



**HARPSTER LAW LLC**  
4800 SW Meadows Road, Suite 300  
Lake Oswego, OR 97035

Main: (503) 534-3686  
Fax: (503) 926-9153  
Email: kelly@harpsterlaw.com  
Email: kelly@harpsterlaw.com

TESTIMONY IN OPPOSITION TO SB 968  
May 18, 2017

CHAIR BEYER AND MEMBERS OF THE COMMITTEE:

I am an attorney in Lake Oswego, and I spend most of my time on mortgage and real estate litigation and advising the service provider for Oregon's foreclosure mediation program. I write to express my opposition to SB 968.

**SB 968 Overturns Well-Established Law and Creates Legal Uncertainty.** Today, most lenders sell the mortgage loans they make into the secondary market shortly after origination. By the time the loan is paid off or foreclosed, somebody other than the original lender owns the loan. Ideally, we would be able to look in the public land records and see who owns the loan at any given time. But it's not that easy.

As the US Supreme Court held in 1872: a mortgage follows the note. Each time a holder assigns the mortgage note, the lien is transferred automatically by operation of law even if there is no recordable written assignment. As a result, under current law, the note and the beneficial interest in the trust deed cannot be separated. This is a very important legal principal for both lenders and borrowers. It protects the lender's interest in having an enforceable lien and the borrower's interest in making sure that only the person owed money can force a sale of the home.

SB 968 intentionally severs the beneficial interest in the trust deed from the right to enforce the note. It allows the note holder to convey the beneficial interest to a straw man, like MERS. When the note is sold or transferred, the beneficial interest in the lien does not follow by operation of law. Instead, the beneficial interest remains with the straw man unless and until a successor records a document naming a new beneficiary or a new straw man. This is a radical departure from the current Trust Deed Act and more than a century of common law.

That change will have consequences. For example, SB 968 does not tell us what happens if the straw man wants to foreclose. The straw man cannot declare a default. Only the person entitled to enforce the note can do that, and the identity of *that* person is determined by other law—the Uniform Commercial Code. How will these different bodies of law interact? Nobody knows. At the very least, SB 968 will create a huge legal mess that will take years of litigation to sort out.

**SB 968 Reverses *Brandrup* and Rewards Lenders Who Knowingly Violated the Law.** SB 968 does not merely change the status quo going forward; the bill rewrites history by changing the law retroactively. We have known what the law in Oregon requires with great certainty since 2013, when the Oregon Supreme Court decided the seminal MERS case, *In re Brandrup*. In 46 dense pages, the Court clarified the Trust Deed Act and harmonized it with more than a century of common law. At this point, retroactively changing the law only rewards lenders who knew what the law required, but failed to follow it.

**SB 968 Encourages Lenders to Break Their Promises.** SB 968 removes a provision of current law that prohibits a trustee from foreclosing when the homeowner is fully performing a loan modification or another agreed foreclosure avoidance measure. Why should a lender be permitted to foreclose if the borrower is performing as agreed? We should not encourage lenders to break their promises to homeowners.

**SB 968 Encourages Fraud.** SB 968 creates worrisome presumptions. If a straw man beneficiary signs an instrument, he does not have to prove that he had authority to do so if there is a dispute. One must prove that the straw man does not have authority, even though the straw man is the one with all the evidence. SB 968 says that any recital in any document that must be recorded under the Act is presumed to be true, even if it is not. That is a recipe for encouraging fraud in an area where fraud has been rampant in the recent past. We should be discouraging fraudulent practices, not making them easier to conceal.

SB 968 is bad policy. It will create grave uncertainty and destroy the careful balance struck in the Trust Deed Act between the rights of lenders and the rights of borrowers, reducing transparency while encouraging fraudulent practices. SB 968 not only reverses the Supreme Court's decision in *In Re Brandrup*, a case that finally brought clarity and certainty after years of costly litigation, SB 968 is at odds with over 150 years of established common law. This bill would spawn years of litigation as borrowers and courts try to make sense of a completely new legal framework.

For all these reasons, I urge you to take no further action on SB 968.

Sincerely,

A handwritten signature in blue ink, appearing to be 'K. Harpster', with a long horizontal flourish extending to the right.

Kelly L. Harpster