certain contracts to be in writing and signed by the party to be charged. Statutes of frauds traditionally apply to...a contract for the sale or transfer of an interest in land.⁴⁸

RCW 64.04.010 – Every conveyance of real estate, or any interest therein, and every contract creating or evidencing any encumbrance upon real estate, shall be by deed[.]” See RCW 65.08.060(3) (supra) defining “conveyance.”⁴⁹

RCW 64.04.020 – Requisites of a deed. Every deed shall be in writing, signed by the party bound thereby, and acknowledged by the party before some person authorized by *this act to take acknowledgments of deeds. [1929 c 33 § 2; RRS § 10551. Prior: 1915 c 172 § 1; 1888 p 50 § 2; 1886 p 177 § 2; Code 1881 § 2312; 1854 p 402 § 2.] *Reviser's note: The language "this act" appears in 1929 c 33, which is codified in RCW 64.04.010-64.04.050, 64.08.010-64.08.070, 64.12.020, and 65.08.030.

TRUSTEE

RCW 61.24.005(16) – “Trustee” means the person designated as the trustee in the deed of trust or appointed under RCW 61.24.010(2).

TRUSTEE'S SALE

RCW 61.24.005(17) – “Trustee's sale” means a nonjudicial sale under a deed of trust undertaken pursuant to this chapter. [2014 c 164 § 1. Prior: 2011 c 364 § 3; 2011 c 58 § 3; prior: 2009 c 292 § 1; 1998 c 295 § 1.]

TRUSTOR

See “Grantor.”

VALID⁵⁰

Black's Law Dictionary defines the term *valid* as “having legal strength or force, executed with proper formalities, incapable of being rightfully overthrown or set aside... Founded on truth of fact; capable of being justified; supported, or defended; not weak or defective...Of binding force; legally sufficient or efficacious; authorized by law...as distinguished from that

⁴⁸ See *Black's Law Dictionary*, 1636 (10th ed. 2014).

⁴⁹ RCW 64.04.010, 020 is known as Washington’s Real Estate Statute of Frauds,” which is the “strictest in the nation.” 18 William B. Stoebuck & John W. Weaver, *WASHINGTON PRACTICE: REAL ESTATE: TRANSACTIONS* § 16.3, at 225 (2d ed. 2004).

⁵⁰ See *Black's Law Dictionary*, 1550 (6th ed. 1990).

which exists or took place in fact or appearance, but has not the requisites to enable it to be recognized and enforced by law.”

VALID ASSIGNMENT DEED OF TRUST/MORTGAGE

An assignment, to be effective, must contain the fundamental elements of a contract generally, such as parties with legal capacity, consideration, consent, and legality of object. Words of an assignment are, assign, transfer, and set over; but the words grant, bargain, and sell, or any other words which will show the intent of the parties to make a complete transfer, will amount to an assignment. The deed by which an assignment is made is also called an assignment. In the absence of special statutory provision, no words of art and no special form of words are necessary to effect an assignment.⁵¹

Under Washington law, a lien theory state, a *valid assignment deed of trust/mortgage* is one:

- a) which comports with all legal requirements for the creation and execution of the document;
- b) that is executed by the beneficiary/mortgagee (lender) as named in the deed of trust/mortgage instrument itself (or by the beneficiary/mortgagee’s lawfully authorized agent; attorney; assignee, etc.);
- c) where the beneficiary/mortgagee legally owns the note under applicable law (RCW 61.24.005(2)); and/or
- d) where the beneficiary/mortgagee has physical possession of the original note indorsed in blank or specifically indorsed to the beneficiary/mortgagee (i.e., is the holder); and⁵²
- e) in instances where the note has been negotiated or delivered to an assignee for the purpose of enforcement, the assignee can demonstrate it acquired its rights from

⁵¹ See Assignments Law & Legal Definition at: <http://definitions.uslegal.com/a/assignments/>.

⁵² See *Bain v. Metropolitan Mortg. Group, Inc.*, 175 Wn.2d 83, 285 P.3d 34 (2012) [285 P.3d 44]

The plaintiffs argue that our interpretation of the deed of trust act should be guided by these UCC definitions, and ***thus a beneficiary must either actually possess the promissory note or be the payee***. E.g., Selkowitz Opening Br. at 14. ***We agree***. This accords with the way the term “holder” is used across the deed of trust act and the Washington UCC. By contrast, MERS’s approach would require us to give “holder” a different meaning in different related statutes and construe the deed of trust act to mean that a deed of trust may secure itself or that the note follows the security instrument. ***Washington’s deed of trust act contemplates that the security instrument will follow the note, not the other way around. MERS is not a “holder” under the plain language of the statute.*** (emphasis supplied)

the original beneficiary/mortgagee (lender) through a valid and unbroken chain of transactions necessary to convey authority.⁵³

2.3.1 Best Practices⁵⁴

Best practices in transferring or assigning loans are intended to minimize the risk of claims by third parties, and prevent problems of proof. Key best practices include:

- 1) the original secured promissory note should be appropriately indorsed and delivered to the transferee;
- 2) an assignment of the deed of trust should be recorded in the applicable real property records;
- 3) an indorsement to the lender's title insurance policy, insuring the assignment, should be obtained; and
- 4) the assignment of any Uniform Commercial Code (UCC) financing statements filed in connection with the loan should be recorded with the appropriate authority.

When these steps are taken, the more difficult issues described below can be avoided. When the parties do not indorse and deliver possession of the note to the transferee, or do not record an assignment of the deed of trust, complex issues can arise under sometimes contradictory provisions of the recording act, the UCC, the foreclosure laws, and the common law. The complexity arises in part due to the range of discreet imperatives present in the applicable laws. For example the recording act [231 RCW 65.08] typically emphasizes the importance

⁵³ *See Bain v. Metropolitan Mortg. Group, Inc.*, 175 Wn.2d 83, 285 P.3d 34 (2012) [285 P.3d 46]

¶ 32...The legislature has set forth in great detail how nonjudicial foreclosures may proceed. We find no indication the legislature intended to allow the parties to vary these procedures by contract. We will not allow waiver of statutory protections lightly. ***MERS did not become a beneficiary by contract or under agency principals.*** (emphasis supplied)

[285 P.3d 47-48]

¶ 39...***If the original lender had sold the loan, that purchaser would need to establish ownership of that loan, either by demonstrating that it actually held the promissory note or by documenting the chain of transactions.*** Having MERS convey its "interests" would not accomplish this. (emphasis supplied)

[FN15]...*See also U.S. Bank Nat'l Ass'n v. Ibanez*, 458 Mass. 637, 941 N.E.2d 40 (2011) (holding bank had to establish it was the mortgage holder at the time of foreclosure in order to clear title through evidence of the chain of transactions).

⁵⁴ *Foreclosure Manual for Judges: a reference guide to foreclosure law in Washington State.* (*See* 2.3 Assignments - Page 57).

of recording an assignment document, while the UCC emphasizes possession of the original note [232 RCW 62A *et seq.*], and foreclosure laws focus on ownership of the loan [233 RCW 61 *et seq.*]. When there is litigation over a loan, the overlapping layers of applicable law may also give rise to conflicts over procedure. In general, the various bodies of applicable law do not fit together well, and this may create confusion that delays and complicates enforcement of a creditor's remedies against a delinquent or noncompliant borrower.

VOID⁵⁵

Of no legal effect; to null.

- The distinction between *void* and *voidable* is often of great practical importance. Whenever technical accuracy is required, void can be properly applied only to those provisions that are of no effect whatsoever – those that are an absolute nullity.

VOID AB INITIO⁵⁶

Null from the beginning, as from the first moment when a contract is entered into.

- A contract is *void ab initio* if it seriously offends law or public policy, in contrast to a contract that is merely voidable at the election of one party to the contract.

VOIDABLE

Valid until annulled; esp., (of a contract) capable of being affirmed or rejected at the option of one of the parties.

- This term describes a valid act that may be voided rather than an invalid act that may be ratified.

WIRE FRAUD⁵⁷

An act of fraud using electronic communications, as by making false representations on the telephone to obtain money.

- The federal Wire Fraud Act provides that any artifice to defraud by means of wire or other electronic communications (such as radio or television) in foreign or interstate commerce is a crime. 18 USCA § 1343.

⁵⁵ *See Black's Law Dictionary*, 1805 (10th ed. 2014).

⁵⁶ *Ibid.*

⁵⁷ *See Black's Law Dictionary*, 777 (10th ed. 2014).