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MEMORANDUM

DATE: November 1, 2012

TO: Lane County Board of Commissioners

FROM: Stephen E. Dingle, Senior Assistant County Counsel

RE: Mortgage Electronic Registration System (MERS)

QUESTIONS PRESENTED:

1. What is MERS?
2. How could MERS generate revenue for the County?

SHORT ANSWERS:

1. What is MERS?

MERS is the acronym for the Mortgage Electronic Registration System, a database run by Merscorp, Inc. MERS is a database that allows banks and mortgage brokers to sell and trade mortgages without going through the traditional recording process. Basically, MERS allows lenders to trade and sell mortgages in bulk as a commodity by allowing them to track their purchases and sales in a forum outside of a county recorder's records.

Before MERS, lenders and mortgage brokers were forced to record each transaction on the mortgages they bought and sold in order to track ownership of the loans they held. With MERS, recording is no longer a critical aspect of buying and selling mortgages because, in theory, the brokers and lenders are able to track the ownership of loans recorded using MERS on the MERS database.

MERS operates by severing the promissory note associated with a mortgage or deed of trust, MERS then holds the promissory note while lenders and brokers reassign the associated mortgages or deeds of trust at their leisure.

Explanation of how the system works:

A. The Initial Loan:

1. A borrower (Borrower) and a lender (Lender 1, "L1") enter into a contract to purchase a property. This transaction results in the creation of Borrower's mortgage (Mortgage).
 - a. The Mortgage consists of an agreement between Borrower and L1 dictating the terms of the agreement (i.e. how much money L1 is lending Borrower and the purpose of the loan). In addition to the Mortgage Borrower and L1 create a promissory note (Note). The Note outlines the terms of Borrower's agreement to repay the loan.
2. In compliance with the terms of the Mortgage, the deed for the property purchased with the loan will name MERS as the beneficiary of the Note.
3. The documents outlining the transaction will then be recorded with the county in which the property is located.

B. The Operation of the Loans within MERS:

1. While MERS maintains control over the Note, as the beneficiary of the loan, L1 may reassign its interest in the Mortgage as it pleases without recording its subsequent assignment of the Mortgage with the county recorder's office.
 - a. L1 may do this because the beneficiary of the Note named in the property's deed, MERS, never changes.
 - b. The idea is that the first transaction, where a deed is recorded, secures a lender's interest in a mortgage, and that interest may be properly assigned without recording each subsequent assignment because ownership of the mortgage can be tracked on MERS.
 - c. However, the MERS system is notoriously inaccurate because its records are maintained by the lenders and brokers involved in the transactions, and there is little oversight over their recordkeeping.
2. In this example, L1 sells its interest in the Mortgage the day after the loan is executed. After this sale is completed, L1 assigns its rights associated with the Mortgage, to Lender 2 (L2). After the assignment L1 and L2 note the assignment on the MERS database in the loan's tracking record, but the assignment is not recorded with the county recorder.
3. Borrower makes payments in accordance with Note to MERS as the beneficiary. MERS then directs the payments to the current owner of the

Mortgage based on the record of ownership that is noted within its database. In this case L2 will receive the payment. However, L2 may then decide to sell its interest to a third lender, and so on.

- a. MERS asks each of its members to track their assignments, but the database only requires minimum descriptions of transactions so errors in the chain of title occur frequently in properties bought and sold using the system.
- b. In most cases, these transactions will not be recorded with the counties in which the properties subject to the transactions are located. So MERS provides lenders and borrowers with the only record of the assignments of these properties.

C. Foreclosures of Properties Listing MERS as Beneficiary:

1. If Borrower fails to make payments on the Mortgage in accordance with the Note, MERS has the authority to foreclose on the property because it, and not the current lender holding the Mortgage -- L2 in this example, holds the Note associated with Borrower's Mortgage.
 - a. There is a legal question in dispute in the courts at the moment. This question ponders whether MERS actually has the right to foreclose on properties in its database because while MERS may holds the notes associated with properties in default, MERS does not actually have an interest in the deed or mortgage associated with the notes it holds.
2. MERS and not the lender may foreclose on a loan because a promissory note, not a mortgage or deed of trust, creates Borrower's underlying obligation to repay on a loan associated with a mortgage or deed of trust. This obligation to repay a loan, an obligation arising from a promissory note, not a mortgage, triggers the right to foreclose on a mortgage.

2. How Could MERS Generate Money for the County?

Mr. Barrens' public comment on May 22, 2012, suggests that Lane County could easily collect a large sum of money from a claim against MERS. However, this statement is not entirely correct. While Mr. Barrens is correct, counties in several states have filed claims against Merscorp, Inc, the company that created MERS; there is no evidence to suggest these claims will succeed in generating revenue for the counties. In fact, the most promising aspect of such suits is that the suits may allow counties enjoin banks and lenders from using MERS to track properties within the counties' jurisdictions; preventing banks and lenders from using MERS in the future.

Recently, counties and states that have brought suit against Merscorp on a numerous grounds. However, the most successful claims have asserted that Merscorp used fraudulent and deceitful business practices in some way. Additionally, numerous borrowers have been able to stave off foreclosure by claiming that Merscorp illegally or fraudulently foreclosed on their properties. In fact, private citizens have had enormous success the court. Courts across the county have openly questioned the legality of Merscorp's practices and the operation of MERS database; viewing both with suspicion and uncertainty.

In Oregon, the District Court is divided about legality of Merscorp's operations, and in 2011, the court certified several questions to the Oregon Supreme Court requesting clarification about the application of Oregon law to claims regarding MERS' operation in the State. To date, no court, the Oregon Supreme Court included, has given a definitive answer about the legality of MERS operations, or what counties and states can expect to receive from suits claiming damages against Merscorp for the harms they have sustained due to the operation of the MERS database.

Therefore, while a county, or group of counties, could win a suit against Merscorp in which they challenge the operation of MERS, winning would not be an easy task. Additionally, there is no "pot of money" that may easily be accessed by counties claiming damages related to MERS. MERS is simply a shell company that has no office and only a handful of employees. This is likely why in a number of states and counties have filed suits against the banks and brokers using MERS.

DISCUSSION:

How MERS Operates

MERS is a database that mortgage brokers and banks use to track their interests in the mortgages and deeds of trust that they own. Christopher L. Peterson, et al, *Two Faces: Demystifying the Mortgage Electronic Registration System's Land Title Theory* 3, ST055 ALI-ABA 283 (May 2012). These brokers and bankers pay a fee to become members of MERS. *Id.* Becoming a member involves designating an employee of the bank or brokerage as an employee of MERS. *Id.* at 4. Once members, brokerages and banks are able to use MERS to track their interests in mortgages as they buy and sell mortgages to other members. *Id.* Currently, 60% of residential mortgages in the United States are tracked by MERS. *Id.* Because of the large number of mortgages being traded and sold on MERS, its members have the ability to sell and trade large numbers of mortgages in bundles within the database. *Id.* This ease of transaction, in kind, spurs additional transactions on the system (bankers and brokers no long need to wait for the county recorders to record their transactions, and are no longer forced to pay a recording fee for the service). *Id.* This large scale buying and trading of mortgages, along with all other smaller scale assignments occurring on the MERS database occur without giving notice to the counties (the assignments are not recorded), without the payment of recording fees, and in many instances without the knowledge and consent of the borrower of the loan. *Id.*

By holding 60% of American residential mortgages MERS allows its members to assign interest in a substantial percentage of American mortgages without ever leaving the database. *Id.* As a result, it is common for mortgages in the MERS database to be assigned several times during the life of the mortgage. *See Id.* at 3-4.

Assignment transactions happen online, and records of the transactions are only accessible to MERS members. *Id.* at 3. Borrowers are typically unaware of the fact that their mortgages have been assigned to new entities, or that their payments are going to entities other than the bank or broker they originally contracted with. *See Id.* at 4. In many instances, all a borrower knows is that MERS holds the promissory note associated with his or her mortgage. *Id.* at 3-4.

MERS is able to operate in this manner because most states do not require deeds of trust or mortgages to be recorded with the county recorder. *Id.* at 2. Instead, most state legislatures have incentivized recording deeds of trust and mortgages, and later assignments of the loan, by enacting statutes that only protect property rights when the transactions relating to the property are recorded with the county in which the property is located. *Id.*, 6-7. Because maintaining property rights was believed to be of importance to lenders and borrowers alike it was believed that the incentives would outweigh the small monetary and time commitments associated with recording such transactions. *Id.*

A major drawback to MERS is that the system makes recording the assignment of a mortgage a permissive choice for its members because it gives them an alternative way to track their assignments. *Id.* at 7. “Under the current (but presently circumvented) law of all fifty states, owners of an interest in land may intentionally conceal themselves but do so at the risk of losing that ownership interest. . . . [I]f a mortgage assignee fails to record and the assignor either intentionally or unintentionally assigns the same mortgage to a second, subsequent assignee who does record, then the first assignee can lose priority.” *Id.* The idea behind this law is that it promotes the recording of ownership of land in county land records; and important action that facilitates both the sale of land and commerce in the counties. *See Id.* at 6-7.

What this means is, under the MERS system title is often clouded by the system’s failure to properly record assignments with counties. *See Id.* at 7. For instance, Broker B buys Mortgage X from Broker A. Broker A then assigns Broker B interest in Mortgage X on May 1, 2012, using MERS. On May 15, 2012, Broker B assigns his interest in Mortgage X to Broker C using MERS. Then, on May 23, 2012, due to a book-keeping error, Broker A sells Mortgage X to Broker D using MERS. That same day, Broker D records the assignment of Mortgage X with the county in which the property involved in Mortgage X is located. In this situation Broker D and Broker C have both been assigned interest in Mortgage X. However, there is a question as to which broker owns the interest in the mortgage? Under the current state of the law, Broker D owns the interest in Mortgage X because Broker D was the first entity to record the assignment with the county. However, this situation illustrates how MERS can cloud title to a mortgage. Suppose D had never recorded the assignment, then which broker owns the interest in Mortgage X?

This situation results from the fast trading of mortgages that occurs on MERS every day. There are numerous examples of assignments occurring out of order, or getting shuffled and lost. *See Hooker v. Northwest Trustee Services, Inc*, Civ. No. 10-3111-PA 11-12,15 (Dis. Ct. Or. 2011) (noting that the “gap in the chain of title” causes the court concern, and noting that “the MERS system greatly increased the number of investors stuck holding worthless notes”); Margaret Cronin Fisk and Tom Korosec, *Bank of America, MERS Lose Bid to Dismiss Texas Fee Suit*, Bloomberg (May 23, 2012) (noting that the database has created massive confusion for both borrowers and lenders alike). As a result, property owners and counties are left trying to figure out the chain of title for properties whose mortgages are being constantly reassigned on the MERS system. Peterson at 8. “[T]his leaves prospective owners and investors (and courts adjudicating the conflicts that will develop) to speculate on who actually owns rights in the property.” *Id.* at 7.

What does it mean to own a mortgage but not the promissory note?

MERS’ structure (MERS holds the promissory note while its “members” trade interests in the mortgages and deeds of trust related to the promissory note held by MERS) places Merscorp and its members in an awkward legal position because MERS the system is severing promissory notes from their respective mortgages when, technically, the Supreme Court has indicated that mortgages and deeds of trust cannot be severed from their promissory notes. *See Carpenter v. Longan*, 83 U.S. 271, 274 (1872).

This rule is based on old, but still applicable, precedent established by the U.S. Supreme Court in *Carpenter v. Longan*. In *Carpenter*, Longan purchases real property using money loaned to her by Carpenter. *Id.* at 271. At the time, the agreement is executed Logan and Carpenter execute a mortgage and a promissory note; the note associated with the mortgage required Longan to pay back the loan plus interest over a specific period of time. *Id.* According to the mortgage agreement, the mortgage was conditioned on the maturity of the note, and required Longan to pay back the note plus interest when the note matured; six months from the date the note was executed. *Id.* at 271-72. Before the note matured Longan made payment on the note by giving Carpenter goods to cover the amount of the note; Carpenter was instructed to sell the goods and apply the proceeds to the note. *Id.* at 272.

Before the note matured, but after receiving the goods from Longan, Carpenter sold both Longan’s note and the mortgage to a third party (B. Platte Carpenter “Platte”). *Id.* at 272. Platte, the holder of the note never received Longan’s goods, or money from the sale of said goods, so Platte attempted to foreclose on the mortgaged property. *Id.*

Longan challenged the foreclosure claiming that she had already paid the balance on the note. *Id.* Her claim argued that because the note had been paid, the assignment of the note and mortgage failed. *See Id.* “The question presented [to the Court was], whether an assignee [Platte], under the circumstances of [the] case, takes the mortgage as he takes the note, free from the objections to which [the note] was liable in the hands of the mortgagee [Longan].” *Id.* at 273. The Court held that it does. *Id.* The Court noted that a mortgage is conditioned on the fulfillment of a contract established by a note. *Id.* The Court then held that “[a] note and

mortgage are inseparable; the former as essential, the latter as an incident. An assignment of the note carries the mortgage with it, while an assignment of the latter alone is a nullity.” *Id.* at 274.

In *Carpenter*, the Court establishes that a mortgage is a formality that follows a contract established by a promissory note. The Court’s decision turned on the fact that the note specifically stated that payment for the loan would begin when the note matured, and therefore, Longan was bound by that term. *Id.* at 273-74. Therefore, Platte had authority to foreclose on the property because the note was not paid in accordance to its terms. *Id.* The idea being that Longan was in a better position to prevent the fraud than the third party.

As established in *Carpenter*, when a note is severed from a mortgage, the mortgage become a “nullity.” This raises an important question in regard to what MERS’ members are actually assigning, and what rights, if any, they maintain in the notes attached the mortgages being assigned in the system. At this point courts are uncertain about what rights MERS and its members actually hold in regard to mortgages held within the database. However, what is certain is that in the current financial climate the impact of MERS on property rights is staggering because the database currently houses about sixty percent of residential mortgages in the U.S.

Summary:

MERS is an electronic database that operates like a trust that holds its members interest in mortgages. MERS can do this because it is identified as a beneficiary of the promissory note. MERS then severs the promissory note from the mortgage so that its member, the actual lender for the mortgage, can reassign its interest in the mortgage in the future without having to record subsequent assignment of the mortgage.

Once the note is severed from the mortgage, MERS holds the notes in trust while its members sell the mortgage amongst themselves. By never actually holding the promissory notes, MERS’ members have been able to quickly and cheaply reassign ownership of their mortgages without notifying counties, or borrowers responsible for making payments on the notes associated with the mortgages.

The Status of the Law: Mortgages and Deeds of Trust in Oregon

In accordance with ORS § 86.020 (2012), a mortgage in itself is not construed as creating a covenant for the payment of the sum secured in the mortgage. Instead, the promissory note, which stands as the loan agreement and attaches to the mortgage, creates the covenant for repayment of the sum dictated in the note. ORS § 86.110 (2012). In accordance with ORS § 86.110, the mortgagor, the person receiving the loan, must repay the holder of the note in accordance with the note’s terms. The holder of the note is then charged with recording the satisfaction of the note when the mortgagor has paid the sum of the note in full. ORS § 86.110 (2012).

When a person fails to comply with the terms of his or her note, the person named in the deed as a beneficiary may take steps to foreclose on the property designated in the note. ORS § 86.725 (2012). This means that in Oregon, real property may be foreclosed upon when the a person fails to comply with their promissory note. ORS § 86.725 (2012). If the property is held under a deed of trust, the trustee of the trust may act to foreclose the property. ORS § 86.770 (2012). The foreclosure of a deed of trust can be carried out either judicially, or non-judicially. ORS § 86.736(4)(b) (2012).

The fastest and least expensive option for foreclosing on a mortgage or trust deed is to foreclose using a non-judicial foreclosure procedure in accordance with ORS § 86.735 (2012). Under Oregon law, a trustee may foreclose on a trust deed without going to court. ORS § 86.735. However, in order to proceed with the non-judicial process, the trustee must be able to establish a clear chain of title for the property in question, i.e. every assignment of the property must be recorded with the county recorder in the county where the property is located. ORS § 86.735(1), (3). If title to the property is clouded, as it typically is in situations where the deed of trust has been assigned and reassigned using MERS, the foreclosure must go through the judicial process. ORS §§ 86.735(4)(b); 86.725.

The Operation of MERS in Context of Oregon Law

In Oregon a person is not required to record each assignment of his or mortgage or deed of trust. This means that MERS's operation is not technically breaking the law in Oregon.

However, in Oregon, if MERS intends to foreclose on a property its members must either record all assignments of the relating to the property with the county recorder, or go to court.

If MERS goes to court it will be required to sort out its assignments so that court can review the case (to make a determination the court will need to be sure that the title to the property is clear). Because litigation of foreclosures is expensive, and MERS will have to establish clear title, most MERS foreclosures attempt to go use non-judicial foreclosure. Therefore, recorders are receiving recording fees for MERS properties. The problem is, the recorders' offices and judges only see a fraction of the mortgages and deeds of trust held in the MERS database – only properties going through foreclosure.

While the counties and courts have some oversight over mortgages and deeds of trust held in MERS, their oversight is restricted to those properties that MERS is foreclosing on. Therefore, the courts and counties have no oversight over what is likely that a far greater number of mortgages and deeds of trust that are in good standing and continue to be traded on MERS. It is these properties, the properties in good financial standing, that should cause counties, the state, borrowers, and investors to worry because without the assignments being recorded with Oregon counties each transaction has the potential to disrupt the borrower's title to his or her property.

Possible Avenues for Claims Against MERS

A number of legal theories for claims against MERS have been asserted in the context of county administration. These claims for recovery include unjust enrichment, tax fraud, deceptive practices, and judicial estoppel.

The counties of the State of Texas are currently involved in a lawsuit against Merscorp Inc. Margaret Cronin Fisk and Tom Korosec, *Bank of America, MERS Lose Bid to Dismiss Texas Fee Suit*, Bloomberg (May 23, 2012). The Texas counties claim that MERS has “shortchanged Texas counties out of uncollected mortgage filing fees.” *Id.* The counties are currently seeking damages and an injunction that would prevent MERS from filing in Texas in the future. *Id.* Dallas County’s District Attorney has claimed that the “county may be owed as much as \$100 million.” *Id.* While the case is still in its infancy, the fact that it was not dismissed on May 23, 2012, is encouraging.

Similar cases have been initiated in Alabama, Illinois, Kentucky (dismissed Feb. 2012), Michigan, Ohio, and Oklahoma. *Id.* Each case involves counties which claim that they have been cheated out of filing fees. *Id.* These counties all note that the loss of revenue resulting from the operation of MERS has harmed them. *Id.* And they express a sentiment similar to that of Texas’ counties, a belief that the operation of MERS has harmed chain of title in their jurisdictions. *Id.*

CONCLUSION:

By giving banks and mortgage brokers a way to track the assignment of their mortgages and deeds of trust without going through the traditional steps associated with recording the assignments with counties, MERS has greatly reduced the number of assignments being recorded with counties (basically, MERS gives banks and brokers a way of tracking their investments, in the form of mortgages and deeds of trust, without having to rely on county recorders which are slower than MERS and charge fees for their services at each transaction). The result of this change in the business practices associated with the assignment of mortgages has been a sharp decline in revenue coming into counties through the collection of recording fees.

While it is clear that counties are not receiving recording fees like they once did, it may be difficult, if not impossible, for counties to establish that they have been harmed by MERS for two reasons: (1) counties do not require assignments to be recorded unless the property is being foreclosed upon; and (2) it will be very hard for counties to say with certainty how much MERS has cost them in lost fees because it is difficult to know how many times a mortgage or deed of trust has been assigned while it is inside of the MERS system.

MERS made subprime lending possible because it created a secondary market for mortgages and deeds of trust that allows lenders to disconnect themselves the original transactions with a borrower. This disconnect allows banks and brokerages to package mortgages into commodities that could be bought and sold at a moment’s notice. Since the creation of MERS

in the mid-1990s, MERS has been used to increase the rate at which mortgages and deeds of trust can be sold, establishing mortgages and deeds of trust as commodities on the stock market.

There are currently several cases between county governments and Merscorp Inc. pending in the courts. However, there has yet to be a decision defining what counties are entitled to in regard to their claims that MERS harmed them. This is likely due to the fact that in most states there is no requirement that an assignment of a mortgage or deed of trust be recorded with the county. The only certainty about the harm done to counties by MERS is that MERS has clouded the title of much of the residential property in the U.S. This makes the recorders' offices job of maintaining a record of the chain of title for properties within its jurisdiction difficult.

RECOMENDATIONS:

Because Oregon does not require the assignments of deeds of trust and mortgages to be recorded (unless the property is in foreclosure), the County will have a difficult time establishing that Merscorp, through the operation of MERS, actually harmed it by decreasing the amount of revenue the Country receives through recording fees. However, if the County can prove that it has actually been harmed by Merscorp, it may be able to successfully challenge MERS' operation, and it could get an injunction to prevent lenders from using MERS to track properties located in the Lane County. Preventing the operation of MERS in Lane County would require banks to record their assignments of mortgages and deeds of trust for properties in Lane County, which would increase revenues related to recording fees, and would also help to ensure that titles in Lane County remain clear (or at least free from the murkiness that results from their being traded on MERS).

POSTSCRIPT

In July the Oregon Court of Appeals decided a case involving MERS in *Niday v GMAC Mortg., LLC 251Or. App. 278, 284 P.3d 1157*. A summary of the case follows and the last highlighted sentence is the essence of the holding.

Rebecca Niday v. GMAC Mortgage, LLC (Nakamoto, J.) On appeal from the Circuit Court, Clackamas County. The judgment of the trial court is reversed and remanded. Opinion of the court by Judge Lynn Nakamoto. In Oregon, a trustee may foreclose a trust deed by advertisement and sale--also known as nonjudicial foreclosure--only if the beneficiary of the trust deed has publicly recorded "any assignments of the trust deed" in the county mortgage records. Today the Court of Appeals held that using Mortgage Electronic Registry Systems, Inc. (MERS) as the nominal "beneficiary" and its private database for tracking beneficial interests in trust deeds does not satisfy the public recording requirement of Oregon's nonjudicial foreclosure law. Since 1959, the Oregon Trust Deed Act has authorized the use of trust deeds as security for home loans and allowed foreclosure of a homeowner's interest by means of an advertised trustee's sale rather than judicial foreclosure--provided, however, that certain statutory requirements are met. One of those requirements is that "any assignments of the trust deed by the trustee or the beneficiary" are "recorded in the mortgage records in the counties in

which the property described in the deed is situated." ORS 86.735(1). MERS, meanwhile, was created by the mortgage industry in the early 1990s to make it easier to bundle and sell promissory notes and their related security interests on the secondary market. MERS is not itself a lender. Rather, lenders, loan servicers, investors, and other industry participants can become members of MERS. When a MERS member originates a home loan, MERS--as opposed to the lender--is named as the "beneficiary" of the trust deed that the home buyer provides as security for the loan. MERS then allows members to transfer and track their beneficial interests in those promissory notes and associated trust deeds through an internal database rather than by publicly recording each assignment in the county mortgage records.

The question before the Court of Appeals--and one that homeowners and MERS are litigating throughout the country under similar state laws--was whether MERS and its members can avail themselves of the nonjudicial foreclosure process for trust deeds. The plaintiff was a homeowner who, like many other borrowers, executed a trust deed that named MERS as the "beneficiary." After the plaintiff defaulted on her loan repayment obligation, she received a notice of trustee's sale that identified MERS as the 4 "beneficiary" of the sale and that asserted a power of sale under the trust deed. The plaintiff then filed a declaratory judgment action to stop the trustee's sale, arguing that, notwithstanding the labels used in the trust deed, MERS was not the "beneficiary" of the trust deed for purposes of Oregon's nonjudicial foreclosure laws. The trial court granted summary judgment in favor of MERS and the other defendants (the loan servicer and the trustee), ruling that MERS was the designated "beneficiary" of the trust deed and had never assigned that beneficial interest to any other party. On appeal, the Court of Appeals rejected the defendants' argument that MERS was the "beneficiary" of the trust deed within the meaning of the Oregon Trust Deed Act. Rather, the court held that the definition of "beneficiary" in ORS 86.705(1) refers to a particular person "for whose benefit a trust deed is given"--namely, the person to whom the underlying, secured obligation is owed. The "benefit" of the trust deed, like a mortgage, is security for an underlying loan repayment obligation, and that understanding of the "benefit" of a trust deed permeates the statutory scheme. The Court of Appeals then examined, in light of that statutory definition of "beneficiary," the trust deed that the plaintiff granted. Despite labeling MERS as the "beneficiary," the trust deed actually designated the original lender, GreenPoint Mortgage Funding, Inc., as the party to whom plaintiff owed the secured obligation. The trust deed explicitly "secures to Lender: (i) the repayment of the Loan * * * and (ii) the performance of Borrower's covenants and agreements * * *." Thus, the Court of Appeals held that the beneficiary of the trust deed was in fact GreenPoint, not MERS. Because GreenPoint, the lender, was the "beneficiary" of the trust deed, the remaining question was whether GreenPoint had "assigned" the trust deed but not recorded that assignment as required by ORS 86.735(1). The defendants argued that GreenPoint and any subsequent owners of the promissory note had simply assigned the promissory note but not the trust deed. The Court of Appeals rejected that argument. Historically, mortgages were "assigned" under Oregon law in two ways: (1) by a formal written assignment, or (2) by simply assigning the underlying promissory note, which carried with it the mortgage as an "incident to the debt." The legislature explicitly stated its intent that trust deeds are "deemed to be a mortgage" unless otherwise inconsistent with the Oregon Trust Deed Act, and would have understood trust deeds to be "assigned" in either of those two ways as well. Moreover, the broad language of ORS 86.735(1)--that "any assignments" of the trust deed by the beneficiary

must be publicly recorded--includes those assignments that occur by operation of law when the underlying promissory note is assigned. In this case, assignments of the beneficial interest in the promissory note and the trust deed were not publicly recorded but were instead privately tracked through the MERS database. For that reason, the Court of Appeals held that one of the statutory prerequisites to nonjudicial foreclosure was not satisfied, and the trial court therefore erred in granting summary judgment in favor of the defendants. In conclusion, the court emphasized that its holding concerned only the requirements for nonjudicial foreclosure, and that the beneficiary of the trust deed nevertheless retains the option of judicial foreclosure, ORS 86.710. The Court of Appeals explained that "the import of our holding is this: A beneficiary that uses MERS to avoid publicly recording assignments of a trust deed cannot avail itself of a nonjudicial foreclosure process that requires that very thing--publicly recorded assignments."