

# Stewart Bulletin

## Stewart Title Guaranty Company

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WA2012004

Date: August 31, 2012

To: All Washington Issuing Offices

RE:

MERS issues in Washington State: The Bain Opinion  Print

Dear Associates:

The Washington State Supreme Court issued an opinion certifying to the US District Court for the Western District of Washington in Bain v. Metropolitan Mortgage, etc. that under the current state of Washington law, unless MERS has an ownership interest in the underlying indebtedness, MERS is not a beneficiary within the terms of the Washington law (and does not have standing to participate in a non-judicial foreclosure). The Washington court specifically declined to rule on what the legal effect of acting as an “unlawful beneficiary” would be. This raises a number of underwriting issues for title insurers and their agents.

The underwriting guidelines below are issued in conjunction with the guidelines contained in Stewart Bulletin SLS2010023 Insuring at or after Mortgage or Deed of Trust Foreclosure.

For the purposes of this memorandum, we will define “participation” as the execution of any document in the non-judicial foreclosure process -- substitution of trustee, notices, anything other than an assignment of “any interest under the deed of trust to the holder of the secured note.”

### **Participation by MERS in non-judicial foreclosures involves a number of potential fact patterns and results in these guidelines:**

1. MERS assigned such interest as it may have had to the holder of the secured obligation, prior to the commencement of the foreclosure; in effect MERS does not participate in the foreclosure. No problem insuring the REO property or subsequent chain of title resulting from the foreclosure, if no other complications exist.
2. MERS executed a substitution of trustee or otherwise participated in the foreclosure process prior to the assignment of such interest as it may have had to the holder of the secured obligation, and the foreclosure has been completed within the past seven years that results in:
  - a. The title being held by the lender (REO) – submit to local underwriting personnel with copies of the various foreclosure documents through the vesting deed; or
  - b. The title being held by a purchaser from the grantee on the Trustee’s Deed where:

- i. Stewart has insured previously – you may continue to insure; or
  - ii. Stewart has not previously insured – submit to local underwriting personnel, with full chain of title from first indication of foreclosure or default.
3. If the title has been the subject of litigation disputing the foreclosure, please submit to local underwriting personnel with at least a citation to the case, and preferably with a copy of the result of the litigation or the court docket to the pending litigation.
  4. Files involving MERS and Fannie Mae, Freddie Mac, or other similarly situated government sponsored entities should be referred to local underwriting personnel for review and discussion prior to issuing any commitment.

There is no appeal available from this determination by the State Supreme Court in Bain. We expect that there will be additional litigation to determine the effect that the MERS participation in a foreclosure will have upon the resulting title, and these matters are being monitored for further clarification.

If you have any questions relating to this or other bulletins, please contact a Stewart Title Guaranty Company underwriter.

For on-line viewing of this and other bulletins, please log onto [www.vuwriter.com](http://www.vuwriter.com).

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## **References**

### **Bulletins Replaced:**

None.

### **Related Bulletins:**

[SLS2010023](#) Insuring at or after Mortgage or Deed of Trust Foreclosure

### **Underwriting Manual:**

None.

### **Exceptions Manual:**

None.

### **Forms:**

None.