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MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.: A SURVEY OF CASES DISCUSSING MERS' AUTHORITY TO ACT

John R. Hooge
Lawrence, KS

Laurie Williams
Chapter 13 Trustee
Wichita, KS

INTRODUCTION

As the mortgage meltdown has spread and deepened nationwide, courts must grapple with challenges to efforts to recover on defaulted mortgages. The challenges involve a complex mix of legal concepts and principles. Everything from contract law, state statutory foreclosure law, negotiable instrument law under the Uniform Commercial Code agency, standing and real party in interest issues, to evidentiary and civil procedure issues have been implicated in recent cases. What follows is a survey of the cases analyzing the legal authority of Mortgage Electronic Registration Systems, Inc. (MERS) to act for its

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constituents in enforcing rights under defaulted mortgages.

WHAT IS MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.?

Before discussing the cases that have endeavored to decide what MERS is legally able and authorized to do, it may be useful to consider what MERS is. One court explained that “MERS is a private corporation that administers the MERS System, a national electronic registry that tracks the transfer of ownership interests and servicing rights in mortgage loans.”¹ Another court summarizing the history of MERS explained:

In 1993, the MERS system was created by several large participants in the real estate mortgage industry [Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, Government National Mortgage Association, and the Mortgage Bankers Association, to name a few] to track ownership interests in residential mortgages. Mortgage lenders and other entities, known as MERS members, subscribe to the MERS system and pay annual fees for the electronic processing and tracking of ownership and transfers of mortgages. Members contractually agree to appoint MERS as their common agent on all mortgages they register in the MERS system.²

The need for the MERS tracking system resulted from the sea change in the mortgage lending industry that began in the 1990’s. Mortgage loans today are rarely made and serviced for the life of the loan by the original lender. Once originated, the loans are sold and possibly resold many times on the secondary market. “Looking at the mort-

gage banking industry today, it is apparent that in many mortgage transactions a George Bailey no longer sits in the corner office of the Building and Loan Association in Bedford Falls.”³ “MERS was designed to improve the efficiency and profitability of the primary and secondary mortgage markets.”⁴ “The benefit of naming MERS as the nominal mortgagee of record is that when the member transfers an interest in a mortgage loan to another MERS member, MERS privately tracks the assignment within its system but remains the mortgagee of record.”⁵ As long as the sale of the note is made to another MERS member, MERS remains the beneficiary of record on the deed of trust or mortgage of record on the mortgage and continues to act as “nominee for the new beneficial owner.”⁶ “According to MERS, this system ‘saves lenders time and money, and reduces paperwork, by eliminating the need to prepare and record assignments when trading loans.’”⁷

The way MERS is designed to work has been described as follows:

Through the MERS System, MERS becomes the mortgagee of record for participating members through assignment of the members’ interests to MERS. MERS is listed as grantee in the official records maintained at county register of deeds offices. The lenders retain the promissory notes, as well as the servicing rights to the mortgages. The lenders can then sell these interests to investors without having to record the transaction in the public record.⁸

One court observed that MERS in essence privatized part of the mortgage recording system, “[a] side effect of the MERS system is that a transfer of an interest in a mortgage loan between

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two MERS members is unknown to those outside the MERS system.”⁹ Whereas when a transfer is made to a non-MERS member an assignment should be drafted, executed and recorded in the land recording office.¹⁰ This is not an insignificant number of transactions. In *Jackson v. Mortgage Elec. Registration Sys., Inc.*, decided in August 2009, MERS asserted that it is “currently the nominal mortgagee on approximately two-thirds of all ‘newly originated’ residential loans nationwide.”¹¹ Moreover, back in 2006 MERS’ stated hope was to “register every residential and commercial home loan nationwide on its electronic system.”¹²

The operative document defining MERS and its rights and functions is the mortgage or deed of trust. The MERS mortgage is generally a uniform form and the provisions are fairly consistent. These instruments all typically begin with a section identifying the parties to the transaction. A fairly typical example is:

“(A) ‘Security Instrument’ means this document which is dated _____. (B) ‘Borrower is _____, husband and wife... ‘Borrower is the mortgagor under this Security Instrument. (C) ‘MERS’ is Mortgage Electronic Registration Systems, Inc. MERS is a separate corporation that is acting solely as a nominee for Lender and Lender’s successors and assigns. MERS is the mortgagee under this Security Instrument. MERS is organized and existing under the laws of Delaware and has an address telephone number... (D) Lender is _____. Lender is a corporation, organization under the laws of _____.... Lender is the mortgagee under this Security Instrument.”¹³

A typical provision grants the security interest in the realty to the Lender:

“This security instrument secures *to Lender* (I) the repayment of the loan, and all renewals, extensions and modifications of the Note; and (II) the performance of Borrower’s covenants and agreements under this Security Instrument and the Note. For this purpose and in consideration of the Debt, Borrower does hereby mortgage, grant and convey to MERS *solely as nominee* for Lender and Lender’s

successors and assigns and the successors and assigns of MERS, with the power of sale, the following described property[.]”¹⁴

Another typical provision says that:

“Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender’s successors and assigns) has the right to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the property; and to take any action required of Lender, including, but not limited to, releasing and canceling this Security Instrument.”¹⁵

No contractual definition of ‘nominee’ is contained in the mortgage or deed of trust. The documents do not expressly state that MERS is an “agent” of its members.

It also may be of use to understand what MERS is *not*. MERS does not purport to own or hold the promissory note. It has no right to payments made on the notes.¹⁶ It is not a mortgage banker. MERS does not “take applications, underwrite loans, make decisions on whether to extend credit, collect mortgage payments, hold escrows for taxes and insurance, or provide any loan servicing functions whatsoever.”¹⁷ MERS does not lend money or acquire the right to receive payments on mortgage loans.¹⁸ MERS does not receive compensation from consumers, just fees from its members for tracking ownership of the liens.¹⁹

As long as mortgagors made their payments, the MERS System worked quietly. However, with the sub-prime meltdown came large numbers of defaults, foreclosures and bankruptcies. Questions arose due to the unusual wording in MERS mortgages/deeds of trust. Issues of standing were raised in response to motions for relief from stay filed in bankruptcies and in foreclosures in state courts. Notwithstanding the millions of MERS mortgage loans, there is a paucity of case law discussing these issues. The number

of relevant decisions is increasing with differing rationales and outcomes.

A. MERS Authority to Assign a Mortgage and/or Record a Mortgage Assignment

As one court noted, when MERS began recording mortgages in its name as the nominal mortgagee, questions arose concerning MERS authority to act on behalf of its members.²⁰ One issue is whether MERS as nominee mortgagee has authority to execute and record assignments of mortgages from an original lender to a subsequent purchaser of the mortgage.

One of the earliest cases testing MERS' authority to act on behalf of its members is *MERSCORP, Inc. v. Romaine*.²¹ In 2001, the clerk of the court in Suffolk County, New York began refusing to record mortgages and assignments and other instruments submitted and executed by MERS. This was in response to an informal opinion of the New York Attorney General that said recording a MERS instrument would violate New York recording statutes. The parent of MERS, MERSCORP, instituted an action to force the Suffolk County clerk to accept MERS mortgages as well as MERS assignments of mortgages and other MERS instruments.

The New York Court of Appeals decided that recording MERS instruments did not violate New York recording statutes and ordered the county clerk to accept MERS mortgages, MERS assignments and other MERS instruments.²² The court did not analyze whether MERS had statutory or contractual authority to execute and/or assign these instruments. It said only that the act of *recording* these instruments did not violate existing state recording statutes and in fact such recording was specifically permitted. It should also be noted that in a concurring opinion, Judge Ciparick specifically noted this case left undecided the issue whether MERS had standing to bring foreclosure actions.²³

Interestingly, in *Jackson*,²⁴ the court noted the potential problems raised concerning MERS' authority to *record* assignments from and to its members and non-members, but found that this problem had been avoided in Minnesota because the Minnesota legislature had enacted a statute

(“frequently called ‘the MERS statute’”) that expressly gave nominees the right to record assignments and other instruments.²⁵

One court has concluded MERS has no authority to execute mortgage assignments. In *LaSalle Bank National Association v. Lamy*,²⁶ LaSalle Bank was attempting to foreclose a mortgage based on an assignment of the mortgage from the original lender. The assignment was issued by MERS as the nominee of the original lender. The court denied relief to LaSalle in the foreclosure proceeding. The court reasoned that MERS did *not* have authority to assign the mortgage as nominee for the original lender to LaSalle. The court explained:

It is axiomatic that to be effective, an assignment of the note and a mortgage given as security therefore must be made by the owner of such note and mortgage and that an assignments (sic) made by entities having no ownership interest in the note and mortgage pass no title therein to the assignee. (Citation omitted). A nominee of the owner of a note and mortgage may not effectively assign the note and mortgage to another for want of an ownership interest in said note and mortgage by the nominee.²⁷

The *Lamy* court did not discuss the rights of the parties set forth in the contract provisions naming MERS as nominee/mortgagee. It also did not discuss the meaning of the term “nominee” and what authority or rights that relationship conveys. It reasoned that a number of New York cases had already held that MERS could not prosecute a foreclosure action in its own name as nominee because it lacked ownership of the note and mortgage at the time of the foreclosure. From there, it then made the leap that if MERS could not foreclose because it was not the owner of the note and mortgage it likewise could not effectively assign the note and mortgage. *Lamy* did not find its conclusion inconsistent with the holding in *Romaine* noting that *Romaine* involved only the county clerk's ministerial act of *recording* a MERS document, not the actual assignment of the note and mortgage.²⁸

The Wyoming bankruptcy court in *In re Relka*,²⁹ reached the opposite conclusion about MERS'

authority to assign a mortgage on behalf of the original lender. It held that based on the language in the original mortgage designating MERS as the mortgagee ““acting solely as a nominee for Lender and Lender’s successors and assigns”” that MERS could execute and record an assignment of the mortgage.³⁰ The *Relka* court did not analyze what rights a mortgagee acting “solely as nominee” holds but instead looked to other provisions in the mortgage that purport to give MERS “only legal title” to the interest granted by the borrower and ““if necessary to comply with law or custom, MERS (as nominee for Lender and Lender’s successor and assign) has the right to exercise any or all of those interest[s], including, but not limited to, the right to foreclose[.]””³¹ The court held that one of the non-exclusive rights enunciated in this provision is the right to assign the mortgage.³² The court did not identify any particular law or custom that would require MERS to exercise the lender’s rights under the note and mortgage.

In *Jackson*, the Minnesota Supreme Court addressed a related but discrete issue pertaining to MERS authority. The U.S. District Court in Minnesota had certified this question to the state supreme court: “When MERS serves as mortgagee of record as nominee for a lender and that lender’s successors and assigns, and the original lender subsequently sells, assigns or transfers its rights under the mortgage, has there been an assignment of the mortgage that must be recorded” pursuant to Minnesota foreclosure statutes. Unfortunately, this is not the question the Minnesota Supreme Court answered. The court reformulated the question as follows:

Where an entity, such as defendant [Mortgage Electronic Registration Systems, Inc.], serves as mortgagee of record as nominee for a lender and that lender’s successors and assigns and there has been no assignment of the mortgage itself, is an assignment of the ownership of the underlying indebtedness for which the mortgage serves as security an assignment that must be recorded prior to the commencement of a [non-judicial] mortgage

foreclosure [under Minnesota foreclosure statutes]?³³

Or, stated another way, does MERS have the authority to institute a non-judicial foreclosure in its own name when the original lender has assigned the underlying note but not assigned the mortgage securing the note without first recording an assignment of the note? The court noted the answer to the certified question turned on the legal question of what constitutes an assignment of mortgage under the Minnesota statutory foreclosure structure.

The court did not actually address whether MERS has the authority to assign and record the assignments. Instead the issue is framed as whether MERS must assign and record assignments of each transfer of the promissory note before foreclosure may be commenced. It seems to conclude, at least with respect to recording assignments, it may do so only because the Minnesota statute grants nominees the authority to record instruments. Because the court ultimately concluded MERS does *not* have to assign the note, it never reached the issue whether MERS, contractually or otherwise, may execute an assignment.

Procedurally, the issue arose in four separate cases in various stages of the mortgage foreclosure process. In each case the foreclosure had been initiated by MERS. The plaintiffs in the four cases claimed MERS had failed to record assignments of the mortgages, one of the statutory requirements for non-judicial foreclosure under Minnesota law.

The court thoroughly reviewed the history of MERS and the functioning of the primary and secondary home mortgage markets. The court observed that:

MERS has developed a system of structuring mortgage transactions that presents a potential conflict with some of our traditional assumptions and principles governing real property law. By acting as the nominal mortgagee of record for its members, MERS has essentially separated the promissory note and the security instrument, allowing the

debt to be transferred without an assignment of the security instrument.³⁴

The court then set about to analyze how the MERS system fit within existing statutory real property law and state recording statutes.

The plaintiffs' theory was that under the historical understanding of the mortgage foreclosure statutes, the term 'mortgage' refers to the security instrument *and* the note; and, under long accepted principles of real property law, an assignment of the note carries with it and therefore constitutes an assignment of the mortgage as a matter of law. Thus, because the promissory note had been assigned from the original lender, that assignment(s) was in essence an assignment of the mortgage and thus must be recorded; no such assignment had been recorded; MERS, then, was not in compliance with Minnesota foreclosure statutes in instituting the foreclosures without recording and giving notice of the note assignments between its members.

First the court concluded the foreclosure statutes' references to 'mortgage' meant only the security instrument, not the promissory note.³⁵ Thus under the plain language of the statutes, assignment of the promissory notes is unnecessary. Next, the court addressed whether assignment of the note constituted an assignment of the mortgage as a matter of law. Plaintiffs argued that, because under Minnesota property law the 'mortgage follows the note', assignment of the promissory note is also an assignment of the mortgage by operation of law, and therefore must be recorded. Here, the court turned to an analysis of the difference between legal and equitable title to the mortgage. The court reasoned that assignment of the promissory note *transferred only equitable title* to the mortgage. To foreclose, record and legal title "must concur and co-exist at the same time in the same person[.]"³⁶ Whereas, equitable interests do not have to be recorded for foreclosure purposes.³⁷ Plaintiffs tried to argue that because MERS is only a nominee for the member and as such, it does not even hold legal title, the member holds the legal title and equitable title to the mortgage. Yet the court found MERS remained the mortgagee of record on the plaintiffs' loans and there was no evidence that MERS had trans-

ferred or assigned the security instruments. The court also found that the legal and equitable title can be separated. And if "the holder of the legal title allows the equitable owner to foreclose, using his name, both are bound, and the foreclosure is valid. It is a matter between them alone, and does not concern the mortgagor... and he could not object."³⁸

The court held:

Our case law establishes that a party can hold legal title to the security instrument without holding an interest in the promissory note. The cases demonstrate that an assignment of only the promissory note, which carries with it an equitable assignment of the security instrument, is not an assignment of legal title that must be recorded for purposes of a foreclosure [under the Minnesota statutory foreclosure scheme].³⁹

Without discussing the meaning or nature of the term "nominee" or what rights that status might implicate, the court concluded that because MERS is the mortgagee of record on the recorded mortgage it continued to hold legal title to the mortgage. As record and legal title holder to the security instrument, MERS did not have to record an assignment of the notes.

The dissent took issue with this analysis. It observed that MERS was both acting as legal title holder (but only legal title) to the mortgage being foreclosed and at the same time acting as a nominee in foreclosing the mortgage for the MERS member that held the promissory note. Whenever the promissory note is assigned between members, the member for which MERS acts as nominee, and on whose behalf MERS holds legal title changes, and those changes, the dissent concludes, should then be recorded before the mortgage can be foreclosed.⁴⁰

Jackson is important because from its analysis flow a number of possible implications. First, since legal and equitable title to the mortgage may be split, no assignment of the note or apparently the mortgage from the original owner to any subsequent owner/holder, is needed to foreclose, at least under Minnesota law. There is simply no issue as to whether MERS has the authority to make or record an assignment; an assignment

is simply not necessary. Second, if MERS holds legal and record title, such that it may institute non-judicial foreclosures, it would seem then that MERS would have standing and is the real party in interest that could properly prosecute mortgage foreclosures, under Minnesota law. However, that question is never answered directly or even alluded to in *Jackson*. The identity of the beneficial owner/holder of the note and mortgage might only be relevant to an evidentiary defense that the original note cannot be produced by the purported holder.

B. MERS is Not a Necessary Party to a Foreclosure

In *Landmark National Bank v. Kesler*,⁴¹ the Kansas Supreme Court found that MERS was not a contingently necessary party and denied its motion to intervene and set aside a default judgment and foreclosure sale. The first mortgagee, Landmark National Bank, filed suit to foreclose its mortgage loan. It named as defendants the debtor and Millenia Bank, the original lender on a second mortgage loan. Landmark took default judgment and conducted a foreclosure sale. Before the sale was confirmed, motions to intervene and set aside the judgment and sale were filed by Sovereign Bank, apparent purchaser of the second mortgage loan, and by MERS. The second mortgage contained typical MERS language naming MERS mortgagee, acting “solely as nominee for Lender, as hereinafter defined, and Lender’s successors and assigns.” Millenia had apparently sold the second mortgage loan to Sovereign, but no assignment was recorded with the Register of Deeds. In their motions, Sovereign and MERS asserted that MERS was a contingently necessary party and because MERS had not been given notice of suit, the judgment and the sale were invalid.

After hearing, the trial court denied the motions and confirmed the sale, finding that MERS was not a real party in interest and served only as an agent or representative for Millenia. Sovereign’s failure to record its interest with the Register of Deeds “precluded it from asserting rights to the mortgage after judgment had been entered.”⁴² MERS and Sovereign appealed. The court of appeals affirmed and the Supreme Court granted review to consider whether the trial court abused

its discretion when it found that “MERS lacked a meritorious defense to the foreclosure proceeding or had an interest that could be impaired[,]” and thus was not a contingently necessary party.⁴³

The court “examine[d] the nature of the interest in the mortgage that MERS... demonstrated[,]” and noted that its relationship to the transaction “is not subject to an easy description.”⁴⁴ The court quoted extensively from the second mortgage which “purported to define the role played by MERS in the transaction and the contractual rights of the parties.”⁴⁵

The court then focused upon and extensively discussed the possible meaning of “nominee:” “The parties appear to have defined the word in much the same way that the blind men of Indian legend described an elephant—their description depended on which part they were touching at any given time.”⁴⁶

The court noted the various meanings that were given by the parties for “nominee” and quoted the definition of nominee from Black’s Law Dictionary:

“[a] person designated to act in place of another, usu. in a very limited way” and as “[a] party who holds bare legal title for the benefit of others or who receives and distributes funds for the benefit of others.” This definition suggests that a nominee possesses few or no legally enforceable rights beyond those of a principal whom the nominee serves.⁴⁷

Citing the one published Kansas case discussing the term nominee, the court observed, “[t]he legal status of a nominee... depends on the context of the relationship of the nominee to its principal.”⁴⁸

The *Kesler* court then quoted from other decisions also surveyed in this article as to such relationship between MERS and a lender. The quoted cases held MERS was an agent or a representative of the lender. Since MERS was not the owner of the note and mortgage, it could not assign the note and mortgage.⁴⁹

The court continued:

The relationship that MERS has to Sovereign is more akin to that of a straw man than to a party possessing all the rights given a buyer.

A mortgagee and a lender have intertwined rights that defy a clear separation of interests, especially when such a purported separation relies on ambiguous contractual language. The law generally understands that a mortgagee is not distinct from a lender: a mortgagee is “[o]ne to whom property is mortgaged: the mortgage creditor, or lender.” (Black’s Law Dictionary 1034) (8th ed. 2004). By statute, assignment of the mortgage carries with it the assignment of the debt. K.S.A. 58-2323.⁵⁰

The court then pointed out that although MERS asserts “under some situations, the mortgage document purports to give it the same rights as the lender, the document consistently refers only to rights of the lender... [and] consistently limits MERS to acting ‘solely’ as the nominee of the lender.”⁵¹ The court then observed: “Indeed, in the event that a mortgage loan somehow separates interests of the note and the deed of trust, with the deed of trust lying with some independent entity, the mortgage may become enforceable.”⁵² The court quoted from other decisions (also surveyed in this article) echoing this point and that MERS does not hold or have the authority to assign notes.

The court in *Kesler* then considered what interest MERS could have in an “independent action for foreclosure”:

It did not lend the money to Kesler.... Neither Kesler nor anyone else involved in the case was required by statute or contract to pay money to MERS on the mortgage. “MERS is not an economic ‘beneficiary’.... It is owed and will collect no money from Debtors under the Note, nor will it realize the value of the Property through foreclosure[.]” If MERS is only the mortgagee, without ownership of the mortgage instrument [i.e., the note], it does not have an enforceable right. “[W]hile the note is ‘essential,’ the mortgage is only ‘an incident’ to the note[.]”⁵³

Kesler noted that MERS’ counsel declined to “demonstrate to the trial court a tangible interest in the mortgage.”⁵⁴ And further, that in a case before another state’s supreme court MERS itself

contended that it was not authorized to enforce or transfer mortgages.⁵⁵

The court noted the “economic policy” arguments made by MERS and amicus curiae that “the statutory recording system... grounded in seventeenth-century property law... is... unsuited to twentieth-century financial transactions.”⁵⁶ The court said “[w]hile this may be true, the MERS system introduces its own problems and complications... [H]aving a single front man, or nominee, for various financial institutions makes it difficult for mortgagors and other institutions to determine the identity of the current note holder.”⁵⁷

Quoting from another decision, the court then noted that investors that purchased loans from MERS should not be allowed to

“obscur[e] from the public the actual ownership of a mortgage, thereby creating the opportunity for substantial abuses and prejudice to mortgagors..., [and] should not be permitted to insulate [the mortgage purchaser] from the consequences of its actions in accepting a mortgage from [the original lender] that was already the subject of litigation in which [the original lender] erroneously represented that it had authority to act as mortgagee.”⁵⁸

The court further noted that it is not its duty to criticize the legislature’s registration requirements for “service of notice of litigation involving real property interests” or to substitute its view on economic or social policy.

Finally, the court dealt with the argument of MERS that due process guarantees in the Federal and Kansas Constitutions were violated since it did not receive notice of the proceeding and was denied the opportunity to intervene. The court noted that without a property interest at stake, MERS was not entitled to due process.

C. MERS Authority to Prosecute Mortgage Foreclosure Actions

A number of courts have reached the conclusion that MERS *does* have the right to bring mortgage foreclosures. In *In re Sina*,⁵⁹ the pro se defendants to a foreclosure sought to set aside the foreclosure-by-advertisement under Minnesota foreclosure statutes. The pro se defendants ar-

gued that MERS did not have standing to bring the foreclosure and that the lower court erred in not reaching the standing issue. While noting that the standing issue was not properly before it because the lower court never addressed standing, presumably due to the procedural posture of the case, the court nevertheless discussed MERS' standing. The court explained the facts in *Sina* as follows: The mortgagors purchased real estate in Minnesota and at the same time signed a note and mortgage in favor of Maribella Mortgage. Maribella then signed an assignment of the mortgage "in favor of" MERS. MERS in turn "sold and assigned the note and mortgage in the secondary market to Aurora Loan Services, Inc. (ALS). But MERS continued to hold the mortgage in its name, and it acted as a nominee for ALS with the power to foreclose the mortgage."⁶⁰ The court does not specifically set out the relevant terms of the documents referred to in the opinion and does not make clear which documents were actually of record or what the recorded documents specifically stated. Nonetheless, the court concluded that MERS had recorded an assignment to it before it commenced the foreclosure. The pro se defendants tried to claim that MERS was only acting as nominee for ALS. The court responded that, "[a]lthough the record shows that ALS serviced the mortgage, the assignment of mortgage was recorded in MERS's name."⁶¹ The court said MERS had retained the power to foreclose the mortgage in its name. However, again there is no analysis of the specific contract provisions involved and no discussion of the contractual or judicially determined meaning of nominee/mortgagee.

Two Florida appellate courts have in similarly conclusory fashion found standing for MERS to foreclose. In *Mortgage Electronic Registration Systems, Inc. v. Azize*,⁶² MERS was appealing a trial court's dismissal of its foreclosure on the basis that MERS was not the proper party to bring the action. The complaint in *Azize* was filed in the name of MERS as nominee for Aegis Lending Corporation. The court *sua sponte* raised the question of MERS ability to file suit as nominee for another corporation. The *Azize* defendants did not file an answer to the complaint and did not appear at the show cause hearing. The trial court dismissed the MERS filed complaint because the

court concluded that MERS was not the owner of the beneficial interest in the note and thus could not properly bring the foreclosure action. Reversing, the Florida appellate court did not directly find that MERS could proceed even if it did not own the beneficial interest in the note. The court found only that MERS alleged it was the owner and holder of the note and no one challenged that allegation in the pleadings.

In *Mortgage Electronic Registration Systems, Inc. v. Revoredo*,⁶³ MERS appealed the dismissal on standing grounds of a mortgage foreclosure proceeding initiated by MERS. Reversing the lack of standing holding, *Revoredo* found that the "clear majority" of courts have allowed MERS to bring foreclosures.⁶⁴ Moreover, the court was not troubled by the fact that MERS was not the "owner" of the note; it was the holder "by delivery" of the note. Nor was it concerned that:

Although [MERS] was called the "mortgagee" in the instrument and acted on behalf of the most recent purchaser-assignee-lender, however, MERS was not—again, as usual—its "owner." We simply don't think that this makes any difference.⁶⁵

Again, there is no identification in the opinion of the contractual provision or provisions that would give MERS the authority to foreclose in its own right or the authority to foreclose for the benefit of another. The court reasons that where questions have been raised about what MERS does or can do, "the problem arises from the difficulty of attempting to shoehorn a modern innovative instrument of commerce into nomenclature and legal categories which stem essentially from the medieval English land law."⁶⁶ The court held that no "substantive rights, obligations or defenses are affected by the use of the MERS device, there is no reason why mere form should overcome the salutary substance of permitting the use of this commercially effective means of business."⁶⁷

Another case allowing MERS to commence foreclosure is *Bucci v. Lehman Brothers Bank, FSB*.⁶⁸ The plaintiff sought to have a scheduled foreclosure sale canceled on the basis that MERS lacked standing to foreclose under Rhode Island mortgage foreclosure statutes. First the plaintiffs claimed the language of the mortgage contract did

not permit MERS to foreclose by power of sale. Here, the mortgage defined the “Borrower” and the mortgagors as the Buccis. The Lender was defined as Lehman Brothers Bank, FSB. MERS is identified as acting “solely as a nominee for Lender and Lender’s successors and assigns” and the “mortgagee under this Security Instrument.” The mortgage also contained a provision stating that “MERS holds only legal title to the interests granted by [the Buccis] in this [Mortgage], but, if necessary to comply with law or custom, MERS (as nominee for [Lehman] and [Lehman]’s successors and assigns) has the right to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property, and to take any action required of [Lehman][,] including, but not limited to, releasing and canceling this [Mortgage].”⁶⁹ In a separate provision, the mortgage authorized the Lender to give notice of default and acceleration to the Buccis, and gave the Lender, at its option, the power to invoke the statutory power of sale and give notice thereof.

Aurora Loan Services was servicing the note and mortgage; the note had been endorsed in blank and was held by LaSalle as the “custodian for the beneficial owner of the note.” MERS was described as being, “in its capacity as mortgagee,... the nominee of the beneficial owner of the Note.”⁷⁰ The Buccis defaulted; Aurora gave them notice of the default; MERS as nominee for the beneficial owner of the note initiated the foreclosure proceedings and noticed the foreclosure sale.

The Buccis claimed the mortgage only authorized the contractually defined Lender—Lehman Brothers—to institute the statutory power of sale. The court disagreed finding that MERS was specifically granted this power as nominee for the Lender. The provision giving the defined “Lender” the power to invoke a power of sale did not negate the other language in the mortgage “granting MERS, as mortgagee in a nominee capacity, the right to invoke the Statutory Power of Sale.”⁷¹ MERS rights under the mortgage contract were found to exist in addition to, and independently of, the rights of the Lender. MERS could invoke the statutory right of foreclosure because it was named as the mortgagee and nominee of Lehman and Lehman’s assignees; LaSalle Bank was in possession of the note in a trustee capac-

ity for the beneficial owner of the note; the current owner is an assignee of Lehman. “Therefore, MERS is the mortgagee as the nominee for the current beneficial owner of the Note.”⁷²

Buccis then argued MERS had no statutory authority to foreclose. They claimed the Rhode Island foreclosure laws only permit a mortgagee to foreclose not a mortgagee in a “nominee” capacity. But the court found MERS was the mortgagee because it and no other was named in the mortgage instrument as the mortgagee. “The fact that MERS acts in a nominee capacity for the lender and the lender’s successors and assigns does not diminish MERS’s role as the mortgagee nor is there created a new legal term ‘nominee-mortgagee.’”⁷³ Accordingly the court held Rhode Island foreclosure statutes did not prohibit MERS, “as mortgagee in a nominee capacity” from foreclosing. The court makes no analysis of what a “nominee” is, either legally or contractually. It says MERS is the mortgagee because the mortgage says so. But it is the mortgagee in name only—as “nominee.” What does a mortgagee in name only mean?

Foreclosure by MERS was not overturned by the federal district court in Michigan in *Hilmon v. Mortgage Electronic Registration Systems, Inc.*⁷⁴ The owner of a foreclosed house filed suit pro se in state court to set aside MERS’ foreclosure sale. The action was removed to federal court. Plaintiff argued that the sale was improper under Michigan law governing foreclosure sales by advertisement. Michigan law allowed a sale if, inter alia, “[t]he party foreclosing... is either the owner of the indebtedness or of an interest in the indebtedness secured by the mortgage or the servicing agent of the mortgage.”⁷⁵ Plaintiff argued that MERS was not a holder in due course, since it could not produce the original note, and was neither a servicing agent nor an assignee of the mortgage. MERS argued that the note was not a negotiable instrument and therefore the holder in due course argument was irrelevant. Further, MERS argued that as named mortgagee it had the right to foreclose. The court provided minimal analysis of these arguments, merely noting that the Florida case cited as support by the plaintiff had been reversed by *Azize*, above; that Michigan law did not require that a mortgagee be a holder in due course to fore-

close; and that the mortgage gave MERS the right to foreclose as nominee for the lender.

Crum v. LaSalle Bank, N.A.,⁷⁶ reviewed a trial court's summary judgment grant to LaSalle Bank, assignee of MERS, in an ejectment proceeding. LaSalle had previously foreclosed and bought the property. The borrower alleged that LaSalle did not have power to foreclose as it did not own the debt, citing case law that stated that an agent who receives a mortgage solely for the purpose of foreclosing a mortgage and which does not own the note cannot foreclose. The court distinguished the facts of the instant case in two ways. It first held that the mortgage and assignment together indicated that "MERS and the assignee were not delivered a mortgage instrument 'merely for' the purpose of effecting a 'foreclosure[.]'... MERS was authorized to perform any act on the lender's behalf as to the property, including selling the note and the mortgage[.]"⁷⁷

Secondly, the court noted that the prior case law assumed that there was a separation of the "legal and equitable ownership of a debt and the security for the repayment of the debt."⁷⁸ The court cited the Restatement (3d) of Property (Mortgages) § 5.4(b) (1997) for "[t]he generally prevailing common-law rule,... that 'a transfer of a mortgage also transfers the obligation the mortgage secures unless the parties to the transfer agree otherwise.'"⁷⁹ The court also noted that the debtor could not question the separation of the note and mortgage. "Thus,... , no party, other than an innocent purchaser of notes... would be in a position to raise the question 'whether or not the debt had been assigned.'"⁸⁰

The court acknowledged the debtor's argument that the note was a negotiable instrument and the note was not properly acquired via negotiation pursuant to the UCC. Unfortunately for her, she did not raise this argument at the trial level and the promissory note was not included in the record. Accordingly, the court would not review this argument.

Declaratory relief seeking a determination that a note and deed of trust could be enforced was denied in *Saxon Mortgage Services, Inc. v. Hillery*.⁸¹ The plaintiffs were Consumer Solutions REO, the assignee of the mortgage, and Saxon,

the servicer of the loan. They sued the debtor and debtor's attorney who had attempted to rescind the loan within three days of the mortgage loan having been made. The mortgage named MERS as nominee for the original lender. MERS later assigned the deed of trust to Consumer. Consumer and Saxon sought declaratory relief under TILA seeking to enforce the note and deed of trust. The defendants filed a motion to dismiss alleging several grounds, including lack of standing and failure to join an indispensable party. Consumer acknowledged that it had to show that it was the holder of the note as well as the mortgage at the time the action was filed. The court held for the assignment to be valid, the assignment had to be of the note and not just the deed of trust, quoting early Supreme Court authority, "[t]he note and mortgage are inseparable; the former as essential, the latter as an incident'... '[a]n assignment of the note carries the mortgage with it, while an assignment of the latter alone is a nullity' [.]"⁸² The court also quotes from the Restatement (3d) of Property (Mortgages): "[a] mortgage may be enforced only by, or in behalf of, a person who is entitled to enforce the *obligation* that the mortgage secures [.]"⁸³

The court found that MERS did not assign the note as there was no evidence that it either held the note or was given the authority by the lender to assign the note. The court concluded that Consumer thus had no standing and dismissal was warranted but it was given leave to file an amended complaint. Saxon had also transferred servicing to another company after the complaint had been filed. The court stated that a substituted party may be filed for Saxon since Consumer was allowed to file an amended complaint.

The Missouri Court of Appeals reviewed a MERS mortgage in *Bellistri v. Ocwen Loan Servicing, LLC*,⁸⁴ and held that a note and MERS mortgage had been separated and the assignee had no standing to foreclose. Ocwen, the assignee, appealed from summary judgment quieting title for the purchaser at a tax sale. The deed of trust named as mortgagee MERS, as nominee of BNC, the lender. The debtor failed to pay realty taxes and at a tax sale Bellistri purchased the property. As required by Missouri Law, Bellistri sent BNC a notice of redemption before receiving a col-

lector's deed. Thereafter, MERS, as nominee for BNC, assigned the deed of trust to Ocwen. The assignment also stated that it "transferred any and all notes described in the deed of trust."

Bellistri filed suit to eject the debtor and quiet title and filed a motion to add Ocwen as a necessary if not indispensable party. In a footnote, the court notes that Ocwen refers to itself as servicer for the trustee of holders of a pooled trust, as successor in interest to MERS.⁸⁵ Both Bellistri and Ocwen filed motions for summary judgment. The court denied Ocwen's motion and granted summary judgment for Bellistri. Ocwen appealed, arguing that the trial court erred because the notice sent to MERS by Bellistri was invalid for several reasons.

The court of appeals addressed whether Ocwen had standing and held that although Ocwen "appears... to have an interest in the property because it is the named grantee on the assignment of the deed of trust[,]... [it did not have a] legally cognizable interest" in the realty.⁸⁶ The court observed: "Typically, the same person holds both the note and the deed of trust." But, the court asserted that a note and security interest can be split:

In the event that the note and the deed of trust are split, the note, as a practical matter becomes unsecured. The practical effect of splitting the deed of trust from the promissory note is to make it impossible for the holder of the note to foreclose, unless the holder of the deed of trust is the agent of the holder of the note. Without the agency relationship, the person holding only the note lacks the power to foreclose in the event of default. The person holding only the deed of trust will never experience default because only the holder of the note is entitled to payment of the underlying obligation. The mortgage loan becomes ineffectual when the note holder did not also hold the deed of trust.⁸⁷

The court went on to say when a note is assigned or transferred (by the holder of the note), the deed of trust is also transferred:

Effectively, the note and the deed of trust are inseparable, and when the promissory note is transferred, it vests in the transferee "all the interest, rights, powers and security con-

ferred by the deed of trust upon the beneficiary therein and the payee in the notes."⁸⁸

However, MERS had no power to transfer the note:

When it assigned the deed of trust, MERS attempted to transfer to Ocwen the deed of trust "together with any and all notes and obligations therein described or referred to, the debt respectively secured thereby and all sums of money due."... There is no evidence... that MERS held the promissory note or that BNC gave MERS the authority to transfer the promissory note. MERS could not transfer the promissory note; therefore the language in the assignment of the deed of trust purporting to transfer the note is ineffective. MERS never held the promissory note, thus its assignment of the deed of trust to Ocwen separate from the note had no force.⁸⁹

The court concluded "Ocwen lacks a legally cognizable interest and lacks standing to seek relief from the trial court. The trial court was without jurisdiction to grant Ocwen its requested relief[.]"⁹⁰

In *Mortgage Electronic Registration Systems, Inc. v. Southwest Homes of Arkansas, Inc.*,⁹¹ the Supreme Court of Arkansas held that MERS was not a necessary party in a foreclosure law suit and refused to set aside the judgment of foreclosure granted to the second mortgagee, Southwest Homes. "Mortgage Electronic Registration Systems, Inc. (Pulaski Mortgage Company)" were listed as Respondents. Pulaski Mortgage was served but did not file an answer. MERS was not served and after learning of the foreclosure nine months after judgment, moved to set aside the judgment. MERS asserted it held legal title to the property and was a necessary party. MERS asserted that it was the agent for every MERS member lender who acquires ownership in property subject to a MERS' mortgage. The Supreme Court

specifically reject[ed] the notion that MERS may act on its own, independent of the direction of the specific lender who holds the repayment interest in the security instrument at the time MERS purports to act. "[A]n agent is authorized to do, and to do only, what is

reasonable for him to infer that the principal desires him to do in the light of the principal's manifestation and the facts as he knows or should know them at the time he acts."⁹²

MERS also argued it held a property interest by holding legal title, but the court disagreed. "In this state, the naked legal title to real property included in a mortgage passes to the mortgagee, or to the trustee in a deed of trust, to make the security available for the payment of the debt."⁹³

The deed of trust did not convey title to MERS. Further, MERS is not the beneficiary, even though it is so designated in the deed of trust. Pulaski Mortgage, as the lender... was the beneficiary. It receives the payments on the debt.

....[U]nder Arkansas foreclosure law, a deed of trust... "confer[s] upon the trustee a power of sale for breach of an obligation of the grantor contained in the deed of trust." Thus, under the statutes, and under the common law noted above, a deed of trust grants to the trustee the powers MERS purports to hold. Those powers were held by East as trustee. Those powers were not conveyed to MERS.

MERS holds no authority to act as an agent and holds no property interest in the mortgaged land. It is not a necessary party....

....MERS was at best the agent of the lender. The only recorded document provides notice that Pulaski... is the lender and, therefore, MERS's principal. MERS asserts Pulaski... is not its principal. Yet no other lender recorded its interest as an assignee of Pulaski.... Permitting an agent, such as MERS purports to be[,] to step in and act without a recorded lender directing its action would wreak havoc on notice in this state.⁹⁴

In a concurring opinion, Judge Danielson also noted his agreement with *Kesler*, that "neither MERS's holding of legal title, nor its status as nominee, demonstrates any interest that would have rendered it a necessary party [under Arkansas law]."⁹⁵

In Vermont, MERS has been found not to have authority to foreclose due to a determina-

tion that the note and mortgage were separated. In *Mortgage Electronic Registration Systems, Inc. v. Johnston*,⁹⁶ the court took up on its own initiative whether MERS had standing, either independently or as nominee for the lender, to commence a state court foreclosure petition. The court determined that MERS had no standing in either capacity.

In *Johnston*, the Johnstons signed a promissory note in favor of WMC Mortgage Corp. (WMC). The note was secured by a mortgage deed from the Johnstons to MERS as nominee for WMC. The mortgage deed also listed MERS as the mortgagee. MERS, as nominee for WMC, filed the complaint to foreclose the mortgage deed alleging the Johnstons failed to make payments on the promissory note.

Starting with the principle that a mortgage may only be enforced by the person entitled to enforce the obligation secured by the mortgage, the court looked first at the contract provisions in the mortgage that purported to define MERS' role and the contractual rights of the parties. Pursuant to the contract, MERS was to function "solely as the nominee" for the lender and lender's successors and assigns. But the court noted that there is neither a contractual definition of the term "nominee" nor a statutory definition of this term. The court concluded that MERS purposely chose to use the specific term "nominee" and not "agent" or "power of attorney" and also chose not to define the term in the contract. The intention was apparently that MERS only has authority to act in "a very limited way 'solely as nominee' by holding bare legal title (not equitable title) for the lender."⁹⁷

The court held MERS had no authority to foreclose independently in its own name because it was not the holder of the note. The court noted that in Vermont the U.C.C. dictates how a negotiable promissory note is transferred. Only the "holder" or a "non-holder in possession... who has the rights of possession" can enforce a negotiable note. And such a "non-holder" must be able to "prove the transaction."⁹⁸ MERS does not assert to "hold" the note nor does it assert that it can otherwise enforce the note. Bare legal title was

not enough to authorize MERS to sue independently to foreclose the mortgage.⁹⁹

Next the court in *Johnston* turned to whether MERS could proceed as the “nominee” for the lender. Citing the Kansas Supreme Court decision in *Kessler* and its discussion of “nominee,” *Johnston* found the mortgage limited MERS’ authority to act “solely as the nominee of the lender.”¹⁰⁰ The contract only allowed MERS to foreclose and sell property “if necessary to comply with law or custom.” The court found that it was not necessary “to comply with law or custom” that MERS have the right to foreclose and sell the property.” The mortgage did not create an agency or power-of-attorney relationship.

The court specifically found that:

MERS and the lender intentionally split the obligation and the mortgage deed. This split was necessary to create the MERS system and facilitate the growth of the secondary mortgage market.¹⁰¹

However, the court also noted that the result of the mortgage and note having been separated:

need not be inequitable if the rules of mortgage law are properly followed. The two commentators... noted that while a loan is current there would be no need to execute or record assignments...; however, if a loan is to be foreclosed MERS could assign the mortgage in order to allow for a foreclosure action.¹⁰²

The court clearly appeared to be saying that such assignment will rejoin the note and mortgage. But here, such was not done before MERS filed suit to foreclose. “The outcome that MERS does not have standing is consistent with MERS role simply as a ‘clearinghouse’ which holds bare legal title and tracks mortgage ownership interests.”¹⁰³

If MERS is just a clearing house for tracking the exchange of mortgages it cannot become an active participant in the transactions it oversees. Accordingly, the *Johnston* court held MERS lacked standing to bring the foreclosure either in

its own name or on behalf of the lender in this case.¹⁰⁴

D. MERS Authority to Prosecute a Motion for Relief from Stay in Bankruptcy

In *In re Huggins*,¹⁰⁵ the bankruptcy court granted a motion for relief from stay filed by MERS, acting as nominee for the lender. The debtor opposed, arguing that MERS lacked standing. After a non-evidentiary hearing, the court granted the motion. The court cited a First Circuit decision for the rule that stay hearings “do not involve a full adjudication on the merits of claims, defenses or counter-claims, but simply a determination as to whether a creditor has a colorable claim to property of the estate.”¹⁰⁶ The court found that such colorable claim was established by the MERS mortgage and the Massachusetts foreclosure statute. The court found that the language in the mortgage gave MERS “the customary rights of a mortgagee under a... mortgage and may act under the Mortgage on [the lender’s] behalf.”¹⁰⁷ The statute read “[t]he mortgagee... or a person authorized by the power of sale... may, upon breach of condition and without action, do all the acts authorized or required by the powers.”¹⁰⁸

Noteworthy is the lengthy criticism given to the *Huggins* decision by Judge Cohen in *Johnston*, who found *Huggins* “unpersuasive or distinguishable” from the facts in *Johnston*. Judge Cohen “decline[d] to accept this logic, as it ignore[d] black letter mortgage law.”¹⁰⁹

In *In re Vargas*,¹¹⁰ the bankruptcy court heard a motion for relief from stay prosecuted by MERS. The documents attached to the motion included a promissory note showing Freedom Home Mortgage as the promisee, a deed of trust showing Freedom Home Mortgage as the lender, and the deed of trust showing MERS as the beneficiary under the deed of trust, acting solely as a nominee for the lender and lender’s successors and assigns. The motion also included a declaration signed by an employee of Countrywide Home Loans, Inc., which was represented to be a servicing agent of the movant. MERS tried to join as moving parties “its assignees and/or successors in interest”

but it failed to identify any third party. The debtor denied signing the note and mortgage documents.

The court denied the motion for relief.

By adding these unidentified movants, MERS is trying to obtain relief from the automatic stay for the current note holders without disclosing to the court their existence, identities or the source of MERS's authority to act on their behalf. This is improper.¹¹¹

Although not explicitly stating so, the court clearly finds that MERS has no authority based on the original mortgage or deed of trust document to prosecute a stay relief motion in its own name as the nominee mortgagee.

The court also found MERS failed to prove that it was the proper party to enforce the note. MERS made no attempt to claim that it was the noteholder. Nor was MERS able to prove who the current noteholder was. Due to these and other procedural and evidentiary defects, MERS was not allowed to prosecute the motion for stay relief. The decision leaves aside the question of whether MERS could proceed on behalf of the holder of the note if it had identified and joined the actual note and mortgage holder in the motion.

In *In re Sheridan*,¹¹² the Idaho bankruptcy court denied a motion for relief from the automatic stay filed by MERS as “nominee HSBC Bank USA, National Association, as Indenture Trustee (of a named trust)”, the apparent assignee of MERS. In the motion, MERS identified itself as a “secured creditor and claimant” and stated that the debtors were indebted “to Movant” and the debt arose out of a note and deed of trust “naming Movant as beneficiary.” Attached to the motion were the note and deed of trust. MERS, “acting solely as nominee for Lender and Lender’s successors and assigns” was named as “beneficiary” in the deed of trust. The Chapter 7 trustee objected, contending that MERS failed to establish its interest in the property or its standing to seek relief from stay. At a final hearing on such motion, the note and deed of trust were admitted by agreement. No other documents or evidence was submitted.

The court noted that § 362(a) of the Code requires that stay relief be requested by a “party in interest” for cause, and that the Bankruptcy Rules

incorporate Federal Rule of Civil Procedure 17(a) (1) which also required that an action be brought in the name of the “real party in interest.” The district’s local rules require that the request be made by a “party by interest” and that the motion shall have attached “documents evidencing the obligation and the basis of perfection of any lien or security interest[.]”¹¹³ MERS alleged delinquent payments as cause.

The court reasoned that while “party in interest” is not defined by the Code, a party must at least have a “pecuniary interest” in the outcome.¹¹⁴ The court cited several decisions for the proposition that standing encompassed both constitutional standing requirements and prudential standing limitations. “Constitutional standing requires an injury in fact... [and] [p]rudential standing requires that the party’s assertions fall within the zone of interests protected... and, further requires that litigant assert only its own rights and not those of another party.”¹¹⁵ The court cited held that the Code, Rules, local rules and case law required that a motion be brought by a party in interest, with a pecuniary interest in the case and,

in connection with secured debts, by the entity that is entitled to payment from the debtor and to enforce security for such payment. That entity is the real party in interest. It must bring the motion or, if the motion is filed by a servicer or nominee or other agent with claimed authority to bring the motion, the motion must identify and be prosecuted in the name of the real party in interest.¹¹⁶

The court observed that the note and deed of trust establish that the original lender would appear to be a party in interest and have standing, but the motion was not brought by the lender. MERS argued that the deed of trust’s designation of MERS as “beneficiary” and “as nominee for Lender and Lender’s successors and assigns” was synonymous with agency. The court observed:

Even assuming that MERS as a “nominee” had sufficient rights and ability as an agent to advance its principal’s stay relief request, there remain[ed] an insurmountable problem. The Motion provides no explanation, much less documentation or other evidence, to show that the [assignee-trust] (as an en-

tity) or HSBC Bank USA (as that entity's "indenture trustee") has an interest in the subject Note or the subject Deed of Trust.¹¹⁷

MERS argued that its role as "nominee for Lender and Lender's successors and assigns" under the deed of trust gave it authority to assert the stay relief request "for whatever successor in interest or assignee might have the beneficial interest."¹¹⁸ The court noted that even if MERS is correct, its capacity is representative and it does not act on its own account.

The key question was not answered by the note and deed of trust—who was the holder of the note at the time of the motion? The court noted that other movants for stay relief have argued that the holder of a note secured by a deed of trust

obtains the benefit of the deed of trust even in the absence of an assignment of the deed of trust, on the theory that the security for the debt follows the debt. Under this theory, it would appear that when bankruptcy intervenes, and somewhat like a game of Musical Chairs, the then-current holder of the note is the only creditor with a pecuniary interest and standing sufficient to pursue payment and relief from stay.¹¹⁹

MERS ultimately conceded that the note contained nothing indicating transfer by the lender, the motion failed to allege any details of such transfer and the record lacked any other documents related to this issue.

MERS counsel filed a "supplemental affidavit" after the closing of the final hearing to supplement the record. In the affidavit it was alleged that counsel had obtained the "original" note with an indorsement. The court refused to allow the affidavit for several reasons, but also noted that the indorsement was in blank and failed to identify the transferee.

After an evidentiary hearing, the bankruptcy court in *U.S. Bank, Nat'l Ass'n v. Roberts (In re Roberts)*,¹²⁰ granted a motion for relief from stay to U.S. Bank who had foreclosed and purchased the realty prepetition. Debtor unsuccessfully argued that the motion for relief amounted to an informal proof of claim and therefore the creditor had to prove its claim. Rejecting the debtor's ar-

gument, the court concluded that U.S. Bank only had the burden of showing a colorable claim to the property and the court was not to determine the substantive rights of the parties. The debtor no longer had any property rights in the realty as the debtor's redemption rights had expired prepetition and the sale deed had been issued. Full faith and credit had to be given the state court judgment.

Nevertheless, the court discussed the foreclosure case extensively and found no defect. Although endorsements of the note were confusing, the court found that the final indorsement was to U.S. Bank. The MERS' mortgage apparently not been assigned to any entity and the court found that:

MERS acted solely in a representative capacity for the original lender... as well as its successors and assigns. Thus, MERS was empowered to act on behalf of whoever was the equitable owner of the rights in the Deed of Trust. In fact, the Deed of Trust itself makes clear that MERS, operating in its representative capacity, may, if necessary, exercise all of the substantive rights [of the] party who holds the beneficial ownership of the Deed of Trust.¹²¹

The court noted that the powers set forth in the deed of trust included the power of foreclosure, but Colorado law, however, gave the "owner of an evidence of debt" the right to foreclose. Despite confusion as to ownership of the note due to multiple assignments and the involvement of a servicer and another party in marketing the property after foreclosure, the court found that U.S. Bank was the owner of the note at the time of foreclosure. The court noted that Article 3 of the UCC applied as to the negotiability and enforcement of the note but as stated in Article 9, the UCC had no application to the deed of trust. The court found no documents had to be recorded to be enforceable.¹²²

In *In re Wilhelm*,¹²³ the Idaho bankruptcy court *sua sponte* considered motions for stay relief on MERS' deeds of trust in five cases. The court denied all five motions for failure of the movants to demonstrate standing and that they were the party in interest. In each of the five cases, the movant was not the payee of the note, the note was not

indorsed, either in blank or to any specified entity, and the movant did not establish that it had possession of the note. Each of the deeds of trust named MERS as the beneficiary, acting “solely as nominee for Lender and Lender’s successors and assigns.” In four of the cases, the movants submitted assignments of the deeds of trust from MERS to the movants. The court noted that to obtain stay relief, a movant had to have standing and be the real party in interest—related but not identical concepts.

Standing encompasses both constitutional and prudential elements. To have constitutional standing, the litigant must allege an “injury... likely to be redressed by a favorable ruling.” Prudential standing includes the idea that the injured party must assert its own claims, rather than another’s.¹²⁴

Further, the movants must have the right to enforce the notes to be the real parties in interest. If the pleadings revealed a lack of standing or a party objected to stay relief, the movant had the burden of proving at least prima facie case standing and could not rest on allegations in pleadings.¹²⁵

The court noted that to enforce a promissory note—a negotiable instrument under Idaho’s UCC—one must have possession of the note and be either a “holder” or “nonholder in possession.” The latter must be able to “prove the transaction” by which it acquired the note. The court went to length to discuss the UCC and what was required to establish such status.¹²⁶ Neither possession nor proof of the transaction was demonstrated by movants, and allegations in the motions and declarations often were at odds with the actual notes submitted.¹²⁷ In footnote 20, the court observed “that Movants’ submissions in many of these cases were filed helter-skelter[,]... typically filed piecemeal” and that “sloppiness pervaded this group of motions.”¹²⁸ The movants failed to establish either possession of any of the notes or that they had ownership (“prove the transaction”). The movants relied upon the assignments to show that the notes were transferred to the movants, but the court found that the movants had not established MERS’ authority to transfer the notes. The deeds of trust naming MERS as nominal beneficiary for the lender “d[id] not—either expressly or by

implication—... authorize MERS to transfer the promissory notes at issue.”¹²⁹

*In re Hawkins*¹³⁰ is one of 18 cases in which the bankruptcy court denied motions for stay relief filed by either MERS or in the name of MERS as the nominee for another entity. Ten of the movants had attempted to withdraw the motions, but due to objections by the trustees, withdrawal was denied. The court ruled that MERS must have constitutional and prudential standing and be the real party in interest. Constitutional standing requires that the party have suffered some actual or threatened injury likely to be redressed by a favorable decision. Prudential standing requires that a party assert “his own legal interests as the real party in interest.”¹³¹ MERS contended that it had standing by virtue of being named beneficiary under the deeds of trust or that it was the nominee of the beneficiary. MERS also argued that it had standing under the UCC which entitled the nominee holder to enforce a negotiable instrument. Due to conflicting arguments in its brief, the court observed that it was unclear if MERS was arguing that it had “standing in its own right, or as the agent of the entity entitled to enforce the note, or both.”¹³²

The court found that the deed of trust “attempts to name MERS as both beneficiary and a nominee” but held that MERS was not the beneficiary as it had “no rights whatsoever to any payments, to any servicing rights, or to any of the properties secured by the loans. To reverse an old adage, if it doesn’t walk like a duck, talk like a duck, and quack like a duck, then it’s not a duck.”¹³³ And even if MERS was the beneficiary or nominee of the beneficiary, such is insufficient to enforce the deed of trust. Under the Nevada UCC a negotiable instrument is enforceable by the holder or a nonholder in possession who has the rights of a holder.

MERS must be a transferee in possession who is entitled to the rights of a holder or have authority under state law to act for the holder... For there to be a valid assignment for purposes of foreclosure both the note and the deed of trust must be assigned. A mortgage loan consists of a promissory note and a security instrument, typically a mortgage

or a deed of trust. When the note is split from the deed of trust, “the note becomes, as a practical matter, unsecured.” A person holding only a note lacks the power to foreclose because it lacks the security, and a person holding only a deed of trust suffers no default because only the holder of the note is entitled to payment on it. “Where the mortgagee has ‘transferred’ only the mortgage, the transaction is a nullity and his ‘assignee,’ having received no interest in the underlying debt or obligation, has a worthless piece of paper.”¹³⁴

The court discussed agency and noted that MERS as nominee could “meet the threshold test of standing” and might be “the ‘real party in interest’” if it was the “actual nominee of the present Member who is entitled to enforce the note.”¹³⁵ But, MERS’ counsel acknowledged that MERS was the agent for its members only. The court stated that if a note had been transferred to a non-member, then MERS cannot act as the agent. “One cannot assume that just because MERS was named as the initial nominee in the deed of trust that it still retains that relationship with the holder of the note.”¹³⁶

Some of the motions had been filed by non-MERS members. MERS attempted to establish standing through affidavits of “Certifying Officers.” Its Membership Agreement allowed members to designate employees of the member to be a MERS Certifying Officer, and appointed the individual assistant secretary and vice president of MERS, and gave them power to

“take any and all actions and execute all documents necessary to protect the interest of the Member, the beneficial owner of such mortgage loan, or MERS in any bankruptcy proceeding regarding a loan registered on the MERS System that is shown to be registered to the Member.[“] There appears to be absolutely no requirement that these Certifying Officers have any knowledge of the loan in question.”¹³⁷

Finally, the court held that the testimony was neither competent or admissible. Affidavits were introduced without any evidence that the affiants had adequate personal knowledge of the facts as

required by Federal Rule of Evidence 602. The elements of the business records exception to hearsay found in Federal Rule of Evidence 803(6) also were not met.¹³⁸

Some of these decisions were appealed by MERS. Different judges issued differing decisions upholding the bankruptcy court and reflecting the differing opinions as to what MERS can and cannot do. The district court in *Mortgage Electronic Registration Systems, Inc. v. Chong*,¹³⁹ upheld the lower court’s ruling on the basis that MERS had the burden of proof but failed to present sufficient evidence showing that it was the real party in interest. MERS admitted that it “does not actually receive or forfeit money when borrowers fail to make their payments, [therefore, the court concluded] MERS must at least provide evidence of its alleged agency relationship with the real party in interest” for purposes of standing. (This was one of the cases before the bankruptcy court in which MERS had attempted to withdraw its motion for relief.) MERS was unable to show that a MERS member actually had physical possession of the promissory note at the time the motion was filed. Its sole evidence was its declaration that it was named as beneficiary in the deed of trust and nominee for the original lender. The court held that this was insufficient to show that it was the agent or nominee for the current owner.

The district court in another one of the appeals, *Mortgage Electronic Registration Systems, Inc. v. Mitchell*,¹⁴⁰ upheld the bankruptcy court’s decision but seems to indicate its disagreement with the court’s rationale that “MERS lacked standing because it was not a holder in due course... and thus was not a real party in interest.” The court stated that this rationale “appears to conflict with numerous rulings by the district Judges in Nevada dismissing unrelated, non-bankruptcy lawsuits brought by homeowners who seek to enjoin MERS from foreclosing on their homes. The district judges have dismissed the homeowners’ complaints and ruled that MERS is authorized by state statute to foreclose the deeds of trust that encumber these various properties.” Without further comment as to this rationale, the court says it will affirm the bankruptcy court’s decision “nevertheless... on alternative grounds.” The district court held that MERS had failed to fulfill the require-

ments of Nevada's Local Rule of Practice 4001(5) to attempt to confer with debtors' counsel and resolve the matter without court action despite "sincere effort." MERS failed to do so "in a meaningful way" because MERS could not produce either the note "or written authority from the holder of that note". Therefore, the bankruptcy court's order denying stay relief was affirmed.

Two motions for stay relief filed by HomEq were denied in *In re Schwartz*.¹⁴¹ The successive motions sought relief to pursue an eviction of the debtor from real estate that Deutsche Bank, as Trustee—"which appears to be the present mortgagee"—had previously foreclosed. The pro se debtor objected to the motions for relief, arguing that the proper party did not foreclose. Deutsche filed a memorandum in support of the second motion and a non-evidentiary hearing was held on the second motion. In its memorandum decision denying relief, the court expressed its frustration with the movant's inability to properly provide documentation. In such foreclosure, Deutsche asserted it was the assignee of the mortgage. HomEq was apparently the servicer but also had participated in the foreclosure sale. The foreclosure deed was signed by persons identified as vice presidents of HomEq, referencing a recorded power of attorney from Deutsche. The court was not given a copy of the recorded deed or the recorded power of attorney, but an unrecorded power of attorney from Deutsche dated the day after the sale was provided. The original lender was First NLC and the mortgagee named in the mortgage was MERS as nominee for First NLC. Before the foreclosure, HomEq had advised the debtor first that it was the servicer for Ocwen Federal Bank which HomEq said was the creditor, and later HomEq said it was the servicer for Deutsche. Two assignments from MERS to Deutsche were provided to the court, one provided by the pro se debtor dated after the foreclosure suit was filed but a day before the foreclosure sale. The second assignment to Deutsche was provided by Deutsche, but was dated after the sale. The court noted a number of problems with other pertinent documents purporting to give power to foreclose, some of which were produced and others which were alluded to without being produced. Some contradicted each other. The court expressed its frustration. "[D]es-

pite having been given ample opportunity to do so, what [HomEq] produced instead was a jumble of documents and conclusory statements, some of which are not supported by the documents and indeed even contradicted by them."¹⁴² Unable to find that the foreclosure sale was proper, the court denied relief from stay.

Subsequently, the debtor (this time with counsel) filed an adversary proceeding against Deutsche with numerous counts: wrongful foreclosure; fraud, deceit and misrepresentation; void lien; unfair servicing practices; intentional infliction of emotional distress; and violation of fair debt collection practices act. The court denied a motion by Deutsche Bank for summary judgment in a Memorandum of Decision issued Feb. 23, 2009, in *Schwartz v. Deutsche Bank National Trust Co.*, Adv. Pro. No. 07-4098, (Feb. 23, 2009), finding that the order denying the second motion for relief was a finding that the foreclosure was invalid. The court concluded that "[i]t is too late for the Defendants to argue that the foreclosure was commenced and conducted by the proper party. They are barred by the principle of collateral estoppel."¹⁴³

Because Deutsche and HomEq failed to appeal the orders denying their respective Motions for Relief and because the time to seek relief from the order has long since expired, the Motion for Summary Judgment is DENIED.¹⁴⁴

Judge Rosenthal, who had denied relief in *In re Schwartz* (and who denied summary judgment for Deutsche Bank in the associated adversary proceeding), also issued a memorandum decision in *In re Maisal*,¹⁴⁵ as to the responsibilities of a movant seeking relief from stay on a mortgage loan. Wells Fargo, in its capacity as trustee for a pooled trust, filed a motion for relief in the case. The documents attached to the motion indicated that the original lender on the note and mortgagee of the mortgage was Option One and did not show that the note or mortgage had been assigned. The court called upon Wells Fargo to show that it had standing at a hearing on the motion. Counsel for Wells Fargo presented an assignment of the mortgage from Option One to Wells Fargo dated four days after the motion had been filed. The debtors

advised the court that they wished to surrender the property. The court granted the motion but nevertheless, the court reserved the right to issue a memorandum concerning the motion. In the memorandum that followed the court observed that it has the responsibility to ensure that debtors seeking protection in bankruptcy get the benefit of the automatic stay for as long as they are entitled to it.

Unfortunately, concomitant with the increase in foreclosures is an increase in lenders who, in their rush to foreclose, haphazardly fail to comply with even the most basic legal requirements of the bankruptcy system. It is the lenders' responsibility to comply, and this Court's responsibility to ensure compliance, with both the substantive and procedural requirements of the Bankruptcy Code. As this Court made clear in its decision in *In re Schwartz*, 366 B.R. 265 (Bankr. D. Mass. 2007), it takes its role in this regard very seriously and will require proof of each element required to obtain relief from stay. The most basic element required to obtain relief from stay is that a movant have standing to bring and prosecute such a motion.

...In the case at bar, the Court cannot find from the evidence provided that the Movant had a colorable claim to the property **at the time** the Motion for Relief was filed.

...Parties seeking relief from stay must be aware that by presenting a motion to the Court, they represent that the "allegations and other factual contentions have evidentiary support...[.]" Fed. R. Bankr. P. 9011(b)(3). The Movant was unable to provide evidentiary support for its allegations when called upon to do so. It is the claimant's burden to bring information regarding the relationships between the parties to the Court.

"If the claimant is the original lender, the claimant can meet its burden by introducing evidence as to the original loan. If the claimant acquired the note and mortgage... the claimant can meet its burden through evidence that traces the loan from the original lender to the claimant. A claimant who is the servicer must, in addition

to establishing the rights of the holder, identify itself as an authorized agent for the holder."

Compliance with these rules is not difficult and this Court will require it in order to preserve the rights of debtors. Any motion filed with the Court must be true and have support as of the date of the motion.... [A] movant cannot state that it is the "current holder" of an instrument if it is not.¹⁴⁶

CONCLUSION

MERS is a construct of the mortgage finance industry created and implemented to facilitate the sale of promissory notes and servicing rights in residential mortgage transactions. But, the architects of MERS did not simply create a modernized system of keeping track of loan transfers. They also adopted untested, novel terminology for the most important documents that protect lenders and investors claiming liens on real estate—the mortgage/deed of trust and assignments. Then they decided that the execution and/or recording of assignments was unnecessary unless foreclosure needed to be filed.

Historically, the effectiveness of mortgage language and assignments of mortgages were rarely questioned. Time outran the MERS system, and now state and federal courts across the country are struggling to give meaning to the terminology used in the standard MERS mortgage—including the ubiquitous "acting solely as nominee." And by design, MERS assignments are not created until default has occurred. As a result, assignments are often not executed and/or recorded until bankruptcies, motions for stay relief or foreclosures have commenced. And MERS assignments sometimes state that they are effective years before the actual date of execution.

The MERS language and assignment policies present courts with a complex bundle of procedural and substantive issues: standing to seek relief from stay and/or to sue; contingently necessary party status; agency; equitable and beneficiary ownership vs. legal title or bare legal title; note holder and non-holder status under the UCC; delay in execution and recording of assignments; perfection; noticing issues; as well as the inter-

pretation of language not ordinarily used for the purposes and results intended or not intended. MERS and its assignees have repeatedly taken contradictory positions—sometimes arguing that MERS is only a tracking system with no lending or servicing powers; other times contending that MERS has the right to hold notes, assign or foreclose mortgages; and still other times, MERS and its assignees say that it acts on behalf of its own property interests or simply as the “nominee” and/or the agent of another. These interpretive problems and inconsistencies have provoked some courts to determine the worst possible fate for secured loan buyers—that their mortgages were not effectively transferred or even that the mortgages have been separated from the note and are no longer enforceable.

How did so many different banks and investment companies sign on to using this standardized but unusual mortgage language and non-recording system? Perhaps for the same reason that the marketing and securitization of subprime loans happened. The original lenders—the actual scrivener of the mortgages—no longer retained, serviced and depended upon the viability of the loans they created. They made their fees and sold the loans to others—often immediately after creating the loans—and the new buyers in turn sold to other buyers for yet more fees. The lenders and the next-in-line loan owners weren’t concerned if the borrowers would be able to make the payments nor apparently if the language of the mortgage was valid. Conservative banking and long-tested legal principles were disregarded.

As Professor Peterson notes in his soon-to-be published article¹⁴⁷ describing the formation and evolution of MERS, the MERS system was not tested in court nor approved with legislation before being propounded so effectively by MERS. Credit rating companies simply agreed that the conveyances of mortgage loans without recordation and notice would not be subject to contest by subsequent purchasers. Rating companies, of course, also gave AAA rating to the same securitized loans that were originated with MERS docu-

ments and tracked in the MERS system. One must question if the reasons for the MERS system approval were the same for the AAA approval given the securitization of subprime loans supposedly secured by this “system.” In his article’s conclusion, Professor Peterson points out that the MERS system should be acknowledged as one “important cog in the machine that churned out the millions of unsuitable, poorly underwritten, and incompletely documented mortgages that were destined for foreclosure.”¹⁴⁸ As another author noted, the machine that turned the U.S. housing market into a system of “Ponzi finance.”¹⁴⁹

Whether the MERS construct holds water is being robustly tested in a variety of contexts. Given the pervasiveness of MERS, if the construct is not viable, if MERS cannot file foreclosures, and, perhaps most importantly, cannot even record or execute an assignment of a mortgage, what then?

Already, legislation has been proposed in attempts to rectify the problems caused by MERS. In Kansas, House Bill 2613 would amend Rule 60-219 in the Code of Civil Procedure and make a person a contingently necessary party in a civil law suit if the person is “a party or nominee with whom... a contract has been made for the benefit of another.” FannieMae has recently announced (Servicing Guide Announcement SVC-2010-05 issued March 30, 2010) that MERS will no longer be named as the plaintiff in any foreclosures of FannieMae mortgage loans.

Over half the nation’s mortgage loans are now recorded under MERS’ name. The CEO of MERS has declared that MERS’ mission is “to capture every mortgage loan in the country.”¹⁵¹⁵⁰ How ironic that the banks too big to fail who created this system and the investors who relied upon them now argue as one defense to attacks on

MERS' mortgages that the system is too big to be allowed to fail.

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Notes

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135. In re Hawkins, 2009 WL 901766 at *6.
136. In re Hawkins, 2009 WL 901766 at *6.
137. In re Hawkins, 2009 WL 901766 at *5 (footnotes omitted).
138. In re Hawkins, 2009 WL 901766 at *8-*9.
139. Mortgage Elec. Registration Sys., Inc. v. Chong, 2009 WL 6524286 (D. Nev. Dec. 4, 2009).
140. Mortgage Elec. Registration Sys., Inc. v. Mitchell (In re Mitchell), 423 B.R. 914 (D. Nev. 2009).
141. In re Schwartz, 366 B.R. 265 (Bankr. D. Mass. 2007).
142. In re Schwartz, 366 B.R. at 266.
143. Schwartz v. Deutsche Bank Nat'l Trust Co., Adv. Pro. No. 07-4098, Mem. Op. at 3 (Feb. 23, 2009).
144. Schwartz v. Deutsche Bank National Trust Co., Adv. Pro. No. 07-4098, Mem. Op. at 7 (trial is scheduled for June 2010).
145. In re Maisel, 378 B.R. 19, 21, 22 (Bankr. D. Mass. 2007).
146. In re Maisel, 378 B.R. at 20-2 (internal citations omitted).
147. Christopher L. Peterson, Foreclosure, Subprime Mortgage Lending, and the Mortgage Electronic Registration System, __ U. Cin. L. Rev. __ (forthcoming Spring 2010) (draft available at: http://papers.ssrn.com/so13/papers.cfm?abstract_id=1469749).
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149. Arthur E. Wilmarth, Jr., The Dark Side of Universal Banking: Financial Conglomerates and the Origins of the Subprime Financial Crisis, 41 U. Conn. L. Rev. 963, 970 (2009).
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