NO. 90509-6

**SUPREME COURT OF THE STATE OF WASHINGTON**

ROCIO TRUJILLO,

Petitioner,

v.

NORTHWEST TRUSTEE SERVICES, INC.,

Respondent.

# BRIEF OF *AMICUS CURIAE* OF THE ATTORNEY GENERAL OF THE STATE OF WASHINGTON

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Cases

**Statutes**

## I. INTRODUCTION

Among the most basic questions in any non-judicial foreclosure is whether the party claiming to be the "beneficiary" has the right to foreclose. The trustee's duty of good faith and RCW 61.24.030(7)(a) demand that it answers this question with an unequivocal "yes" before recording the Notice of Trustee's Sale.

This case is about what happens when a trustee relies on an ambiguous beneficiary declaration to resolve this central question in favor of its paying client, the beneficiary. Such reliance is an abdication of the trustee's fundamental duty of good faith to the homeowner: "maybe" is not "yes," and "X or Y" does not equal "X." When presented with an ambiguous beneficiary declaration, the trustee must demand an unambiguous declaration or other proof sufficient to satisfy RCW 61.24.030(7)(a). And it must do so *before* recording the Notice of Trustee's Sale – it cannot simply accept the beneficiary's statutorily insufficient proof and proceed as the beneficiary requests.

A trustee's failure to act in good faith in this manner is an unfair or deceptive act or practice, and gives rise to a claim under the Consumer Protection Act. Even if the beneficiary is later proved to be the "actual

holder," the trustee's failure to investigate that fact as required by RCW 61.24.030(7)(a) may injure homeowners and support a CPA claim.

## II. IDENTITY AND INTEREST OF *AMICUS*

Amicus Curiae is the Attorney General of Washington. The Attorney General submits this amicus brief to urge this Court to hold that (1) a trustee cannot rely on a beneficiary declaration that fails to track the second sentence of RCW 61.24.030(7)(a) in order to satisfy its obligation under that statute and its duty of good faith to the homeowner to investigate the beneficiary's authority to foreclose, (2) the trustee's compliance with RCW 61.24.030(7)(a) and its associated duty of good faith must be judged as of the time it recorded the Notice of Trustee's Sale; and (3) a trustee's failure to comply with RCW 61.24.030(7)(a) and its associated duty of good faith may violate the Consumer Protection Act (CPA) regardless of whether the beneficiary is later proved to be the "actual holder."

The Attorney General's constitutional and statutory powers include the submission of amicus curiae briefs on matters affecting the public interest. *Young Americans for Freedom v. Gorton*, 91 Wn.2d 204, 212, 588 P.2d 195 (1978). This case presents issues of significant public interest, including the level of protection afforded to Washington consumers by the Deed of Trust Act and Consumer Protection Act during

the process of non-judicial foreclosure. The Attorney General has an interest in enforcing the Deed of Trust Act. *See* RCW 61.24.172(2). The Attorney General also enforces the CPA on behalf of the public, RCW 19.86.080, and has an interest in the development of CPA case law, RCW 19.86.095, including the availability of private CPA claims:

> Private actions by private citizens are now an integral part of CPA enforcement. Private citizens act as private attorneys general in protecting the public's interest against unfair and deceptive acts and practices in trade and commerce. Consumers bringing actions under the CPA do not merely vindicate their own rights; they represent the public interest and may seek injunctive relief even when the injunction would not directly affect their own private interests.

*Scott v. Cingular Wireless*, 160 Wn.2d 843, 853, 161 P.3d 1000 (2007) (internal citations omitted).

## III. ISSUES ADDRESSED BY *AMICUS*

Whether a trustee may rely on a beneficiary's declaration to satisfy its obligations under RCW 61.24.030(7)(a) and its duty of good faith where the declaration fails to conform to the second sentence of that subsection and state unequivocally that the beneficiary is the "actual holder" of the relevant promissory note.

Whether the trustee's compliance (or non-compliance) with its obligations under RCW 61.24.030(7)(a) and associated duty of good faith

should be judged based on the "proof" gathered by the trustee as of the date it recorded the Notice of Trustee's Sale.

Whether a trustee's non-compliance with its obligations under RCW 61.24.030(7)(a) and associated duty of good faith may give rise to a CPA claim when the beneficiary later proves to be the "actual holder."

## IV. STATEMENT OF THE CASE

Amicus relies on the facts as set forth by the Court of Appeals below.

## V. ARGUMENT

### A. The Trustee Cannot Rely on an Ambiguous or Equivocal Beneficiary Declaration to Satisfy its Obligation under RCW 61.24.030(7)(a).

The Legislature established strict requirements that must be met before a trustee's sale can go forward:

> It shall be requisite to a trustee's sale:
>
> . . . .
>
> That, for residential real property, before the notice of trustee's sale is recorded, transmitted, or served, the trustee shall have proof that the beneficiary is the owner of any promissory note or other obligation secured by the deed of trust. A declaration by the beneficiary made under penalty of perjury stating that the beneficiary is the actual holder of the promissory note or other obligation secured by the deed of trust shall be sufficient proof as required under this subsection.

RCW 61.24.030(7)(a).

The first sentence of RCW 61.24.030(7)(a) imposes an obligation that a trustee must meet before it may record a Notice of Trustee's Sale.[1] The second sentence states that a trustee can satisfy that obligation – by obtaining "[a] declaration by the beneficiary made under the penalty of perjury stating that the beneficiary is the actual holder of the promissory note or other obligation secured by the deed of trust." RCW 61.24.030(7)(a).

The Legislature's description of this declaration as "sufficient proof" creates a sort of "safe haven" for the trustee. The trustee can rely on a declaration that conforms to the second sentence of RCW 61.24.030(7)(a) so long as the trustee does not breach its duty of good faith to the homeowner. RCW 61.24.030(7)(b).[2] But subsection (b) presupposes a beneficiary declaration that complies with the second sentence of subsection (a). Neither subsection provides refuge when the beneficiary declaration fails to track the plain language of RCW 61.24.030(7)(a)'s

[1] In this brief, the Attorney General does not address whether the first sentence requires the beneficiary to "own" the promissory note. Instead, we address only the legal consequences that arise from a trustee's improper reliance on an ambiguous declaration that fails to track the second sentence of RCW 61.24.030(7)(a). The beneficiary is the source of the "beneficiary declaration" and will often be the source for any additional evidence necessary to satisfy the trustee's duty of good faith and its obligations under RCW 61.24.030(7)(a). But that statutory obligation and duty of good faith rest squarely upon the trustee. *See* RCW 61.24.010(4). As in *Lyons v. U.S. Bank, N.A.*, 181 Wn.2d 775, 336 P.3d 1142 (2014), the beneficiary is not a party to this appeal, and we therefore take no position with respect to a beneficiary's actions relating to RCW 61.24.030(7)(a).

[2] "Unless the trustee has violated his or her duty [of good faith] under RCW 61.24.010(4), the trustee is entitled to rely on the beneficiary's declaration as evidence of proof required under this subsection." RCW 61.24.030(7)(b). The trustee owes a duty of good faith to the borrower, beneficiary, and grantor. RCW 61.24.010(4).

second sentence to state unequivocally that the beneficiary is the "actual holder."

### 1. The plain language and legislative history of RCW 61.24.030(7)(a) require an unequivocal declaration that the beneficiary is the "actual holder."

The plain language of RCW 61.24.030(7)(a) describes the declaration that satisfies the trustee's obligation to gather "proof." If the Legislature had intended for different declaration language to suffice, it would have said so. For the trustee to rely on a beneficiary declaration to satisfy its proof-gathering obligations, the declaration must strictly comply with the requirements of RCW 61.24.030(7)(a) and include an unequivocal, sworn statement that the beneficiary is the "actual holder." *See Albice v. Premier Mortg. Services of Wash., Inc.*, 174 Wn.2d 560, 567, 276 P.3d 1277 (2012) (requiring both strict construction of Deed of Trust Act in favor of borrowers and strict compliance). Alternative formulations, such as adding language like "or has requisite authority under RCW 62A.3-301 to enforce said obligation," do not pass statutory muster. The Court need not look to legislative history to construe this unambiguous statutory language. But even if the Court did so, the plain meaning of the statute is confirmed.

RCW 61.24.030(7)(a) began life in 2009 as Senate Bill 5810 (SB 5810). The original version lacked any requirement that the trustee have

proof that the beneficiary held the promissory note. SB 5810 (Feb. 3, 2009). The Senate amended the bill to require that the trustee obtain "proof that the beneficiary is the actual holder" of the promissory note or had "possession of the original" promissory note "with the proper endorsements so that the entity initiating the foreclosure sale has the authority to enforce the terms of the promissory note." Engrossed SB 5810, § 7(7)(k)(i) (Mar. 12, 2009). "Proof that the beneficiary is the actual holder of the promissory note or other obligation secured by the deed of trust must be made by way of an affidavit made by a person with personal knowledge of the physical location of the promissory note or other obligation." *Id* § 7(7)(k)(ii).

The House of Representatives then amended the bill to replace the Senate's language with what is now RCW 61.24.030(7)(a). The House kept the critical term "actual holder," but instead of a declaration from a person with personal knowledge of the promissory note's location, it substituted a declaration from the "beneficiary" that it was the "actual holder." These successive draft bills confirm that the term "actual holder" is central to the beneficiary declaration. *See Bellevue Fire Fighters Local 1604 v. City of Bellevue*, 100 Wn.2d 748, 753, 675 P.2d 592 (1984) (sequential drafts of bill may be useful in interpreting statute).

A trustee cannot rely on a beneficiary declaration unless it unequivocally states that the beneficiary is the "actual holder." Instead, if the trustee does not obtain a beneficiary declaration that unequivocally states that the beneficiary is the "actual holder," it must investigate further.

**2. A trustee's duty of good faith requires it to obtain alternative proof when presented with a non-conforming declaration.**

In *Lyons*, this Court held that "a trustee must . . . investigate possible issues using its independent judgment to adhere to its duty of good faith" and "must adequately inform itself regarding the purported beneficiary's right to foreclose, including, at a minimum, a cursory investigation to adhere to its duty of good faith." *Lyons v. U.S. Bank, N.A.*, 181 Wn.2d 775, 787, 336 P.3d 1142 (2014). Thus, "if there is an indication that the beneficiary declaration might be ineffective, a trustee should verify its veracity before initiating a trustee's sale to comply with its statutory duty." *Id.* at 790. When receiving a declaration such as the one here, the trustee should investigate and confirm which of the two statements in the beneficiary's declaration is true – (1) that the beneficiary is the "actual holder" (which would comply with the statute), or (2)

whether it merely has "requisite authority to enforce" the promissory note for some other reason (which would not).[3]

### 3. A trustee's unexamined reliance on an ambiguous beneficiary declaration is an unfair or deceptive act or practice under the CPA.

This Court has already determined that a trustee's breach of good faith by deferring to a lender and failing to exercise its independent discretion is an unfair or deceptive act or practice that satisfies the first element of the CPA. *Klem v. Wash. Mut. Bank*, 176 Wn.2d 771, 792, 295 P.3d 1179 (2013) (holding that "the practice of a trustee in a non-judicial foreclosure deferring to the lender . . . and thereby failing to exercise its independent discretion as an impartial third party with duties to both parties is an unfair or deceptive act or practice and satisfies the first element of the CPA). Similarly, a trustee's deferral to the beneficiary's ambiguous declaration – without further steps to independently investigate the issue – is a breach of its duty of good faith and an unfair or deceptive act or practice. *Lyons*, 181 Wn.2d at 791-92. Such a breach gives rise to a CPA claim against the trustee. *Klem*, 176 Wn.2d at 792.

[3] Conceivably, the trustee ask the beneficiary for a second declaration before recording the Notice of Trustee's Sale that resolves the ambiguity in the initial declaration by hewing strictly to the statutory language and stating unequivocally that the beneficiary is the "actual holder."

## B. The Trustee's Compliance (or Non-Compliance) with RCW 61.24.030(7)(a) and Its Duty of Good Faith Must Be Judged as of the Date It Recorded the Notice of Trustee's Sale.

In *Lyons*, this Court recognized that a trustee's uncritical acceptance of an ambiguous beneficiary declaration and failure to obtain sufficient, independent proof required by RCW 61.24.030(7)(a) is an unfair act or practice that gives rise to a cause of action under the CPA. *Lyons*, 181 Wn.2d at 791-92. But that holding can unfortunately be read to suggest that a trustee may retroactively cure its CPA violation by presenting to the Court evidence that the beneficiary was the "actual holder" even if the trustee first received the evidence *after* recording the Notice of Trustee's Sale – and upon which it therefore could not have relied to satisfy its pre-recording duty. *Id.* at 791. The Court should now clarify that to fulfill its duty of good faith and its obligation under RCW 61.24.030(7)(a), the trustee must obtain the requisite proof *before* recording the Notice of Trustee's Sale. And in a subsequent lawsuit challenging the trustee's actions, whether the trustee fulfilled its duties must be judged based on the trustee's investigation and evidence in its possession at that time.

The plain language of RCW 61.24.030(7)(a) sets the date by which the trustee must fulfill these obligations: "[*B*]*efore* the notice of trustee's sale is recorded, transmitted, or served." (Emphasis added). The trustee has complete control over this timing, because it is the only party that may

record the Notice of Trustee's Sale. RCW 61.24.040(1)(a). If the trustee records the Notice of Trustee's Sale before obtaining the requisite proof, it breaches its duty of good faith and violates the statute. RCW 61.24.030(7)(a) is a protective measure, and the time designated for performance is essential to its purpose. It primarily shields homeowners from the initiation of foreclosure by the wrong beneficiary – and the resulting costs of hiring an attorney to investigate the beneficiary's status and restrain the trustee's sale pursuant to RCW 61.24.130. Thus, in order to prevent uncertainty, litigation, and costs to the homeowner in challenging whether the trustee properly determined the beneficiary, it is essential that the trustee satisfy its obligation to verify a beneficiary *before* initiating foreclosure proceedings. The judiciary benefits from the statute's gatekeeping function because "wrong beneficiary" lawsuits are screened out before they can become controversies.[4] But for RCW 61.24.030(7)(a) to serve these functions, the trustee must do its duty before recording the Notice of Trustee's Sale, and its performance must be judged by the "proof" that it obtained before doing so.

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[4] The statute also helps protect successful trustee's sale bidders from having the completed sale later declared invalid – at least because it was conducted at the behest of a "wrong beneficiary." *See, e.g., Albice v. Premier Mortg. Services of Wash., Inc.*, 174 Wn.2d 560, 276 P.3d 1277 (2012) (trustee's sale rescinded where trustee failed to complete sale within statutory parameters). RCW 61.24.030(7)(a) is a "requisite" of a trustee's sale, and any resulting trustee's deed will recite that the requisites were met. RCW 61.24.040(7). These recitals "shall be prima facie evidence of such compliance and conclusive evidence thereof in favor of bona fide purchasers and encumbrances for value." This Court need not decide, and this brief does not address, the effect on a completed trustee's sale of a trustee's false recital relating to timely fulfillment of its duty under RCW 61.24.030(7)(a).

*Post hoc* proof that the beneficiary was the "actual holder" before the Notice of Trustee's Sale was recorded may affect the remedies available to the homeowner, as discussed below. But such *post hoc* proof does *not* mean that the trustee complied with RCW 61.24.030(7)(a) or fulfilled its obligation of good faith unless the trustee was in possession of that proof *before* recording the Notice of Trustee's Sale. And even where *post hoc* proof exists, the Trustee's breach may cause injury to consumers.

### C. The Trustee's Breach of Its Duty of Good Faith May Give Rise to a Consumer Protection Act Claim – Even if the Beneficiary Later Proves to Be the "Actual Holder."

The trustee's failure to satisfy RCW 61.24.030(7)(a) and its duty of good faith before recording the Notice of Trustee's Sale is an unfair or deceptive act or practice, *Lyons*, 181 Wn.2d at 786, and the trustee must therefore attempt to escape CPA liability on remand by negating another element of a private CPA claim under RCW 19.86.090. *See Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986) (identifying elements of a private CPA claim). But a trustee's acts in non-judicial foreclosure are in "trade or commerce" because they relate to the sale of property. RCW 19.86.010(2). And the public interest element will likely be satisfied because many consumers have been similarly affected – in addition to this case and *Lyons*, many

other lawsuits involve identical, ambiguous beneficiary declarations.[5] That leaves only causation and injury.

### 1. This Court's insurance bad faith and CPA jurisprudence provide guidance.

One aspect of this Court's well established insurance bad faith and CPA jurisprudence provides a useful framework to analyze causation and injury where the trustee can produce *post hoc* proof that the beneficiary was the "actual holder." Like trustees, insurers have a statutorily imposed duty of good faith. *Compare* RCW 61.24.010(4) *with* RCW 48.01.030. Like a trustee in receipt of an ambiguous beneficiary declaration, an insurer has investigative duties: When a policyholder tenders a claim, the insurer must investigate in good faith whether coverage exists before declining coverage. This obligation to investigate "is not dependent on" whether coverage ultimately exists. *St. Paul Fire & Marine Ins. Co. v. Onvia, Inc.,* 165 Wn.2d 122, 132, 196 P.3d 664 (2008); *Coventry Assocs. v. Am. States Ins. Co.,* 136 Wn.2d 269, 279, 961 P.2d 933 (1998).

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[5] *See, e.g.*, *Beaton v. JPMorgan Chase Bank N.A.*, No. C11-0872 RAJ, 2013 WL 1282225 (W.D. Wash. Mar. 26, 2013) (beneficiary declaration stated that JPMorgan Chase Bank, N.A. "is the actual holder...or has requisite authority under RCW 62A.3–301"); *In re Butler*, 512 B.R. 643 (Bankr. W.D. Wash. 2014) (beneficiary declaration stated that OneWest Bank "is the actual holder of the promissory note...or has requisite authority under RCW 62A.3-301 to enforce said obligation"); *Mulcahy v. Fed. Home Loan Mortg. Corp.*, No. C13-1227RSL, 2014 WL 1320144 (W.D. Wash. Mar. 28, 2014) (declaration stating that Wells Fargo "is the actual holder...or has requisite authority under RCW 62A.3–301"); *Mickelson v. Chase Home Fin. LLC*, 579 F. App'x 598, 601 (9th Cir. 2014) (beneficiary declaration stated that Chase Home Finance, LLC "is the actual holder...or has requisite authority under RCW 62A.3–301"). Several of these pre-*Lyons* cases reach the wrong result on the propriety of such declarations.

When an insurer fails to investigate a claim in good faith, it breaches its duty of good faith, and this breach may injure the policyholder whether or not coverage exists. Thus, "an insured may maintain an action against its insurer for bad faith investigation of the insured's claim and violation of the CPA regardless of whether the insurer was ultimately correct in determining coverage did not exist." *Coventry*, 136 Wn.2d at 279, 280. *See also Onvia*, 165 Wn.2d at 132, 134 (holding that an insurer's failure to investigate in good faith may injure policyholders and give rise to CPA claims, even if the insurer ultimately has no duty to indemnify, settle, or defend); *Griffin v. Allstate Ins. Co.*, 108 Wn. App. 133, 148-49, 29 P.3d 777 (2001) (holding that following *Coventry*, expenditure of money caused by bad faith failure to investigate was injury under the CPA "even if the expenses caused by the statutory violation are minimal"). As this Court recognized in *Coventry*, the insurer's failure to investigate forces the policyholder to either (a) incur the expense of investigation itself, or (b) accept a potentially erroneous denial of coverage:

> The problem arises when the insurer fails to investigate, in bad faith, thereby placing the insured in the difficult position of having to perform its insurer's statutory and contractual obligations....When an insurer fails to adequately investigate an insured's claim, the insured must either perform its own investigation to determine if coverage should have been provided or take no action at

> all. *In either situation, the insured does not receive the full benefit due under its insurance contract.*

*Coventry*, 136 Wn.2d at 279-282 (emphasis added). The policyholder may therefore recover the costs of its own investigation into coverage and other damages caused by the insurer's bad faith failure to investigate. *Coventry*, 136 Wn.2d at 285.[6] Similarly, a consumer forced to investigate unfair or deceptive collection attempts may be injured even if he or she does not pay the claimed debt. *See Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 55-56, 204 P.3d 855 (2009).

Analogous reasoning has guided this Court in the foreclosure context. *See, e.g.*, *Klem*, 176 Wn.2d at 795 (suggesting that trustee could cause injury to homeowner by falsely notarizing notices of sale, even if homeowner otherwise received timely notice); *Frias v. Asset Foreclosure Servs., Inc.*, 181 Wn.2d 412, 431, 423, 334 P.3d 529 (2014) (homeowner may suffer injury even in absence of completed trustee's sale). The same rule should apply here: a homeowner is injured when he or she is forced to undertake an investigation into the beneficiary's right to foreclose because of the trustee's improper reliance on an ambiguous beneficiary

[6] By recognizing that costs incurred by a homeowner because of a trustee's failure to satisfy RCW 61.24.030(7)(a) and its duty of good faith are "injury" under the CPA, the Court should not also import the elements of the tort of insurance bad faith, or the "unreasonable, frivolous, or unfounded" standard that defines that tort. Those rules are well suited to the insurance context, but not to circumstances outside that industry, such as non-judicial foreclosure.

declaration, even if the investigation later shows that the beneficiary is the actual holder.

### 2. "Prejudice" is not a CPA element; a private CPA plaintiff must merely show "injury."

Conversely, NWTS's suggestion that a borrower cannot be "prejudiced" when *post hoc* proof shows that the beneficiary was the actual holder is irrelevant to this case. *See* Supplemental Brief of Respondent Northwest Trustee Services, Inc., pp. 17-19. This Court has made clear that "nothing about the DTA indicates a CPA claim should be subject to a different analysis where the CPA claim is premised on alleged DTA violations as opposed to any other alleged wrongful acts." *Frias*, 181 Wn.2d at 432. "[T]he analysis of the elements of a CPA action premised on alleged DTA violations is the same as the analysis of the elements of a CPA claim premised on any other allegedly unfair or deceptive practice . . . ." *Id.* at 432-33. There is no basis to depart from *Frias* and create a new "prejudice" element.

NWTS's reliance on *Mickelson v. Chase Home Fin. LLC*, 579 F. App'x 598 (9th Cir. 2014), is unavailing. Before *Lyons*, the *Mickelson* court dismissed a CPA claim against NWTS because it believed that (a) the ambiguous beneficiary declaration complied with RCW 61.24.030(7)(a), and (b) *post hoc* proof that the beneficiary was the "actual

holder' meant that the defective beneficiary declaration "could not have prejudiced" the homeowners. *Id.* at 601. *Mickelson* was mistaken about the declaration's compliance with RCW 61.24.030(7)(a). *See Lyons*, 181 Wn.2d at 791. And it should not have imported a "prejudice" element into the CPA claim. *See Frias*, 181 Wn.2d at 432-33. Its improper "prejudice" element for the CPA claim was taken from a quiet title action in which the plaintiff sought to rescind a completed trustee's sale due to an inadequate purchase price. *Mickelson*, 579 F. App'x at 601-02 (citing *Udall v. T.D. Escrow Servs., Inc.*, 159 Wn.2d 903, 154 P.3d 882 (2007)).[7] *Udall* did not involve a CPA claim at all, and is irrelevant to the elements of a CPA claim.

Here, there has been no completed trustee's sale and therefore no claim for rescission. "Prejudice" is irrelevant to Ms. Trujillo's CPA claim. Instead, she must just show a "minimal" injury to business or property. *See Panag,* 166 Wn.2d at 57, 58.

**3. A homeowner may be injured by the trustee's improper reliance on a beneficiary declaration, even if the beneficiary is the "actual holder."**

[7] The Ninth Circuit discussed the "injury" element in upholding the dismissal of private CPA claims against Mortgage Electronic Registration Systems, Inc. (MERS), Federal Home Loan Mortgage Corp. (Freddie Mac), and JPMorgan Chase, N.A. *Id.* at 602. It provided no explanation for its departure from the usual "injury" element for the CPA claim against NWTS.

The trustee's improper reliance on an ambiguous beneficiary declaration and failure to investigate whether the purported beneficiary was the "actual holder" before recording the Notice of Trustee's Sale may cause injury to the homeowner even if the beneficiary is later determined to be the "actual holder." For example, the homeowner may have to consult an attorney, attempt to locate the promissory note, or otherwise investigate the beneficiary's status to compensate for the trustee's failure to investigate. The homeowner would need to do so in order to determine whether he or she has an actionable CPA claim, and to determine whether he or she may have a "legal or equitable ground" to enjoin the non-judicial foreclosure under RCW 61.24.030(7)(a).

These injuries are not inconsequential just because the beneficiary later proves to be the "actual holder." Just like the insurer's duty to investigate coverage, the trustee's duty to investigate after receiving an ambiguous beneficiary declaration under *Lyons* is not dependent on the beneficiary's ultimate status. The Court should apply the same rule: The trustee's reliance on an ambiguous beneficiary declaration and failure to investigate independently before recording the Notice of Trustee's Sale is an unfair or deceptive act or practice that may injure the homeowner and give rise to a CPA claim, even when the beneficiary is later proved to be the "actual holder."

## VI. CONCLUSION

The Attorney General respectfully requests that the Court confirm that (1) a trustee may not rely on a beneficiary declaration to satisfy its duty of good faith and obligations under RCW 61.24.030(7)(a) unless the declaration unambiguously states that the beneficiary is the "actual holder" of the promissory note, (2) the trustee's compliance with these obligations must be judged at the time it issues the Notice of Trustee's Sale, and (3) a trustee's non-compliance with these obligations may give rise to a CPA claim even if the beneficiary is later proved to be the "actual holder" of the note.

RESPECTFULLY SUBMITTED this 8th day of May, 2015.

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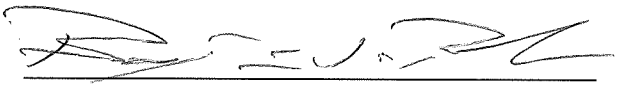

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