

# Parallel Universe

## Parallel Universe?

### **MERS–GSE – Intangible Bank**

**Electronic World**

**Control**

**Authoritative Copy of eNote**

**Controller (eVault)**

**Transfer of Control**

**Transferable Record Audit trail**

**Controller's Delegatee**

**CONTRACTUAL PARTY(s)**

**Electronic Promissory Note  
[eNote]**

**Borrower/Obligor**

**Lender/Obligee**

**Electronic Agent**

**Electronic Security Interest**

**Transferable Record**

**Electronic Agent**



**Electronic & Personal  
Property Laws**

### **Actual Paper Bank**

**Paper World**

**Possession**

**Original Note (wet signature)**

**Investor**

**Custodian**

**Endorsement**

**Holder in due course**

**Servicer**

**CONTRACTUAL PARTY(s)**

**Paper Promissory Note /  
Borrower/Obligor  
Lender/Obligee**

**Paper Security Instrument**

**Borrower/Grantor**

**Lender/Grantee**

**Trustee**



**Real Property Laws**

**The Two mortgage Worlds**

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The concept of a National eNote Registry (National Registry) has evolved out of the need to track and identify electronic promissory notes (eNotes) in an evolving industry infrastructure for electronic mortgages (eMortgages). This need assumes that:<sup>1</sup>

- i. Proprietary electronic custodial repositories (eCustodians or eVaults) will exist to store eNotes
  - ii. When an eNote is sold, the electronic file may be transferred from the seller's eVault to the buyer's (or it may remain in place, if the buyer and seller have a business relationship that allows for that).
  - iii. Any electronic copy of an eNote is identical to any other – since they are simply bit-for-bit copies of computer files, no one copy of an eNote can contain data that would identify it as the Authoritative Copy (the electronic equivalent of the paper copy with the wet ink signatures)
- c. Therefore, some external mechanism is required to resolve the question of which of the (**potentially many**) copies of an eNote is the Authoritative Copy, and thus identify ownership of the eNote.

## **What about the Paper Promissory Note?<sup>2</sup>**

e. The National Registry functionality is limited to electronic notes, and not paper notes.

*The National Registry is intended to satisfy the requirements of UETA and ESIGN for electronic notes only. Attempting to provide functionality for paper note tracking would greatly complicate the design and implementation of the National Registry.*

## **So MERS only track electronic promissory Notes?<sup>3</sup>**

a. Electronic notes registered with the National Registry must contain language, which refers to the National Registry to identify their Controller.

*This language provides the “closed loop” of relationships and responsibility, which ensure that the eNote, Controller, eVault, and National Registry all work together to satisfy the Safe Harbor provision of UETA Section 16.*

b. All parties interacting with the National Registry must have executed membership agreements with the National Registry.

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<sup>1</sup> National eNote Registry Requirements Document Version 1.0 Mar 7, 2003

<sup>2</sup> National eNote Registry Requirements Document Version 1.0 Mar 7, 2003 [pg3, item “e”]

<sup>3</sup> National eNote Registry Requirements Document Version 1.0 Mar 7, 2003

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c. The authority of the National Registry would extend from specific investor requirements for its use.

But I thought MERS was designed as “Book entry system”, just like Texas Property Code defines it?

1. The National Registry is not involved in the transfer of funds (it is not a book entry system).

*The National Registry would not be involved in the entry, forwarding, or tracking of good funds associated with the closing of the electronic mortgage or the transfer of the eNote.*

Source: National eNote Registry Requirements Document Version 1.0 Mar 7, 2003

## **So, what are the reasons for MERS?<sup>4</sup>**

- Industry investors will require eNote registration
- eNote must refer specifically to the MERS®eRegistry
- Participants must be members of MERS
- Registry does not store eNotes
- Multiple eVaults will be created to store eNotes
- Funding of loans occurs outside the Registry

## **Why do you need to be a MERS member?**

- Create an eNote in SMART Doc format
- Execute eNote with digital signatures
- Store eNote in compliant eVault
- Deliver eNote to investor
- Transfer eNote from one eVault to another
- Service eNote
- Interface with MERS®eRegistry to record these steps

## **What are the primary requirements?**

### • Member Profile

- MERS Org. ID Number is unique entity identifier
- Member functionality tailored to role on Registry
- Authentication and security routines

### • eNote Registration

- MERS MIN is unique loan identifier
- eNote hash value enhances integrity

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<sup>4</sup> The MERS eRegistry: Paving the way for eNotes and eMortgages  
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- Cross referencing information (Borrower Name, SSN, Property Address)
- Reversal transaction to correct invalid registrations
- Location and Controller fields are required
- MIN Generation and Reservation
  - Validate and reserve third party generated MIN
  - Request MIN generation and reservation by MERS®System
- Transfer of Control
  - Validate transferor and transferee
  - MIN and Hash value comparison
- Transfer of Location
  - Validate Controller, old Location and new Location
  - MIN and Hash value comparison
- Deactivations
  - Paid off
  - Charged off
  - Converted to Paper
  - Converted to Proprietary Registry

So, let me get this right, a MERS member creates an eNote and registers it in the MERS registry. And with the registration, the MERS system shows who has control of the eNote?<sup>5</sup>

**Control:** With eNotes, control over the Transferable Record replaces the notion of possession and endorsement in the paper analog for purposes of establishing the “holder in due course” status.

## **What is a transferable record?**

**Transferable Record (TR):** An eNote issued in accordance with the provisions of Section 16 of the UETA and Title II of E-SIGN.

## **And the Authoritative Copy of eNote means what?**

**Authoritative Copy (AC):** The unique, identifiable and mostly unalterable version of the eNote that

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<sup>5</sup> National eNote Registry Requirements Document Version 1.0 Mar 7, 2003

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(1) identifies the person asserting control as the person to which the Transferable Record was issued or most recently transferred,

(2) ensures that “each copy of the authoritative copy and any copy of a copy is readily identifiable as a copy that is not the authoritative copy” and (3) any revision of the AC is readily identifiable as authorized or unauthorized

## **What does Controller mean?**

**eVault:** A secure electronic repository for eNotes. May be operated by an eCustodian or by a lender or investor to store their own eNotes. Similar to a paper vault run by the Document Custodian industry today.

## **What is “Transfer of Control”**

This is an action where one controller transfers its “holder” status to another.

## **What are beneficial rights?**

Beneficial Rights: Ownership rights to the future cash flows of the eNote; the transfer of control of the TR evidences transfer of beneficial rights.

## **What are “servicing rights?”**

Servicing Rights: The contractual rights that can be sold in the secondary market to collect payments on behalf of the Note Holder

## **Who has these “contractual rights”**

Servicer: The party with contractual responsibility to collect payments on behalf of the Note Holder

## **What does Note holder mean?**

Note Holder: The investor or institution that is intended to be the permanent holder (i.e. controller) of the eNote

So to implement an eMortgage, what do you do?<sup>6</sup>

•To originate and register loans on the MERS®eRegistry you must:

–Close loans on eNotes (using MISMO standard SMART Documents) containing eRegistry language and a MIN

–Connect to the eRegistry through a VPN or Frame Relay connection

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<sup>6</sup> The MERS eRegistry: Paving the way for eNotes and eMortgages  
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–Send XML transactions signed by a digital certificate provided to you from a SISAC-accredited issuing authority

## **Ok, so I get it MERS was designed to meet certain guidelines.**

- a. The National eNote Registry is a compliance vehicle to satisfy certain requirements imposed by the Uniform Electronic Transactions Act (UETA) and the federal Electronic Signatures in Global and National Commerce Act (E-SIGN) so that the owner of an eNote (the Controller) would have legal rights similar to those that a “Holder in Due Course” has with a paper negotiable promissory note. An eNote issued in compliance with Section 16 of UETA or Title II of ESIGN is called a Transferable Record (TR). Specifically, Section 16 of UETA and Title II of E-SIGN require that the party in control of the Authoritative Copy (AC) of the TR at any given point in the life cycle of an eNote can be readily identified.

So, since MERS was designed to meet the E-SIGN and UETA guidelines, it must be the MERS members who failed to use MERS in a lawful manner.

MERS members created a different promissory note. This promissory Note is electronic and meets the Guidelines of E-SIGN and UETA. And since this type of electronic transaction was created, it will be governed by UETA.

And since this type of obligation was made electronically, it is most likely governed by the Uniform Commercial Code as a sale of goods or such.

But, why is a certificate issued for a paper real property mortgage?

## **What is a Certificate Authority?**

Certificate Authority (CA): A trusted third-party organization or company approved by the investor that issues Digital Certificates used to create digital signatures and public-private key pairs. The role of the CA in this process is to guarantee that the individual granted the unique certificate is, in fact, who he or she claims to be. Usually, this means that the CA has an arrangement with a financial institution, such as a mortgage company, which provides it with information to confirm an individual's claimed identity.

Didn't G. Tommy Bastian mention something about this in the Judicial Task Force Meeting back in November, 2007?<sup>7</sup>

Page, 25- (16) MR. BASTIAN: Well, MERS is going to be the (17) mortgagee of record. In about 60 percent of all loans (18) MERS is going to be the mortgagee of record, but all MERS (19) is a registration system. That's all it is. It really (20) is a piggyback on what happened in the securities market (21) back in the early Seventies when Wall Street was (22) exploding, and back in those days whenever you bought and (23) sold stocks or bonds you had to have a paper certificate. (24) Well, the back rooms couldn't keep up with it, and Wall (25) Street almost cratered, and they came up with a book entry (1) system that everybody is familiar with today where loans (2) are bought and sold, and that's basically what MERS is.(3) It's just a listing of who has all the beneficial (4)

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<sup>7</sup> <http://www.supreme.courts.state.tx.us/jfrtf/pdf/110707transcript.pdf>

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ownership interest in a mortgage, and that's going to be (5) the investor, it's going to be the mortgage servicer, it's (6) going to be the subservicers. It gives you four or five, (7) six pieces of corroborating information about the borrower (8) and that particular loan. I mean, it has the detail on (9) their status sheet that says, "This is when the loan was (10) made, here is the borrower, and here's the amount of the (11) loan." I mean, all that information is right there so (12) that if the loan is registered on MERS it's real easy to (13) determine all the different parties in the transaction, (14) and that's the way the world's going, so maybe that's kind (15) of the place we need to be going.

## **I thought MERS was not a book entry system?**

1. The National Registry is not involved in the transfer of funds (it is not a book entry system).

*The National Registry would not be involved in the entry, forwarding, or tracking of good funds associated with the closing of the electronic mortgage or the transfer of the eNote.*

## **So what MERS members hold is an eMortgage?<sup>8</sup>**

At the Mortgage Bankers Association (MBA), we define an eMortgage as, "A mortgage where the critical loan documentation — at a minimum the promissory note, and preferably also the security instrument and other closing docs — are created electronically, executed electronically, transferred electronically and stored electronically. AKA — the paperless mortgage."

But you say the promissory note, security instrument and other closing documents are created and executed electronically? That requires electronic signatures. I did not electronically sign.

So, if I understand this, MERS members create and execute a promissory note that is electronic, and without my signatures, other than what is viewable from the digital images of the original scanned loan documentation?

How is this legal? Why are you sharing my private information with a group of electronic strangers? Doesn't this violate the "Privacy Act?"

If this is an electronic mortgage a.k.a. eMortgage how does it equal my paper mortgage?

The eMortgage is something that I am not involved with. I did not register to become a MERS member. I did not sign any electronic tracking agreement. How can this eMortgage be the same as my paper mortgage?

When someone scanned my paper mortgage and attached it to an eMortgage and registered in the MERS registry, the eNote that was registered was not my promissory note. This is a promissory note between the MERS member borrower and the MERS member Lender. The MERS member

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<sup>8</sup> <http://www.mortgagebankers.org/IndustryResources/eMortgageResourceCenter.htm>

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borrower agreed to use MERS as an electronic agent, since MERS is a computer system. MERS being the electronic agent, acts like a trustee in the paper world. But MERS is a trustee of an eMortgage, not a paper mortgage.

If I were the borrower mentioned in the security instrument that agreed to use MERS, I would have gone to jail for creating a security instrument that could not lawfully attach to the paper promissory note. When it was recorded, it provided the actual proof that the mortgage is separated from the paper promissory note.

Think of it this way if you have not already.

Paper is paper. Electronic is electronic. How can you put paper into an electronic device?

## **So, what has happened?**

MERS member use electronic records governed by E-SIGN, UETA and UCC to take the place of real property laws. MERS members, hold an electronic note classified as personal property and claim it is real property in a court or non-judicial foreclosure. How can that lawfully take place?

Who is that is foreclosed on? The Borrower?

## **NOTICE OF DEFAULT**

\_\_\_\_\_, \_\_\_\_\_  
Attention: Sharon M. Horstkamp  
MERSCORP Holdings, Inc.  
1818 Library Street, Suite 300  
Reston, Virginia 20190

Ladies and Gentlemen:

Please be advised that **this Notice of Default is being issued** pursuant to Section 4(b) of that certain **Electronic Tracking Agreement** (the “Electronic Tracking Agreement”), dated as of \_\_\_\_\_, 200\_, by and among (the “**Lender**”), the (the “**Borrower**”), MERSCORP Holdings, Inc. (the “**Electronic Agent**”) and Mortgage Electronic Registration Systems, Inc. (“MERS”). The Affected Loans are listed on the attached Schedule 1 (including the mortgage identification numbers). Accordingly, the Electronic Agent shall not accept instructions from the Borrower, the Servicer, any subservicer and from no party other than the Lender with respect to such Mortgage Loans, until otherwise notified by the Lender.

Any terms used herein and not otherwise defined shall have such meaning specified in the Electronic Tracking Agreement.

You’ve been fighting the “Mutha, from anotha world”. Stick to your real property world, not their fictitious personal property world. MERS members are trying to confuse you.

Your rights have been severely violated and you do not even realize it.

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Transferable records are personal property, **NOT REAL PROPERTY**, and therefore are within the general scope of Revised Article 9.-UCC Revised Article 9 §9-109(a).

Real property is not governed by UCC.

A Transferable Record is not an “instrument.” Rather, under Revised Article 9 a transferable record secured by real property is a “payment intangible” - UCC Revised Article 9 §§9-102(42), 9-102(47) and 9-102(61); UCC §3-104.

## **Sec. 9.102. Definitions and Index of Definitions<sup>9</sup>**

(47) "Instrument" means a negotiable instrument or any other writing that evidences a right to the payment of a monetary obligation, is not itself a security agreement or lease, and is of a type that in ordinary course of business is transferred by delivery with any necessary indorsement or assignment. The term does not include (i) investment property, (ii) letters of credit, (iii) writings that evidence a right to payment arising out of the use of a credit or charge card or information contained on or for use with the card, or (iv) nonnegotiable certificates of deposit.

## **Sec. 9.109. SCOPE**

- (a) Except as otherwise provided in Subsections (c), (d), and (e), this chapter applies to:
- (d) This chapter does not apply to:
  - (1) a landlord's lien, other than an agricultural lien;
  - (2) a lien, other than an agricultural lien, given by statute or other rule of law for services or materials, but Section 9.333 applies with respect to priority of the lien;
  - (11) the creation or transfer of an interest in or lien on real property, including a lease or rents, as defined by Section 64.001, Property Code.

## **So, why are the MERS member using UCC 9?**

Because you don't appear to know the difference between an electronic personal property mortgage and a paper “real property” mortgage. They deal in “goods” and “services” and you own real estate. There is a big difference when it comes to laws that govern.

Now do you realize why it is important to know who owns the real paper promissory Note? MERS member can print an electronic image of an alleged Note without ever having to produce it. Just press the “print” key.

We can only hope the Courts can begin to realize this. Else, we are all up the creek without a paddle.

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<sup>9</sup> <http://www.statutes.legis.state.tx.us/Docs/BC/htm/BC.9.htm>

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Put it this way.

How many cars could one own and transfer into their own name using a copy of a certificate of title and claim to be the lawful owner of that car? Why is it different in public land records?

The alleged “assignments” recorded into public records by MERS members is a fraud.

MERS is a completely different system. MERS is electronic registration system and only eNotes are registered by MERS members on the MERS eRegistry. This is separate from paper. How can this electronic transaction replace an original mortgage obligation? It can't.

If the MERS members did not adhere to real property laws, the electronic laws cannot save them.

The Deed of Trust was hypothecated when it was created. It was designed with hypothecation in mind. In doing so, this separates the mortgage from the paper promissory Note. And the courts claim that this cannot be done? MERS and GSE security instruments do it. They created it I didn't.

It is proof that MERS members are doing it though. Criminal?

Peace be with you,