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August 15, 2014

Mr. Malcolm L. Stewart
Deputy Solicitor General
Mr. Allon Kedem
Assistant to the Solicitor General
Office of the Solicitor General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Re: *Federal National Mortgage Association v. Sundquist*, No. 13-852

Dear Messrs. Stewart and Kedem:

I am writing on behalf of respondent Loraine Sundquist to provide some additional discussion of a point made on p. 10 of my letter of July 17, 2014: The application of Utah law in this case does not implicate 12 U.S.C. § 92a(a) or, for that matter, the OCC's regulation at 12 CFR § 9.7(d), because the legislative grant of authority to conduct nonjudicial foreclosures in Utah only to attorneys and title insurance agencies does not prevent a national bank from acting in a fiduciary capacity, or in any way impair a national bank's fiduciary powers. A nonjudicial foreclosure under a trust deed is not a fiduciary act under the laws of either Utah or Texas, the two potentially relevant jurisdictions.

The essential premise of the view that Texas law governs the ability of a national bank to conduct a nonjudicial foreclosure on a Utah deed of trust is that such foreclosure activity constitutes action in a fiduciary capacity within the meaning of section 92a. In fact, however, neither Texas law nor the law of Utah treats the exercise of such powers by the trustee of a trust deed as action in a fiduciary capacity.

The Texas statute authorizing nonjudicial foreclosure on a trust deed unambiguously states that the trustee of a trust deed "may not be … held to the obligations of a fiduciary of the mortgagor or mortgagee." Tex. Prop. Code § 51.0074(b)(2); *see also Sanchez v. Wells Fargo Nat'l Bank, N.A.*, 2014 WL 722103, at *3 (W.D. Tex. Feb. 24, 2014) (dismissing claim for breach of fiduciary duty against a trustee of a trust deed).

Similarly, under Utah law, merely using a trust deed to secure a loan on real property does not create a fiduciary relationship. *See First Sec. Bank of Utah, N.A. v. Banberry Crossing*, 780 P.2d 1253, 1256 (Utah 1989); *Russell v. Lundberg*, 120 P.3d 541, 545 (Utah Ct. App. 2005); *Five F, L.L.C. v. Heritage Sav. Bank*, 81 P.3d 105, 108 (Utah Ct. App. 2003); *see also Blodgett v. Martsch*, 590 P.2d 298, 302–03 (Utah 1978) (finding that evidence of a special relationship of trust beyond the "mere utilization of a trust deed in the loan transaction" is necessary for creation of a fiduciary duty). In Utah, a foreclosing "trustee's" primary duties consist of giving notice of default and notice of sale, conducting the sale as auctioneer, distributing the proceeds, and delivering a "trustee's deed" to the successful bidder, none of which is a fiduciary act.

That foreclosing on a deed of trust is not an action taken in a fiduciary capacity renders section 92a(a)'s provision that national banks must be permitted to act in a fiduciary capacity if state banks or other competitors are permitted to do so inapplicable, regardless of whether the state whose law is at issue is that of Utah or Texas.

Of course, both states use the word "trustee" to identify the third party that nominally holds legal title under a trust deed. But the word in itself is only a title, and section 92a makes clear that it is not triggered by a mere title. Section 92a applies to the right to "act as trustee … or in any *other* fiduciary capacity" (emphasis added)—language that makes clear that the statute uses the words "act as trustee" only to describe actions taken pursuant to a fiduciary capacity recognized under state law. It is the substance of the act that is at issue, not the title of the actor.

In any event, Utah law does not prevent a bank (including an out-of-state national bank) from acting as a "trustee" under a trust deed, but only from conducting a nonjudicial foreclosure, which does not constitute acting in a fiduciary capacity under the law of either Texas or Utah.

Moreover, the explicit provision of Texas law that a trust deed "trustee" does not have any obligations of a fiduciary means that the three factors in 12 CFR § 9.7(d) cannot require application of Texas law to empower a national bank to foreclose on a trust deed in Utah in contravention of Utah law. *First*, even if the bank performed all the relevant paperwork in Texas (of which there is no evidence in the record), it did not thereby "accept[] [a] fiduciary appointment" in Texas, because being designated a trust deed "trustee" is not a fiduciary appointment under Texas law. *Second*, ReconTrust likewise could not have "execute[d] the documents that create the fiduciary relationship" in Texas, because the trust deed creates no such "fiduciary relationship" under Texas law.[1] *Third*, ReconTrust did not make any "discretionary decisions regarding the investment of fiduciary assets" in Texas, because being the "trustee" of a trust deed does not involve discretionary decisions concerning the investment of any "fiduciary assets," or any assets at all.

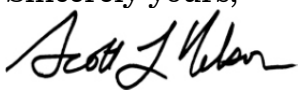
[1] In fact, ReconTrust did not execute any documents creating any relationship, let alone a fiduciary one.

These considerations all underscore the basic point that the non-judicial foreclosure of trust deeds has nothing to do with the concerns underlying section 92a and OCC's regulation. Neither in Utah nor in Texas, nor in any jurisdiction, does a trust deed create the type of trusteeship or fiduciary relationship with which the statute and the regulation are concerned. It is merely a statutory alternative to a traditional mortgage that, in some circumstances, places the statutory power of sale in the hands of a party that is independent of both the lender and the property owner.

The mere happenstance that these mortgage alternatives use the words "trust deed" and "trustee" does not by itself justify using section 92a as a mechanism for exporting foreclosure laws of one state to another.

For these reasons, as well as those set forth in our earlier letter, the Solicitor General should recommend denial of the petition for a writ of certiorari in this case. We look forward to meeting with you to discuss these issues further and to answer any questions you may have.

Sincerely yours,



Scott L. Nelson

cc: Doug Short
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