

MERS: A Twenty First Century Creation Navigating An Eighteenth Century Legal System

Introduction

One need not be an expert in banking or real estate to have become acutely aware of the 2008 financial crisis and the housing bubble that largely precipitated it. High unemployment, low economic growth, and record government deficits are daily reminders of the lingering effects of this cataclysmic series of economic events. Perhaps in no area more than real estate is the fallout still clearly visible. Home ownership rates are down, delinquency rates are up, and a mass of foreclosures weighs like an albatross on both the financial industry and the United States economy. One entity, the Mortgage Electronic Registration System (MERS) is emblematic of this problem. MERS was forged out of the environment which ultimately led to the housing bubble, helped sustain and strengthen this bubble, is a lead contributor to the ongoing foreclosure crisis, and is a primary impediment to its swift resolution. MERS, and more precisely judicial treatment of MERS, will have a profound impact on not just resolving the broken foreclosure process, but also upon the real estate market going forward, and in turn, economic recovery.

I. DEVELOPMENTS LEADING TO THE CREATION OF MERS

A. Background On Real Estate Transactions

Before understanding MERS, it is necessary to grasp the fundamentals of a basic residential real estate transaction. "In its traditional and most basic form, a home mortgage loan consists of a mortgagor, a note and mortgage, and a mortgagee, with the mortgagee originating the mortgage and also performing both the loan servicing and investor roles."^[i] Generally, a mortgage secures underlying debt, which, in the case of a residential real estate transaction, is real property.^[ii] "This secured debt is commonly evidenced by a promissory note payable to the order of the lender."^[iii] Basically, "the note is the IOU that contains the borrower's promise to repay the money loaned," whereas "the mortgage is the document that connects the IOU with the house. The mortgage gives the lender a contingent right to the house; it provides that *if* the borrower does not pay according to the terms of the note, then the lender can foreclose and have the property sold."^[iv]

The traditional process for change in ownership of the loan is as follows:

If the mortgagee sold the loan, the mortgage (including the servicing) typically was assigned via an assignment of the mortgage to a new mortgagee. This assignment of the mortgage was typically recorded. In this basic model, the same mortgagee is always the holder of the note, the owner and servicer of the loan, and the mortgagee of record.^[v]

Later, if this property is being foreclosed on, "the amount owed on the debt attaches as a lien against the mortgaged property in favor of the debt's owner, and the court may order a judicial sale to satisfy the lien."^[vi]

This basic mortgage process has become much more complicated over time as widespread changes in the banking industry have propagated.^[vii]

B. Consolidation of Banks, Concentration of Banking Assets, and Deregulation

In the last 30 years, the U.S. banking system has changed dramatically, with the total number of banks and other financial institutions steeply declining, while financial assets have become increasingly concentrated in a handful of large banks.^[viii] Innovation and deregulation have largely been contributing factors. In the latter half of the twentieth century, new technologies and the widespread adoption of existing technologies, including the fax machine, personal computers, and the internet, made communication and the transfer of information increasingly

faster and less cumbersome. [ix] This “freed the financial services industry from the constraints of time and place...” allowing firms “to transfer huge amounts of capital around the globe with the click of a mouse.” [x]

Just as it was becoming cheaper and more feasible for banks to consolidate their operations and quickly move capital, a climate of deregulation cleared the way for them to do so. [xi] “In the early 1980s, policymakers began a decades-long process of deregulating the banking and thrift industries so that they could be more responsive to marketplace realities.” [xii] “In the 1970s, commercial banks faced restrictions on interest rates,” and were operationally limited to “deposit taking and lending – to the exclusion, for example, of underwriting many corporate securities and insurance products.” [xiii] Furthermore, “no state permitted banks headquartered in other states either to open branches or to buy their banks”. [xiv]

Today, after 30 years of deregulation, most geographical and interest rates restrictions have been removed or severely relaxed, as have the restrictions on underwriting corporate securities and insurance. [xv]

C. Real Estate Boom

While the banking industry was experiencing widespread consolidation and asset concentration from the 1980’s through the 2000’s, real estate assets in the United States began appreciating in value at an historically high rate, starting in the 1990’s. [xvi] “Government data shows that inflation-adjusted house prices nationwide were on average essentially unchanged from 1953 to 1995... [but] [b]y 2002, house prices had risen by nearly 30 percent after adjusting for inflation.” [xvii]

This infusion of capital into the housing sector created “a substantial run-up—indeed, a large bubble—in house prices: Increases in ... house prices in the United States averaged 12¹⁷² percent (on a year-over-year basis) during the 2003–05 period.” [xviii]

Banks and other financial institutions invested heavily in the residential real estate market, hoping to capitalize on rising prices, [xix] which caused prices to rise even further, attracting even more homeowners, investors, and capital, even further increasing prices, even further inflating the bubble. [xx]

D. Mortgage Securitization

The development of a practice known as “mortgage securitization” allowed banks and other financial institutions to offer more loans, including residential home loans, and to quickly profit from rising housing prices.

“Securitization [is the] process of pooling many mortgages into a trust and selling income from the trust to investors on Wall Street.” [xxi] Traditionally, when a bank loaned money to a person or family seeking to buy a home, the bank would require 20% of the purchase price of the property as down payment. [xxii] The bank would usually retain ownership of the note and mortgage, and service the loan. [xxiii]

As banks consolidated and became more sophisticated, instead of retaining ownership of these notes and mortgages, they began to sell them as securities to investors, thereby “securitizing” the loan. [xxiv] This helped banks in two ways: banks received money quickly which they could immediately plow back into the white-hot real estate market, and banks’ self-interests and the self-interests of borrowers became decoupled. [xxv] In the old system, banks had a strong incentive to investigate borrower’s finances, and only loan to those who possessed a strong ability to pay the loan back, because if the borrower defaulted, the bank would be negatively affected financially. [xxvi] However, under the new system, once a bank had sold the note and mortgage, it mattered little financially if the consumer defaulted, because the bank had already recouped the money it loaned, and the risk of default was borne by the entity that purchased the security. [xxvii] This provided a perverse economic incentive for banks to recklessly make as many loans as possible as quickly as possible; an environment with no moral hazard. [xxviii] Complicating matters, this process of securitization usually required “several successive mortgage assignments to different companies,” [xxix] which proved cumbersome under the American land title recording system. [xxx]

E. The American Land Title Recording System

“Since the founding of the American republic, each county in the United States has maintained records of who owns the land within that county,” [xxxii] resulting in there currently being “over 3,000 local recording systems where holders of an interest in real estate can register that interest into books.” [xxxii] The system is basically a county-by-county hodgepodge of different systems and techniques, with no two alike, although there are some commonalities. [xxxiii]

This created a bottleneck of sorts for the banking industry, [xxxiv] which was seeking to issue as many home loans as possible, as quickly as possible. Every assignment of a mortgage had to be physically recorded with the Register of Deeds or Clerk of Court for the county in which the property was located, with the recorder having to pay recording costs of approximately “\$15 to 30 for the first page and...\$2 to \$3 for each additional page.” [xxxv] The costs and the hassle of complying with these motley recording statutes, multiplied by the sheer volume of mortgage transactions, presented a barrier for banks and other financial institutions from fully engaging in the residential real estate market. [xxxvi] Out of this conflict, MERS was spawned.

II. DEVELOPMENT OF MERS

“As the market for mortgage-backed securities grew, mortgage lenders and investment banks sought to make the transfer of residential mortgages cheaper and easier, and so MERS was born.” [xxxvii] In October 1983, representatives from the Mortgage Bankers Association (MBA), Fannie Mae, Freddie Mac, and Ginnie Mae came together to form the Mortgage Bankers Association (MBA) InterAgency Technology Task Force (IAT) [xxxviii]

This task force ultimately concluded that the financial industry could substantially reduce its costs by not paying the fees typically assessed by local governments for the recordation of mortgage assignments, [xxxix] saving an average of \$45.50 each time a loan was transferred. [xl]

As Professor Chris Peterson of the Utah School of Law succinctly described:

To avoid the hassle and expense of paying county recording fees, these mortgage bankers formed a plan to create one shell company that would pretend to own all the mortgages in the country. With this plan, the mortgage bankers would never have to record assignments because the same company would always own all the mortgages. [xli]

By the late nineties, after an estimated establishment cost of \$11-12 million, MERS became fully operational. [xlii] Many have called the creation of MERS, “the most significant event for the mortgage industry since the formation of Fannie Mae and Freddie Mac.” [xliii]

III. MERS'S CURRENT OPERATIONS

Today, MERS is a privately held corporation registered in Delaware and headquartered in Northern Virginia, which “operates a computer database designed to track servicing and ownership rights anywhere in the United States.” [xliv] MERS is largely owned by its members which consist of three classes: the “Agency Class,” comprised of Fannie Mae and Freddie Mac; the “Lender Class,” comprised of entities who originate and service mortgage loans; and the “Related-Industry Class,” which includes entities indirectly involved in the mortgage business, including mortgage insurance companies and title companies. [xlv]

“MERS does not originate, lend, service, or invest in home mortgage loans. Instead, MERS acts as the nominal mortgagee for the loans owned by its members.” [xlvi] The forty-three page “Merscorp, Inc. Rules of Membership” clearly delineates the relationship between MERS and its over 4,593 members who each pay between \$264 and \$7,500 annually in membership fees. [xlvii]

“A loan held by a member is registered in the MERS database. Once registered, MERS serves as the mortgagee of record for all loans in its system. More specifically, MERS is the nominal mortgagee for the lender and any successors and assigns. When the security instrument is recorded, the local land records list MERS as the mortgagee.” [xlviii] The exact process is as follows:

To execute a MERS mortgage, the borrower conveys the mortgage to MERS, who is acting as a contractual nominee. MERS becomes the recorded grantee, however, the lender retains the note and servicing right. The lender can then sell that note and servicing rights on the market and MERS records each transaction electronically on its files. When the mortgage loan is repaid, MERS, as agent grantor, conveys the property to the borrower.”^[xlix]

MERS members may transfer the beneficial ownership interest and/or servicing rights among themselves multiple times throughout the mortgage’s lifetime, but assignments are not publically recorded, instead being tracked privately by MERS.^[i] While the mortgagor receives notice of servicing rights transfers as required by the Truth in Lending Act, they seldom receive notice of transfers in ownership of their mortgage.^[ii] Legally, MERS remains the nominal mortgagee, regardless of how many times ownership of the mortgage is transferred amongst MERS members.^[iii]

The new MERS method of originating and transferring mortgages has quickly displaced centuries of traditional practices. Although merely a decade old, by 2007 MERS had a role in the origination of roughly 60% of all United States mortgage loans, with over 60 million mortgage loans registered in the MERS system.^[iiii] By 2009, MERS was the nominal mortgagee on two-thirds of “newly originated” residential loans in the United States.^[iv] Although similar figures are not available for the present day, there is little to suggest that MERS’s role in mortgage origination has diminished. Whereas MERS’s rapid growth might be good for MERS Corp.’s private owners, recent developments suggest that this might not benefit United States’ homeowners.

IV. THE FORECLOSURE CRISIS

During MERS’s infancy and adolescence, economic growth and rising real estate prices glossed over some of its inherent flaws, and its cracks did not begin to show until the Great Recession of 2008. This economic calamity resulted in 40 % of global wealth evaporating in a little over one year.^[v] As of early 2009, real estate prices had plummeted over 32% from their peak,^[vi] and by December 2010, the U.S. economy had jettisoned over seven million jobs.^[vii] These ill economic conditions have lingered and festered. Despite two years of ostensible economic “recovery,” as of October, 2011, fourteen million people are still unemployed in the United States, resulting in an unemployment rate of 9.1%.^[viii]

Two years of chronic unemployment and suppressed real estate values have greatly exacerbated the already precarious financial situations of millions of Americans, leading to increases in home mortgage delinquency rates and foreclosures. The ratio of outstanding consumer debt to disposable income in the United States rose from an average of 65 % in the mid 1980’s to 137 % in 2007, meaning that Americans were twice as in debt in 2007 as they were 20 years before.^[ix] According to the San Francisco Federal Reserve Board, “[m]uch of the run-up in debt was mortgage-related.”^[x] This increased mortgage borrowing was the necessary complement to the increased lending discussed previously, brought on by “a combination of factors including low interest rates, weak lending standards, the spread of exotic mortgages, and the growth of a global market for securitized loans promoted increased borrowing.”^[xi] Yet as consumer debt rose, its negative effects were not really felt because personal wealth was also rising due to rising housing prices. This allowed consumers to “extract hundreds of billions of dollars per year in spendable cash” from home equity lines of credit.^[xii]

When the economy crashed, the music stopped, and real estate prices fell, people could no longer use their home equity to pad their finances. Nearly everyone had to face elevated debt levels with less income and often with the value of the collateral securing the debt, frequently a home, having depreciated.^[xiii] This unsustainable debt led to a rash of mortgage delinquencies and foreclosures, which have both only increased over time.^[xiv] Currently, there are five million people who are more than two months late on their mortgage payments.^[xv] “Since mid-2007, around eight million homes entered foreclosure, and over three million borrowers lost their homes in foreclosure.”^[xvi] 2011 is expected to set a new record with over 1.2 million houses repossessed by lenders.^[xvii]

V. MERS'S ROLE IN THE FORECLOSURE PROCESS:

A. Overview

With millions of foreclosures happening annually, and with MERS holding legal title to over 60 million mortgages, MERS has been very involved in the foreclosure process.

In fact, "MERS is currently a plaintiff in as many as 40 percent of pending foreclosure actions in some locales." [lxviii] This poses several daunting legal issues, which differ somewhat depending upon which method of foreclosure is proscribed by state law. "[S]tates can be divided into two groups: those where foreclosure actions are conducted through the courts ("judicial foreclosure") and those where foreclosure actions are conducted by private sales ("nonjudicial foreclosure") [lxix] To foreclose in judicial foreclosure states, "a[n] attorney files a lis pendens (lawsuit pending) with the court. The lis pendens gives notice to the public that a pending action has been filed against the mortgagor. The purpose of the action is to provide evidence of a default and get the court's approval to initiate foreclosure." [lxx]

"It is axiomatic that in order to bring a suit, like a foreclosure action, the plaintiff must have legal standing, meaning it must have a direct interest in the outcome of the litigation. In the case of a mortgage foreclosure, only the mortgagee has such an interest and thus standing." [lxxi] Since MERS is technically the mortgagee of record for the loans of its members, steps must be taken before standing can be established and foreclosure can begin.

According to the MERSCORP, Inc. Rules of Membership, Rule 8, a MERS member who seeks to foreclose on a mortgage contained in the MERS system has three basic options to ensure that there will be requisite standing to foreclose: bring the foreclosure proceeding "in the name of Mortgage Electronic Registration Systems, Inc., [in] the name of the servicer, or [in] the name of a different party to be designated by the beneficial owner." [lxxii] All three of these options have posed problems for the legal system. As Adam J. Levitin testified before the Subcommittee on Housing and Community Opportunity of the House Financial Services Committee, "[m]any of the issues relating to foreclosure fraud by mortgage servicers, ranging from more minor procedural defects up to outright counterfeiting relate to the need to show standing." [lxxiii]

B. Transferring the Mortgage from MERS

If the holder of the note either forecloses in its own name, "the servicer designated on the MERS System shall cause to be made an assignment from Mortgage Electronic Registration Systems, Inc. to the person designated by the beneficial owner." [lxxiv] This process appears backwards, because in effect it is requiring a party seeking to foreclose to create an assignment from MERS to itself or another party it chooses, when ordinarily the person or entity assigning something is the one who creates an assignment. Furthermore, MERS has fewer than 50 full time employees, yet holds legal title to over 60 million mortgages. [lxxv] With millions of foreclosures in the last several years, it strains credulity that all of the requisite mortgage assignments from MERS for foreclosing were properly filled out, signed by one of those 50 MERS employees, and notarized. Not surprisingly, this was not the case:

Instead, MERS invites financial companies to enter names of their own employees into a MERS webpage, which then automatically regurgitates boilerplate "corporate resolutions" that purport to name the employees of other companies as "certifying officers of MERS." These certifying officers also take job titles from MERS stylizing themselves as either assistant secretaries or vice presidents of the MERS, rather than the company that actually employs them. [lxxvi]

The legality of these resolutions is suspect, because they purport to allow individuals to sign assignments and other documents on MERS's behalf, even though MERS has never paid them any compensation. [lxxvii] Often times, these "certifying officers of MERS" actually work for the company who is being assigned the mortgage. There are currently "thousands" of "assistant secretaries" and "vice-presidents" of MERS. [lxxviii]

Many of these "certifying officers" have engaged in the practice of "robo-signing," "the rapid-fire approval of thousands of foreclosure documents at a time without the signers verifying their contents." [lxxix] One of the most famous "robo-signers" is Jeffrey Stephan, a team leader in the foreclosure department at GMAC Mortgage. [lxxx]

Although he had never received any training or compensation from MERS and had never been to MERS headquarters, Mr. Stephan signed over ten thousand assignments per month as an officer of MERS, without verifying the information to which he was attesting, [xxxix] and not in the presence of a notary. [xxxix] Mr. Stephan signed as both an assistant secretary and a vice-president of MERS, or as he explained, “[t]he majority of the time I sign as a vice president. Most times we do not need an assistant secretary, unless they are asking for a second signature on any type of an affidavit or assignment.” [xxxix] As Mr. Stephan so aptly said, “I do not work for MERS.” [xxxix] Mr. Stephan was not alone.

The most famous “robo-signer” of all is Linda Green, who purportedly was president of up to twenty banks at once. [xxxv] A former shipping clerk for an auto parts store, Ms. Green worked for a company in Alpharetta, Ga, by the name of Docx, which was a sweatshop of sorts for forged mortgage documents. [xxxvi] Ms. Green was hired because her name was short and easy to repeatedly write, and her duties included “recreating missing mortgage assignments for the banks and providing the legally required signatures of bank vice presidents and notaries.” [xxxvii] Eventually there were simply too many documents for Linda Green to sign, so the company began paying other people \$10.00 an hour to sign Linda Green’s name to legal documents. [xxxviii] These employees, many of them still in high school, were required to sign at least 350 documents an hour, or up to 4,000 a day. [xxxix]

While Linda Green, Jeffrey Stephan, and other robo-signers sometimes signed assignments and other documents on behalf of many different financial institutions, it is hard to imagine the phenomenon of robo-signing occurring if not for the rapid electronic transfer of mortgages with no paper trail that MERS allowed. This eventually led to lost documents, uncertain chains of title, and confusion. When the owner of a note sought to foreclose, because the accompanying mortgage had been transferred so many times through MERS, the note holder often could not locate the original mortgage, or establish a clear chain of title establishing that he or she owned it. Robo-signers and forgers filled in the gaps and the missing links, often fraudulently, thus allowing the note holder to foreclose. Whether assigning mortgages from MERS to a foreclosing institution, or “fixing” documentation problems that MERS helped create, it is clear that robo-signers, and the fraud they helped perpetuate on our legal system, were in large part a product of the MERS system.

C. Foreclosing in the Name of MERS

One easy way for a prospective foreclosing entity to address the standing problem of not legally holding title to the mortgage, and thus avoid the steps which must be taken in order to obtain ownership of the mortgage is to simply bring a foreclosure in the name of MERS. This raises the issue of whether or not MERS has standing as a real party in interest to bring a foreclosure action, an issue that courts across the country are still grappling with.

While a majority of courts throughout the country initially ruled that MERS had standing to foreclose, courts are beginning to increasingly questioning the MERS concept, and its judicial standing in particular. [xc]

i. Pro-MERS Rulings

In 2006, the Court of Appeals of Minnesota held that MERS had standing to foreclose when it held legal title to a mortgage and was acting as nominee for the holder of the note. [xci] The court ultimately ruled that, “[b]ecause MERS is the record assignee of the mortgage, we conclude that MERS had standing to foreclose the property by advertisement.” [xcii] In a similar vein, in 2007, the District Court of Appeals in Florida, Third District, held that MERS had standing to foreclose. [xciii] The court explained that, “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...” [xciv] The court concluded that because, “there is no reason why mere form should overcome the salutary substance of permitting the use of this commercially effective means of business,” MERS can foreclose. [xcv] Similarly, the Superior Court of Massachusetts, Suffolk County, held that MERS had standing to foreclose upon a mortgage because, “[t]he mortgage ... expressly grants MERS the authority to foreclose on the Property and to sell the Property,” and MERS was the mortgagee, of record, it had legal right to foreclose. [xcvi]

ii. Anti-MERS Rulings

Several courts across the country have recently held that MERS lacked standing to foreclose. In 2010, the Maine Supreme Court held that “[w]ithout possession of or any interest in the note, MERS lacked standing to institute foreclosure proceedings and could not invoke the jurisdiction of our trial courts.”^[xcvii] Similarly, in 2011, the Michigan Court of Appeals held that because, “[t]he parties agree that MERS is neither the owner of the indebtedness, nor the servicing agent of the mortgage...MERS lacked the authority to foreclose....”^[xcviii] Furthermore, in 2009 the Supreme Courts of both Arkansas and Kansas held that MERS was not a real party in interest and therefore need not be named or served in a foreclosure action by a second mortgage holder.^[xcix]

Courts throughout the country have yet to reach a consensus on a judicial prism through which to view MERS, and on such fundamental issues as whether MERS has standing to foreclose. Comparing the various MERS cases is essentially no different than comparing apples to oranges, in that these cases, “depend on such fact-specific circumstances as the wording of the particular mortgage, the wording of the state’s foreclosure statutes, and more generally, the willingness of judges in interpreting those laws to facilitate modern innovation over archaic conventions of real property law.”^[c]

iii. State and County Legal Action

Recently, states and counties have taken legal action against MERS.^[ci] On October 27, 2011, Delaware Attorney General Beau Biden filed a lawsuit against MERS for, “engaging in a range of deceptive trade practices that sow confusion among consumers, investors and other stakeholders in the mortgage finance system, damage[ing] the integrity of Delaware’s land records, and lead[ing] to unlawful foreclosure practices.”^[cii]

Similarly, New York Attorney General Eric Schneiderman issued a subpoena to MERS for information concerning the interaction between itself and mortgage servicers including JP Morgan Chase & Co., Bank of America Corp., and Wells Fargo & Co., and how these servicers typically operate within the MERS system.^[ciii] Finally, Dallas County, District Attorney Craig Watkins, has sued MERS for the recordation fees the county has not received for mortgages traded on the MERS system, seeking up to \$100 million.^[civ] As MERS and its practices become well known, it stands to reason that more state and local governments will follow the examples of Delaware, New York, and Dallas.

VI. CONCLUSION

In the last decade, MERS has swiftly come to dominate the residential mortgage industry, supplanting centuries of legal tradition. MERS is not inherently malevolent, and it is certainly true that the law must evolve and adapt to technological and social changes. However, MERS has created unintended consequences, many of which are confounding the legal system and impeding the swift resolution of the foreclosure crisis plaguing the nation. Only after a comprehensive legal solution to MERS is achieved will the real estate market and the overall economy properly heal.

^[i]Beau Phillips, *MERS, the Mortgage Electronic Registration System*, Consumer Fin. L. Q. Rep. 262 (Fall-Winter 2009).

^[ii]Kevin M. Hudspeth, *Clarifying Murky MERS: Does Mortgage Electronic Registration Systems, Inc., Have Authority to Assign the Mortgage Note in a Standard Illinois Foreclosure Action?* 31 N. Ill. U. L. Rev. 1, 4, (2010).

^[iii]*Id.*

^[iv]Robo-Signing, Chain of Title, Loss Mitigation, and Other Issues in Mortgage Servicing: Hearing Before the Subcomm. on Hous. and Cmty. Opportunity of the H. Fin. Serv. Comm., 111th Cong., Nov. 18, 2010 (Statement of Associate Professor Adam J. Levitin, Geo. U. L. Center).

^[v]Phillips, *supra* note i, at 262.

[vi] *Id.*

[vii] See Phillips, *supra* note i, at 262-63.

[viii] See Kenneth D. Jones & Tim Critchfield, *Consolidation in the U.S. Banking Industry: Is the “Long, Strange Trip” About to End?* 17 FDIC Banking Rev. 31, 32 (2006).

[ix] See *id.*

[x] Jones, *supra* note vii, at 35.

[xi] See *id.*

[xii] *Id.*

[xiii] Philip E. Strahan, *The Real Effects Of U.S. Banking Deregulation*, in The Working Paper Series, Boston College, Carroll School of Management & Wharton Financial Institutions Center, 02-39 (September 2002).

[xiv] *Id.*

[xv] *Id.*; see also Depository Institutions Deregulation and Monetary Control Act of 1980 (DIDA) (DIDMCA) [Pub.L. 96-221](#), Mar. 31, 1980, 94 Stat. 132; Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, [Pub.L. 103-328](#), Sept. 29, 1994, 108 Stat. 2338; Financial Services Modernization Act of 1999, [Pub.L. 106-102](#), 113 [Stat. 1338](#).

[xvi] See Jane Dokko, et. al., *Monetary Policy and the Housing Bubble*, in Finance and Economics Discussion Series, Divisions of Research & Statistics and Monetary Affairs, Federal Reserve Board, Washington, D.C.(December 22, 2009).

[xvii] Dean Baker, *The Housing Bubble and the Financial Crisis*, 42 Real-world Econ. Rev., 73-81 (2008), <http://www.paecon.net/PAEReview/issue46/Baker46.pdf>.

[xviii] Dokko, *supra* note xvi, at 1

[xix] *Id.*

[xx] See generally *id.*

[xxi] Christopher L. Peterson, *Two Faces: Demystifying the Mortgage Electronic Registration System’s Land Title Theory*, SS049-ALI-ABA 259, (March 10-12, 2011).

[xxii] See generally, Andrea J. Boyack, *Laudable Goals and Unintended Consequences: The Role and Control of Fannie Mae and Freddie Mac*, 60 Am. U. L. Rev. 1489, 1495-1501 (2011).

[xxiii] *Id.*

[xxiv] See generally Peterson, *supra* note xxi.

[xxv] See generally Boyack, *supra* note xxii, at 1518-1520

[xxvi] See generally *id.*

[xxvii] See *id.*

[\[xxviii\]](#) See *id.*

[\[xxix\]](#) Peterson, *supra* note xxi.

[\[xxx\]](#) See generally Tanya Marsh, *Foreclosures and the Failure of the American Land Title Recording System*, 111 Colum. L. Rev. Sidebar 19 (March 19, 2011).

[\[xxxi\]](#) Peterson, *supra* note xxi.

[\[xxxii\]](#) Marsh, *supra* note xxx, at 20-21.

[\[xxxiii\]](#) See *id.*

[\[xxxiv\]](#) See *id.* at 22.

[\[xxxv\]](#) Phillips, *supra* note i at 263.

[\[xxxvi\]](#) [Residential Funding Co. LLC v. Saurman](#), Nos. 290248, 291443 (Mich. Ct. App.) WL 1516819 (April 21, 2011)

[\[xxxvii\]](#) Nolan Robinson, *The Case Against Allowing Mortgage Electronic Registration Systems, Inc. (MERS) To Initiate Foreclosure Proceedings*, 32 Cordozo L. Rev. 1621 (March 2009)

[\[xxxviii\]](#) Phillips, *supra* note i, at 263.

[\[xxxix\]](#) *Id.* at 1368-69.

[\[xl\]](#) Phyllis K. Slesinger & Daniel Mclaughlin, *Mortgage Electronic Registration System*, 31 Idaho L. Rev. 805, 812-13 (1995).

[\[xli\]](#) Christopher L. Peterson, *Foreclosure, Subprime Mortgage Lending, and the Mortgage Electronic Registration System*, 8 U. Cin. L. Rev. 1359, 1369 (Summer 2010).

[\[xlii\]](#) *Id.*; Slesinger, *supra* note iv at 516.

[\[xliii\]](#) R.K. Arnold, *Yes There is Life on MERS*, 11-AUG Prob. & Prop.32, 34 (1997).

[\[xliv\]](#) Peterson, *supra* note xi.

[\[xlv\]](#) *Id.* at 33.

[\[xlvi\]](#) [Jackson v. Mortgage Electronic Registration Systems, Inc.](#), 770 N.W.2d 487, 490 (Minn. 2009).

[\[xlvii\]](#) Robinson, *supra* note xxxvii, at 1625.

[\[xlviii\]](#) *Id.*

[\[xlix\]](#) [Mortgage Electronic Registration Systems, Inc. v. Nebraska Dept. of Banking and Finance](#), 270 Neb. 529 704 N.W.2d 784, (2005).

[\[l\]](#) [MERSCORP, Inc. v. Romaine](#), 8 N.Y.3d 908, 28 N.Y.S.2d 266 (Ct. App. 2006).

[\[li\]](#) *Id.*

[\[lii\]](#) *Id.*

[[liii](#)] Peterson, *supra* note xli, at 1362 (citing Kate Berry, *Foreclosures Turn Up Heat on MERS*, Am. Banker, July 10, 2007).

[[liv](#)] Jackson v. Mortgage Electronic Registration Systems, Inc., 770 N.W.2d 487, 490 (Minn. 2009).

[[lv](#)] Jason Kelly and Rob Williams, *Schwarzman Says Wealth Destruction Is 'Unprecedented'*, Bloomberg, March 10, 2009, <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=abwwColum9a4&refer=home>

[[lvi](#)] S&P/Case-Shiller Home Price Indices 2009, S&P Induces, a year in review, Standard and Poor's, (January 2001).

[[lvii](#)] See Louis Uchitelle, *Jobs Report Is Strongest Since the Start of the Recession*, N. Y. Times, Dec. 14, 2009, <http://www.nytimes.com/2009/12/05/business/economy/05jobs.html>

[[lviii](#)] Bureau of Labor Statistics, United States Department of Labor, Employment Situation Summary, (2011).

[[lix](#)] Reuven Glick & Kevin J. Lansing, *U.S. Household Deleveraging and Future Consumption Growth*, FRBSF Economic Letter, May 15, 2009, at 1.

[[lx](#)] *Id.*

[[lxi](#)] *Id.*

[[lxii](#)] *Id.* at 2.

[[lxiii](#)] See *id.* at 1-3.

[[lxiv](#)] *Id.* at 1-3.

[[lxv](#)] Janna Herron, *Highest Number of Foreclosures in Forecast*, The News Tribune, Jan. 14, 2011, <http://www.thenewstribune.com/2011/01/14/1501753/highest-number-of-foreclosures.html>

[[lxvi](#)] Levitin, *supra* note iv.

[[lxvii](#)] Herron, *supra* note lxxv.

[[lxviii](#)] Robinson, *supra* note xxxvii, at 1625

[[lix](#)] Levitin, *supra* note iv. For the purposes of brevity, this paper will focus on judicial foreclosure states, such as South Carolina.

[[lxx](#)] *Foreclosure Laws and Procedures By State*, RealtyTrac, <http://www.realtytrac.com/foreclosure-laws/foreclosure-laws-comparison.asp>, (last visited October 23, 2011).

[[lxxi](#)] Levitin, *supra* note iv.

[[lxxii](#)] Phillips, *supra* note i, at 265-66.

[[lxxiii](#)] Levitin, *supra* note iv.

[[lxxiv](#)] Phillips, *supra* note i, at 266.

[[lxv](#)] Peterson, *supra* note iv, at 1362

[[lxxvi](#)] Christopher L. Peterson, *TwoFaces: Demystifyingthe Mortgage Electronic Registration System's Land Title Theory*, Real Prop. Tr. & Est. J.(forthcoming), 5, (available at <http://ssrn.com/abstract=1684729>)

[[lxxvii](#)]/*Id.* at 7.

[[lxxviii](#)]/*Id.*

[[lxxix](#)] Allison Torres Burtka, *Foreclosure Fallout*, 47 Trial16 (April 2011).

[[lxxx](#)] GMAC Mortgage, LLC, vs. Ann M. Neu, et. al., (Fla. Cir. Ct.) (2009) (Stephan dep. at 5:10, 6:5).

[[lxxxi](#)]/*Id.* (Stephan dep. at 7:1-21).

[[lxxxii](#)]/*Id.* (Stephan dep. at 13:7-16).

[[lxxxiii](#)]/*Id.* (2009) (Stephan dep. at 16: 3).

[[lxxxiv](#)]/*Id.* (Stephan dep. at 41:22).

[[lxxxv](#)] *Sixty Minutes:Mortgage paperwork mess: Next housing shock*(CBS television broadcast Aug. 7, 2011)).

[[lxxxvi](#)]/*Id.*

[[lxxxvii](#)]/*Id.*

[[lxxxviii](#)]/*Id.*

[[lxxxix](#)]/*Id.*

[[xc](#)] Michael T. Madison, Jeffrey R. Dwyer, and Steven W. Bender, *Rights and duties of parties at foreclosure—Judicial foreclosure—Standing of MERS and who owns the note?* 2 Law of Real Estate Financing § 12:35 (2011).

[[xci](#)]/*In reSina*, No. A06-200, 2006 WL 2729544, (Minn. Ct. App. Sept. 26, 2006).

[[xcii](#)]/*Id.*

[[xciii](#)]/*Mortgage Electronic Registration Systems, Inc. v. Revoredo*, 955 So.2d 33 (Fla. Dist. Ct. App. 2007).

[[xciv](#)]/*Id.* at 34 (citing [Romaine](#), 8 N.Y.3d 90, 101, 828 N.Y.S.2d 266, 271, 861 N.E.2d 81 (2006))(Kaye, C.J., dissenting in part)

[[xcv](#)]/*Id.* at 34.

[[xcvi](#)]/*Id.*

[[xcvii](#)]/*Id.*

[[xcviii](#)]/*Id.*

[[xcix](#)]/*Mortgage Elec. Registration System, Inc. v. Southwest Homes of Arkansas*, 2009 Ark. 152, 301 S.W.3d 1 (2009); *Landmark Nat. Bank v. Kesler*, 289 Kan. 528, 545, 216 P.3d 158, 169. 216 P.3d 158 (2009).

[[c](#)] Madison, *supra* note 108.

[ci]David McLaughlin, Margaret Cronin Fisk & Phil Milford, *Mortgage Registry MERS Sued by Delaware Attorney General*, Bloomberg Bus. Wk., Oct. 27, 2011.

[cii]/d.

[ciii]/d.

[civ]McLaughlin, *supranote ci*.

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MERS: A Twenty First Century Creation Navigating An Eighteenth Century Legal System

Published on The National Law Review (<http://www.natlawreview.com>)

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