

I. ABOUT THE UNITED TRUSTEE ASSOCIATION

The United Trustees Association (“UTA”) is a multi-state professional association comprised of trustees under deeds of trust and members working in industries that provide support services in the non-judicial foreclosure process (e.g., foreclosure agents, legal newspapers, title companies, posting services and attorneys). UTA’s trustee members provide reconveyances (when secured loans are satisfied) and non-judicial foreclosure services for literally all lenders in California, Nevada, Arizona, Washington, Oregon, Texas and other non-judicial foreclosure states.

The UTA has been actively involved in the legislative process for over 25 years and also regularly participates in amicus curiae efforts on behalf of the lending, servicing and foreclosure industries. More information on the UTA can be found at www.unitedtrustees.com.

Below is a brief bio of each of the four UTA Board members who are attending the meeting with the FHFA:

- **Robert Finlay**, 2011 and 2012 UTA President. Founding Partner at Wright, Finlay & Zak, a law firm representing the mortgage-related interests of the foreclosure, lending and servicing industries. RAN approved firm in CA and NV.
- **Elizabeth M. Knight**, 2012 UTA Secretary. Owner of PLM Lender Services, Inc. (since 1989), a company licensed by the California Department of Real Estate and Nevada Department of Corporations, handling of non-judicial foreclosures in CA and NV, private placement loan servicing, fund administration and loan document drawing. Fannie Mae approved trustee in CA.
- **Michelle Mierzwa**, 2010 through 2012 UTA Legislative Committee Member and 2012 Board Member. Corporate Counsel at Cal-Western Reconveyance Corporation, an independent foreclosure trustee providing non-judicial foreclosure and related services to the lending and servicing industries since 1982. FNMA RAN approved in CA, AZ, NV, WA, OR, ID, TX and UT, and FHLMC Designated Counsel in CA in conjunction with Pite Duncan, LLP.
- **Rande Johnsen**, 2009-2010 UTA President. President of Trustee Corps, Harmony Title Agency, and Harmony Escrow; Has been active in the default and foreclosure industry since 1983. Trustee Corps is an independent foreclosure trustee based in Irvine, CA offering service for financial clients on distressed loans and processing of non-judicial foreclosures in AZ, CA, ID, MT, NV, OR, TX and WA. Freddie Mac Designated Counsel in CA, AZ, and NV, and Fannie Mae Retained Counsel in CA and AZ with its affiliate law firm, Malcolm Cisneros.

II. NON-JUDICIAL FORECLOSURE OVERVIEW

Non-judicial foreclosure of a deed of trust has been the predominant method of enforcing defaulted loans secured by real property in the Western United States for over thirty years.¹ As noted by the California Supreme Court: “The nonjudicial foreclosure statutes - an alternative to judicial foreclosure - reflect a carefully crafted balancing of the interests of beneficiaries, trustors, and trustees. Beneficiaries, of course, want quick and inexpensive recovery of amounts due under promissory notes in default. Trustors, on the other hand, need protection against the forfeiture of valuable property rights. Trustees, the middlemen, need to have clearly defined responsibilities to enable them to discharge their duties efficiently and to avoid embroiling the parties in time consuming and costly litigation.”² To achieve the balance and efficiency of the non-judicial foreclosure system, many West Coast states have enacted comprehensive legislative frameworks regulating the step-by-step procedures trustees or foreclosure agents must follow in processing a non-judicial foreclosure. Many of these tasks are ministerial and do not call for the exercise of discretion or for legal interpretation.

The typical non-judicial foreclosure begins with a Notice of Default or a Notice of Acceleration/Breach/Intent to Foreclose, which provides for a period ranging from 20 to 125 days for the borrower to cure the default before a Notice of Sale can be issued or a sale can be conducted.³ Most state statutes require the Notice of Default to be recorded, mailed to the borrower and interested parties, and/or posted on the property securing the loan, and require the Notice of Sale to be recorded, mailed, posted, and/or published in a newspaper of general circulation in the city or county where the property is located. The above requirements serve the dual purposes of providing the borrower with ample notice and opportunity to cure the

¹ Alaska, Arizona, California, Colorado, Hawaii, Idaho, Montana, Nevada, New Mexico, Oregon, Texas, Washington and Wyoming have enacted statutes providing for a non-judicial foreclosure process. In addition to these Western states, Alabama, Arkansas, the District of Columbia, Georgia, Iowa, Michigan, Minnesota, Mississippi, Missouri, New Hampshire, North Carolina, Oklahoma, Rhode Island, South Dakota, Tennessee, Virginia, West Virginia, and Wisconsin, have enacted non-judicial processes, for a total of thirty states.

² *I.E. Associates v. Safeco Title Ins. Co.* (1985) 39 Cal.3d. 281, 288.

³ California and Nevada – three month period between Notice of Default and Notice of Sale, then another 20 days before sale; Washington – 30 day period between notice of Default and Notice of Sale, then another 90 days before sale date; Arizona – 90 day period between Notice of Breach/Notice of Sale and conduct of sale; Oregon and Idaho 121 days between Notice of Default and conduct of sale.

default and providing ample notice to the general public of the foreclosure and impending sale such that the public auction will bring the highest possible price for the property.⁴

As the non-judicial foreclosure process is governed by statutes and does not require the filing of a complaint with the court, an attorney is not required to initiate or to be involved in the non-judicial process. Many Western states have enacted statutes dictating who can act as a trustee under a deed of trust, but none of the states providing for a non-judicial process limit the ability to act as trustee only to attorneys.⁵ Thus, the non-judicial foreclosure process does not require court supervision or attorney involvement. However, an attorney can and occasionally does act as a trustee in a non-judicial state. In addition, many trustees have general counsel to advise the trustee client.

III. FANNIE MAE AND FREDDIE MAC'S DESIGNATED PROGRAMS

Below is a brief explanation of how non-judicial foreclosures have been handled under Fannie Mae's Retained Counsel Program ("RAN"), Freddie Mac's Designated Counsel Network and by Servicers on non-Freddie Mac or Fannie Mae loans.

Fannie Mae Loans

In California, and until recently, Nevada and most of the non-judicial foreclosure states, non-judicial foreclosures were primarily referred directly to foreclosure trustees. Some of the foreclosure trustees were closely related to a Fannie Mae RAN Law Firm, while other trustees were independent of any law firm and still others are "servicer-controlled". Regardless of the

⁴ "The purposes of the non-judicial foreclosure sale statutes are to protect the trustor (debtor) from wrongful loss of the property and to provide a quick, inexpensive, and efficient remedy for creditors of defaulting debtors. The debtor is protected by notice requirements..." *Moeller v. Lien* (1994) 25 Cal. App 4th 822, 832)

⁵ California has no limitations on who can act as a trustee upon proper substitution. *Cal. Civ. Code §2924, et seq.* Alaska requires any person or entity acting as a trustee to post a \$100,000.00 bond if it is not a licensed attorney. *Alaska Statutes* 34.20.125. Arizona requires a trustee to be a licensed escrow company, insurance company, bank or savings and loan, real estate broker, a title company OR an attorney. *Ariz. Rev. Stat.* 33-803. Oregon requires that a trustee be a licensed escrow company, a title company, a savings and loan or banking institution, OR an attorney. *Or. Rev. Stat.* 86.790. Idaho requires that a trustee be a licensed fiduciary, a title company, a savings and loan or banking institution, OR an attorney. *Idaho Code* §45-1504. Utah requires that a trustee be a licensed fiduciary/trustee, a title company, a savings and loan or banking institution, OR an attorney with an office in the state. *Utah Code* §57-1-21. Nevada allows many categories of persons or entities to act as trustee, including: a licensed escrow company, a company with a Nevada business license, a licensed fiduciary/trustee, a licensed debt collection agency, a title company OR an attorney. *Nev. Rev. Stat. Chapter 107.* Washington requires a trustee to be a corporation organized under the laws of Washington, a title company, a bank or savings and loan association, OR a Washington attorney, all with an office located in Washington. *Rev. Code. Wash.* 61.24.010.

nature of the trustee, the non-judicial foreclosure was generally referred directly to the trustee by the servicer. The legal work, such as bankruptcy, eviction or contested matters, was handled by a designated RAN Law Firm.

The 2011 revisions to the RAN changed the referral process in states like Nevada, Idaho, Utah, Oregon and other non-judicial states. Beginning in May 2011, all non-judicial foreclosure referrals in those states were required to go through one of the RAN Law Firms. The designated law firm could then handle the foreclosure itself (as trustee) or through a foreclosure trustee. In most instances the non-judicial foreclosure continued to be handled by a trustee, and not directly by the designated law firm. The designated law firm would be responsible for all legal work on the file, as well as the reporting on all aspects of the file (including any non-judicial foreclosures).

Freddie Mac Loans

Freddie Mac has a similar state specific Designated Counsel program, with one primary difference: Instead of *only* approving law firms, Freddie Mac will approve law firm/trustee combinations that can provide “cradle to grave” foreclosure and legal services. Under both Fannie Mae and Freddie Mac programs, the Servicer is free to select any designated firm or trustee.

Non-Fannie Mae / Freddie Mac Loans

Loans that are not owned by Fannie Mae and Freddie Mac are generally referred to foreclosure trustees or, occasionally, law firms based on the particular servicer’s internal requirements. Each Servicer has its own “approved vendor list”, which is normally state specific. Being either Fannie Mae or Freddie Mac retained or designated counsel is not the controlling factor in who the Servicer uses, however it can be a determining factor for being approved by the Servicer. Many servicers will also mandate compliance with Fannie Mae or Freddie Mac fee structures.

IV. THE UTA'S MESSAGE

The UTA wants to convey to the FHFA, the important and longstanding role of the foreclosure trustee in non-judicial states, and to ensure that its member trustees (including licensed attorneys) can continue to operate professionally and independently in a cost-effective manner by receiving direct referrals from their Srviceer clients in non-judicial states. The UTA would welcome the creation of certain minimum criteria or qualifications of a trustee in order to receive direct referrals from FNMA and FHLMC, and we offer our expertise and experience in this specialized area to assist the FHFA in creating these threshold requirements.

The UTA thanks you in advance for the FHFA's time and consideration.