SENATE BILL 628
TESTIMONY OF DAVID E. FENNELL
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INTRODUCTION

My name is David E. Fennell. A native Portlander (David Douglas High School Class of 1976 and Lewis & Clark College Class of 1980) whose entire family lives in Oregon, I now live in Newcastle, Washington and work as a lawyer with the law firm of Routh Crabtree Olsen, P.S. ("RCO"), a mortgage default services law firm representing lenders, and as counsel to Northwest Trustee Services, Inc. ("NWTS"), a foreclosure trustee company. RCO and NWTS both have offices in the Portland area. I have worked in the mortgage default arena in Oregon for more than 25 years and have been involved at some level in virtually all substantive amendments to Oregon's trust deed foreclosure laws since 1988.

Today, I am appearing on behalf of my employers, RCO and NWTS. More broadly, I am also appearing on behalf of United Trustees Association ("UTA"), a multi-state association of trust deed foreclosure trustees with a keen interest in this bill. Finally, I am appearing unofficially for the Oregon Bar Association's Debtor Creditor Section's Legislative Committee "(Committee"), composed of both debtor and creditor attorneys. The Committee, which has not yet taken a position concerning this bill, is nevertheless watching it closely for corrections in subsequent amendments that will address some vagueness and procedural concerns observed in the initial drafts.

TRUSTEES

Trustees of trust deeds have three roles under Oregon's trust deed laws, namely:

1. Foreclose a trust deed pursuant to the trust deed's power of sale provisions and Oregon trust deed laws (ORS 86.705, *et seq.);*
2. Reconvey (release the lien of) a trust deed; or
3. Do nothing.

To be qualified as a trustee in Oregon, the trustee must be an Oregon licensed attorney, a licensed title company, a licensed escrow company, a bank or a federal agency.

By statute, a trustee is appointed by the lender. When functioning as a foreclosure service provider, the trustee's sole duty is to perform the foreclosure in strict accordance with the statutory foreclosure procedures. The trustee, in essence, follows the legislature's prescribed roadmap designed to meet due process requirements for realizing on lender security. In that sense, the trustee's role is neutral, like a train following the course of the tracks.

TRUST DEED LAWS

Oregon's statutes governing the nonjudicial foreclosure of trust deeds have now been in effect – and have worked well -- for decades. They were adopted at the urging of lender groups with the concurrence of consumer groups after intense negotiation. The resulting legislation was designed to balance the lending industry's need to recover its security as quickly and inexpensively as possible (to keep mortgage loans as inexpensive as possible) with the desire of consumers to be released from personal liability or deficiency judgment after foreclosure. The legislation successfully balanced those interests by establishing a relatively simple 120+ day nonjudicial foreclosure process with no post-foreclosure redemption period and barring lenders from further pursuing collection activities against the borrower.

Perhaps the key to the current nonjudicial foreclosure procedure in Oregon is simplicity. Until last year's special session, Oregon kept the nonjudicial process simple by requiring a foreclosure trustee to record a notice of default and mail, post or serve and publish a notice of sale. Keeping the procedure relatively simple has reduced potential challenges to the conduct of foreclosure, thereby avoiding unnecessary clouds on real property titles, and enabled trustees to perform nonjudicial foreclosures for fees well below the amounts allowed by the statute, keeping borrower foreclosure fees to a minimum.

In last year's special session, the legislature added a special loss mitigation notice to the process. To make matters more complicated, the

notice was given a narrow window for mailing. It must be sent after the notice of default is recorded but before the notice of sale is mailed. Title companies have required trustees to record proof of mailing of this notice in the affidavit of compliance package trustees must record before the trustee's sale. A pending bill before the legislature this year would require the recording of an affidavit of mailing the special loss mitigation notice.

Last year's addition of the loss mitigation notice to the procedure increased a trustee's labor cost in a foreclosure by approximately twenty-five percent (25%). Given the narrow window for mailing, it increased a trustee's risk of foreclosure error by more than that. It also increased the cost of foreclosure mailing by approximately $20 per file. The new notice has made foreclosures more complicated, more risky for trustees to perform and more expensive for borrowers to reinstate and pay off their loans.

I am appearing today first to implore the committee to consider refraining from making the foreclosure process any more complicated and risky for trustees than it has already become. As originally drafted, SB 628 would have been a complete non-starter for foreclosure trustees, thrusting them as full participants in and funders of the mediation process. Translating mediation notices into all world languages was, similarly, a non-starter. According to my understanding, however, that first draft has been or is being substantially re-worked and that most of the burdens on the trustees have been, mercifully, removed. For that reason, I will not address any specific concerns about that draft.

Late Sunday, I was given an advance "rough draft" of proposed amendments to the original version of the bill. Although I do have a number of comments and concerns relating to that version as well, I will generally refrain from commenting at this time since it was a work in process and I have received assurances from the bill's proponents that my input will be welcomed when amendments are published. That said, I would like to highlight several points that the committee should bear in mind as it considers subsequent amendments:

1. Nonjudicial foreclosure procedures need to be kept relatively simple so that reputable trustees will not be chased away by increased risk or too little compensation. The alternative is judicial

foreclosure, a slow foreclosure process that would clog the courts and have a big impact on both state and county judicial budgets.

2. Declaring an emergency and making this bill effective upon passage would be a mistake. According to the bill, the Department of Business and Consumer Services would be granted rule making authority. Rules are contemplated in the "rough draft" amendment for completing mediation notices and qualifying mediators. It is highly doubtful that the Department will have rules promulgated the day the bill is effective. In addition, some of the mediation settlement parameters are to be derived from federal loan modification standards that have not yet been defined or adopted. They may not be in effect upon passage of this bill, either. Finally, the lenders and trustees would need some ramp up time to adjust to this new procedure. If this bill became effective upon passage, nonjudicial foreclosure paralysis would ensue. Judicial foreclosures would become an attractive alternative.
3. The "rough draft" amendment would seem to prevent the trustee from processing the foreclosure during the mediation process by prohibiting the lender from adding charges to the loan. The bill should expressly allow the trustee to continue to process the foreclosure during the mediation period. Doing so will not result in substantially increased trustee fees because most of the trustee's work is done and its fee earned at the very beginning of the foreclosure. The only additional costs that would be incurred during mediation would be the cost of publishing the foreclosure notices, the cost of recording compliance affidavits and the cost of crying sale postponements. Not allowing the trustee to publish the sale notice or timely record compliance affidavits could delay the foreclosure beyond the extended150 days contemplated by the bill. Not allowing the trustee to postpone a scheduled sale during the mediation window could kill a foreclosure sale, forcing an expensive re-start.
4. The notice provisions in the "rough draft" are vague and open to numerous conflicting interpretations. Trustees need procedural certainty when following the foreclosure process. Moreover, "actual notice" requirements (an impossible standard to meet or prove) must be wholly replaced by an "effective upon mailing or service" standard. The "rough draft" appeared to attempt to accomplish this, but missed the mark in one or two instances.