No. 11-35534

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

IVAN HOOKER; KATHERINE HOOKER,

Plaintiffs-Appellees,

v.

NORTHWEST TRUSTEE SERVICES, INC.,

Defendant,

and,

BANK OF AMERICA, N.A.; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.,

Defendants-Appellants

BRIEF OF AMICUS CURIAE STATE OF OREGON, SUPPORTING APPELLEES' BRIEF AND AFFIRMANCE OF THE DISTRICT COURT'S JUDGMENT

Appeal from the United States District Court
for the District of Oregon

Continued...

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AMICUS BRIEF

THE STATE OF OREGON'S BASIS FOR APPEARING, AND ITS INTEREST IN THE CASE

The State of Oregon files this brief under Fed. R. App. P. 29(a), which permits a state to file an amicus brief without the court's leave or the parties' consent.

This case involves the correct construction of Oregon Revised Statute § 86.735(1), which identifies the circumstances in which a nonjudicial foreclosure may commence against a homeowner. Construing § 86.735(1) correctly will ensure that Oregon's nonjudicial foreclosure process operates as the Oregon Legislature intended—in a manner that fosters confidence among home owners and purchasers by making pertinent information easily accessible; and in a manner that is equitable and efficient for homeowners, lenders, and other affected parties. Because the correct construction of § 86.735(1) is important to the State of Oregon and its citizens, this brief focuses on that provision and its meaning.

ARGUMENT

The factual scenario that prompted this lawsuit has become increasingly common in Oregon. Plaintiffs borrowed money to buy property. They signed a promissory note, agreeing to repay the borrowed amount plus interest to the lender, and they signed a Deed of Trust that identified the property as security

for the loan. Plaintiffs defaulted on the promissory note, and the deed's trustee initiated a nonjudicial foreclosure. By then, the initial lender (the trust deed's initial "beneficiary") no longer owned the promissory note. Although the note had been transferred to new owners multiple times, not all of the transfers had been recorded in county records.[1] Consequently, the district court ruled that Or. Rev. Stat. § 86.735(1)—which requires all "assignments of the trust deed by . . . the [deed's] beneficiary" to be recorded prior to a nonjudicial foreclosure—precluded a nonjudicial foreclosure, and it dismissed the foreclosure proceedings. (E.R. 2-3, 7-8, 16, Order).

The district court correctly construed § 86.735(1). Promissory-note transfers shift the security interest in a trust deed from the deed's current beneficiary to a new beneficiary, and they thus qualify as "assignments of the trust deed by . . . the beneficiary." As a result, § 86.735(1) requires them to be recorded before a nonjudicial foreclosure can commence.[2]

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[1] As defendants note, unrecorded transfers occurred on December 9, 2005 (when Guaranty Bank transferred the promissory note to Wells Fargo) and on July 15, 2006 (when Wells Fargo transferred the note to Bank of America). (Br. 13).

[2] Oregon statutes do not appear to define "assignment" or "transfer." Both terms generally connote the conveyance of rights from one entity to another. *See Black's Law Dictionary* (9th ed. 2009) at 135 (defining "assign," in part, as "[t]o convey; to transfer rights or property," as in "the bank assigned the note to a thrift institution"); *James v. Recontrust Company*, ___ F. Supp. 2d

Footnote continued...

As in many other foreclosure cases in Oregon, this case also involves Mortgage Electronic Registration Systems, Inc. (MERS). The trust deed identified MERS as the "nominee" for the initial lender and its "successors and assigns." Defendants argue that, because the deed further described MERS as the deed's "beneficiary," the promissory-note transfers did not alter the beneficiary's identity, and § 86.735(1) did not require the transfers to be recorded. (Br. 15-16). Yet defendants' premise is at odds with Oregon law. Because the deed's declared purpose was to secure the loan's repayment to the initial lender and its successors, the lender and its successors—not MERS—were the deed's beneficiaries under Oregon law. Read as a whole, the deed demonstrates that MERS was merely an agent authorized to do things for the benefit of the deed's true beneficiaries. Because the beneficiary's identity shifted with each promissory-note transfer, § 86.735(1)'s recording requirements applied to those transfers.[3]

(...continued)
___, 2012 WL 653871, *3 (D. Or. 2012) ("[t]he transfer of a security instrument is called an 'assignment'"), citing G. Nelson and D. Whitman, *Real Estate Finance Law* § 5.27, p. 530 (5th ed. 2007).

[3] If this court concludes that the state-law question presented by this case is potentially dispositive, certifying the question to the Oregon Supreme Court would be appropriate. *See* Or. Rev. Stat. § 28.200 (Oregon Supreme Court "may answer questions of [state] law certified to it by" a federal Court of Appeals if any such question "may be determinative of the cause then pending

Footnote continued...

A. Or. Rev. Stat. § 86.735(1) requires promissory-note transfers to be recorded prior to a nonjudicial foreclosure.

In construing Oregon statutes, courts must "discern the intent of the legislature." *PGE v. Bureau of Labor and Industries*, 317 Or. 606, 610, 859 P.2d 1143 (1993). Courts first examine "text and context." *State v. Gaines*, 346 Or. 160, 171, 206 P.3d 1042 (2009). Statutory text is "the best evidence of the legislature's intent" and courts—in reviewing statutory text—"consider[] rules of construction . . . that bear directly on how to read the text." *PGE*, 317 Or. at 610-11. "Some of those rules are mandated by statute, including" Or. Rev. Stat. §174.010's directive "not to insert what has been omitted, or to omit what has been inserted." *PGE*, 317 Or. at 611; *see also* Or. Rev. Stat. § 174.010 ("where there are several provisions or particulars [within a statute] such construction is, if possible, to be adopted as will give effect to all"). Statutory context "includes other provisions of the same statute and other related statutes." *PGE*, 317 Or. at 611.

Second, courts consider legislative history. *Gaines*, 346 Or. at 172. "[A] party is free to proffer legislative history to the court" and—so long as the history "appears useful"—the "court will consult it after examining text and

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(...continued)
in the certifying court," and if "no controlling precedent" exists on the issue in Oregon's appellate courts).

context, even if the court does not perceive an ambiguity in the statute's text." *Gaines*, 346 Or. at 172.

Third, "[i]f the legislature's intent remains unclear" at that point, courts "may resort to general maxims of statutory construction to aid in resolving the remaining uncertainty." *Gaines*, 346 Or. at 172.

The pertinent methodology reveals that Or. Rev. Stat. § 86.735(1) requires promissory-note transfers to be recorded before a nonjudicial foreclosure may commence. The methodology further reveals that, under Oregon law, MERS was not the trust deed's "beneficiary."

1. Text and context show that Or. Rev. Stat. § 86.735(1) requires promissory-note transfers to be recorded.

Or. Rev. Stat. § 86.735 requires all "assignments of the trust deed by . . . the beneficiary" to be recorded prior to a nonjudicial foreclosure:

> The trustee may foreclose a trust deed by advertisement and sale in the manner provided in Or. Rev. Stat. 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[.]

Defendants appear to suggest that § 86.735(1)'s recording requirements simply do not encompass promissory-note transfers. (*See* Br. 39, asserting that under Oregon law, promissory-note transfers are not "even susceptible to recordation"). But as statutory text and context demonstrate, a promissory-note

transfer qualifies as an "assignment of the trust deed by . . . the beneficiary," and § 86.735(1)'s recording requirements apply to it.

a. That construction gives effect to each portion of § 86.735(1).

If a person borrows money to buy a property, the loan is commonly memorialized in a promissory note. Under Oregon law, the borrower and lender can "secure" the loan by creating a trust deed. Or. Rev. Stat. § 86.710. The trust deed creates two distinct interests. First, a trust deed "conveys an interest in real property" to the trustee, who generally is distinct from the lender. *See* § 86.705(7) (trust deed "conveys an interest in real property to a trustee in trust to secure the performance of an obligation"); § 86.705(8) ("[t]rustee" generally "means a person[] other than the beneficiary").

Second, a trust deed grants a security or "beneficial" interest to the initial lender. The lender is the deed's "beneficiary," "the person for whose benefit [the] trust deed is given." *See* Or. Rev. Stat. § 86.705(2) ("[b]eneficiary" is "a person named or otherwise designated in a trust deed as the person for whose benefit a trust deed is given"); § 86.705(7) (trust deed "secure[s] the performance of an obligation the grantor or other person named in the deed owes to a beneficiary"). All trust deeds thus create a beneficiary, and that beneficiary possesses a security or beneficial interest in the trust deed.

If the borrower repays the loan, "the trustee shall reconvey the estate of real property described in the trust deed" to the borrower. Or. Rev. Stat. §86.720(1). But if the borrower defaults, the beneficiary may "sell the property to satisfy the obligation," and may do so—assuming that § 86.735(1)'s "recording" requirements have been satisfied—without initiating a lawsuit. Or. Rev. Stat. §§ 86.735(2) and (3). Under those circumstances, "the trust deed . . . may be foreclosed by advertisement and sale," and the "power of sale is conferred upon the trustee." Or. Rev. Stat. § 86.710.[4]

Because a trust deed grants interests to two different entities, a trust deed can be "assigned"—as § 86.735(1) reflects—by either the trustee or the beneficiary. The trustee is free to assign its real-property interest and its rights as trustee to some other entity. Likewise, the beneficiary is free to assign its security or beneficial interest in the trust deed to another entity. The beneficiary does so by transferring the promissory note. When the note is transferred, the note's new holder necessarily becomes the deed's new "beneficiary." Because a promissory-note transfer shifts the security interest in the trust deed from the old beneficiary to a new beneficiary, it qualifies as an

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[4] A more complete discussion of §§ 86.705-86.990, and of Oregon real estate finance law generally, appears in the district court opinion in *James v. Recontrust Company*, 2012 WL 653871.

assignment of the trust deed by the beneficiary. It therefore must be recorded prior to a nonjudicial foreclosure.[5] *See* § 86.735(1) ("any assignments of the trust deed by the trustee or the beneficiary" must be recorded).

That construction gives effect to § 86.735(1)'s requirement that "any assignments of the trust deed by the trustee" be recorded, *and* gives effect to its requirement that "any assignments of the trust deed by . . . the beneficiary" be recorded. If, as defendants urge, § 86.735(1) does *not* require promissory-note transfers to be recorded, the requirement that "assignments of the trust deed by . . . the beneficiary" be recorded has no practical effect. Defendants have not identified any other type of act, aside from a promissory-note transfer, that might qualify as a beneficiary's "assignment[] of the trust deed." They have not suggested any other way—aside from adopting the state's construction—to

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[5] Nothing in § 86.735(1) suggests that the recording requirement can only be satisfied by a document that is expressly titled an "assignment" of the trust deed. If a promissory note is transferred, § 86.735(1) requires that the transfer be recorded in some fashion; that requirement could be satisfied by recording the document that effects the transfer, or by recording any other document that memorializes the transfer. Nothing in Oregon law suggests that an "assignment" needs to be in a particular form. *See Wittmayer v. Edwards*, 99 Or. App. 136, 139, 781 P.2d 866 (1989) (noting that "[a] present and binding appropriation of an interest in a specific fund is an assignment," and that an assignment "'may be oral or written and no special form is necessary provided that the transfer is clearly intended as a present assignment of the interest held by the assignor'"), quoting *Anderson v. Dept. of Justice*, 38 Or. App. 29, 32, 588 P.2d 1295 (1979).

give that phrase meaning.[6] Construing § 86.735(1) to *not* apply to promissory-note transfers, it follows, will violate the required methodology. *See* Or. Rev. Stat. § 174.010 ("where there are several provisions or particulars [within a statute] such construction is, if possible, to be adopted as will give effect to all"); *PGE*, 317 Or. at 611 (in construing text, courts must apply "the statutory enjoinder" found in Or. Rev. Stat. §174.010 "not to insert what has been omitted, or to omit what has been inserted").

b. Pre-1959 common law further demonstrates that promissory-note transfers must be recorded.

Statutory "[c]ontext includes the preexisting common law and the statutory framework within which [a] law was enacted." *Ram Technical Services, Inc. v. Koresko*, 346 Or. 215, 232, 208 P.3d 950 (2009) (internal

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[6] Defendants might suggest that § 86.735(1)'s reference to assignments of trust deeds by beneficiaries merely refers to a beneficiary's right to appoint a successor trustee. *See* Or. Rev. Stat. § 86.790(3) (authorizing beneficiary to appoint "another qualified trustee" "any time after the trust deed is executed"). That type of "assignment," however, is expressly referred to by a *different* phrase in § 86.735(1). *See* § 86.735(1) (requiring "any appointment of a successor trustee" to be recorded before a nonjudicial foreclosure may commence). But if the phrase "assignments of the trust deed by . . . the beneficiary" is construed to refer merely to a beneficiary's appointment of a successor trustee, the effect will be to render the same provision's later phrase—requiring the recording of "any appointment of a successor trustee"—superfluous, and without independent effect. The required methodology disfavors that construction. *See* Or. Rev. Stat. § 174.010 ("where there are several provisions or particulars [within a statute] such construction is, if possible, to be adopted as will give effect to all").

quotes omitted). Pre-existing common law shows that the 1959 Oregon Legislature—which created the nonjudicial foreclosure process and adopted § 86.735(1)—intended promissory-note transfers to be recorded prior to a nonjudicial foreclosure. *See FDIC v. Burdell*, 92 Or. App. 389, 392, 759 P.2d 282, *aff'd*, 307 Or. 285, 766 P.2d 1032 (1988) ("Oregon law first permitted trust deeds in 1959").

The 1959 Legislature would have understood that—under pre-existing law—transferring a promissory note necessarily transfers the security or beneficial interest in whatever instrument had secured the loan at issue. Under pre-1959 law, transferring a promissory note secured by a mortgage also accomplished the transfer of the mortgage.[7] In approving the use of trust deeds,

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[7] *See Holt v. Guaranty & Loan Co.*, 136 Or. 272, 282, 296 P. 852 (1931) ("[i]t has long been the law of this jurisdiction that the lawful assignment of a negotiable promissory note payment of which is secured by a mortgage carries with it the mortgage"); *Schleef v. Purdy et al*, 107 Or. 71, 78, 214 P. 137 (1923) ("transfer of the note, without any formal transfer of the mortgage, transfers the mortgage"); *U.S. Nat. Bank v. Holton*, 99 Or. 419, 428, 195 Pac. 823 (1921) ("to facilitate the transaction of business, [courts] have held that, for certain purposes, the mortgage is an incident of the note, and passes with it"), quoting *Kaiser v. Idleman*, 57 Or. 224, 108 P. 193 (1910); *Roth v. Troutdale Land Co.*, 83 Or. 500, 506-07, 162 P. 1069 (1917) ("[t]he indorsement and transfer by a mortgagee of a promissory note secured by a mortgage carries with it the mortgage security without a formal assignment of the mortgage"); *Stitt v. Stringham*, 55 Or. 89, 92, 105 P. 252 (1909) (even if objections to a written assignment of the mortgage were well taken, "still plaintiff has in evidence the note, duly indorsed by the personal representative

Footnote continued...

the 1959 Legislature generally described a trust deed as a "mortgage." *See* Or. Rev. Stat. § 86.715 ("[a] trust deed is deemed to be a mortgage on real property and is subject to all laws relating to mortgages on real property except to the extent that such laws are inconsistent with" §§ 86.705-86.795). By doing so, it signaled that—just as a promissory-note transfer transferred the lender's security interest in a mortgage under existing law—transferring a promissory note secured by a trust deed would create an analogous effect, by transferring the lender's security interest in the trust deed.

Nothing in § 86.735(1)'s text or context suggests that the legislature meant to abandon the common-law principles reflected in pre-1959 case law. The 1959 Legislature instead assumed, and intended, that transferring of a promissory note transfers the note holder's interest in the trust deed, and qualifies as an assignment of the trust deed. Accordingly, a promissory-note transfer must be recorded prior to a nonjudicial foreclosure.

c. Contrary to defendants' claim, other statutory provisions reflect that promissory-note transfers are recordable.

According to defendants, Or. Rev. Stat. § 93.610, § 93.630, and § 205.130 show that, in Oregon, promissory-note transfers are simply not

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of the payee thereof," and "that is sufficient to carry with it the ownership of the

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"susceptible to recording in county land records." (App. Br. 8, 39). The cited provisions do not support that assertion.

Or. Rev. Stat. §§ 93.610 and 93.630 merely provide non-exclusive lists of some documents that—regardless of circumstances, and whether or not a party wishes to initiate a nonjudicial foreclosure—generally "shall" be recorded or indexed in county mortgage records.[8] Neither provision prohibits the recording of promissory-note transfers.

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mortgage given to secure its payment").

[8] Or. Rev. Stat. § 93.610 provides:

> (1) Separate books shall be provided by the county clerk in each county for the recording of deeds and mortgages. In one book all deeds left with the clerk shall be recorded at full length, or as provided in ORS 93.780 to 93.800, with the certificates of acknowledgment or proof of their execution, and in the other all mortgages left with the county clerk shall in like manner be recorded. All other real property interests required or permitted by law to be recorded shall be recorded in the records maintained under ORS 205.130 or in records established under any other law.
>
> (2) Counties maintaining a consolidated index shall record deeds and mortgages and index them in the consolidated index in such a manner as to identify the entries as a deed or mortgage record. All other real property interests required or permitted by law to be recorded shall be recorded in the records kept and maintained under ORS 205.130 or in records established under any other law.

Or. Rev. Stat. § 93.630 provides:

Footnote continued...

Moreover, § 205.130(2)(a) contemplates (as, of course, does § 86.735(1)) that promissory-note transfers *shall* be recorded. Under § 205.130(2)(a), county clerks must record any "interest" "affecting the title to real property required or permitted by law to be recorded."[9] If a promissory note is secured by a trust deed, the note affects the title to the real property identified by the deed. The note affects the title because, if the borrower defaults on the note, the result can be a foreclosure that deprives the borrower of title. Hence, any transfer of the note alters the identity of those who hold an "interest" affecting title to real property. Because a promissory-note transfer creates a new and previously

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> The county clerk shall also keep a proper direct index and a proper indirect index to the record of deeds, mortgages and all other real property interests required or permitted by law to be recorded, in which the county clerk shall enter, alphabetically, the name of every party to each instrument recorded by the county clerk, with a reference to where it is recorded.

[9] Or. Rev. Stat. § 205.130(2) provides that county clerks "shall"

> Record, or cause to be recorded, in a legible and permanent manner, and keep in the office of the county clerk, all:
>
> (a) Deeds and mortgages of real property, powers of attorney and contracts affecting the title to real property, authorized by law to be recorded, assignments thereof and of any interest therein when properly acknowledged or proved and other interests affecting the title to real property required or permitted by law to be recorded[.]

unrecorded interest affecting title to real property, § 205.130(2)(a) requires it to be recorded.[10]

Or. Rev. Stat. § 93.710(1) similarly provides that assignments "for security purposes relating to" real-property interests "may be indexed and recorded" in county records. (Emphasis added.)[11] If a trust deed identifies real property as security for a promissory note, the transfer of the promissory note constitutes an assignment of the security interest in the deed, and constitutes an assignment "for security purposes" that "relat[e] to" a real-property interest. Or. Rev. Stat. § 93.710(1) further reflects that the transfer is recordable.

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[10] Because nothing in Oregon law prohibits the recording of a promissory-note transfer, the interest described above qualifies, for § 205.130(2)(a)'s purposes, as an interest that is "permitted" by law to be recorded. And because § 86.735(1) *requires* a promissory-note transfer to be recorded prior to nonjudicial foreclosure, the interest described above also qualifies as an interest that, at least under certain circumstances, is "required" by law to be recorded.

[11] Or. Rev. Stat. § 93.710(1) provides, in part:

> *Any* instrument creating a mortgage or trust deed, or a memorandum thereof, or *assignment for security purposes relating to any of the interests or estates in real property referred to in this subsection*, which is executed by the person from whom the mortgage, trust deed, or assignment for security purposes is intended to be given, and acknowledged or proved in the manner provided for the acknowledgment or proof of other conveyances, *may be indexed and recorded* in the records of mortgages of real property in the county where such real property is located[.]

(Emphasis added.)

Text and context demonstrate that promissory-note transfers must be recorded before a nonjudicial foreclosure can commence. Nothing in the statutes cited by defendants undermines that conclusion.

2. Legislative history is consistent with the above construction.

The legislative history contains no discussion of § 86.735(1)'s recording requirements. Supporters of the bill that became § 86.735 did suggest that nonjudicial foreclosures would be speedier and more efficient than judicial foreclosures. Yet none of the testimony supporting the bill suggested that the bill would foster efficiency by reducing or eliminating any preexisting *recording* requirements. Instead, supporters generally noted that § 86.735 would increase efficiency by shrinking the amount of time for those in default to exercise their "right of redemption"—their right to terminate foreclosure proceedings by making the defaulted payments.[12]

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[12] Under the pre-1959 judicial foreclosure process, which was initiated by a lawsuit under Or. Rev. Stat. § 88.010, the "right of redemption" lasted until "a decree [memorializing the sale] is given." Or. Rev. Stat. § 88.100 (1953). In creating Oregon's nonjudicial foreclosure process, the 1959 Legislature provided that the redemption period for that process could last no longer than 175 days after notice of the default was recorded. Or. Laws 1959, ch. 625, § 10. In arguing that the 1959 bill would increase efficiency, supporters emphasized the "long period of time" that the existing judicial foreclosure process granted, to those in default, for redeeming property. *See* Testimony, House Judiciary Committee Exhibits, Senate Bill 117, 2/20/1959 letter to Senator Pearson from Vice President of Schuyler Southwell Inc. General Contractors, supporting bill and stating that "[t]he record of redemption

Footnote continued...

The history does reflect that the 1959 Legislature, in authorizing nonjudicial foreclosures, intended—in part—to assist and protect Oregon homeowners. *See* Minutes, Committee on Financial Affairs, February 12, 1959 Hearing on S.B. 117, at p. 1 (noting that Senator Cook "explained the purpose of the bill" and "feels that SB 117 would be to the best interests of both lenders and borrowers"); *id.* (noting that Portland Realty Board representative supported bill and "feels that it would be a help to the small borrower"). The legislature also intended, in creating § 86.735(1)'s recording requirements, to help homeowners avoid the wrongful sale of their properties. *See Staffordshire Investments, Inc. v. Cal-Western Reconveyance Corporation*, 209 Or. App. 528, 542, 149 P.3d 150 (2006), *rev. den.*, 342 Or. 727 (2007) (Or. Rev. Stat. §§ 86.705-86.795 were intended, in part, "to protect grantors from the unauthorized foreclosure and wrongful sale of property"). Significantly, requiring promissory-note transfers to be recorded helps protect homeowners by

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(...continued)
under mortgage foreclosures do not support the contention that such a long period of time serves any good purpose"); Minutes, Committee on Financial Affairs, February 12, 1959 Hearing on S.B. 117, at pp. 1-2 (noting that Standard Insurance Company Assistant Vice President "in charge of the mortgage department" explained that his company "would be more attracted to those states operating under Trust Deed laws . . . because of it being possible for the lender to gain possession of the property quicker" and "to offer it either for sale or for rent without the handicapping feature of the redemption rights on the part of the former borrower").

enabling them to ensure that any nonjudicial foreclosure was commenced by those with authority to do so. Legislative history thus suggests that the legislature intended to require the recording of all promissory-note transfers whenever a lender seeks to foreclose outside the judicial process.

3. "Third-level" maxims support the conclusion that § 86.735(1) requires promissory-note transfers to be recorded.

"If the legislature's intent remains unclear after examining text, context, and legislative history," a court—in construing an Oregon statute—"may resort to general maxims of statutory construction to aid in resolving the remaining uncertainty." *Gaines*, 346 Or. at 172. Those maxims include "the maxim that, where no legislative history exists, the court will attempt to determine how the legislature would have intended the statute to be applied had it considered the issue." *PGE*, 317 Or. at 612. That maxim supports the conclusion that the legislature intended § 86.735(1) to require promissory-note transfers to be recorded prior to a nonjudicial foreclosure.

The Oregon Legislature intended that the nonjudicial foreclosure process would be equitable and efficient for homeowners, consumers, and lenders alike. *See Staffordshire Investments, Inc.*, 209 Or. App. at 542 (Or. Rev. Stat. §§ 86.705-86.795 "represents a well-coordinated statutory scheme to protect grantors from the unauthorized foreclosure and wrongful sale of property, while

at the same time providing creditors with a quick and efficient remedy against a defaulting grantor").[13]

The Oregon Legislature also intended that homeowners and purchasers of foreclosure properties should have confidence in the nonjudicial foreclosure process. *See Bamberger v. Geiser*, 24 Or. 203, 210, 33 P. 609 (1893) (describing the traditional "purpose of the registry laws" as being "to protect subsequent purchasers against prior and unrecorded conveyances").

Requiring promissory-note transfers to be recorded promotes those goals. The requirement ensures that homeowners faced with nonjudicial foreclosure, along with prospective purchasers of a foreclosed property, have easy access to records confirming that those initiating the foreclosure have the right to do so. Requiring promissory-note transfers to be recorded ensures that a homeowner facing foreclosure will not need to use the court system to access that information. Ultimately, the requirement promotes an efficient foreclosure system, one whose transparency benefits consumers and lenders alike.[14]

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[13] Under Oregon law, a "grantor" is, in essence, the borrower whose name appears on a promissory note and trust deed. *See* Or. Rev. Stat. § 86.705(4) (defining "grantor" as "the person that conveys an interest in real property by a trust deed as security for the performance of an obligation").

[14] Defendants suggest that, "[i]n some cases, lenders who formerly owned the note will have gone out of business, making it impossible to obtain and record the necessary written assignments" prior to a nonjudicial

Footnote continued...

Defendants assert that if § 86.735(1) requires promissory-note transfers to be recorded, a "flood of unnecessary litigation" will result, and that defaulting homeowners will try to set aside already completed foreclosure sales, thereby "clouding title" for "subsequent *bona fide* purchasers." (Br. 16, 42). That assertion, however, provides no useful guidance to the statutory-construction question here, even assuming that Oregon law entitles a defaulting homeowner to challenge an already-completed foreclosure sale.

First, it may be a relatively unusual case in which a homeowner who defaulted, and whose home was already sold via a nonjudicial foreclosure, will attempt to challenge the foreclosure after the fact. Under Oregon law, the completed sale reflects that the homeowner violated the note's repayment terms, and then was unable to "cure the default" prior to the sale. *See* Or. Rev.

(...continued)
foreclosure. (Br. 41). But nothing in § 86.735(1) suggests that the required recordings necessarily have to involve the entity that made or received the assignment in question. Nothing would preclude a party who wishes to commence a nonjudicial foreclosure from recording a promissory-note transfer that it was not directly involved in; that party could record the transfer by submitting a document that memorialized the transfer in some fashion.

Notably, defendants describe MERS as an "electronic database that tracks transfers of promissory notes." (Br. 9). In cases in which MERS was the nominee for a lender and its successors, it presumably will not be difficult for the current note holder to obtain documentation of, and to record, any promissory-note transfer that was not recorded previously.

Stat. §§ 86.735(2) (authorizing nonjudicial foreclosure only if homeowner defaulted); § 86.753(3) (permitting homeowner to make required payments "at any time prior to five days before" sale). As a result, the only homeowners who will perceive a practical benefit to trying to "undo" the sale, based on § 86.735(1), will be those whose financial circumstances have changed dramatically in the meantime. That factor suggests that any litigation "flood" will be significantly smaller than defendants suggest.

Second, even if the state's proposed construction *would* produce the consequences imagined by defendants, defendants—and any other entities with histories of similar practices—have only themselves to blame. By commencing a nonjudicial foreclosure without ensuring that all promissory-note transfers had been recorded, defendants undeniably took a risk. Nothing in § 86.735(1) expressly exempts promissory-note transfers from the provision's recording requirements, and neither this court nor any Oregon appellate court (that is, no court whose construction of the statute would have been binding in this case) has construed the provision as creating such an exemption. Defendants nonetheless proceeded with a nonjudicial foreclosure in the hope that any failures to record promissory-note transfers would be insignificant. If that gamble turns out to have been ill-advised, and to have "clouded title" with

respect to foreclosed properties, the blame lies with defendants, and should not be invoked as a reason for construing § 86.735(1) as they urge.

Third-level maxims support the conclusion that § 86.735(1) requires promissory-note transfers to be recorded prior to a nonjudicial foreclosure.

B. By itself, calling MERS a "beneficiary" in a trust deed does not automatically make MERS a beneficiary under Oregon law.

As in other nonjudicial foreclosure cases involving MERS, the trust deed referred to MERS as "the beneficiary under this Security Instrument." (E.R. 24). According to defendants, the trust deed's beneficiary thus was MERS both before and after each promissory-note transfer. Hence, defendants argue, § 86.735(1)—which requires the recording of all trust deed assignments by a beneficiary—did not require the promissory-note transfers to be recorded. (*See* App. Br. 39, arguing that district court ruling would require MERS to "record an assignment of the trust deed to itself each time the [promissory] note was transferred"). Defendants are mistaken.

An entity qualifies as a "beneficiary" under Oregon law only if it is "named or otherwise designated in a trust deed *as the person for whose benefit a trust deed is given.*" Or. Rev. Stat. § 86.705(2) (emphasis added).[15] Although

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[15] Defendants emphasize the phrase "named or otherwise designated" to suggest that an entity "named" as a beneficiary in a deed necessarily *is* a

Footnote continued...

the trust deed refers to MERS as the "beneficiary," courts need not accept that assertion at face value. The deed would have rendered MERS as its "beneficiary" only if the deed—read as a *whole*—described MERS's rights in a manner that satisfied Oregon's legal definition of that term. *See Ocean Accident & Guarantee Corp. v. Albina Marine Iron Works*, 122 Or. 615, 617, 260 P. 229 (1927) ("law of the land applicable thereto is a part of every valid contract").[16] The deed failed to do so.

Read as a whole, the deed demonstrates that, under Oregon law, GN Mortgage—and not MERS—was the deed's initial "beneficiary." The deed "secures to [the] Lender," GN Mortgage, "the repayment of the Loan." (E.R. 23, 25).[17] In other words, the deed was created for GN Mortgage's benefit, to

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(...continued)
beneficiary under Oregon law. (Br. 26). Defendants essentially ignore the remainder of the statutory definition.

[16] The Oregon Legislature could have provided that § 86.705(2)'s definition of "beneficiary" controls "unless the parties agree otherwise," but—although it has adopted similar wording in other statutes—it has not done so in chapter 86. *See* Or. Rev. Stat. § 90.340 ("[u]nless otherwise agreed, [a] tenant shall occupy [a] dwelling unit only as a dwelling unit"). That omission is significant. *Cf. State v. Rainoldi*, 351 Or. 486, 492, 268 P.3d 568 (2011) ("given that the legislature knows how to include a culpable mental state requirement," it can be inferred that "the omission of such a requirement [in the statute at issue] was purposeful").

[17] Even aside from §§ 86.705 and 86.735, Oregon statutes contemplate that when a trust deed secures a loan, the lender is the beneficiary. *See* § 86.737(4)(a) and (b) (identifying situations in which "the beneficiary" of

Footnote continued...

permit it to foreclose on the property if the borrower defaulted on the loan that the deed secured. Because the deed was created for the lender's benefit, the lender qualified as the deed's initial "beneficiary." *See* Or. Rev. Stat. § 86.705(2) (trust deed's "beneficiary" is "the person for whose benefit a trust deed is given"). It follows that the lender's successors (a category that does not include MERS) also qualified as the deed's beneficiaries.

The promissory note further supports the conclusion that the trust deed was created for GN Mortgage's benefit, and that GN Mortgage and its successors—rather than MERS—were the deed's beneficiaries. The note declares that GN Mortgage is the entity entitled to payments, and that its right to payment is secured by the security instrument that the borrower signed. (*See* E.R. 43, identifying the lender as GN Mortgage, declaring that "Lender may transfer this Note," and referring to "Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note" as the "Note Holder"; E.R. 45, noting that a "Security Deed (the 'Security Instrument'), dated the same date as this Note, protects the Note Holder from possible losses that might result if [the borrower does] not keep the [note's] promises").

(...continued)
a residential trust deed "[m]ade the loan with the beneficiary's own money" or "[m]ade the loan for the beneficiary's own investment"); § 86.205(4) (as used in §§ 86.205 to 86.275, "lender" includes "beneficiaries under trust deeds").

Nothing in the note suggested that the deed was designed to benefit anyone other than the lender and its successors.

Because the deed was not created to benefit MERS, MERS was never the beneficiary under § 86.705(2). MERS was merely the "nominee" for the true beneficiaries. (*See* E.R. 25: "[t]he beneficiary of this Security Instrument is MERS (*solely as nominee for Lender and Lender's successors and assigns*)"; emphasis added). In other words, although the deed reflects that MERS—as the true beneficiaries' nominee—possessed authority to do things for their benefit, nothing suggests that the trust deed was designed for *MERS's* benefit, or that MERS thereby qualified as the beneficiary under Oregon law. *See Landmark National Bank v. Kesler*, 289 Kan. 528, 538, 216 P.3d 158 (2009) (noting that *Black's Law Dictionary* 1076 (8th ed. 2004) defines nominee as a "person designated to act in place of another, usu. in a very limited way," and as a "party who holds bare legal title *for the benefit of others* or who receives and distributes funds *for the benefit of others*"; emphasis added).

Defendants invoke the following sentence from the trust deed to suggest that the deed gave MERS the "right to receive payment of the obligation," and therefore made MERS the beneficiary under Oregon law:

> 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 this Security Instrument.

(E.R. 25 (emphasis added); *see* Br. 34, arguing that "the trust deed repeatedly calls MERS the beneficiary, a statement which would not comply with law or custom unless MERS's powers were expanded to include the right to receive payment of the obligation"). But even if that clause somehow gave MERS (as the note holder's agent) the ability to *receive* payments from the borrower under certain circumstances, it does not suggest that the payments ultimately would be for MERS's *benefit*.[18]

Instead, the trust deed as a whole (including the passage quoted above) demonstrates that payments on the note were for the benefit of the initial lender or its successors, and that MERS was the mere "nominee for Lender and Lender's successors and assigns." (E.R. 25). GN Mortgage (and its successors) were the entities entitled to "repayment of the Loan," and the deed was created

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[18] Defendants' own documents suggest that the promissory-note assignments were intended to benefit the initial lender and its successors, and not MERS. Those documents describe a "Transfer [of] Beneficial Rights" from Guaranty Bank to Wells Fargo on December 9, 2005, along with a "Transfer [of] Beneficial Rights" from Wells Fargo to Bank of America on July 15, 2006. (E.R. 92). If MERS was the entity that was meant to benefit from the payment obligation secured by the deed, those transfers presumably would have reflected that MERS—and not the financial institutions listed above—possessed the "Beneficial Rights" at issue.

to "*secure[] to Lender* . . . the repayment of the Loan" and "the performance of Borrower's covenants and agreements under this Security Instrument and the Note." (*Id.*). Because the deed shows that payments were for the lender's (and its successors') benefit—and not for MERS's benefit—MERS was not the deed's beneficiary for purposes of Oregon law.[19]

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[19] Defendants assert that, even if the promissory note did not entitle MERS to payments, MERS could still be the deed's beneficiary. (Br. 28). According to defendants, Or. Rev. Stat. § 86.720 recognizes that an entity can be the "beneficiary of record" even if it is not the entity that receives "the full satisfaction payment":

> [p]rior to the issuance and recording of a release pursuant to this section, the title insurance company or insurance producer shall give notice of the intention to record a release of trust deed to the beneficiary of record and, if different, the party to whom the full satisfaction payment was made.

Or. Rev. Stat. § 86.720(3). Yet nothing in § 86.720(3) suggests that, if a trust deed secures the payments owed to a lender, the trust deed "beneficiary" is someone other than the entity to whom payments are owed.

Rather, that provision contemplates two possibilities: (1) that *if* all assignments have not already been recorded, the current beneficiary (the one receiving the final payment satisfying a loan) may differ from the "beneficiary of record"; and (2) that the final payment satisfying the loan, rather than being made to the beneficiary of record, may have been made to a loan servicer or to some other *agent* of the beneficiary of record. Under either scenario, the lender (or its successor) is still the entity to whom payments ultimately are owed, and is the entity for whose *benefit* the trust deed was created. Under either scenario, the lender remains the rightful "beneficiary" under Oregon law.

Finally, defendants claim that *Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034 (9th Cir. 2011), rejected the proposition "that MERS is not a valid beneficiary because it does not own the note," and they claim that *Cervantes* is "dispositive." (Br. 19-20). Here, too, defendants are mistaken. Although *Cervantes* rejected a claim that "no party is in a position to foreclose" when interests have been transferred via the "MERS system," the court did not resolve whether MERS may be deemed a trust deed's "beneficiary." 656 F.3d at 1044. The *Cervantes* court simply noted that, "[*e*]*ven if we were to accept* [the plaintiffs' assertion] that . . . MERS is a sham beneficiary," it would reject the plaintiffs' argument that "no party ha[d] the power to foreclose." 656 F.3d at 1044.

Further, although *Cervantes* involved Arizona law, the plaintiffs did not "allege a violation of [Arizona] state recording and foreclosure statutes." 656 F.3d at 1044. *Cervantes*' ultimate holding, it follows, was based neither on Or. Rev. Stat. § 86.735(1) nor on any Arizona statute that mirrors § 86.735(1). *Cervantes* does not govern the statutory-construction question at issue.

The promissory-note transfers in this case shifted the beneficial interest in the trust deed from one financial institution to another—that is, from one beneficiary to a new beneficiary. MERS was not the deed's "beneficiary" for purposes of Oregon law.

CONCLUSION

Oregon's statutory construction methodology reveals that Or. Rev. Stat. § 86.735(1) requires promissory-note transfers to be recorded prior to a nonjudicial foreclosure. The methodology further reveals that MERS was not the "beneficiary" of the trust deed at issue. Because not all promissory-note transfers were recorded in this case, § 86.735(1) precluded a nonjudicial foreclosure. Construing § 86.735(1) in that manner comports with the Oregon Legislature's intent to create an equitable, transparent, and efficient nonjudicial foreclosure system.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7), Federal Rules of Appellate Procedure, I certify that the State of Oregon's Amicus Brief is proportionately spaced, has a typeface of 14 points or more and contains 6,928 words.

DATED: March 27, 2012

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CERTIFICATE OF SERVICE

I hereby certify that on March 27, 2012, I directed the State of Oregon's Amicus Brief to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

IVAN HOOKER; KATHERINE HOOKER, Plaintiffs-Appellees, v. NORTHWEST TRUSTEE SERVICES, INC., Defendant, and, BANK OF AMERICA, N.A.; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., Defendants-Appellants.	U.S.C.A. No. 11-35534 STATEMENT OF RELATED CASES

Pursuant to Rule 28-2.6, Circuit Rules of the United States Court of Appeals for the Ninth Circuit, the undersigned, counsel of record for amicus

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curiae State of Oregon, certifies that he has no knowledge of any related cases pending in this court.

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