

PUBLICATION

The Southeastern States' View of MERS

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Mortgage Electronic Systems, Inc. (MERS) operates an electronic registry that tracks servicing rights and ownership of mortgage loans across the U.S. This electronic registry has allowed for the rapid buying and selling of mortgage-backed promissory notes and the growth of the mortgage-backed securities market. MERS's role in facilitating mortgage trading was relatively uncontroversial in its early days, but has spawned federal and state court litigation nationwide as the government and consumers alike search for a culprit (or a deep pocket) in the subprime mortgage meltdown.

The main thrust of the arguments asserted by borrowers against MERS is that it is only a means of circumventing the public recording system and therefore does not give MERS or assignees of mortgages through MERS the authority to enforce remedies under the mortgages they have been assigned. Given the number of residential mortgages in the MERS registry, any finding that invalidated MERS assignments would have an immediate and detrimental impact on the mortgage banking industry.

The majority of decisions that have been decided are similar to the much cited *In re MERS Litigation*.¹ In that instance, the court dismissed 13 of the 14 cases where the plaintiffs asserted wrongful foreclosure actions based on MERS' lack of standing as a nominee beneficiary to pursue non-judicial foreclosure. The court unequivocally held that MERS and MERS-appointed trustees have the power to foreclose. The court rejected the plaintiffs' argument that "because 'the note and deed of trust were no longer together' the holders of the notes 'are no longer allowed to enforce the note through non-judicial foreclosure.'"

The minority position is best articulated by *MERS v. Saunders*.² The Supreme Judicial Court of Maine held that the only rights conveyed to MERS under the mortgage were "bare legal title to the property for the sole purpose of recording the mortgage and the corresponding right to record the mortgage with the Registry of Deeds." Because MERS could not prove that it suffered any injury when the borrowers failed to pay their mortgage and did not have possession of or any interest in the note, the court found that MERS lacked standing to institute judicial foreclosure proceedings. However, the court allowed the investor, Deutsche Bank National Trust Company, to be substituted as a party for MERS and pursue the complaint for foreclosure.

This article is a compilation of cases across Baker Donelson's footprint and bordering states that have addressed legal questions related to the validity of the MERS and the legal effect given to assignments of mortgages through MERS.

Alabama

In *Crum v. LaSalle Bank, N.A.*,³ the borrower contended that MERS, specified in the mortgage instrument as the lender's nominee and as the mortgagee, was not shown to have owned the debt and therefore could not convey any right to the assignee whereby the assignee would have valid title. The Court of Civil Appeals disagreed and held that the assignee through MERS obtained all rights formerly held by the original lender so as to have the authority to initiate foreclosure action and to bring an action for ejectment after obtaining the foreclosure deed. See also *In re Frank*,⁴ finding that the MERS assignment was valid and the assignee thereunder had standing to pursue the lift stay motion; and *Mortensen v. Mortgage Electronic Registration*

Systems, Inc.,⁵ recognizing an assignment from MERS to the present holder and assignee of the mortgage as valid.

Florida

In *Taylor v. Deutsche Bank National Trust Co.*,⁶ the District Court of Appeals explicitly held that a written assignment of the note and mortgage from MERS to the assignee was sufficient to confer upon the assignee the authority to foreclose the mortgage. In so holding, the court explained that "[t]he transfer . . . was not defective by reason of the fact that MERS lacked a beneficial ownership interest in the note at the time of the assignment, because MERS was lawfully acting in the place of the holder and was given explicit and agreed upon authority to make just such an assignment" under the terms of the mortgage. See also *Trent v. Mortgage Electronic Registration Systems, Inc.*,⁷ holding that MERS has the authority to file foreclosure actions; and *Mortgage Electronic Registration Systems, Inc. v. Azize*,⁸ holding that MERS has standing to re-establish the note and foreclose the mortgage.

Georgia

In *re Corley*,⁹ the bankruptcy court gives an in-depth analysis of the terms of the "note" and "mortgage," which support the "plain meaning" interpretation of the contract that MERS was the grantee, as nominee for the original lender, its successors and assigns. In this matter, when the borrowers filed Chapter 7, the trustee commenced an adversary proceeding to determine the extent, validity, and priority of the security deed, asserting that the note was unsecured. The court held that there is "no split of the Note and Security Deed as a matter of contract by any transfer of the Note, because the Security Deed expressly contemplates that the Note may be transferred from the original Lender, and that MERS' role as nominee for the Lender extends to each successive assignee." The court granted the Defendants' Motion for Summary Judgment and ruled that the note was fully secured. See also *Kante v. Countrywide Home Loans*,¹⁰ upholding District Court's dismissal of borrower's claims, including a claim that MERS lacked standing to foreclose the property; *Selene RMOF REO Acquisition II, LLC v. Vandiver & Kaufman, LLC*,¹¹ recognizing the validity of a foreclosure by MERS as nominee for the lender under the security instrument; *Ma'at v. BB&T Mortgage*,¹² dismissing wrongful foreclosure claim and holding that MERS' assignee has standing to foreclose; *Brown v. Federal National Mortgage Association*,¹³ dismissing wrongful foreclosure claim and holding that MERS' assignee has standing to foreclose; *Nicholson v. OneWest Bank*,¹⁴ holding that MERS assignee has standing to foreclose; and *Johnson v. Mortgage Electronic Registration Systems, Inc.*,¹⁵ noting that MERS held the security deed as "nominee" for the transferee.

Louisiana

There have been no significant decisions relating to MERS in Louisiana. The court did recognize, however, in *First National Bank USA v. DDS Construction, LLC*,¹⁶ the assignment from MERS to the present holder and assignee of the mortgage as valid.

Maryland

In *Suss v. J.P. Morgan Chase Bank, N.A.*,¹⁷ the court held that the MERS "system of recordation is proper and assignments made through that system are valid" citing two decisions from other jurisdictions. See also *Anderson v. Burson*,¹⁸ recognizing an assignment from MERS to a holder of the note and mortgage in the chain of ownership as valid.

Mississippi

There have been no significant decisions relating to MERS in Mississippi. The bankruptcy court in *In re Cothorn*¹⁹ noted that the beneficiary under the security instrument was MERS as the nominee for the original lender and its successors and assigns.

North Carolina

There have been no significant decisions relating to MERS in North Carolina. The court did recognize, however, in *Harty v. Underhill*,²⁰ an assignment of servicing rights from MERS to the servicer of the mortgage as valid and dismissed all of the borrower's claims. See also *Bey v. Brock & Scott, PLLC*,²¹ recognizing MERS as the owner and holder of the note secured by the deed of trust.

South Carolina

There have been no substantive decisions relating to MERS in South Carolina.

Tennessee

While there have been no significant decisions relating to MERS in Tennessee, there have been several cases that implicitly recognize the validity of the MERS system and the assignments made through such system. See *Lee v. EquiFirst Corporation*,²² *Morris v. EquiFirst Corporation*,²³ and *Mills v. First Horizon Home Loan Corp.*²⁴

Texas

The law in Texas is very clear that the MERS system is valid and the assignments made through such a system are also valid. In *Richardson v. Citimortgage*,²⁵ the district court succinctly states its reasoning that the MERS system is valid under Texas law as a "book entry system," which means a "national book system for registering a beneficial interest in security instrument and its successors and assigns" under Texas Property Code § 51.0001(1). When the mortgage documents provide for the use of MERS in Texas, the provisions are enforceable to the extent provided by the terms of the documents. "Under Texas law, where a deed of trust, as here, expressly provides for MERS to have the power of sale, then MERS has the power of sale. MERS was the nominee for [the original lender] and its successors and assigns. MERS had the authority to transfer the rights and interests in the Deed of Trust The Plaintiffs' complaints about the role of MERS in this matter lack merit." Based on this reasoning, the court ruled that a MERS's assignee "had every right to foreclose on the property." See also *McAllister v. BAC Home Loans Servicing, LP*,²⁶ holding that the MERS system and the assignments made through such system are valid and that borrower has no standing to contest the various assignments as she was not a party to the assignments; *Athey v. Mortgage Electronic Registration Systems, Inc.*,²⁷ holding that MERS was the beneficiary of the deed of trust and had authority to initiate a non-judicial foreclosure; and *Santarose v. Aurora Bank FSB*,²⁸ citing language in the deed of trust to establish that MERS had the right to institute foreclosure proceedings.

Virginia

For several centuries, Virginia has made a clear policy decision to enhance commerce within the state by ensuring that negotiable instruments are freely transferable. This policy translates into a favorable forum for disputes relating to the MERS system and the validity of its assignments. In *Horvath v. Bank of New York, N.A.*,²⁹ the Fourth Circuit affirms the lower court holding that (a) the transferee note holder had the authority to enforce the note by appointing a substitute trustee and foreclosing on the property; (b) the transfer of the borrower's note necessarily involved the transfer of the deed of trust, as the underlying security instrument; and (c) the term "lender," under the deed of trust applied not only to the original lender but to any subsequent purchaser of deed of trust. See also *In re Burnett*,³⁰ holding that MERS has the authority to enforce the deed of

trust and commence foreclosure proceedings; *Gibson v. Wells Fargo Bank, N.A.*,³¹ holding that a MERS' assignee was the secured party under the deed and had authority to foreclose; *Ramirez-Alvarez v. Aurora Loan Services, LLC*,³² holding "MERS had the authority and ability to enforce the terms of the security instrument"; *Tapia v. U.S. Bank*,³³ holding that MERS had the right to foreclose the property; and *Larota-Florez v. Goldman Sachs Mortgage Co.*,³⁴ holding that MERS' assignee had authority to foreclose under the state non-judicial foreclosure statute.

Washington, D.C.

There have been no significant decisions relating to MERS in the District of Columbia. The court did note, however, in *Wells Fargo Bank, N.A. v. Wrenn*,³⁵ that "MERS is the legal holder of the Deeds of Trust for the benefit of the holder of the Promissory Notes."

1. MDL Docket No. 09-2119-JAT, 2011 WL 251453 (D. Ariz. Jan. 25, 2011)
2. 2 A.3d 289 (Me. 2010) 4. No. 2080110, 2009 WL 2986655 (Ala. Civ. App. 2009)
3. No. 2080110, 2009 WL 2986655 (Ala. Civ. App. 2009)
4. No. 10-84435-JAC-13, 2011 WL 846125 (Bankr. N.D. Ala. Mar. 8, 2011)
5. No. 09-0787-WS-N, 2010 WL 5376332 (S.D. Ala. Dec. 23, 2010)
6. 44 So.3d 618 (Fla. 5th DCA 2010)
7. 288 Fed. Appx. 571, 572 (11th Cir. 2008)
8. 965 So.2d 151 (Fla. 2d DCA 2007)
9. 445 B.R. 375 (Bankr. S.D. Ga. 2011)
10. No. 10-15770, 2011 WL 2420054 (11th Cir. June 16, 2011)
11. Civil Action No. 3:10-cv-109 (CAR), 2011 WL 1833204 (M.D. Ga. May 12, 2011)
12. Civil Action No. 1:11-cv-0073-RWS, 2011 WL 1807450 (N.D. Ga. May 11, 2011)
13. Civil Action File No. 1:10-CV-03289-TWT-GGB, 2011 WL 1134716 (N.D. Ga. Feb. 28, 2011)
14. No. 1-10-cv-0795-JEC/AJB, 2010 WL 2732325 (N.D. Ga. Apr. 20, 2010)
15. 252 Fed. Appx. 293 (11th Cir. 2007)
16. --- So.3d ---, 2010 WL 4486367 (La.App. 5 Cir. Nov. 9, 2010)
17. Civil Action No. WMN-09-1627, 2010 WL 2733097 (D. Md. July 9, 2010)
18. 196 Md. App. 457, 9 A.3d 870 (Md. App. 2010)
19. 442 B.R. 494 (Bankr. N.D. Miss. 2010)
20. --- S.E.2d ---, 2011 WL 1648099 (N.C. App. May 3, 2011)
21. No. 3:09CV423-V, 2011 WL 1239811 (W.D.N.C. Mar. 29, 2011)
22. No. 3:10-CV-809, 2011 WL 1584124 (M.D. Tenn. Apr. 25, 2011)
23. No. 3:09-CV-1086, 2010 WL 890877 (M.D. Tenn. Mar. 9, 2010)
24. No. W-2010-00310-COA-R3-CV, 2010 WL 4629610 (Tenn. Ct. App. Nov. 16, 2010)
25. No. 6:10cv119, 2010 WL 4818556 (E.D. Tex. Nov. 22, 2010)
26. No. 4:10-CV-504, 2011 WL 2200672 (E.D. Tex. Apr. 28, 2011)
27. 314 S.W.3d 161 (Tex. Ct. App. Aug. 20, 2010)
28. No. H-10-0720, 2010 WL 3064047 (S.D. Tex. Aug. 3, 2010)
29. --- F.3d ---, 2011 WL 1892110, (4th Cir. May 19, 2011)
30. --- B.R. ---, 2011 WL 2214667 (Bankr. W.D. Va. Apr. 28, 2011)
31. No. 1:10-cv-304, 2011 WL 221188 (E.D. Va. Jan. 19, 2011)
32. No. 01:09-cv-1306, 2010 WL 2934473 (E.D. Va. July 21, 2010)
33. N.A., 718 F.Supp.2d 689 (E.D. Va. 2010)
34. 719 F.Supp.2d 636 (E.D.Va. 2010)
35. No. 08-165 (CKK), 2009 WL 1705692 (D.D.C. June 18, 2009)