

MERS LEGAL FAQs

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I. INTRODUCTION TO MERS

What is MERS?

History:

While it may appear that MERS in the last few years is everywhere, it does have a good bit of history behind it. In 1991 an Inter Agency Technology Task Force (IAT) comprised of representatives from Mortgage Bankers Association (MBA), Fannie Mae, Freddie Mac and Ginnie Mae began evaluating the potential for an industry-sponsored central repository to electronically register and track ownership of mortgage rights. Two years later, in 1993, a White Paper was published that concluded that a book entry system had tremendous potential to reduce costs associated with transferring mortgage rights. In July 1994 it was decided that the MERS project should be funded and developed.

The MBA played a key role in keeping MERS on track until MERS incorporated in October of 1995. Shortly thereafter, in April of 1996, EDS was selected as its Technology partner and development of the systems and processes began.

MERS became operational in April 1997 with its first two registrations. However, it was not smooth sailing as forecasted, and much more work needed to be done to become the successful company MERS is today.

One critical change to the original MERS structure was becoming a privately held stock corporation in 1998 as well as moving to a two-tiered corporate structure, MERSCORP, Inc. and Mortgage Electronic Registration Systems, Inc.

Corporate Structure:

MERSCORP, Inc. is currently owned by 27 companies, including Fannie Mae, Freddie Mac, the Mortgage Bankers Association of America, the American Land Title Association, First American Title, Stewart Title, MGIC, PMI, JP Morgan Chase, Citimortgage, Countrywide, Merrill Lynch, SunTrust and various other mortgage companies. A complete list can be found on the MERS Corporate Website, www.mersinc.org. MERSCORP, Inc. is the operating company that owns and operates the MERS® System. It is a national electronic registry system that tracks the changes in servicing rights and beneficial ownership interests in mortgage loans that are registered on the registry. It is also the parent company of Mortgage Electronic Registration Systems, Inc., a bankruptcy remote corporation whose sole purpose is to be the mortgagee of record and nominee for the beneficial owner of the mortgage loan.

This two-tiered structure was approved by the three major rating agencies: Standard & Poor's, Moody's and Fitch. The rating agencies have eliminated the requirement to have an assignment to a securitization trustee prepared and recorded when MERS is the mortgagee of record. MERS registered loans have been included in rated securities issued by Lehman Brothers, Bank of America, RFC, Countrywide, Bank One and Wells Fargo.

Governing Documents:

Each Member of MERS enters into a Membership Agreement with MERSCORP, Inc. This Agreement consists of a Membership Application signed by the Member and incorporates the Terms and Conditions, the Rules of Membership and the Procedures Manual. All documents can be downloaded from the MERS web-site: www.mersinc.org.

Basic MERS:

- **Recording versus Registration.** The security instrument is RECORDED in the applicable county land records. The mortgage information is REGISTERED on the MERS® System. The mortgage, deed of trust or assignment to MERS must be recorded in the land records in order to perfect the mortgage lien. Registering the mortgage loan information on the MERS® System is separate and apart from the function that the county recorders perform.
- **Transfers of Mortgage Interests versus Tracking the Changes in Mortgage Interests:** No mortgage rights are transferred on the MERS® System. The MERS® System only tracks the changes in servicing rights and beneficial ownership interests. Servicing rights are sold via a purchase and sale agreement. This is a non-recordable contractual right. Beneficial ownership interests are sold via endorsement and delivery of the promissory note. This is also a non-recordable event. The MERS® System tracks both of these transfers. MERS remains the mortgage lien holder when these non-recordable events take place. MERS remains the mortgage lien holder in the land records and therefore, since no recordable event is taking place, there is no need for any assignments to be recorded. Some may falsely believe that the non-recordable events that are tracked on MERS are really electronic assignments. There is not true. If in fact servicing is sold to a non-MERS member, then a paper assignment is generated because the mortgage lien will need to be transferred to the non-MERS member. MERS cannot remain holding the mortgage lien for a non-MERS member.

How Does MERS Become the Mortgagee of Record?

This occurs in one of two ways, either by an Assignment to MERS or by MERS being named as the Original Mortgagee of Record (MOM).

Using Assignments:

This is typically used with seasoned loan bulk transactions or is used when the originator is not a MERS member, but is selling to a MERS member who requires the originator to assign the loan to MERS. The assignment is recorded in the local county land records making MERS the mortgagee of record. The MERS member registers the mortgage on

the MERS® System. No further assignments are needed if the servicing rights are sold from one MERS member to another MERS member because the mortgage lien remains with MERS.

Original Mortgagee of Record:

In 1998, it was determined that recording an assignment to MERS is not the only way that MERS can become the mortgagee. The concept of MERS as Original Mortgagee (MOM) was developed. It involves naming MERS on the mortgage as the mortgagee in a nominee capacity for the Lender, who is the promissory note holder.

At the time the loan is closed, MERS is named as the mortgagee as nominee for the originating lender, its successors and assigns. The originating lender is named as the payee on the promissory note. The loan is registered on the MERS® System and the mortgage is recorded in the local county land records.

Changes were made by Fannie Mae and Freddie Mac to the Uniform Security Instrument to accommodate MERS as Original Mortgagee (MOM). The use of MOM has been approved by Fannie Mae, Freddie Mac, the Department of Veteran's Affairs, Department of Housing and Urban Development, Federal Home Loan Bank System, State of New York Mortgage Agency (SONYMA) and California Housing Finance Agency, among others.

Three principal changes were made:

- To ensure that the note and mortgage are tied together, MERS is named in a nominee capacity for the Lender, because the Lender is named on the note.
- It is made clear that the Borrower in the granting clause grants the mortgage to MERS.
- Language was added to give MERS the power to foreclose and release the security instrument because typically these are functions that a mortgagee of record perform and it needed to be clear that MERS can perform these.

Sample Florida MERS Uniform Security Instrument

MERS language has been highlighted

After Recording Return To:

_____ [Space Above This Line For Recording Data] _____

MORTGAGE

DEFINITIONS

Words used in multiple sections of this document are defined below and other words are defined in Sections 3, 11, 13, 18, 20 and 21. Certain rules regarding the usage of words used in this document are also provided in Section 16.

- (A) **“Security Instrument”** means this document, which is dated _____, _____, together with all Riders to this document.
- (B) **“Borrower”** is _____. 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 and telephone number of P.O. Box 2026, Flint, MI 48501-2026, tel. (888) 679-MERS.
- (D) **“Lender”** is _____. Lender is a _____ organized and existing under the laws of _____. Lender’s address is _____.
- (E) **“Note”** means the promissory note signed by Borrower and dated _____, _____. The Note states that Borrower owes Lender _____ Dollars (U.S. \$ _____) plus interest. Borrower has promised to pay this debt in regular Periodic Payments and to pay the debt in full not later than _____.
- (F) **“Property”** means the property that is described below under the heading “Transfer of Rights in the Property.”

(G) **“Loan”** means the debt evidenced by the Note, plus interest, any prepayment charges and late charges due under the Note, and all sums due under this Security Instrument, plus interest.

(H) **“Riders”** means all Riders to this Security Instrument that are executed by Borrower. The following Riders are to be executed by Borrower [check box as applicable]:

- Adjustable Rate Rider
- Condominium Rider
- Second Home Rider
- Balloon Rider
- Planned Unit Development Rider
- Other(s) [specify] _____
- 1-4 Family Rider
- Biweekly Payment Rider

(I) **“Applicable Law”** means all controlling applicable federal, state and local statutes, regulations, ordinances and administrative rules and orders (that have the effect of law) as well as all applicable final, non-appealable judicial opinions.

(J) **“Community Association Dues, Fees, and Assessments”** means all dues, fees, assessments and other charges that are imposed on Borrower or the Property by a condominium association, homeowners association or similar organization.

(K) **“Electronic Funds Transfer”** means any transfer of funds, other than a transaction originated by check, draft, or similar paper instrument, which is initiated through an electronic terminal, telephonic instrument, computer, or magnetic tape so as to order, instruct, or authorize a financial institution to debit or credit an account. Such term includes, but is not limited to, point-of-sale transfers, automated teller machine transactions, transfers initiated by telephone, wire transfers, and automated clearinghouse transfers.

(L) **“Escrow Items”** means those items that are described in Section 3.

(M) **“Miscellaneous Proceeds”** means any compensation, settlement, award of damages, or proceeds paid by any third party (other than insurance proceeds paid under the coverages described in Section 5) for: (i) damage to, or destruction of, the Property; (ii) condemnation or other taking of all or any part of the Property; (iii) conveyance in lieu of condemnation; or (iv) misrepresentations of, or omissions as to, the value and/or condition of the Property.

(N) **“Mortgage Insurance”** means insurance protecting Lender against the nonpayment of, or default on, the Loan.

(O) **“Periodic Payment”** means the regularly scheduled amount due for (i) principal and interest under the Note, plus (ii) any amounts under Section 3 of this Security Instrument.

(P) **“RESPA”** means the Real Estate Settlement Procedures Act (12 U.S.C. §2601 et seq.) and its implementing regulation, Regulation X (24 C.F.R. Part 3500), as they might be amended from time to time, or any additional or successor legislation or regulation that governs the same subject matter. As used in this Security Instrument, “RESPA” refers to all requirements and restrictions that are imposed in regard to a “federally related mortgage loan” even if the Loan does not qualify as a “federally related mortgage loan” under RESPA.

(Q) **“Successor in Interest of Borrower”** means any party that has taken title to the Property, whether or not that party has assumed Borrower’s obligations under the Note and/or this Security Instrument.

TRANSFER OF RIGHTS IN THE PROPERTY

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, Borrower does hereby mortgage, grant and convey to MERS (solely as nominee for Lender and Lender's successors and assigns) and to the successors and assigns of MERS, the following described property located in the _____ of _____

_____: [Type of Recording Jurisdiction] [Name of Recording Jurisdiction]

which currently has the address of _____ [Street]
_____, Florida _____ ("Property Address"):
[City] [Zip Code]

TOGETHER WITH all the improvements now or hereafter erected on the property, and all easements, appurtenances, and fixtures now or hereafter a part of the property. All replacements and additions shall also be covered by this Security Instrument. All of the foregoing is referred to in this Security Instrument as the "Property." 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.

BORROWER COVENANTS that Borrower is lawfully seised of the estate hereby conveyed and has the right to mortgage, grant and convey the Property and that the Property is unencumbered, except for encumbrances of record. Borrower warrants and will defend generally the title to the Property against all claims and demands, subject to any encumbrances of record.

THIS SECURITY INSTRUMENT combines uniform covenants for national use and non-uniform covenants with limited variations by jurisdiction to constitute a uniform security instrument covering real property.

Sample California Deed of Trust

MERS language has been highlighted

After Recording Return To:

_____ [Space Above This Line For Recording Data] _____

DEED OF TRUST

DEFINITIONS

Words used in multiple sections of this document are defined below and other words are defined in Sections 3, 11, 13, 18, 20 and 21. Certain rules regarding the usage of words used in this document are also provided in Section 16.

(A) **“Security Instrument”** means this document, which is dated _____, together with all Riders to this document.

(B) **“Borrower”** is _____. Borrower is the trustor under this Security Instrument.

(C) **“Lender”** is _____. Lender is a _____ organized and existing under the laws of _____.

Lender’s address is _____.

(D) **“Trustee”** is _____.

(E) **“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 beneficiary under this Security Instrument.** MERS is organized and existing under the laws of Delaware, and has an address and telephone number of P.O. Box 2026, Flint, MI 48501-2026, tel. (888) 679-MERS.

(F) **“Note”** means the promissory note signed by Borrower and dated _____, _____. The Note states that Borrower owes Lender _____ Dollars (U.S. \$ _____) plus interest. Borrower has promised to pay this debt in regular Periodic Payments and to pay the debt in full not later than _____.

(G) **“Property”** means the property that is described below under the heading “Transfer of Rights in the Property.”

(H) **“Loan”** means the debt evidenced by the Note, plus interest, any prepayment charges and late charges due under the Note, and all sums due under this Security Instrument, plus interest.

(I) **“Riders”** means all Riders to this Security Instrument that are executed by Borrower. The following Riders are to be executed by Borrower [check box as applicable]:

- o Adjustable Rate Rider
- o Balloon Rider
- o 1-4 Family Rider
- o Condominium Rider
- o Planned Unit Development Rider
- o Biweekly Payment Rider
- o Second Home Rider
- o Other(s) [specify] _____

(J) “Applicable Law” means all controlling applicable federal, state and local statutes, regulations, ordinances and administrative rules and orders (that have the effect of law) as well as all applicable final, non-appealable judicial opinions.

(K) “Community Association Dues, Fees, and Assessments” means all dues, fees, assessments and other charges that are imposed on Borrower or the Property by a condominium association, homeowners association or similar organization.

(L) “Electronic Funds Transfer” means any transfer of funds, other than a transaction originated by check, draft, or similar paper instrument, which is initiated through an electronic terminal, telephonic instrument, computer, or magnetic tape so as to order, instruct, or authorize a financial institution to debit or credit an account. Such term includes, but is not limited to, point-of-sale transfers, automated teller machine transactions, transfers initiated by telephone, wire transfers, and automated clearinghouse transfers.

(M) “Escrow Items” means those items that are described in Section 3.

(N) “Miscellaneous Proceeds” means any compensation, settlement, award of damages, or proceeds paid by any third party (other than insurance proceeds paid under the coverages described in Section 5) for: (i) damage to, or destruction of, the Property; (ii) condemnation or other taking of all or any part of the Property; (iii) conveyance in lieu of condemnation; or (iv) misrepresentations of, or omissions as to, the value and/or condition of the Property.

(O) “Mortgage Insurance” means insurance protecting Lender against the nonpayment of, or default on, the Loan.

(P) “Periodic Payment” means the regularly scheduled amount due for (i) principal and interest under the Note, plus (ii) any amounts under Section 3 of this Security Instrument.

(Q) “RESPA” means the Real Estate Settlement Procedures Act (12 U.S.C. §2601 et seq.) and its implementing regulation, Regulation X (24 C.F.R. Part 3500), as they might be amended from time to time, or any additional or successor legislation or regulation that governs the same subject matter. As used in this Security Instrument, “RESPA” refers to all requirements and restrictions that are imposed in regard to a “federally related mortgage loan” even if the Loan does not qualify as a “federally related mortgage loan” under RESPA.

(R) “Successor in Interest of Borrower” means any party that has taken title to the Property, whether or not that party has assumed Borrower’s obligations under the Note and/or this Security Instrument.

TRANSFER OF RIGHTS IN THE PROPERTY

The beneficiary of this Security Instrument is MERS (solely as nominee for Lender and Lender’s successors and assigns) and the successors and assigns of MERS. 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, Borrower irrevocably grants and conveys to Trustee, in trust, with power of sale, the following described property located in the _____ of _____:

[Type of Recording Jurisdiction]

[Name of Recording Jurisdiction]

which currently has the address of _____
[Street]
_____, California _____ (“Property Address”):
[City] [Zip Code]

TOGETHER WITH all the improvements now or hereafter erected on the property, and all easements, appurtenances, and fixtures now or hereafter a part of the property. All replacements and additions shall also be covered by this Security Instrument. All of the foregoing is referred to in this Security Instrument as the “Property.” 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.

BORROWER COVENANTS that Borrower is lawfully seised of the estate hereby conveyed and has the right to grant and convey the Property and that the Property is unencumbered, except for encumbrances of record. Borrower warrants and will defend generally the title to the Property against all claims and demands, subject to any encumbrances of record.

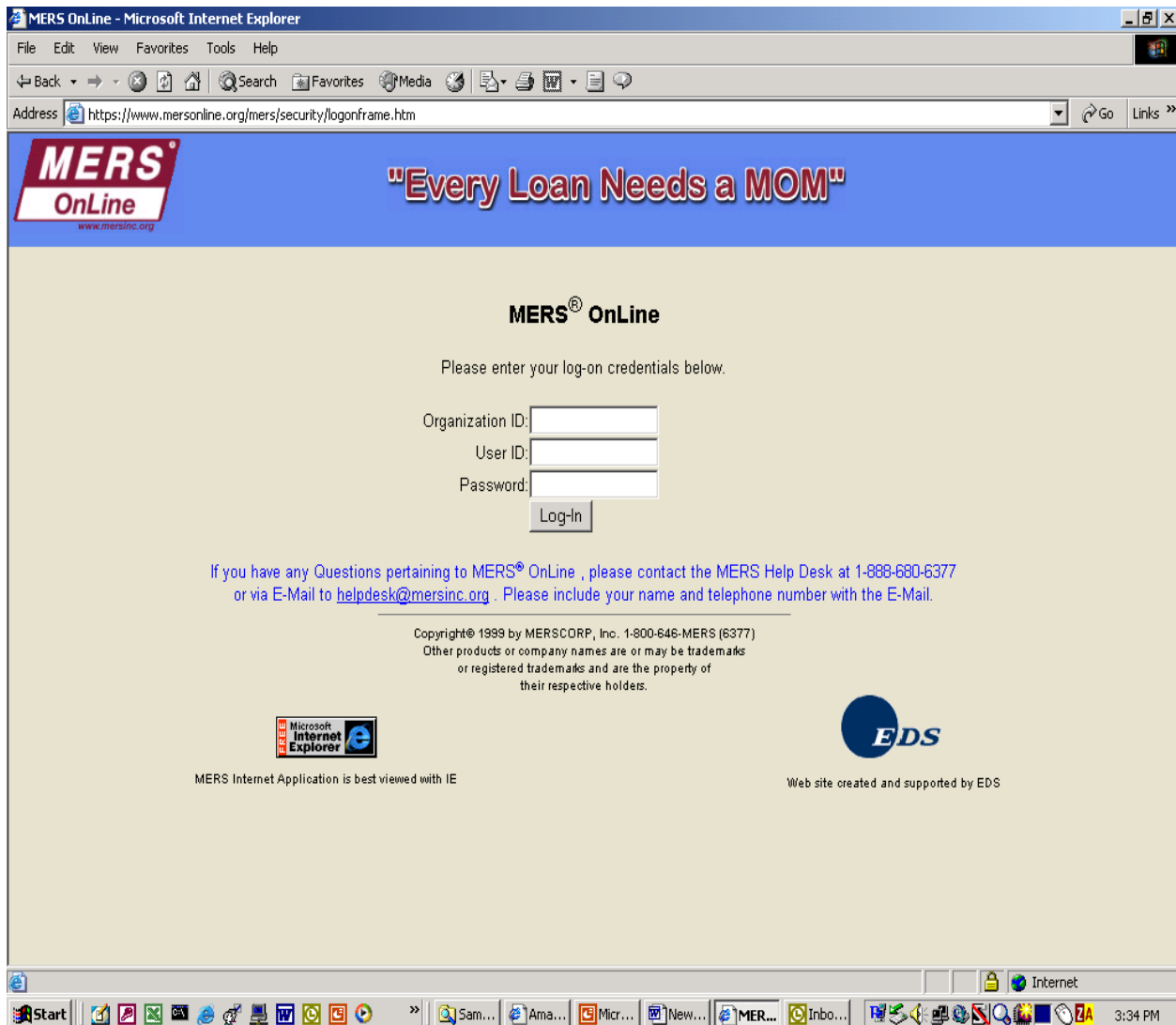
THIS SECURITY INSTRUMENT combines uniform covenants for national use and non-uniform covenants with limited variations by jurisdiction to constitute a uniform security instrument covering real property.

II. MERS® SYSTEM OVERVIEW

Logging on to MERS® OnLine

Logging on to MERS® OnLine is similar to logging on to any browser-based application using Internet Explorer 6.x or higher. To log on, you must have:

- A seven-digit organization identification (Org. ID) assigned by MERS.
- An individual user identification (User ID) assigned by your system administrator.
- A password assigned by your system administrator.



Information displayed on a MIN Summary

The following information is displayed on the MIN summary when a MIN is selected for viewing:

MIN Information

- MIN
- MIN Status (will be in bold red font if not in Active status)
- MOM (Y/N)
- Property address
- Lien Type
- Primary borrower name
- Social Security Number (if you are allowed to view it)
- Pool number
- Note amount
- Note date
- Servicer name
- Custodian name
- Investor name
- Loan number
- Subservicer name
- Interim funder name
- QR Flag (Y/N)

MERS OnLine "Every Loan Needs a MOM" Training 1000001

MIN Information
1001475-0000005555-9

[Loan](#)
[Borrower Details](#)
[Property](#)
[Legal Description](#)
[Assignment](#)
[Miscellaneous](#)
[Security Inst.](#)
[Mod Agree](#)
[Milestones](#)

Summary			
1001475-0000005555-9	Active (Registered)	MOM: Y	QR: N
123 W ANYWHERE ST		Reg Date:	02/25/2002
JACKSONVILLE, FL 32225		First Lien	
Borrower	FLINTSTONE, FRED		
SSN	123-45-6788		
Pool Number	N/A	Investor Loan Number	N/A
Note Amount	\$275,000.00	Note Date	02/22/2002
Servicer	1001453 - Matrix Financial Services Corporation		
Custodian	N/A		
Investor	1001453 - Matrix Financial Services Corporation		
Subservicer	N/A		
Interim Funder	N/A		

III. CERTIFYING OFFICERS

There are numerous documents that can only be executed by the mortgagee of a mortgage loan (assignments, lien releases, etc). When MERS is the mortgagee, the Lender continues to prepare and execute these documents by its MERS certifying officer.

Question: *What is a Certifying Officer?*

A certifying officer is an employee of the Lender who is appointed a MERS officer by a MERS Corporate Resolution. The Resolution allows the certifying officer to execute documents as a MERS officer.

Question: *Does the title that the employee holds as an employee of the Lender correspond to the title that the employee holds as a MERS Certifying Officer?*

No. All MERS Certifying Officers are appointed assistant secretaries and vice presidents of Mortgage Electronic Registration Systems, Inc. That means that if an employee is a Senior Vice President of the Lender, that employee is not a Senior Vice President of MERS. The employee is an assistant secretary and vice president of MERS.

Question: *Do we need to file a power of attorney and what do we do if we are asked to produce a power of attorney?*

Being appointed a MERS Certifying Officer means that the employee is an officer of MERS and is signing as an officer. A power of attorney is not needed because that is not the capacity of how a certifying officer is signing. A power of attorney would be necessary if an employee is signing as an employee of the Lender on behalf of MERS. The Corporate Resolution does not need to be recorded and is appointing the employee as an officer of MERS. In essence, the employee is becoming a dual officer.

Question: *How do we update our officer list?*

Go to the MERS web site [www:mersinc.org](http://www.mersinc.org), and under MERS Products>MERS Online>Forms, click on the Corporate Resolution Request Form and follow the instructions.

Question: *Who should be named as a certifying officer?*

Anyone that signs documents for the Lender currently should be named as a certifying officer. This way, the Lender's procedures will not need to be changed and the same people will continue to execute the documents.

Question: *Do we need MERS Corporate Seals?*

If you currently are using seals or stamps on your assignments or lien releases, then you probably need to order MERS Corporate Seals. MERS can provide the seals to you at \$25.00 a piece plus shipping.

Some Lenders do not use seals and therefore probably do not need MERS seals.

Question: *Do we need to record the Corporate Resolution?*

No, the Corporate Resolution is not a power of attorney document. However, we have become aware that in Massachusetts and some parishes in Louisiana, it may be required that the document be on file. A filing in these counties is required with or without MERS. We can provide extra copies if this becomes necessary for you.

Question: *What does the Corporate Resolution look like?*

CORPORATE RESOLUTION

Be it Resolved that the attached list of candidates are employees of (**Insert Name of MERS Member**), a Member of Mortgage Electronic Registration Systems, Inc. (MERS), and are hereby appointed as assistant secretaries and vice presidents of MERS, and, as such, are authorized to:

- (1) Release the lien of any mortgage loan registered on the MERS[®] System that is shown to be registered to the Member;
- (2) Assign the lien of any mortgage loan naming MERS as the mortgagee when the Member is also the current promissory noteholder, or if the mortgage loan is registered on the MERS[®] System, is shown to be registered to the Member;
- (3) Execute any and all documents necessary to foreclose upon the property securing any mortgage loan registered on the MERS[®] System that is shown to be registered to the Member, including but not limited to (a) substitution of trustee on Deeds of Trust, (b) Trustee's Deeds upon sale on behalf of MERS, (c) Affidavits of Non-military Status, (d) Affidavits of Judgment, (e) Affidavits of Debt, (f) quitclaim deeds, (g) Affidavits regarding lost promissory notes, and (h) endorsements of promissory notes to VA or HUD on behalf of MERS as a required part of the claims process;
- (4) 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, including but not limited to: (a) executing Proofs of Claim and Affidavits of Movant under 11 U.S.C. Sec. 501-502, Bankruptcy Rule 3001-3003, and applicable local bankruptcy rules, (b) entering a Notice of Appearance, (c) vote for a trustee of the estate of the debtor, (d) vote for a committee of creditors, (e) attend the meeting of creditors of the debtor, or any adjournment thereof, and vote on behalf of the Member, the beneficial owner of such mortgage loan, or MERS, on any question that may be lawfully submitted before creditors in such a meeting, (f) complete, execute, and return a ballot accepting or rejecting a plan, and (g) execute reaffirmation agreements;
- (5) Take any and all actions and execute all documents necessary to refinance, subordinate, amend or modify any mortgage loan registered on the MERS[®] System that is shown to be registered to the Member.
- (6) Endorse checks made payable to Mortgage Electronic Registration Systems, Inc. to the Member that are received by the Member for payment on any mortgage loan registered on the MERS[®] System that is shown to be registered to the Member;
- (7) Take any such actions and execute such documents as may be necessary to fulfill the Member's servicing obligations to the beneficial owner of such mortgage loan (including mortgage loans that are removed from the MERS[®] System as a result of the transfer thereof to a non-member of MERS).

I, William C. Hultman, being the Corporate Secretary of Mortgage Electronic Registration Systems, Inc., hereby certify that the foregoing is a true copy of a Resolution duly adopted by the Board of Directors of said corporation effective as of the day of , which is in full force and effect on this date and does not conflict with the Certificate of Incorporation or By-Laws of said corporation.

William C. Hultman, Secretary

IV. TITLE COMPANIES

One frequently asked question is: *How are title policies issued when MERS is the original mortgagee?*

There are three options that are used:

- 1) Naming the Lender, its successors and assigns appearing of record as Mortgage Electronic Registration Systems, Inc. as the insured.
- 2) Naming Mortgage Electronic Registration Systems, Inc. as the beneficiary and the Lender as the beneficial lender as the insured.
- 3) Lender and/or Mortgage Electronic Registration Systems, Inc. solely as nominee for the Lender, its successors and assigns, as their interests may appear.

MERS Members are currently using all three options.

Issues:

#1. One scenario that can cause confusion is when a lender insists that the lender be named on the title policy, but the lender is not named on the MOM (MERS as Original Mortgagee) mortgage, nor is there an assignment to the lender. This typically happens when a third party originator or broker is involved. For example, ABC Mortgage Company uses Bob Broker Company. The mortgage document reads "Mortgage Electronic Registration Systems, Inc. as nominee for Bob Broker Company, its successors and assigns." Bob Broker is not a MERS member because ABC Mortgage Company has signed a MERS Broker Agreement that allows a MERS member to have its broker be listed on the MOM mortgage as the lender. There is no assignment from Bob Broker to ABC Mortgage in this case.

Question: *Can ABC Mortgage Company be named on the title policy if the mortgage was originated MERS as nominee for Bob Broker?*

No, because ABC Mortgage Company is not named on the mortgage and there is no assignment to ABC Mortgage Company, the title company will not agree to specifically name ABC on the policy. However, ABC Mortgage Company is fully covered under the title policy because in the definition section of the standard title policy, the owner of the indebtedness is always insured. ABC Mortgage Company is a successor to the promissory note from Bob Broker because ABC purchased the loan and therefore is the owner of the indebtedness. It is not true that ABC Mortgage Company must be specifically named on the title policy in order to have coverage.

Prior to using MERS, ABC Mortgage Company could have been named on the title policy because the process was different. Typically the mortgage was issued in Bob Broker's name and an assignment from Bob Broker to ABC Mortgage Company was simultaneously issued and recorded. It was the assignment that allowed ABC Mortgage Company to be listed on the policy or endorsement as the insured by name. However, it was not really necessary because when Bob Broker endorsed the promissory note over to ABC Mortgage Company, ABC Mortgage

Company was automatically covered under the policy whether ABC was specifically named on the policy or not named on the policy.

#2. One thing to remember is that MERS cannot fix a problem that exists in the chain of title prior to MERS becoming the mortgagee of record by an assignment.

Question: *I am showing MERS as the last mortgagee of record, but I cannot find a prior assignment to Last Chance Mortgage, the company that assigned the mortgage to MERS. What can MERS do for me?*

Many times callers will think this is a MERS problem and that MERS can fix this. MERS cannot clear up a problem in the title that originated before MERS became the mortgagee. However, MERS can prevent future problems like this from occurring because assignments go away. This problem was created because the MERS Member instructing Last Chance Mortgage to assign the loan to MERS did not check to make sure that Last Chance Company had clear title to pass on.

#3. A title company called with this question: One of the attorney agents called with the following fact pattern:

- Mortgage to ABC Mortgage Corporation recorded 11/12/99;
- Assignment by ABC to MERS as nominee for AMF Corporation recorded 11/22/00;
- Assignment directly from AMF Corporation to non-MERS member recorded on 1/25/01, which is executed by AMF Corporation with no reference to MERS.

Our agent wonders if he needs a Confirmatory Assignment from MERS to perfect the chain of title.

YES, the bottom line is that MERS remains the mortgage lien holder on this loan pursuant to the 11/22/00 assignment. The 1/25/01 assignment from AMF to the Non-MERS member is not a valid assignment transferring the lien because MERS holds the lien, not AMF. To correct this, an assignment from MERS to the Non-MERS member is needed. AMF should be contacted to correct this.

V. PAYOFFS & LIEN RELEASES

Title companies may want an explanation of the relationship between MERS and the Lender. Issues can often be quickly solved when the member fully understands and lets the title agent know that MERS is the mortgagee and as such, is the entity that will be executing the lien release.

Question: *I have received a payoff figure from ABC Mortgage Company, but my title report shows MERS as the mortgagee. Therefore, I need to have an assignment from MERS to ABC Mortgage Company. Can you do this?*

As more and more loans are put onto the MERS® System, title companies are becoming more comfortable with having payoff funds sent to a Lender that is not the mortgagee of record because they understand the relationship between MERS and the Lender. When a company just can't seem to get there without some sort of documentation for their files, a letter explaining how the payoff process works when MERS is the mortgagee may be needed. A sample of the letter can be as follows:

May 10, 2006

Western Peninsula Title Co.
123 Insurance Street, Suite 3
Orlando, FL 11111

VIA FACSIMILE AND FIRST CLASS MAIL

RE: Robert M. and Karen L. Borrower, 123 South Mortgage Road, Orlando, FL 49736
MIN 1000000-1234567891-0

Dear Sir or Madam:

Please be advised that ABC Mortgage Company is the servicer of the above-referenced mortgage loan, and as such has provided a payoff figure to you. Mortgage Electronic Registration Systems, Inc. (MERS) is the mortgagee of record pursuant to recorded mortgage [*or assignment if a non-MOM mortgage or deed of trust*]. MERS is holding the mortgage in a nominee capacity for the promissory note-owner of the mortgage loan.

MERS, as the mortgagee, is authorizing and instructing that all funds are made payable to ABC Mortgage Company and forwarded directly to them. Upon payoff of the mortgage, MERS will execute a lien release.

If you have any questions or problems, please contact me.

Very truly yours,

“MERS Vice President [use a MERS Certifying Officer to sign the letter]”

Sometimes lien releases or satisfactions are not recorded, not done properly or not done in a timely manner and MERS will show up on a title report as the lien holder on a mortgage that has been paid off.

Question: *I am showing that John Smith's mortgage was paid on May 20, 2002 and MERS has still not recorded a lien release. I need MERS to do this right away; can I send it to you?*

What MERS typically does in this case is look up the mortgage on the MERS® System and find out the name of the servicer. We then direct the caller to the servicer to handle the verification of the payoff and the execution and recording of the lien release.

We require the MERS member servicing the mortgage that is receiving the payoff to prepare, execute, and record the lien release in accordance with the applicable state law. The lien release must be executed by one of the member's MERS certifying officers on behalf of MERS. Failure to timely record a correct release can potentially subject MERS to statutory penalties and other damages.

If the mortgage is not registered, MERS is in a difficult position because how can we verify it was paid off if we do not know which member is the current servicer? If the caller has the mortgage or assignment to MERS, we can sometimes figure out which member is involved. If they do not have the documentation, we may send someone to the land records to pull the mortgage or the assignment.

Question. *I am showing that Jane Smith's mortgage was assigned to MERS on December 15, 2000, but ABC Mortgage Company signed the lien release. There is no assignment to ABC Mortgage Company, what do I do?*

This sometimes occurs because one of two things has happened:

1. Occasionally a mortgage is included in a bulk transfer and for whatever reason is pulled out of the bulk. However, the assignment to MERS may have already been prepared and is not pulled and gets recorded by mistake. In other words, there was no intention to have it be a MERS registered mortgage.

For example, ABC Mortgage (non-MERS member) is selling 1,000 mortgages to XYZ Mortgage (MERS Member). Jane Smith's mortgage is paid off prior to the transfer, but the assignment to MERS has already been prepared and is not pulled and mistakenly is recorded. ABC Mortgage is unaware that the assignment has already been recorded and still thinks they hold the mortgage lien in the land records so they sign the lien release. MERS shows up on the title report as holding a mortgage lien. MERS will not have a record of this mortgage because XYZ did not register it because they did not purchase it. XYZ is unaware that the assignment was even sent for recording. When this happens, title companies insure over it because ABC can show that the loan was paid in full and no outstanding lien currently exists.

2. The second situation where this can happen requires something to be done to fix it. In this case, MERS really is holding the mortgage lien, but the MERS Member internally did not pick up the fact that MERS is the mortgagee or does not know the correct way to release a lien held by MERS. For instance, ABC Mortgage Company registers Jane Smith's mortgage on the MERS® System and MERS is recorded as the mortgagee. However, ABC Mortgage Company

fails to somehow track that MERS holds the mortgage lien, so they go ahead and execute the lien release on behalf of ABC Mortgage Company. Sometimes Recorders will catch this and reject the release. If it does get recorded, it does not release the lien properly and MERS may still show up on a title report. To fix this, ABC Mortgage Company needs to prepare another lien release executed on behalf of MERS.

Question: What happens if a Recorder/Clerk refuses to record a MERS lien release?

Whether the Clerk records or marks the mortgage lien as discharged is not what evidences the lien actually being discharged. Keep in mind that the promissory note should be marked "paid in full" when the loan is paid off. The mortgage lien follows the note, so if there is no note, there cannot be a mortgage lien outstanding regardless of what the land records show.

Question: What is the status of lien releases in New York?

Over the past couple of years, some Counties erroneously relied upon a 2001 New York Attorney General's Opinion as a basis for either outright rejecting lien releases executed by a MERS officer or recording the release, but not marking their records as the mortgage being discharged. We recommended to all members to continue to submit the MERS lien releases so that we comply with state law in good faith while we awaited the outcome of our case against the Suffolk County Clerk. After receiving a unanimous 4-0 winning decision from the New York Appellate Division, 2nd Department, we reached out to the Counties once again to show them that New York mandated that they properly record MERS lien releases..

By looking at the applicable New York Law, the duty of the mortgagee after payment of the indebtedness due under the note is to execute and acknowledge before a proper officer, a satisfaction of mortgage and present it for recording. By presenting the MERS release to the Recorder for recording, we are in good faith complying with New York law. New York law is clear that under Real Property Section 321(2)(b) the county clerk has a mandatory duty to record any instrument relating to a mortgage, including discharges of mortgages and certificates "purporting" to discharge a mortgage "regardless by whom any such instrument has been executed." Any county that does not record a MERS release is acting contrary to law. If a Clerk chooses to act contrary to their statutory duty, then the liability is on them for any damages incurred. Title companies are insuring new loans and insuring over the unrecorded releases because the simple fact is that the loan has been paid and all parties involved would agree that no outstanding lien exists.

We have been informed by our members that certain counties have taken the following positions regarding MERS lien releases:

Cortland, Erie, Nassau, Onondaga, Orange, Oswego, Otsego, Putnam, Rockland, Sullivan, St. Lawrence, Ulster, Warren, Westchester, and Yates Counties: These counties will accept MERS instruments including MOM mortgages, assignments, and discharges with the "as nominee" language included on the release following the identity of MERS. Putnam, Westchester, Sullivan, and Yates want the original lender identified as the original mortgagee on the cover sheet that is submitted along with MERS instruments for recording.

Broome, Herkimer, and Saratoga Counties: Herkimer and Broome will record but not mark the mortgage as discharged. However, the Counties have indicated that a “minute” will be added to the mortgage referencing the recorded discharge. Anyone doing a title search would see that a discharge has been recorded for that particular mortgage. Further, if the note is marked paid in full, the mortgage is effectively discharged regardless of what the Recorder does. Saratoga County is a little different. The Clerk's procedure is to return the discharge and suggest a discharge signed by the lender. If the original document is re-tendered, they will record it but not index the mortgage as discharged. Therefore, re-submit all MERS releases to the Saratoga County Clerk along with instructions to the Clerk that the member wants the releases recorded.

The important point to focus in on- is that whether or not the Clerk marks the mortgage lien as discharged is not what evidences the lien actually being discharged. Keep in mind that the promissory note should be marked "paid in full" when the loan is paid off. The mortgage lien follows the note, so if there is no note, there cannot be a mortgage lien outstanding. In this case, there is nothing further to do. As long as the release is recorded, that should be good enough and a title company should be able to determine that the lien is released because of the recording of the lien regardless of what the Clerk's index states.

Dutchess, Genessee, Richmond, Steuben, and Suffolk Counties: These counties have modified their procedures for recording and indexing MERS documents in light of the favorable opinion rendered in the Suffolk County litigation. All MERS instruments including MOM (MERS as Original Mortgagee) mortgages, assignments, and discharges that meet statutory requirements for recording and are accompanied by the appropriate recording fees will be recorded and indexed under MERS as the mortgagee. The Dutchess County Clerk has made a complete turn-around now acknowledging that she will re-index previously recorded MERS instruments under MERS as the county becomes aware of them. Steuben will not re-index MERS instruments under MERS, but will include a “minute” on all previously recorded MERS instruments directing a title searcher to the recorded discharge.

Monroe, Niagara, and Oneida Counties: Will not accept MERS releases at this time. The Clerks state that the releases must be signed by the original lender unless the mortgage is assigned to MERS without the nominee language. These counties have chosen to continue to ignore the law and their duty to comply with same. We will continue to work with these counties to bring them into compliance. In the meantime, keep submitting the MERS lien releases and retain any rejected ones in a file so that they can easily be located in the near future for resubmission.

VI. FORECLOSURES

Foreclosing a mortgage in MERS name is an option that is made available to MERS members. It is noteworthy to mention that MERS has not changed the way the industry handles foreclosures. The mortgage industry has historically used servicing agents to bring foreclosure suits as agents for the Promissory Note-owner. Under Rule 8 of the MERS Membership, the beneficial owner (promissory note owner) of such mortgage loan or its servicer shall determine whether foreclosure proceedings with respect to such mortgage loan shall be conducted in the name of Mortgage Electronic Registration Systems, Inc., the name of the servicer, or the name of a different party to be designated by the beneficial owner.

In the event that the beneficial owner or its designated servicer determines that foreclosure proceedings shall be conducted in the name of a party other than Mortgage Electronic Registration Systems, Inc., the servicer designated on the MERS® System shall cause to be made an assignment of the mortgage from Mortgage Electronic Registration Systems, Inc. to the person designated by the beneficial owner, and such beneficial owner shall pay all recording costs in connection therewith.

If a Member chooses to conduct foreclosures in the name of Mortgage Electronic Registration Systems, Inc., the note must be endorsed in blank and in possession of one of the Member's MERS certifying officers. If the investor so allows, then MERS can be designated as the note-holder.

- (i) The Member shall not plead MERS as the note-owner in any foreclosure document; including but not limited to, the foreclosure complaint.
- (ii) The Member shall not plead MERS as a co-plaintiff in a foreclosure action.
- (iii) If the note is lost or cannot be located, the Member shall not commence a foreclosure action in the name of MERS, but rather must assign the mortgage out of MERS.

The Member shall take all reasonable and necessary steps to avoid having Mortgage Electronic Registration Systems, Inc. take title to the applicable property that is the subject of a mortgage loan. Mortgage Electronic Registration Systems, Inc. shall not be obligated to take title to any property that is the subject of a mortgage loan; provided, however, that if the Member so requests, Mortgage Electronic Registration Systems, Inc. may take title at the conclusion of the foreclosure sale upon prior written consent to the Member from Mortgage Electronic Registration Systems, Inc. If title is taken in the name of Mortgage Electronic Registration Systems, Inc., the Member shall take all necessary and reasonable steps to remove Mortgage Electronic Registration Systems, Inc. from title as soon as possible.

To help MERS Members understand how to foreclose using MERS, state by state recommended foreclosure procedures are available on the MERS website, www.mersinc.org.

- We recommend to our members that loans that are already in foreclosure should not be assigned to MERS. If a mortgage is assigned after foreclosure proceedings have begun, the foreclosure may have to be re-started. This will just add unnecessary delays.
- As a general rule, MERS should not take title at the end of a foreclosure. However, there are 9 states where this may be unavoidable. The states are: Connecticut, Louisiana, Michigan, Minnesota, Montana, New Mexico, South Dakota, Texas and Vermont. A subsequent deed should be issued as soon as possible either to the servicer or the investor so that MERS does not stay as the titleholder for an extended period of time.
- Please note that Fannie Mae requires in New Hampshire, Rhode Island and the Parish of New Orleans, Louisiana an assignment of the mortgage from MERS to Fannie prior to foreclosing. This is the same requirement you already follow on non-MERS loans. It has come to our attention that Fannie Mae may be requiring an assignment in Connecticut as well.

Question: *A mortgage loan has been assigned to MERS and the assignment is recorded, but the foreclosure is commenced in the name of the Lender. Is this right?*

No. Usually only the mortgagee of record has the authority to foreclose a mortgage lien. Therefore, if MERS is the mortgagee of record, then the foreclosure should be brought in the name of MERS. If it is brought in the Lender's name, the foreclosure may be challenged and can be found to be invalid.

Question: *I am renting a house and just received a foreclosure notice from MERS. I have been paying my rent to my landlord every month. What can I do?*

We receive calls like this and what we do is look up the property on the MERS[®] System and find out who is listed as the servicer for the loan. We then refer the caller to the servicer for further handling. MERS tries not to get involved in the middle of disputes. Similar calls involve borrowers who claim to have been paying the Lender and cannot understand why they are being foreclosed upon and that they have never heard of MERS. Again, we direct them to the servicer.

Question: *What happens if MERS holds the second lien and the first lien holder forecloses on their mortgage?*

MERS receives service of process as the second lien holder and then forwards the documentation onto the servicer listed on the MERS[®] System for that property. The servicer then handles the foreclosure. The caption of the lawsuit may distinguish the two mortgages by describing the plaintiff MERS as Mortgage Electronic Registration Systems, Inc. as nominee for (the name of whatever MERS member the MERS System shows the mortgage being registered to) and the defendant MERS as Mortgage Electronic Registration Systems, Inc. as nominee for (the name of whatever MERS member the MERS System shows the mortgage being registered to).

Question: *What happens if MERS takes title after the foreclosure is completed? Can we deed it out?*

If MERS takes title, MERS should remain in title for as short of time as possible. The MERS Corporate Resolution appointing certifying officers gives the authority to execute deeds on behalf of MERS.

We have had calls and notices from city officials and the police about vacant houses where vandals are getting in and it poses a hazard to the city. The only thing we can do is direct them to the last servicer. If these ordinance violations are not corrected by the servicer, MERS may be fined as a result because MERS is the record title holder. In fact, in the City of Chicago, MERS was fined for many of these violations totaling over \$100,000. Fortunately, MERS was able to work with the appropriate servicers to resolve the issue, but it came at the expense of everybody's time and money.

Question: *What is the Status of MERS foreclosures? Are they being challenged?*

The discussion below is based upon cases that MERS Corporate is aware of, and in some cases, has actively defended. This may or may not be an exhaustive list, and there may be other states and other cases where a case has been decided that is troubling to MERS ability to foreclose. We encourage our members and their counsels to alert us to challenges so that we can participate in the case if needed and keep track of trouble spots.

Arkansas

In *Mortgage Electronic Registration Systems, Inc. v. Stephanie Gabler, et al.*, (Circuit Court of Garland County # 2004-17-II) the borrowers claimed that MERS does not have standing because MERS is not the owner of the note. The court held that **“MERS has standing to seek relief for its Writ of Assistance and is the proper party to foreclose the mortgage as MERS is the mortgagee of record and holder of the promissory note.”**

MERS obtained a foreclosure judgment, held the foreclosure sale, and obtained a post-judgment order for writ of assistance to remove the occupant(s), including the named defendant, Gabler . Shortly after the writ was obtained in June 2004, the pro se borrowers sought removal to federal court, and the Western District of Arkansas rejected jurisdiction. A subsequent emergency appeal to the 8th Circuit Court of Appeals was also denied. The borrowers then filed for bankruptcy, but voluntarily dismissed the bankruptcy action four months later.

The borrowers then went back to state court in the eviction action and filed an objection to the writ of assistance, a request for injunction and a counterclaim. The borrowers claimed in their objection that they were not properly served in the foreclosure proceedings and that MERS does not have standing because it is not the owner of the note.

The court rejected all of the contentions made by the borrowers and ordered that MERS may execute its writ with the assistance of the county Sheriff.

California

Members occasionally inquire about a challenge to MERS liens raised in a California case named *Sulak et al. v. Mortgage Electronic Registration Systems, Inc., et al.*, (Superior Court of Riverside County # RIC398123). MERS has prevailed at every stage in this action, as the California courts have held that the borrowers have not even stated a valid claim worthy of further litigation.

Sulak is a case in which the borrowers stopped making payments on their loan and initiated a suit for damages and injunctive relief against MERS, the servicer, the trustee, and the foreclosure firm (among others) to prevent a non-judicial foreclosure. The Sulaks had stopped making payments on the loan because they believed that MERS could not enforce or collect the note and deed of trust without holding a Certificate from the Secretary of State, without responding to multiple requests for validation of the debt under the Fair Debt Collection Practices Act (FDCPA), and without having endorsements on the note or recorded assignments to successors in interest to the original lender. In an unpublished opinion entered on September 20, 2004, the Appellate Division characterized the Sulaks approach as “[e]ssentially, plaintiffs called ‘Olly olly oxen free’ on the note and deed of trust, and stopped making payments.”

The California courts have rejected the borrowers’ theory at every procedural step in this litigation. All three of the Sulaks’ motions for a temporary restraining order and both of their orders to show cause for a preliminary injunction have been denied for their inability to demonstrate likelihood of success on the merits of the complaint. All of these rulings were upheld in full by the Fourth Appellate Division.

The trial court has sustained demurrers against the borrowers’ first amended complaint, second amended complaint and third amended complaint. The Sulaks were given 30 days to file a fourth amended complaint, but did not do so. Instead, the Sulaks filed another appeal, which was rejected by the Fourth Appellate District because the demurrer on the third amended complaint was not a final judgment subject to appeal.

MERS and its co-defendants moved to have the case dismissed, and that motion was granted on May 17, 2005. The borrowers attempted to have the order of dismissal vacated, but that motion was denied on July 25, 2005. The borrowers filed yet another appeal, and that appeal is pending. (*Sulak, et al. v. Wells Fargo, et al.*, DCA No. E038916).

We are fully confident that the Fourth Appellate District will uphold the judgment of dismissal, the order granting the demurrer to the third amended complaint, and the order denying the Sulaks’ motion to strike defendants’ demurrer. We expect this decision will finally put an end to this litigation.

Connecticut:

(a) Status of Foreclosures:

Some have questioned in light of the *Fleet National Bank v. Nazareth*, 75 Conn.App. 791, 818 A.2d 69 (2003), case whether MERS has standing in Connecticut foreclosure cases. The Connecticut Superior Court issued a “rule” for determining the proper plaintiff in a foreclosure when MERS holds the mortgage. The court “rule” essentially requires that the plaintiff in a MERS foreclosure must be the holder of the promissory note. We are aware of counsels who are successfully using an affidavit and are foreclosing MERS mortgages.

Mortgages can be foreclosed in Connecticut by MERS because MERS is the record owner of the mortgage and is entitled to enforce the note. If the note is endorsed in blank, possession of the note is transferred to MERS prior to foreclosure and the original note is delivered to counsel for the plaintiff in the foreclosure action to be used at the foreclosure judgment hearing.

A note endorsed in blank is “bearer paper.” Connecticut General Statutes Section 42a-3-109, provides:

“(a) A promise or order is payable to bearer if it:

“(1) States that it is payable to bearer or to the order of bearer or otherwise indicates that the person in possession of the promise or order is entitled to payment;

“(2) Does not state a payee; or

“(3) States that it is payable to or to the order of cash or otherwise indicates that it is not payable to an identified person.

“(b) A promise or order that is not payable to bearer is payable to order if it is payable (i) to the order of an identified person or (ii) to an identified person or order. A promise or order that is payable to order is payable to the identified person.

“(c) An instrument payable to bearer may become payable to an identified person if it is specially endorsed pursuant to section 42a-3-205(a). An instrument payable to an identified person may become payable to bearer if it is endorsed in blank pursuant to section 42a-3-205(b).” (Emphasis added.) Connecticut General Statutes Section 42a-3-205(b), provides, “If an endorsement is made by the holder of an instrument and is not a special endorsement, it is a ‘blank endorsement’. When endorsed in blank, an instrument becomes payable to bearer and may be negotiated by transfer of possession alone until specially endorsed.”

The Uniform Commercial Code defines “holder,” as follows: “‘Holder’, with respect to a negotiable instrument, means the person in possession if the instrument is payable to bearer or, in the case of an instrument payable to an identified person, if the identified person is in possession. ‘Holder’ with respect to a document of title means the person in possession if the goods are deliverable to bearer or to the order of the person in possession” (C.G.S. §42a-1-201(20).)

Therefore, where the instrument has been endorsed in blank or otherwise is bearer paper, the person in possession is the holder of the note. A holder is entitled to enforce a promissory note.

Connecticut General Statutes Section 42a-3-301, provides, “Person entitled to enforce’ an instrument means (i) the holder of the instrument, (ii) a nonholder in possession of the instrument who has the rights of a holder, or (iii) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to section 42a-3-309 or 42a-3-418(d). A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument.” (It is important that the Complaint plead that MERS is a holder of the note, not that it is an owner of the note.)

Under these facts, a Connecticut court should hold that MERS has standing to pursue a mortgage foreclosure action as a holder of the note and the mortgagee of record.

In *Fleet National Bank v. Nazareth*, 75 Conn.App. 791, 818 A.2d 69 (2003), the Connecticut Appellate Court addressed the issue of standing in foreclosure actions. This is a seminal decision in Connecticut at the appellate level regarding the standing of the holder of a promissory note to pursue a foreclosure.

In *Nazareth*, the defendant-mortgagors appealed from the entry of judgment of foreclosure by sale in favor of the substituted plaintiff, R. I. Waterman Properties, Inc. The loan originator (Shawmut Mortgage) had merged with and into Fleet Mortgage Corporation. Prior to the foreclosure, Fleet Mortgage assigned its interest in the mortgage, but not the note, to Fleet National Bank. In turn, Fleet National Bank assigned the mortgage (but not the note) to the substituted plaintiff, which was a wholly owned subsidiary of Fleet National Bank and which handled Fleet National Bank’s foreclosure accounts.

On appeal, the defendants claimed that the plaintiff lacked standing to foreclose the mortgage. The Appellate Court distilled the facts as follows, “It is undisputed that Fleet Mortgage is the holder of the note, while the plaintiff is the holder of the mortgage.” (75 Conn.App. at 794.)

The plaintiff contended that it had standing and relied on *New England Savings Bank v. Bedford Realty Corp.*, 238 Conn. 745, 680 A.2d 301 (1996), rev’d after remand, 246 Conn. 594, 717 A.2d 713 (1998), and on *Connecticut National Bank v. Marland*, 45 Conn.App. 352, 696 A.2d 374, cert. denied, 243 Conn. 907, 701 A.2d 328 (1997). The Appellate Court distinguished those cases because in those cases it was not disputed that “the party seeking foreclosure had an interest in the note and the mortgage.” (75 Conn.App. at 794.) In *Bedford Realty*, the foreclosing plaintiff had lost the original of the note, and in *Marland* the court had made the specific finding that the foreclosing plaintiff was the holder of the note and mortgage. “In this case, however, the plaintiff was never the holder of the note,” wrote the Court in *Nazareth*. The court pointedly observed that neither the plaintiff nor the court could cite any authority “to support [the plaintiff’s] claim that it has standing to foreclosure on the mortgage without ever having been assigned the note.” (75 Conn.App. at 795.) Finally, the Court observed that the Connecticut legislature had by statute allowed a holder of the note to foreclose even if it had not been assigned the mortgage (75 Conn.App. at 795, citing C.G.S. §49-17.), but that no statute provided for the converse, i.e. a holder of the mortgage to foreclose when it did not hold the note.

This decision supports the analysis that MERS has standing to foreclose because the owner of the note authorizes and transfers the note to MERS prior to the foreclosure so that MERS is a holder of the note (and of the mortgage, too). Under the analysis used by the Court in *Nazareth*,

MERS would have standing to foreclose the mortgage. Please see MERS Recommended Foreclosure Procedures on the MERS Website www.mersinc.org.

Some may mistakenly think *MERS v. Rees* (No. CV03081773, 2003 Conn. Super. LEXIS 2437 (9/4/03)) cast doubt on MERS standing to foreclose. The Court in *Rees* did not issue any adverse ruling pertaining to MERS standing to commence a foreclosure proceeding on behalf of a principal. To the contrary, the *Rees* case involved procedural issues. The counsel in *Rees* had erroneously pled that MERS commenced the suit as the current owner of the note and mortgage but the papers supporting the motion for summary judgment reflected that MERS served as an agent/nominee. As such, the *Rees* court found sufficient issue of fact warranting the denial of summary judgment.

Standing is a legal concept to ensure that a plaintiff has a real interest in the action being litigated. It is not a rigid rule. In mortgage foreclosure cases in Connecticut, the crucial criterion appears to be whether the plaintiff is a holder of the note. In the typical MERS foreclosure, MERS is a holder of the note because it possesses the original note endorsed in blank, which makes it a holder of the bearer paper. Possession of the bearer paper should give MERS adequate legal standing to pursue a foreclosure in Connecticut.

(b) Department of Banking Opinion

The Department of Banking issued a March 9, 2006 letter in response to a consumer filing a complaint with the Department alleging that Mortgage Electronic Registration Systems is an unlicensed consumer collection agency. This complaint was filed in conjunction with a foreclosure initiated in MERS name against this consumer. The Department of Banking found that MERS is not in violation of Connecticut General Statutes Sections 36a-800 et seq. MERS role is limited to being the plaintiff in the legal foreclosures themselves and is not in the business of contacting the borrowers by telephone or letter to demand payment. All loan administration and efforts to resolve the default without foreclosure are handled directly by the mortgage servicer and not MERS. Even if MERS was acting as a consumer collection agency, the Department of Banking held that MERS would be exempt from the provisions of the Consumer Collection Agency statute because MERS provides significant services to its members for loans that are current as well as for loans that are in default.

Florida:

In September 2005, we suspended the option of allowing MERS members to foreclose in MERS name in Florida. We are in the process of appealing two adverse decisions against MERS standing as a proper plaintiff in foreclosure actions. Judge Logan in Pinellas County has issued an August 18, 2005 Decision on an Order to Show Cause why the Complaint should not be Dismissed for Lack of Proper Plaintiff. He dismissed with Prejudice as to MERS and dismissed without prejudice as to the "proper Plaintiff." We filed an appeal on September 14, 2004. Our appeal is based upon the Judge not dismissing with leave to amend as to MERS. We demonstrated to the Judge at a July 26th Hearing that under Florida Law, MERS has standing as a proper party. On January 20, 2006, we filed our brief in our appeal in Pinellas County, FL. A joint amicus brief was filed on our behalf by Fannie Mae, Freddie Mac, the MBA, JP Morgan

Chase and Countrywide. The Jacksonville Area Legal Aid (JALA) has filed an Amicus Brief in opposition. We are waiting to be scheduled for oral arguments which should be later this year.

A similar Order was entered by Judge Jon I. Gordon in Dade County on September 28, 2005 stating that a plaintiff must establish ownership of the note in order to have standing. We filed our brief on March 29, 2006 in Dade County, FL. JP Morgan Chase filed an Amicus Brief in support of our position.

Both Rulings are contrary to established Florida law. The Florida Supreme Court and the Florida legislature have made clear that a plaintiff need not allege and prove it “owns” the note in order to enforce the note and foreclose on the secured property. *Uniform Commercial Code Services* at section 3-301:2 which states, in part:

The holder of an instrument may sue in his own name to enforce payment, **even though he is not the owner.** (citations omitted.) Language found in some court’s opinion to the effect that the plaintiff **must plead and prove that he is the single ‘owner and holder’ of the instrument in order to enforce payment is clearly misguided.** (citation omitted.) The holder need only plead and prove that he is a holder in order to be entitled to enforce payment. (citations omitted.) (emphasis added.)

In fact, the Florida Supreme Court declared this issue to be well-settled law back in 1895 in *McCallum v. Driggs*, 17 So. 407 (Fla. 1895). The Florida Supreme Court without equivocation stated:

The law is now too well-settled . . . that an action on a bill or note payable to bearer, or **endorsed in blank**, may be maintained in the name of the **nominal holder who is not the owner** by the owner’s consent.” (emphasis added.)

The Court in *Troupe v. Redner*, 652 So. 2d 394 (Fla. 2d DCA 1995), could not have been more clear as to what must be alleged by MERS in order to be the real party in interest to a mortgage foreclosure action:

To foreclose upon a promissory note, the plaintiff must be the “holder” in order to be the real party in interest. *Withers v. Sandlin*, 36 Fla. 619, 18 So. 856 (1896); *Laing v. Gainey Builders, Inc.*, 184 So.2d 897 (Fla. 1st DCA 1966). The “holder” is the “person who is in possession of . . . an instrument . . . endorsed . . . in blank.” (citation omitted.) (emphasis added.)

The Third District has been equally clear that ownership of the note is not necessary in order to enforce it on behalf of the beneficiaries. In *Rauch, Weaver v. Central Bank and Trust Co. of Miami*, 453 So. 2d 459 (Fla. 3d DCA 1984), a **law firm** as holder of a promissory note was held to be the proper party to enforce it on behalf of the beneficiaries. Other Florida courts have also reaffirmed the long standing principle that “ownership” of the note is not necessary in order to enforce it.

MERS is a Real Party in Interest. Fla. R. Civ. Pro. 1.210(a) and Fed. R. Civ. Pro. 17(a) state in part, “every action may be prosecuted in the name of the real party in interest...” which includes “...a party with who or in whose name a contract has been made for the benefit of another...”. Each rule goes on to state that such party may sue “...in that person’s own name without joining the party for whose benefit the action is brought.” Because MERS is the mortgagee of record and legal owner of the mortgage and because of the Membership Agreement with its members, it meets this standard and has standing to bring mortgage foreclosure actions and seek foreclosure remedies.

Greer v. O’Dell, 305 F.3d 1297, (11th Cir. 2002) is the seminal case addressing this issue for this district. In *O’Dell*, the 11th Circuit affirmed in its entirety the District Court’s holdings. These holdings include a finding that an authorized agent can pursue and protect it’s principal’s claims in a court of law. *Id.* At 1302. The Court analyzed the issue of whether a loan servicer is a real party in interest and, if so, whether the loan servicer has standing to administer the legal affairs of the investor. *Id.* At 1299. The Court answered in the affirmative. In so ruling, the Court stated, “a servicer is a party in interest in proceedings involving loans which it services.” *Id.* at 1302. Further, the Court cited specific cases holding that mortgage servicers are real parties in interest. *Id.* at 1303. (citing *Myers v. Citicorp Mortgage, Inc.*, 878 F. Supp. 1553, 1558 (M.D. Ala. 1995); *In re Tainan*, 48 B.R. 250, 252 (Bankr. E.D. Pa. 1985)). Still other courts have ruled that a mortgage loan servicer has standing to bring a foreclosure action. *See, e.g., Fairbanks Capital Corp. v. Jenkins*, 225 F. Supp. 2d 910 (US Dist Crt N. Dist. IL 2002).

Mortgage loan servicers have standing to and are real parties in interest to pursue foreclosure actions. Properly authorized agents have standing to and are real parties in interest to pursue lawsuits on behalf of their principal. Therefore, MERS, as nominee of its members and by virtue of the Membership Agreement with its members, has standing to and is a real party in interest to pursue a foreclosure lawsuit seeking remedies on behalf of its members.

Moreover, we cannot find any law in the State of Florida that precludes a party from nominating another party to bring an action on its behalf. In fact, the courts of this state have specifically recognized the right of a party to nominate another party to bring an action on the other party’s behalf. *See Overseas Development, Inc. v. R.A. Krause, as Nominee of the Trustees of Atico Mortgage Investors*, 323 So.2d 679 (Fla. 3rd DCA 1975), where the defendant Overseas filed a motion to dismiss arguing the plaintiff must be all of the trustees of the trust and not a nominee of the trustees. The trial court denied the motion to dismiss and the appellate court affirmed citing *Your Construction Center, Inc. v. Gross*, 316 So.2d 596 (Fla. 4th DCA 1975). In that case, the defendant argued that the case should be dismissed because only one of the trustees of the trust was the plaintiff. The trial court and appellate court agreed that since the trust elected to take ownership of the note and mortgage under the name of only one trustee, only one trustee was necessary to maintain the action.

The case law is strong that supports MERS ability to foreclose on a mortgage when MERS is the mortgagee. In the case of *Mortgage Electronic Registration Systems, Inc. as Nominee for Countrywide Home Loans, Inc. v. Angela Foster, et al.* (Slip Op. Index No. 2004-3956-CA)[Cir. Ct. 4th Judicial Cir., Duval County, FL 12/17/04], the Court denied the defendant’s motion to dismiss MERS foreclosure action. The defendant’s motion alleged that MERS was not the “real party in interest and, therefore, was not the proper party to bring the foreclosure action.” *Id.*

Specifically, the defendant argued that MERS exceeded its authority as the “nominee” of Countrywide Home Loans, Inc. The Court, however, recognized that MERS and Countrywide had entered into a service contract that defined their relationship and, in that context, Countrywide had authorized MERS to represent it in foreclosure actions. Based on such evidence, the Court held:

Therefore, the appropriate definition of nominee in this case includes Plaintiff’s [MERS] capacity to seek judicial foreclosure of mortgages on behalf of Countrywide. Countrywide is not an indispensable party because it is a party by way of its representation by Plaintiff [MERS] as its nominee. Countrywide’s rights under the loan will be adequately prosecuted and *res judicata* would prevent another foreclosure action by Countrywide against Defendant on the same

Georgia

Georgia courts continue to recognize to right of MERS to foreclose, as illustrated by a recent decision. *American Equity Mortgage, Inc., et al. v. Chatahoochee National Bank*, (Superior Court of Forsyth County # 05-CV-1951) was an action to enjoin an immediate judicial sale due to equitable subrogation in which the court recognized the validity of a lien held by MERS and the authority of MERS to enforce it.

The borrower had executed a security deed naming Citifinancial Services as the grantee in exchange for a loan. The deed was recorded. On June 15, 2004, the borrower re-financed the loan by obtaining a home equity credit line from American Equity Mortgage. The deed to secure the debt named MERS as the grantee in a nominee capacity for American Equity. The deed was recorded on June 24, 2004, and Citifinancial's loan was paid off by the refinance.

Approximately a month prior to the re-finance, Chattahoochee Bank obtained a writ due to a judgment lien obtained against the borrower in the amount of \$679,240.01. Chattahoochee provided a Notice of Levy on Land to the borrower which indicated that it intended to conduct a judicial sale of the property.

American Equity, claiming it had no knowledge of Chattahoochee's interest in the land when it loaned the money for the refinance, brought suit and obtained a temporary restraining order. Following the entry of the temporary restraining order, the issue was raised as to which entity should be the plaintiff in an effort to determine whether American Equity/MERS has priority over Chattahoochee Bank.

After briefing and an evidentiary hearing, the Honorable David L. Dickinson determined that “MERS, in its capacity as grantee in the deed to secure debt and as nominee for American, or its successor in interest as the holder of the note, is the entity that would suffer irreparable harm if [Chatahoochee] foreclosed on its judgment lien and is the entity entitled to seek an injunction in this case. **MERS is entitled to enforce the American Deed to Secure Debt per its terms.**”

The court awarded MERS a permanent injunction precluding Chatahoochee or its successors or assigns from selling or foreclosing on the property so long as the deed held by MERS remains in effect.

Illinois:

Mortgage Electronic Registration Systems, Inc. v. Estrella, 390 F.3d 522 [7th Cir. 2004] shows ample authority for MERS to commence a foreclosure proceeding, in its agency capacity on behalf of its principal. In *Estrella*, the Seventh Circuit issued a “public chastisement” to counsel for “failing to do any research into the requirements of federal appellate jurisdiction before filing this appeal” (390 F.3d at 524). More importantly, the *Estrella* case did not negatively rule upon the standing of MERS to commence a foreclosure proceeding on behalf of its principal. At issue was an application to confirm a sale. On appeal, the Seventh Circuit dismissed the appeal based upon well settled law that Court orders denying confirmation to judicial sales are not final decisions, and thus are not appealable.

In addition, the court opined that the district Court may lack federal subject matter jurisdiction over the proceeding because for diversity of citizenship purposes “ it is the citizenship of the principal, and not that of the agent that matters.” (390 F.3d at 525). Because the principal in *Estrella* was an Illinois corporation and the suit was brought against Illinois residents, the Seventh Circuit opined that subject matter jurisdiction “is doubtful.” Implicit in the holding was a recognition by the Seventh Circuit that MERS has standing to commence a foreclosure proceeding as agent on behalf of its principal. Indeed, the *Estrella* Court did not dismiss the proceeding in its entirety for lack of standing by the agent, rather cited to *Indiana Gas Co. v. Home Insurance Co.*, 141 F.3d 314, 319 [7th Cir. 1998] which recognizes the capacity of an agent to commence a proceeding “[w]hen the principal’s interests are affected by the litigation, the principal’s citizenship counts even if the agent is the sole litigant” (emphasis added). In short, the federal appellate Court did not issue a blanket ban to suits commenced by MERS as an agent on behalf of its principals. Instead, in suits brought by agents, it directs federal district Courts to ascertain the citizenship of the principal of the plaintiff to determine whether federal diversity jurisdiction exists.

Illinois statutory law specifically permits an agent to commence a foreclosure proceeding on behalf of a principal. Section 735 ILCS 5/15-1504(a)(3)(N) provides in pertinent part:

A foreclosure complaint may be in substantially the following form:...(N) capacity in which plaintiff brings this foreclosure (here indicate whether plaintiff is the legal holder of the indebtedness, a pledge, an agent, the trustee under a trust, deed or otherwise, as appropriate.) (Emphasis added).

Kentucky:

We have been alerted to a January 2005 letter from the Master Commissioner in Jefferson County that when MERS is the only named Plaintiff and there is no assignment in the court records to MERS, he does not view MERS as the real party in interest. It is unclear from the letter if a correct understanding of MERS was present when the letter was written

As we gather more information, it will be shared with our membership as well as their counsels.

Michigan

MERS has had great success foreclosing in Michigan, and recent attempts to challenge MERS have been rejected by the trial courts. MERS received a favorable ruling from Judge Susan M. Moisey after reviewing MERS brief on MERS standing in *Amera Mortgage Corporation v. Schatz*, 46th District Court # LT-05-6565. This case involved a post-foreclosure eviction action in which the borrower raised affirmative defenses challenging the foreclosure on the basis that MERS allegedly had no standing to foreclose. MERS had obtained a non-judicial foreclosure, and the property was conveyed to Amera Mortgage Corporation who proceeded as plaintiff in the eviction action.

MERS established its right as a proper party plaintiff by showing numerous precedents supporting the right of MERS to foreclose. MERS demonstrated that it acts as a nominee for the owner of the indebtedness, and therefore has standing to bring a foreclosure by advertisement pursuant to MCL 600.3204. MERS further demonstrated that it had standing to act as mortgagee and enforce notes under both MCR 2.201.(B)(1) and MCL 600.2041. Michigan law permits a party “with whom or in whose name a contract has been made for the benefit of” to file suit. MERS also cited case law from the Michigan Supreme Court holding that a corporate entity can be the mortgagee without having any interest in the underlying debt. *See Canvasser v. Bankers Trust Company of Detroit*, 284 Mich. 634, 280 N.W. 71 (1938). Finally, MERS demonstrated that the validity and enforceability of MERS mortgages has already been affirmed by the Attorney General of Michigan in formal Opinion No. 7116, August 28, 2002, (2002 Mich AG Lexis 19). Specifically, the Attorney General stated that the Register of Deeds is required to accept MERS mortgages and index them as either mortgagee for the disclosed nominee or an undisclosed nominee. The Attorney General described MERS and the legal acceptance of the use of a “nominee,” and concluded that, “No provision in the Recording Requirements Act suggests that a discrepancy will exist to the mortgage interest instrument simply because the mortgagee is listed as a nominee” for an undisclosed party.

Upon reviewing these precedents, the Judge entered final judgment of possession for Amera Mortgage.

New York:

There has been some speculation that MERS cannot foreclose in New York. We are aware of no such legal prohibition. New York law recognizes the rights of an agent to sue on behalf of his principal (CPLR 1004; *Airlines Reporting Corp. v. S&N Travel, Inc.*, 238 A.D.2d 292 [2d Dep’t 1997]), and specifically recognizes the right of an agent to commence a foreclosure proceeding on behalf of a principal. (*See* Bergman on New York Mortgage Foreclosuresw; section 16.02[1][a] (Matthew Bender Co., Inc 2004) and *Fairbanks Capital Corpl v. Nagel*, 289 A.D.2d 99 [1st Dep’t 2001] (Court rejected mortgagor’s argument that servicing agent lacks standing to maintain an action in its capacity as servicing agent for a trustee)).

Any foreclosures brought to MERS attention as having issues were the result of the complaint not being plead properly. For example, in *Mortgage Electronic Registration Systems, Inc. v. Burek*, 4 Misc. 3d 1030A [Sup. Ct. Richmond County 2004], the complaint alleged that MERS is “the sole, true and lawful owner of the bond/note and mortgage securing the same.” We do not

recommend or support complaint making this allegation and when we become aware of it, we advise to amend the complaint or dismiss it. We were not made aware of this case until after the fact. Interestingly, the summary judgment papers reflected that the action was brought in an agency capacity.

However, the case does not stand for MERS not being able to foreclose. Instead, citing to issues of fact, the *Burek* Court denied summary judgment, but did not question or disturb New York procedural law and case law which specifically permits an agent to commence a suit on behalf of its principal. With respect to the pending summary judgment application, the *Burek* Court found sufficient issues of fact warranting its denial, namely conflicting proof the mortgagor produced showing that he was not in default on his mortgage obligations, outstanding discovery sought of plaintiff on its claim of default, and counsel's presentation of conflicting allegations concerning the standing of the plaintiff. Although the *Burek* Court cited to issues of fact in denying summary judgment, it did not issue any ruling barring MERS from commencing a foreclosure proceeding on behalf of its principal. The Court did not dismiss the proceeding for lack of standing.

Ohio:

We primarily are seeing issues in Cuyahoga County. We are informed that per County rules, they do not "recognize" MERS. We are not sure what that means. The borrower has signed a mortgage document acknowledging that MERS is the mortgagee as nominee for the lender, its successors and assigns. The lender has entered into a contractually relationship with MERS to have MERS hold the mortgage lien on their behalf and MERS has agreed to same. We are in the process of investigating what is not "recognized" about these legal contract and relationships.

What we do know is that some foreclosure firms are informing MERS members that the "county" wants the firms to match the foreclosure plaintiff, the mortgagee and the note holder verbatim. In one case, it was asked of the member to execute an assignment from MERS as nominee for ABC to MERS as nominee for XYZ. An allonge was also completed transferring the note from XYZ to MERS as nominee for XYZ.

Oklahoma:

There has been some talk that MERS foreclosures are in trouble in Oklahoma because of a Magistrate Judge's Report and Recommendation issued December 9, 2004 in *Sanchez v. Countrywide Home Loans, Inc., Mortgage Electronic Registration Systems, et al.*, Northern District of Oklahoma, Case No. 04-CV-337. The final resolution on this case is that the Plaintiff filed a response with the Court that she will not be able to prosecute the action as she is leaving the country. The Judge entered an Order dismissing the case for failure to prosecute. This case has some similarity to the case of *Richard Robey v. Mortgage Electronic Registration Systems, Inc.*, United States District Court, Northern District of Oklahoma, Case No. 02-CV-584-P(C).

The *Robey* case alleged FDCPA violation based on a prayer for the award of a "reasonable attorney's fee" included in a prayer for relief contained in a foreclosure petition filed against him. Robey contended that this was *prima facie* violation of the FDCPA because the prayer for

relief failed to disclose to the court details of an alleged flat fee agreement between MERS and the attorney.

MERS and the attorney moved to dismiss, and Robey contested the dismissal. On September 30, 2004, the district court entered an order granting the Motions to Dismiss, and on October 1, 2004, entered a judgment of dismissal. The district court rejected Robey's FDCPA challenge because the prayer for relief for a "reasonable attorney's fee" in the Foreclosure Petition was expressly authorized by both Oklahoma law and the Mortgage itself. The district court declined to exercise supplemental jurisdiction over the pendent state law claims, which alleged that MERS and the attorney violated Oklahoma Consumer Protection Act (OCPA) by alleging in the foreclosure petition that MERS had standing to bring the foreclosure action as holder of the Note in default, and also by requesting a reasonable attorney's fee. Robey has filed an appeal that the district court erred in determining that the request for reasonable attorney fees is authorized by law and/or the instrument creating the debt. Robey has not raised as error on appeal the district court's decision to decline to exercise supplemental jurisdiction over the pendent state claims. MERS has filed a reply brief. **THE COURT OF APPEALS RULED IN OUR FAVOR.**

As for the *Sanchez* case, it arises out of a state foreclosure action MERS filed against Daniel Sanchez in January 2004. MERS initiated the action as the holder of the note. This petition also included in the prayer for relief a request for a "reasonable attorney's fee." Sanchez sold the property on March 17, 2004 and paid off the balance of the note. The foreclosure action was dismissed without prejudice on March 22, 2004. Four days later, Sanchez commenced his lawsuit.

MERS along with Countrywide, moved to dismiss and sought summary judgment (Combined Motion) with regard to Sanchez' class claims. The class claims included: (i) alleged violations of the OCPA and the FDCPA based on the request for reasonable attorney fees and (ii) alleged violations of the OCPA and the FDCPA for pleading that MERS was the holder of the note.

Sanchez did not dispute the material facts set for in MERS Motion to dismiss and for summary judgment. The Magistrate Judge recognizes that the material facts are undisputed, but he found that the evidence submitted by MERS/Countrywide was not sufficient to support summary judgment. The Report incorrectly treats the material facts as if they were "disputed" because the facts were supported by evidence other than an affidavit. The Magistrate expressed concern that upon presentation of additional evidence, Sanchez will have failed to state a claim.

The Magistrate's Report and Recommendation recommends that the Combined Motion be granted in part and denied in part. The Report recommends that all claims under the OCPA be dismissed and that the class claims under the FDCPA based on prayer for attorney fees be dismissed. The Report did find that Sanchez did have standing to assert 1) violations of the FDCPA for the actual collection of attorneys fees; 2) violations of the FDCPA because Foreclosure Petition alleged that MERS was the holder of the note; 3) violations of the FCPA because the summons in the Foreclosure Action provided Sanchez twenty (20) days to answer the Petition; and 4) violations of the FDCPA as a result of MERS and attorneys attempt to collect attorneys' fees in the Foreclosure Action.

The issue of the Report and Recommendation that involves MERS is its status as holder of the note. The Magistrate found that the affidavit submitted by William C. Hultman, Secretary of MERS, was insufficient to establish that MERS is the holder of the note. Again, this is an undisputed fact by the Plaintiffs.

Possession of the note is the key element to being the holder of the note. *See Russell v. Mason Sales Co.*, 591 P.2d 703,706 (Okla. 1979); *Gray v. Carter*, 802 P.2d 646, 649-50 (Okla. Ct. App. 1990); and 12A Okla. Stat. section 3-301. Whether this possession is considered actual, because the MERS officers are also Countrywide employees, or constructive, because of an agency relationship between the two entities, the legal result is the same, the summary judgment on the holder issue is required.

The undisputed facts are that the MERS Corporate Resolution given to Countrywide, and the mortgage, establish that MERS has the standing to and responsibility for administering and foreclosing on the mortgage loans. The mortgage provides that MERS is the beneficiary of the security instrument, acting on behalf of the lender, with the right to foreclose. The fact that Countrywide initiated the foreclosure in MERS name shows that Countrywide empowered its employees under the MERS corporate resolution acknowledges that MERS is the holder of the note and had the capacity to foreclose the mortgage.

We had offered in our objection that if the Court agrees with the Report and Recommendation that some additional facts explaining Countrywide's grant of authority to MERS would assist in resolving this issue, that an supplemental affidavit from Countrywide could and should be provided to the Court. We did do this. The "holder" claim is the only Class Claim left unresolved by the Report and Recommendation.

We may never get a ruling on this case in light of the Plaintiff filing a response that she will not be prosecuting this case. We had positioned ourselves for a positive outcome and looked forward to a ruling in our favor.

Nonetheless, we have received favorable rulings in Oklahoma trial courts when MERS' standing is challenged. In *Mortgage Electronic Registration Systems, Inc. v. William C. Warden, et al.*, (District Court of Oklahoma County # CJ-2005-7027), a borrower attempted to vacate a foreclosure judgment on several grounds, including the contention that MERS lacks standing to sue because it is not registered to do business in Oklahoma and because MERS was not the "real party in interest" since it did not own the note.

MERS argued that it was not required to register with the Secretary of State in order to foreclose in Oklahoma, pursuant to the exception from the registration requirement for entities that create or acquire mortgages found in Okla. Stat. Ann. Tit. 18 §§ 1132(A)(6), 1132(A)(7). MERS further argued that it had standing to foreclose because it held the recorded mortgage and at all times indicated that it was appearing as the designee of the trustee, Bank of New York.

On March 3, 2006, Judge Barbara Swinton entered an order denying the motion to vacate the foreclosure judgment. This judgment was not appealed

Wisconsin:

A very favorable opinion was rendered in *Mortgage Electronic Registration Systems, Inc. v. Diana M. Schroeder and American General Finance, Inc.*, Circuit Court, Branch 31, Milwaukee County (June 23, 2005). Plaintiff MERS filed the foreclosure when Defendant Schroeder failed to make payments on her mortgage. The mortgage was a MOM (MERS as Original Mortgagee) with Paragon Home Lending, LLC as the original lender. MERS filed a Motion for Summary Judgment and Defendant responded contending that MERS is not the correct real party of interest because MERS is not the lender and that the loan is unconscionable. The Defendant states that, if the Court were to permit MERS' claim to remain, the lender could attempt to obtain a deficiency judgment against Defendant because MERS has not received a written assignment or request from the lender, JP Morgan Chase Bank, to proceed with the foreclosure.

The Court found that the mortgage was not unconscionable. As to MERS standing, the Court found that "according to the Mortgage, Ms. Schroeder is the borrower and mortgagor, and MERS is the mortgagee under the security instrument. See Mortgage, page 1 of 13." The Court further examined the Mortgage document and found, "According to the Mortgage, MERS is also the nominee for the Lender to exercise rights to foreclose and sell the property. See Mortgage, page 3 of 13."

The Defendant tried to use *Mortgage Electronic Registration Systems, Inc. v. Estrella* (Case mentioned in materials under Illinois) as holding that only the lender is the proper party. This Court found, "However, the citation is to court dicta regarding subject matter jurisdiction, indicating the parties did not brief this matter."

The Court held that "In this case, MERS/Plaintiff has elected to foreclose on Defendant's property according to Wisconsin Statute 846.101 Foreclosure without deficiency. That statute does not require specifically that the "lender" be the plaintiff in a foreclosure case. The statute specifically refers to the "plaintiff." In this case, it appears MERS is properly enforcing the lender's interest according to the Mortgage. MERS has interest in the mortgage as mortgagee. It also has interest as "nominee" for the lender."

The Court also held that "Res judicata will act as a bar to Lender to pursue any judgment because the Lender, is a party in privity with MERS according to the Mortgage."

Mortgage Electronic Registration Systems, Inc. v. Degner, et al., (Circuit Court for Waukesha County # 05CV1982) is a more recent case in which a Wisconsin Court rejected an attack on the standing of MERS to foreclose. In his counterclaim and affirmative defenses, the borrower alleged various violations of federal lending laws. The borrower then brought a motion to dismiss which asserted that MERS could not foreclose because MERS was not registered as a foreign corporation and because MERS allegedly lacked standing because "it never takes possession of any funds" and "is not the servicing agent".

On February 6, 2006, the Honorable James R. Kieffer denied the motion to dismiss and stated at the motion hearing: "**MERS does have standing to bring and continue this foreclosure action**, and that is under . . . Section 803.01(2) of the Wisconsin Statutes. I'm satisfied given the

legal relationship of MERS and how it relates to HSBC and Household Finance and how these entities all work, I believe that Wisconsin law does provide for that . . .” The final written order of denying the motion to dismiss was entered on February 23, 2006.

Section 803.01(2), the statute cited by Judge Kieffer, provides that a “party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in the party’s name without joining the person for whose benefit the action is brought . . .” This language is quite similar to Rule 17(a) of the Federal Rules of Civil Procedure, which addresses the issue of whether a party is a “real party in interest” entitled to bring suit. Most states have a rule that incorporates almost identical language regarding standing to sue.

MERS has since obtained summary judgment in this action, and the borrower has appealed the order of summary judgment.

VII. BANKRUPTCY

Question: *Can MERS file a Proof of Claim or a Motion from Relief from Stay?*

When MERS is the mortgagee of record pursuant to either a recorded MOM (MERS as Original Mortgagee) mortgage or an assignment, MERS holds an "in rem" mortgage interest in the property. Under the United States Bankruptcy Code, such an interest constitutes a claim in bankruptcy, and as such, MERS would qualify as a creditor for purposes of filing a Proof of Claim. A claim filed in MERS name is based upon the mortgage lien. Therefore, the claim is considered a secured claim. If the lien remains in MERS name and the Proof of Claim is not, the claim may be deemed unsecured and the priority afforded secured claims may be lost.

Keep in mind a claim based upon the mortgage lien securing the note are one in the same. In a recent case, outside counsel filed two Proofs of Claims, one in the name of MERS based upon the mortgage and a separate claim in the name of the investor based upon the note. The court in that case raised an issue regarding a purported conflict of interest. To the court it appeared that counsel was representing two parties with a claim to the same amount of monies. The MERS claim was not pursued or defended and a default was taken against MERS. As a result, the investor lost priority as a creditor and was left with only an unsecured claim.

In addition, as a creditor and mortgagee of record, MERS would be a party in interest with standing to seek relief from the automatic stay under section 362(d) of the Bankruptcy Code. You can either bring it in MERS' name alone or in MERS' name as nominee for the servicer. However, in such a proceeding, only the in rem interest is at issue, so MERS' name alone is fine.

Question: *What happens if the Lender (MERS member) files a proof of claim and MERS files the Motion from Relief from Stay? Will the Debtor contest this inconsistency?*

This actually happened in a case in Chicago. The MERS member filed the proof of claim in their name and then filed a motion for relief from stay in MERS' name. The debtor's attorney filed a motion contesting MERS' standing. Once the attorney representing MERS/Lender explained to the debtor's attorney that MERS is the mortgagee pursuant to the recorded mortgage and as such, has an in rem interest, he withdrew his motion. Most contested foreclosure and bankruptcy cases boil down to a lack of understanding of MERS' role, and the more attorneys know about the relationship between MERS and its members, the fewer complications should be encountered.

Question: *What should we do if we receive an adversary proceeding filed by a bankruptcy Trustee against MERS?*

Watch out for the ones filed in Michigan. We have noticed an increase in the number of adversary proceedings brought by Trustees on behalf of debtors in Michigan bankruptcies. In some case, not only is the Trustees seeking to avoid mortgage liens as preferential transfers

based upon the recording date of the mortgage at issue, but are looking to recovery money damages in the face amount of the mortgage.

You need to file an appearance and answer for MERS. In one such case, a member did not do so and MERS was defaulted. The court not only entered an order avoiding the mortgage lien but also included a money judgment for the mortgage amount. A garnishment was issued against MERS to enforce the money judgment.

After filing a motion to set aside the default, the Trustee and the title company reached a settlement and as result, the default as well as the garnishment was dismissed. Therefore, we ask that any action that needs be taken in response to adversary proceedings involving a prayer for money damages be taken on behalf of MERS in a timely manner.

VIII. SERVICE OF PROCESS, INDEMNIFICATION AND NOTIFICATION

A. SERVICE OF PROCESS

MERS receives service of process regarding many different issues because MERS appears in the land records as the mortgage lien holder. A post office box address in Flint, Michigan appears on every recorded document to MERS. Most service is received directly through this PO Box and at our mailroom in Ocala, Florida. However, we do receive some mail at our corporate office in Vienna, Virginia as well as through our registered agents in a few states.

When we receive service of process, the documents are scanned into images and forwarded to the current servicer listed on the MERS[®] System. There is one central point of contact at each member that will receive the mail. It is the responsibility of the point of contact to distribute the mail to the proper departments within the member's organization. The member is responsible to handle the processing of the documents.

Question: *We received a complaint naming MERS as a defendant, will MERS be having separate counsel represent you or should our attorney do that?*

Under the Membership rules and procedures, the member is responsible to take whatever action is necessary to protect the mortgage lien. For instance, if MERS holds the second lien on a member's behalf, and the first lien holder is foreclosing, it is the member's responsibility to defend the action in MERS name. We do not take an active role in most lawsuits. However, if the allegations attack MERS itself, and not just in its capacity of mortgage lien holder, we may choose to bring our own counsel in to partner up with the member's counsel for a complete defense.

Question: *We only received the complaint from MERS yesterday and time to answer has already expired. What was the hold up?*

This type of issue has only come up a few times and upon investigating the facts, we found one of two things: 1) the member's point of contact failed to forward the documents in a timely manner internally; or 2) the mortgage loan was never registered with MERS by the member and it was labeled unidentified while the MERS Helpdesk took steps to identify it.

In the first instance, the member's point of contact responsible to check the e-mail box for incoming mail from MERS just wasn't checking it daily. Then, there was a delay in getting the documents to the legal department. MERS has a record of all outgoing mail, and we can pinpoint the exact document and the time and date that we sent it to the member.

In the second instance, if a mortgage loan is not registered with us, we will not know which member to send the documents to and it becomes unidentified. Once it is labeled unidentified, we send an e-mail out to all members with the borrower name and address or other identifiable information and ask our members to claim the loan if they are servicing it. If we receive no response, then we send the information to an outside vendor to go to the applicable land records to pull either the mortgage or assignment to MERS. We can usually tell by the recorded

document which member is involved. We then send it to the member along with an invoice for the search fee.

B. DEFENDING AND INDEMNIFYING MERS

Under Rule 9 of the Terms and Conditions of Membership and Rules 13 and 14 of the Rules of Membership, a Member is obligated to indemnify and defend MERSCORP, Inc. (“MERSCORP”) or its subsidiary, Mortgage Electronic Registration Systems, Inc. (“MERS”) from: (a) claims arising from the actions or failure to act of the Member, (b) a transaction on the MERS[®] System initiated by the Member, or (c) an action taken by MERSCORP or MERS in compliance with an instruction from the Member.

Typically, MERS is named in suits or counterclaims seeking to quiet title to property, impose sanctions for housing code violations, challenge the validity of a loan based upon alleged failures to comply with statutory requirements for real estate transactions, or actions to foreclose on property liens (including mechanic’s liens, tax liens, and actions to recover homeowner’s association dues). In all of these instances, it is the Member’s responsibility to provide a defense for MERSCORP or MERS, and to pay any legal fees, costs or judgment rendered against MERSCORP or MERS in the action. If the Member fails to provide a defense, MERSCORP or MERS has the right to retain its own counsel to defend the claim, and to submit any legal fees, costs or judgment to the Member for payment.

Question: If a Member retains counsel to defend MERS, how involved will MERS be in the management of the case? Will MERS need to consult with the attorney representing it in the case?

The MERS Law Department does not typically oversee actions in which there is no monetary claim against MERS or MERSCORP, such as a foreclosure action where MERS is named as a defendant simply by virtue of it having a junior lien on the property being foreclosed. But in suits involving monetary claims against MERS or challenging the standing of MERS to hold a mortgage lien, the MERS Law Department tracks these cases and makes periodic inquiries to the in-house attorney managing the case for the Member, and to the attorney hired to defend MERS in the suit.

Some outside attorneys are still learning the mechanics of the relationship between MERS and the Member. The MERS Law Department is a valuable resource to such counsel for answers on how to plead certain matters and how to address certain legal challenges or discovery requests that are unique to MERS or MERSCORP. The retained counsel should promptly assert any defenses available to MERS or MERSCORP, even if the legal defense could not be asserted by the Member in its own capacity.

An attorney from the MERS Law Department will typically establish contact with the Member early in the litigation to confirm that a defense is being provided and to answer any questions. The MERS Law Department should be sent copies of any pleadings filed in the case, and should be kept aware of the progress of the litigation. The Member generally has authority to control the case and to settle the claim. However, MERS should be consulted on any settlement,

representation or response to discovery, as a misrepresentation of MERS in one court could adversely impact MERS in another.

C. NOTIFYING MERS OF PENDING LAWSUITS

Frequently, a Member will be the first to learn that a claim has been filed or is threatened against MERSCORP, Inc. (“MERSCORP”) or its subsidiary, Mortgage Electronic Registration Systems, Inc. (“MERS”). This is particularly true in instances where the Member has initiated a foreclosure action in MERS name, and the borrower files a counterclaim against MERS or MERCORP. Under Rule 14, a Member is required to immediately notify MERSCORP, Inc. (“MERSCORP”) of any lawsuit or threatened lawsuit naming either MERSCORP or MERS relating to a loan in which that Member has any legal or monetary interest.

Question: Where should I send the notice?

Notice of a lawsuit should be sent to the attention of General Counsel of MERSCORP, and can be sent by fax (703.748.0183), email (mers@mersinc.org) or by prepaid delivery by overnight courier or registered or certified mail to 1595 Spring Hill Road, Suite 310, Vienna, VA 22182. You will receive confirmation of receipt if you use any of these methods of service.

Question: What information should be included in the notice?

A notice should include the following information:

- (i) the name of the lawsuit, and the county, state and court in which the lawsuit is filed;
- (ii) the Mortgage Identification Number (MIN) of the mortgage loan involved;
- (iii) the date the complaint was filed and the date the Answer is due;
- (iv) the name and phone number of the contact person of the Member with respect to the subject lawsuit, threatened lawsuit or claim (which may be in-house counsel);
- (v) the name and telephone number of the attorney and law firm, if any, retained by the Member with respect to the subject lawsuit or claim; and
- (vi) a copy of all pleadings with respect to the subject lawsuit or claim in the possession of the Member or a copy of the written threat to initiate a lawsuit (as applicable).

Question: What if a Member receives notice of a threatened or pending lawsuit regarding a loan, but no longer has any interest in the loan?

The Member should always give MERSCORP notice of the lawsuit in the manner described in the discussion above. The Member should also indicate that it has transferred or terminated its interest in the mortgage loan, and should immediately update the MERS[®] System to reflect the change in interest in the loan.

Question: What if the Member believes that it is not obligated to indemnify a particular claim?

The Member is still required to provide prompt notice of the pending or threatened lawsuit, even if the Member believes it is not obligated to indemnify or defend the claim. The Member should set forth in the notice the basis for the refusal to indemnify and defend against the claim. Termination of the Member's use of the MERS[®] System does not end a Member's obligations to indemnify and defend MERS or MERSCORP for actions arising from its previous membership.

Members should review Paragraph 9 of the Terms and Conditions and Rules 13 and 14 of the Rules of Membership for a complete understanding of defense, indemnification and notification obligations.

IX. SUBPOENAS

It is not uncommon for MERS to be served a subpoena to produce documents or provide testimony regarding a loan for which MERS holds a mortgage lien. MERS is served the subpoena because of its appearance in the land records as a mortgagee. These subpoenas generally are issued in cases involving bankruptcy matters, criminal investigations, or divorce proceedings. The MERS Help Desk will promptly forward the subpoena in the same manner as it does any litigation document to the Member servicing the loan. The subpoena usually requests documents only related to the history of the loan itself. MERS does not have such information in its possession. Therefore, a MERS certifying officer should respond. The certifying officer should indicate that the Member is the servicer of the loan, that the certifying officer is a vice president of MERS authorized to respond to the subpoena, that MERS has no documents in its possession, and that any documents produced are being produced by the Member.

Question: *What if our company has been served a subpoena in our name for the same information? Do we need to respond separately for MERS?*

It is typical for a party seeking information regarding a loan to serve both MERS and the servicer of the loan for the same information. The attorney issuing the subpoena is most concerned about receiving the documents for the case. As the MERS nominee relationship with mortgage lenders becomes more well-known to lawyers throughout the country, we have found that it generally-acceptable for the Member to answer the subpoena in the Member's name by way of an employee who is also a vice president of MERS identified in the corporate resolution. The vice president should attach a cover letter with the response indicating that the Member is the servicer of the loan and the owner of all documents regarding the loan, that the response is being provided by an agent of the servicer who is also a vice president of MERS, and that MERS has no independent information regarding the loan.

Question: *How should we proceed if the subpoena requires MERS to provide an officer to testify at a hearing?*

In most instances, the attorney issuing the subpoena is more interested in the documents than in testimony, but occasionally an officer will need to be produced for a hearing (particularly in bankruptcy matters). The Member should select a certifying officer who is familiar with the Member's relationship with MERS to act as the witness. The witness should be able to briefly explain that he/she is an agent of the servicer and a vice president of MERS, and that MERS holds the mortgage lien in a limited agency capacity for the party with the beneficial interest in the note. If the subpoena involves issues regarding the history of MERS, the corporate governance of MERS, or any other matters that are specific to MERS and outside of the details concerning a particular loan or borrower, you should contact the MERS Law Department for additional guidance.

Question: *What if the Member chooses not to respond to a subpoena issued to MERS?*

Failure to respond to a subpoena on behalf of MERS could result in additional subpoenas and, ultimately, a finding of contempt by the court. If MERS is found in contempt for failing to respond to the subpoena, any fines, penalties and/or attorney's fees associated with the contempt ruling or spent by MERS to challenge the finding of contempt shall be the Member's responsibility.

Question: *Will MERS produce information a Member has placed on the MERS[®] System to a third party in response to a subpoena?*

Occasionally, a party to a complex commercial dispute or class action will seek discovery from MERS of information contained on the MERS[®] System. As of the date of the preparation of these materials, MERS has never directly produced information from the MERS[®] System to third parties. Pursuant to Rule 9, Section 1(b) of the Rules of Membership, MERS has "no ownership rights whatsoever in or to any information contained on the MERS[®] System." It is our position that the information contained on the MERS[®] System is the private, proprietary property of our Members, and that the information should be produced, if at all, by the Member who owns the information. This approach protects the privacy of the information, and allows our Members to control how and when it is distributed.

While MERS will continue to protect the privacy of our Members' information, MERS cannot risk contempt of court if ordered to respond to a subpoena. Rule 9, Section 1(b)(iii) of the Rules of Membership does authorize MERS to produce information contained on the MERS[®] System in response to a subpoena or court order provided that MERS has taken reasonable efforts to notify any interested Member in advance to allow such Member time to attempt to quash the subpoena or court order. We will work with you to take the best legal strategy in order to protect your information while complying with any court order.

All of our Members have a common interest in protecting the privacy and security of the MERS[®] System. We encourage our Members to continue to work with us to prevent any attempt to use the MERS[®] System as a short cut for legitimate discovery methods.

X. USING MOM DOCUMENTS IN ERROR

Question: *What happens when a loan is closed by a non-MERS member using MOM documents in error?*

From time to time, we have been contacted by various lenders and title companies that have erroneously closed loans using MOM (MERS as Original Mortgagee) documents (“Erroneous MOMs”). Erroneous MOMs are loans that are originated and recorded by lenders or individuals who are not MERS members. Contractually, MERS only agrees to be the lien holder in the land records for MERS Member. When MERS is contacted about Erroneous MOM documents, MERS takes one of two courses of action depending on the circumstances:

1) If the originating lender is an institutional lender that is not a MERS member, MERS may execute an assignment out of MERS, provided that the originating lender indemnifies MERS for any potential liability that MERS may be unnecessarily exposed to by erroneously being named as the mortgagee at the time of the origination of the Erroneous MOM. The indemnification agreement is prepared by MERS and executed by the originating lender (and title company where applicable). Both the assignment and the indemnification agreement are submitted to the relevant county recorder’s office for recording.

2) MERS takes a different approach if the lender that originated an Erroneous MOM is an individual. When this happens, MERS executes a Disclaimer of Interest. Through this document, MERS disclaims any interest in the property that is purportedly created by the Erroneous MOM because MERS never agreed to hold the lien on behalf of the non-member individual. The Disclaimer is recorded in the applicable land records.

Question: *What if I am a broker preparing loans for sale to a MERS Member and I originate a MERS mortgage because the loan is to be purchased by a Member but, later on, the loan is sold to a non-Member?*

Under the MERS Membership Agreement, MERS contractually agrees to hold liens in the land records for its members. Therefore, if a mortgage is closed naming MERS as the mortgagee and the loan is then sold to a non-member, the lien must be assigned out of MERS by a recorded assignment. The MERS member that was to purchase the loan has the responsibility to execute the MERS assignment of the lien back to the originating lender (the non-member broker).

XI. STATE SPECIFIC ISSUES:

(a) CALIFORNIA MORTGAGEE ASSIGNMENT

In California, some Members have experienced that the Mortgagee’s Affidavit is sometimes accepted for recording by the California County Recorders offices, but is often rejected as not in compliance with California law. After reviewing the issue, it seems that California law does not provide a method for correcting previously recorded documents. Nonetheless, errors do occur and corrections need to be made. Accordingly, a custom and practice has developed to correct errant documents through a process called “Re-recording.”

To avoid the need for original documents and to provide a simpler, less expensive method to correct an errant document, MERS advises its Members to use a special form Assignment of Deed of Trust. The special Assignment would assign the trust deed from MERS as nominee to MERS as nominee for the purpose of noting a correction in the originally recorded deed of trust or assignment. The use of the special Assignment would eliminate the need for original documents.

If a Member experiences a similar problem with the Mortgagee’s Affidavit in States other than California, the Member may need to slightly modify the assignment in order for it to meet other state’s recording requirements.

RECORDING REQUESTED BY

WHEN RECORDED MAIL TO

SPACE ABOVE THIS LINE FOR RECORDER’S USE

ASSIGNMENT OF DEED OF TRUST

Lender’s Loan Number: _____ MIN: _____ MERS Phone: 1-888-679-6377
--

FOR VALUE RECEIVED, Mortgage Electronic Registration Systems, Inc., its successors and assigns, as nominee for the true beneficiary hereby assigns and transfers to itself, Mortgage Electronic Registration Systems, Inc, its successors and assigns, as nominee for the true beneficiary all of its right, title and interest in and to a certain deed of trust executed by _____, Trustor(s), and naming _____ as original Trustee and _____, the original Beneficiary(ies), and bearing the date of the ____ day of _____, _____ and recorded on the ____ day of _____, _____ in the office of the Recorder of _____ County, State of California in Book _____ at Pages _____.

This Assignment is for the purpose of providing record notice of the Mortgage Identification Number (MIN) that was either omitted or incorrect on a prior Deed of Trust or Assignment. The correct MIN is _____ and the Mortgage Electronic Registration Systems, Inc telephone number to call for information when using this MIN is 888-679-6377.

Signed on the ____ day of _____, _____

Mortgage Electronic Registration Systems, Inc

By: _____
Assistant Secretary

STATE OF CALIFORNIA)
COUNTY OF _____) ss.

On _____ before me, the undersigned, a Notary Public, personally appeared _____ personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

Signature _____

Name _____

Notary Public

(This area for official notarial seal)

(b) COLORADO

(i) FHA NUMBER AND LOST NOTE AFFIDAVIT

Question: In Colorado, when we release the lien, we send a copy of the original Deed of Trust and are exempt from providing the original evidence of debt under Colorado Revised Code Section 38-39-102(3.5)(b), because we are a Federal Housing Administration(FHA) approved lender. We normally do not have any problem, however I do not think MERS qualifies under any of the exemptions and we are not inclined to send the original collateral and an original Affidavit of Indemnification to the Public Trustee with each Request for Release of Deed of Trust.....what does your experience tell you concerning this jurisdiction?

This Statute requires a public trustee to release a lien upon (1) receipt of a written request, (2) production of the original cancelled evidence of debt and (3) receipt of a fee. When the original note cannot be produced, the public trustee may accept an indemnification agreement. However, only specific entities are allowed to sign an indemnification agreement and MERS does not fit into any of the authorized categories. The accepted entities are 1) a bank, 2) an industrial bank, 3) a savings and loan association, 4) an FHA approved mortgagee, 4) a federally chartered credit union, 5) any agency of the government or 6) any federally created corporation. A public trustee system seems to only be used in Colorado. They are appointed by each county to perform various functions and exercise the powers conferred to them by statute, such as releasing liens and opening and administering foreclosures as well as some other duties.

Therefore, if you cannot or will not produce the promissory note, we suggest that you name yourselves as the holder and owner of the indebtedness, name MERS as the beneficiary, reference your FHA number on the document and sign the document in your name.

(c) NEW YORK - CONSOLIDATION, EXTENSION AND MODIFICATION AGREEMENT (CEMA)

Question: *How do I do a CEMA naming MERS as the mortgagee?*

A CEMA stands for a Consolidation, Extension and Modification Agreement and is unique to New York. The situation that came up was a borrower went to ABC Mortgage to refinance their mortgage and borrow on the equity on their home. They have an existing mortgage with XYZ for \$50,000 and want to borrow an additional \$20,000 from ABC. Under a CEMA (for tax reasons), the \$50,000 (old money) and the \$20,000 (new money) can be consolidated. Therefore, ABC informs XYZ of this, and purchases the old money mortgage from XYZ and an assignment is executed from XYZ to ABC. ABC then issues a new mortgage as a MOM for \$20,000. How do you consolidate these two mortgages using MERS?

First, there needs to be an assignment from XYZ to MERS on the old money mortgage and it is recorded. Then ABC issues the new mortgage for \$20,000 on a MOM security instrument. Now both mortgages, old and new, are held by MERS as the mortgagee. This allows the CEMA to be done in MERS name. (see **sample form on MERS website www.mersinc.org**).

If the old money mortgage was already a MERS loan, then no assignment is needed. If the old money mortgage was a MERS loan, but the new money mortgage will not be a MERS loan, then an assignment from MERS to the new lender needs to be recorded. The key is that both the old and the new money need to be held by the same entity in order to do a CEMA.

Your Business Integration Manager can walk you through how to registered the mortgages on MERS.

Question: *What do I do if a closing attorney requests a MERS to MERS assignment?*

Please call us if a closing attorney requests that there be an assignment of the old money mortgage from MERS as nominee of the original lender to MERS as nominee of the current lender to facilitate a CEMA where MERS will be the mortgagee under the CEMA. This may be requested because the closing attorney believes the CEMA will be rejected for recording if not done. While the assignment is meaningless from a legal perspective, MERS may approve such assignments on a case-by-case basis to facilitate the transaction and avoid the borrower having to pay the recording tax on the entire amount of the refinancing. MERS has recently approved such MERS to MERS assignments in Nassau and Westchester counties.

(d) MASSACHUSETTS VOTE

It is our understanding that Massachusetts requires that a "Vote" be on file prior to accepting documents executed by officers on behalf of an entity for recording. This "Vote" must be on file for all entities including non-MERS members. Before offering documents for filing with the Land Court, a Member may contact MERS to obtain an original executed "Vote." An executed original "Vote" must be filed along with an original of the Member's Corporate Resolution and should include a copy of the most current list of certifying officers. To obtain an executed "Vote," please contact the MERS Legal Department.

(e) MINNESOTA LIEN RELEASES

MERS was able to have Minnesota legislation passed that requires county registrars to accept MERS releases. The change became effective on 8/1/04. Previously, the Torrens Counties in Minnesota had rejected MERS lien releases claiming that there must be two releases, one from MERS and one from the original lender. The Torrens System differs from abstract recording in that it is more stringent because a title examiner actually issues an opinion that the title is held by the person or entity listed in the land records. It provides a state guaranteed registration evidenced by a certificate which reflects the exact state of the title at any moment in time. You do not have to search beyond the immediacy of the register. Since the legislation has passed, we are not aware of any further issues.

(f) NORTH CAROLINA LIEN RELEASES

Previously we recommended to MERS members that a MERS officer should not be executing lien releases in North Carolina because only the owner of the indebtedness was the proper party to release the same under North Carolina law. Now, due to recent changes in North Carolina recording law, MERS can execute Satisfactions of a security instrument. This means that the servicer also now have the right to execute the releases as well. As of October 1, 2005, the State's revised statutes expand the authority to execute a Satisfaction from the owner of the indebtedness to what the State now describes as a Secured Creditor. A Secured Creditor can be either an entity that (1) holds or is the beneficiary of a security interest or (2) is authorized to receive payments on behalf of an entity that holds a security interest and record a satisfaction of the security instrument once there is full performance of the secured obligation. MERS, as the beneficiary of a Deed of Trust, qualifies as a Secured Creditor under the statute.

If you choose to execute the releases in MERS name, please remember that it must be done within the state's applicable time period.

Below, we have included a copy of a form Satisfaction of Deed of Trust as provided for in the State statutes. Before use, you should consult your attorney to determine how the document may appropriately fit your needs.

SATISFACTION OF SECURITY INSTRUMENT

(G.S. 45-36.10; 45-37(a)(7))

The undersigned is now the secured creditor in the security instrument identified as follows:

Type of Security Instrument: _____ (identify as deed of trust or mortgage)

Original Grantor: _____ (identify original grantor(s), trustor(s), or mortgagor(s))

Original Secured Party: _____ (identify original beneficiary(ies), mortgagee(s), or secured party(ies) in the security instrument)

Recording Data: The security instrument is recorded in Book _____ at Page _____ or as document number _____ in the office of the Register of Deeds for _____ County, North Carolina.

This satisfaction terminates the effectiveness of the security instrument.

Date: _____

Title: _____ of _____

STATE OF _____

COUNTY OF _____

I, _____, a Notary Public of the County and State aforesaid, certify that _____ personally appeared before me this day and acknowledged that he/she is a _____ of _____, and that he/she, as _____, being authorized to do so, executed the foregoing Satisfaction of Security Instrument for and on behalf of _____.

WITNESS my hand and official stamp or seal this ___ day of _____

Notary Public

My commission expires: _____

(g) NORTH CAROLINA FORECLOSURES

The North Carolina County Clerk of Courts may be requiring assignments from MERS as nominee for the original lender to MERS as nominee for the current lender in a MERS foreclosure. These assignments are unnecessary and should not be done. MERS only needs to present itself as holder of the note to foreclose in North Carolina. MERS local counsel has proposed the use of an affidavit that would state that the foreclosing entity (MERS) is in possession of the note. MERS can be a holder of the note by virtue of the investor endorsing the note in blank and possession of the note being maintained by MERS through its Certifying Officers (see the "Certify Officers" section of this document).

So far, only one North Carolina trustee has reported this issue. So we are under the impression that this is not a widespread problem in the state. As we obtain more information, we will be providing it to our membership. If this issue arises, please contact the Legal Department.

(h) LOUISIANA FORECLOSURES

In Louisiana, the foreclosure process will normally require MERS to take title to the property for a short period of time. This is because in Louisiana only the foreclosing creditor may make a credit bid for the full amount owed at sale. This bid cannot be assigned. All other parties must pay in cash. If MERS is to be the foreclosing entity (creditor), then only MERS can make a credit bid. A successful credit bid will lead to title being conveyed to MERS.

When conveying title out of MERS, Louisiana parishes may require an original MERS resolution as evidence that the signing officer has authority to convey title in the name of MERS. (The MERS corporate resolution provides authority for members to convey title out of MERS.) This requirement is not specific to MERS and would be required for any entity conveying title. An alternative way to handle it is to record one resolution with a parish, get certified copies and then record them in all the other parishes.

To conform to Louisiana parish requirements, we suggest that members make a copy of their MERS corporate resolution, affix the MERS seal to the copy using the corporate seal provided by MERS, and then attach the sealed copy of the MERS corporate resolution to their conveyance documents.

(i) PENNSYLVANIA (Revenue Ruling / Assignment of Credit Bid)

MERS obtained from the Commonwealth of Pennsylvania, Department of Revenue, a favorable Private Letter Ruling. It allows the investor use of the Realty Transfer Tax exemption where MERS is the successful bidder at the sheriff's sale, is issued a sheriff's deed, and participates merely as an agent of the investor. Our original Letter Ruling started out in 1999 and we have since had it renewed. Coverage by the new Private Letter Ruling lasts thru June 2009 and is renewable at 5-year intervals. Fannie Mae, Freddie Mac, and Ginnie Mae are exempt as investors from the transfer tax. Please see the letter on the following pages as an example. If you need a copy of the Private Letter Ruling, please contact Richard Anderson at (703) 761-1288 or at richarda@mersinc.org.



June 23, 2004

PHONE: 717 787-1382
FAX: 717 772-1459

JOHN D. BRENNER, JR.
DIRECT DIAL: (717) 705-3906
jbrenner@state.pa.us

Melissa S. Woloshin
1701 Market Street
Philadelphia, PA 19103-2921

Re: Realty Transfer Tax
Private Letter Ruling No. RTT-04-016
Mortgage Electronic Recording Systems, Inc. ("MERS")
Principal/Agent - Mortgage Foreclosure

Dear Mrs. Woloshin:

The Department of Revenue, Office of Chief Counsel is issuing this private letter ruling pursuant to §3.3 of Title 61 of the Pennsylvania Code. This responds to your letter of June 11, 2004. **By issuance of this letter ruling the Department renews Private Letter Ruling RTT-99-048 (09/30/99).**

Please be advised that this letter ruling is limited to the specific factual information contained herein and applies to * MERS and its members (Taxpayers), exclusively. Absent a statutory or regulatory change or rescission of this letter ruling by the Department, Taxpayer may rely on this letter ruling for five (5) years from the date of issuance. At the time this letter ruling expires, whether by statutory or regulatory change or rescission by the Department, you may resubmit your letter ruling request to the Office of Chief Counsel for review.

ISSUE

Whether recording a sheriff's deed poll to the real party in interest/beneficial owner, after having foreclosed on the mortgage in the name of MERS, is subject to the Pennsylvania Realty Transfer Tax ("RTT").

Melissa S. Woloshin
June 23, 2004
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CONCLUSION

The recording of a sheriff's deed poll to the real party in interest/beneficial owner, where the mortgage was foreclosed in the name of the legal owner MERS, is not subject to RTT where MERS is acting as the agent for the real party in interest or beneficial owner.

FACTS

MERS is a Delaware corporation with numerous members from the mortgage industry. MERS is a national electronic registry for tracking servicing rights and beneficial ownership interests in mortgage loans. MERS acts as nominee for the servicer and beneficial owner of a mortgage loan in the public land records.

Its members appoint MERS as the mortgagee of record on all loans that they register on the MERS system. This appointment eliminates the need for any future assignments when servicing rights are sold from one MERS member to another. Instead of preparing a paper assignment to track the change in the county land records, all subsequent transfers are tracked electronically on the MERS system.

MERS does not create or transfer beneficial interests in mortgage loans or create electronic assignments of the mortgage. The transfer process of the beneficial ownership of mortgage loans does not change under MERS. Promissory notes still require an endorsement and delivery from the current owner to the next owner in order to change the beneficial ownership of a mortgage loan.

All loans registered with MERS are assigned a unique, 18-digit number which is that loan's Mortgage Identification Number ("MIN"). The MIN does not change during the life of the loan. Once the loan is registered and assigned a MIN, information on the current beneficial owner of a mortgage loan can be accessed from the MERS system.

Melissa S. Woloshin
June 23, 2004
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MERS acts as the mortgagee of record in place of the servicer and receives service of all process related to the property. Where a loan defaults, MERS forecloses on the mortgage and the property securing the mortgage is taken to sheriff's sale. If it is the successful bidder, the beneficial owner of the property will receive a sheriff's deed poll.

DISCUSSION

72 P.S. §§ 8102-C.3(16) and 61 Pa. Code §91.193(b)(16) provide, in pertinent part, that:

A transfer to a holder of a bona fide mortgage in default if the transfer is made in lieu of foreclosure or the transfer is made under a judicial sale in which the mortgage holder is the purchaser. The exemption granted by this section does not apply to a transferee or assignee of the bid or other rights of the holder in the judicial sale . . .

Accordingly, if MERS were the successful bidder at the sheriff's sale, the transfer to MERS would be an excluded transaction and not subject to RTT since MERS was the mortgage holder.

Furthermore a transfer without consideration from an agent to the agent's principal is not subject to tax, if the agent acquired the transferred realty for the exclusive benefit of the principal. MERS is the nominee or agent for the beneficial owner of the mortgage. A transfer from MERS to the beneficial owner of the mortgage would qualify as an excluded transaction.

Under the rationale of the Pennsylvania Supreme Court case of Baehr Bros. v. Com., 487 Pa. 233, 409 A.2d 326 (Pa. 1979), two independent, wholly excludable, concurrent transactions can be collapsed into one deed that is excluded from the RTT. That is to say, if deed A to B is excludable and deed B to C is independently excludable, then a direct deed from A to C is excludable.

Melissa Woloshin
June 23, 2004
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Accordingly, a transfer to the beneficial owner of a mortgage (that was foreclosed on by MERS) via sheriff's deed poll, is an excluded transaction and not subject to RTT when the following documentation is attached to the statement of value:

1. A copy of this letter ruling; and
2. A notarized statement from the respective servicer/MERS officer that attests or affirms:
 - a. That the servicer is the beneficial owner of the mortgage and that MERS is acting as its agent;
 - b. That the servicer is a member of MERS;
 - c. That the mortgage identification number (MIN) provided is in fact the MIN that was assigned to the mortgage that was foreclosed on.

A copy of the terms and conditions for MERS membership was provided with this request for letter ruling.

Sincerely,



John D. Brenner, Jr.
Assistant Counsel

JDB:jlh

XII. STATE QUALIFICATION AND LICENSING

Question: *I noticed that MERS is not qualified as a foreign corporation in my state. Since MERS is the mortgage of record for loans in all 50 states, how is this possible?*

Mortgage Electronic Registration Systems, Inc., a Delaware corporation with its principal offices at 1595 Spring Hill Road, Suite 310, Vienna, VA 22182 (“MERS”) is qualified as a foreign corporation in the following states: Alabama, Florida, Illinois, Maine, Massachusetts, New Jersey, New York, Ohio and Virginia. For other states, our outside counsel has determined that foreign corporation qualification is not necessary.

Similarly, our outside counsel has determined that MERS does not need to be licensed under any state laws dealing with mortgage banking or brokerage activities.

If, in the future, circumstances warrant a reassessment of the need for MERS to be licensed as mortgage banker or broker or qualify as a foreign corporation in other states, our membership rules obligate us to do so and we will take the appropriate action.

Question: *I have seen two different corporate names used for MERS: MERSCORP, Inc. and Mortgage Electronic Registration Systems, Inc. Which name is correct?*

The MERS family is comprised of two distinct corporate entities. MERSCORP, Inc. is the parent company of Mortgage Electronic Registration Systems, Inc. MERSCORP, Inc. is also a Delaware corporation with a principal office at 1595 Spring Hill Road, Suite 310, Vienna, VA 22182. It employs all personnel and also owns and operates the MERS[®] System. Mortgage Electronic Registration Systems, Inc. is a wholly owned bankruptcy remote subsidiary of MERSCORP, Inc. and its sole purpose is to hold mortgage liens. Mortgage Electronic Registration Systems, Inc. is the entity that will be found in the land records.

MERSCORP, Inc. is qualified as a foreign corporation in the following states: California, Florida, Georgia, Illinois, Louisiana, Massachusetts, New Jersey, New York, North Carolina and Virginia. Qualification in most of these states was required because MERSCORP, Inc. has employees based in those states.

Question: *Has MERS been challenged on whether or not MERS needs to be licensed or Qualified to do business in any states?*

We were challenged in Nebraska and prevailed in a decision rendered by the Nebraska Supreme Court on October 21, 2005. In the case, *Mortgage Electronic Registration Systems, Inc. v Nebraska Department of Banking and Finance*, (filed October 21, 2005, No. S-04-786) the Court held that MERS services of holding mortgage liens for promissory note-owners is not the equivalent of acquiring mortgage loans as defined under Neb. Rev. Stat. section 45-702 (Reissue 2004). The Court held that MERS serves as legal title holder in a nominee capacity, permitting lenders to sell their interests in the notes and servicing rights to investors. MERS has no

independent right to collect on any debt because MERS itself has not extended credit, and none of the mortgage debtors owe MERS any money.

XIII. CO-OPS

The MERS[®] System has been modified to accommodate the registration of Co-ops. Please ask your Business Integration Manager on how to do this.

From a legal standpoint, MERS can hold the security interest on a Co-op.

Whenever a UCC Financing Statement (Form UCC1) must be filed to perfect a security interest granted to Mortgage Electronic Registration Systems, Inc., the following information should be used to complete items 3 and 8 on the form as follows:

3. SECURED PARTY'S NAME

3a. ORGANIZATION'S NAME

Mortgage Electronic Registration Systems, Inc.

3c. MAILING ADDRESS	CITY	STATE	POSTAL CODE	COUNTRY
P.O. Box 2300	Flint	MI	48501-2300	USA

8. OPTIONAL FILER REFERENCE DATA

Insert 18 digit MERS mortgage identification number ("MIN") for the loan

Complete all other items using Lender's normal closing instructions, and don't use the MERS address in Item B.

If a security interest is assigned to Mortgage Electronic Registration Systems, Inc. and a UCC Financing Statement Amendment (Form UCC3) must be filed to perfect the security interest, then the following information should be used to complete items 7 and 10 on the form as follows:

7. CHANGED (NEW) OR ADDED INFORMATION

7a. ORGANIZATION'S NAME

Mortgage Electronic Registration Systems, Inc.

7c. MAILING ADDRESS	CITY	STATE	POSTAL CODE	COUNTRY
P.O. Box 2300	Flint	MI	48501-2300	USA

10. OPTIONAL FILER REFERENCE DATA

Insert 18 digit MERS mortgage identification number ("MIN") for the loan

For either form, complete all other items using Lender's normal closing instructions, and don't use the MERS address in Item B.

XIV. MANUFACTURED HOUSING

MERS has received inquiries from Members regarding the use of MERS on mortgages secured by Manufactured Housing. This interest stems from a Note in Section (c)(3) of Chapter H33.7 and a Note in Section (b) of Chapter 22.14 of Freddie Mac's Guidelines. These Notes address restrictions regarding the registration of certain mortgages secured by Manufactured Homes with MERS in States, which issue a Certificate of Title. Based upon our initial inquiries regarding this issue, there is nothing to indicate that loans secured by Manufactured Homes in Certificate of Title states could not be registered with MERS.

It is our understanding that mortgages secured by Manufactured Homes differ from those secured by site-built homes because in some States a certificate of title is issued by an agency charged with this duty, such as the Department of Motor Vehicles. Other States treat Manufactured Homes as real property when certain requirements such as permanent affixture have been met. In these States no certificate of title issued and the lien interest is created and perfected by a security instrument such as a mortgage. We are not aware of any restrictions regarding the use of MERS for Manufactured Housing in these States.

In certificate of title States, while the mortgage creates a lien interest in both the real property and the Manufactured Home, the lien on the Manufactured Home is evidenced and perfected by a certificate of title. Once the Manufactured Home becomes affixed to the land, some certificate of title States have passed laws which provide for surrendering the certificate of title to the issuing agency and it is only then that the mortgage evidences the lien on both the real property and the Manufactured Home.

In States that do not provide for surrendering the certificate of title, also known as non-surrender States, the certificate of title remains the document for perfecting the lien on a Manufactured Home. It is these non-surrender certificate of title States that are impacted by Freddie Mac's restriction mentioned above. In non-surrender States, it is our understanding that when it comes time to foreclose, the original certificate of title along with the note and the mortgage must be produced. This production requirement gave rise to difficulties for many lenders during the foreclosure of loans secured by certificates of title even before MERS came along. The use of MERS does not impact the production of the certificate of title. As with mortgages secured by site-built homes, MERS is not the custodian of the loan documents. Therefore, documents such as the certificate of title remain with the loan file and are transferred between servicers according to industry practices in place for non-MERS loans. Thus, the use of MERS would not impact production of the certificate of title in the non-surrender States. A more detailed discussion of this as well as other issues surrounding Manufactured Housing may be found in Chapter H33.7 of Freddie Mac's Guidelines and Fannie Mae's Announcement 03-06.

To date, MERS is not aware of any legal impediments which would prevent MERS from appearing on mortgages and certificates of title secured by Manufactured Housing. Members should consult with individual investors to determine the policies and procedures for originating and/or assigning liens secured by manufactured housing. We will provide updates as additional information becomes available.

XV. SUFFOLK COUNTY, NEW YORK LITIGATION

We won our appeal in the Suffolk County litigation in a unanimous 4-0 decision. The court's ruling, which is clear and unambiguous, requires "county clerks to record all mortgages, assignments and discharges naming MERS as the mortgagee or as nominee for a lending institution."

In April 2001, a New York Attorney General's Informal Opinion was issued stating that a recorder has the duty to index mortgages under the name of the true mortgagee. How the Opinion affected MERS is that the facts supplied by Nassau County, NY to the AG's office were incorrect by erroneously concluding that MERS does not hold the mortgage interest to the mortgage and therefore is not the true mortgagee. The AG's office takes the facts as supplied to them without the obligation of further investigation. The letter is set forth below:

2001 N.Y. Op. Atty. Gen. 2

Office of the Attorney General State of New York

Informal Opinion No. 2001-2

April 5, 2001

REAL PROPERTY LAW, ART 9, §§ 290(3), 291, 316

County Clerks have no obligation to record Mortgage Electronic Recording Systems (MERS) as the mortgagee of record where MERS is not the actual mortgagee. Doing so (1) violates the terms of N. Y. Real Property Law § 316, and (2) tends to frustrate the legislative intent of the Real Property Law's recording provisions.

Alfred Samenga, Esq.

County Attorney

County of Nassau

Ralph G. Caso Executive &. Legislative Building One West Street

Mineola, NY 11501-4820

Dear Mr. Samenga:

You have advised that Mortgage Electronic Recording Systems, Inc. ("MERS"), in its capacity as nominee, has been submitting mortgages to the Nassau County Clerk for purposes of recording. You further indicate that MERS has no legal interest in the mortgages it submits. Your inquiries are:

1. What are the potential consequences of MERS' use of the following language inserted in a mortgage: "FOR PURPOSES FOR RECORDING THIS MORTGAGE, MERS IS THE MORTGAGEE OF RECORD"?

2. What is the duty of the County Clerk with respect to indexing such documents?

We conclude that N.Y. Real Property Law § 316 prohibits the Nassau County Clerk from naming MERS as mortgagee for the purposes of recording a mortgage where MERS holds no legal interest in that mortgage. Accordingly, MERS' inserted statement has no legal effect. The Clerk must record the mortgage under the name of the actual mortgagee.

Under New York Real Property Law, a county clerk "shall" record a "conveyance of real property" upon the request of "any party," so long as that conveyance has been "duly acknowledged by the person executing the same," or proved and certified as

required. N.Y. Real Prop. Law § 291 (McKinney 1989 & Supp. 2000). The term "conveyance" includes a written instrument by which an interest in real property is mortgaged. See id. § 290(3).

In general, the clerk or registrar of each county must form "general indexes of instruments recorded in his office" to afford "correct and easy reference to the records in his office." Id. § 316. The statute requires a separate set of indexes for "mortgages or securities in the nature of mortgages," and specifies that this set must contain

two lists in alphabetical order, one consisting of the names of the... mortgagors..., followed by the names of their... mortgagees..., and the other list consisting of the names of the... mortgagees...,

...

Such indexes shall form a part of the record of each instrument hereafter recorded.

Id.

We believe that the plain meaning of N.Y. Real Property Law § 316 precludes MERS's effort to designate itself as mortgagee solely for recording purposes. See *People ex reI. Harris v. Sullivan*, 74 N. Y. 2d 305, 309 (1989) ("When [a statute's] language is clear and unambiguous, it should be construed so as to give effect to the plain meaning of its words."). The statute requires the county's clerk or registrar to index mortgages by the names of mortgagors and their mortgagees. If MERS has no legal interest in the mortgage it seeks to record, then MERS can be neither mortgagor nor mortgagee. Therefore, MERS's name cannot substitute for the name of the actual mortgagee in the county's general index for recorded mortgages.

MERS's effort to designate itself as mortgagee solely for recording purposes also undermines the general purposes of the Real Property Law's recording provisions. See *People v. Finnegan*, 85 N. Y. 2d 53, 58 (1995) ("The governing rule of statutory construction is that courts are obliged to interpret a statute to effectuate the intent of the Legislature..."). The Legislature enacted "the recording act, which is embodied in article 9 of the Real Property Law," to (1) "protect the rights of innocent purchasers who acquire an interest in property without knowledge of prior encumbrances," and (2) "establish a public record which would furnish potential purchasers with notice, or at least 'constructive notice', of previous conveyances and encumbrances that might affect their interests." *Andy Associates, Inc. v. Bankers Trust Co.*, 49 N. Y. 2d 13,20 (1979) (citations omitted).

Accordingly, "a purchaser of an interest in land... has no cause for complaint under the statute when its interest is upset as a result of a prior claim against the land the existence of which was apparent on the face of the public record at the time it purchased." Id. (citations omitted). See *First National Bank v. Riccio*, 236 A.D.2d 697, 69S, 652 N.Y.S.2d 90S, 909 (3d Dep't 1997) ("[E]ntries in the appropriate mortgagor and mortgagee indices, setting forth all required information concerning the mortgage to defendant's assignor and showing no discharge thereof, provided plaintiff with constructive notice of defendant's lien.") (citations omitted).

By the same token, errors in indexing may vitiate constructive notice, because section 316 provides that the index "shall form a part of the record of each instrument hereafter recorded," N. Y. Real Prop. Law § 316. See *Baccari v. De Santi*, 70 A.D.2d 198, 203, 43 I N. Y.S.2d 829, 832 (2d Dep't 1979) ("Since the index has, by statute, been made part of the record of filed instruments, an erroneous indexing by the clerk fails to give constructive notice of the existence and contents of the instrument."), *Federal National Mortg. Ass'n v. Levine-Rodriguez*. 153 Misc. 2d 8, 16,579 N.Y.S.2d 975, 980 (N.Y. Sup. Ct. 1991) ("Errors in indexing involving the name of the mortgagor are sufficient to vitiate constructive notice of record.").

In this case, since MERS has no legal interest in the mortgages it seeks to file, designating MERS as the mortgagee in the mortgagor-mortgagee indices would not fully satisfy the intent of Real Property Law's recording provisions to inform the public about the existence of encumbrances, and to establish a public record containing identifying information as to those encumbrances. If MERS ever went out of business, for example, it would be virtually impossible for someone relying on the public record to ascertain the identity of the actual mortgagee if only MERS had been designated as the mortgagee of record.

In sum, despite MERS' statement inserted in the mortgages it submits, the County Clerk has no obligation to record MERS as the mortgagee of record where MERS is not the actual mortgagee, because doing so (1) violates the terms of N.Y. Real Property Law § 316, and (2) tends to frustrate the legislative intent of the Real Property Law's recording provisions.

The Attorney General renders formal opinions only to officers and departments of State government. This perforce is an informal and unofficial expression of the views of this Office.

Very truly yours,

Jim Cole

Assistant Solicitor General In Charge of Opinions

By: Sachin S. Pandya

Assistant Solicitor General

The Suffolk County Recorder interpreted this Opinion to mean that his office should not accept MOM (MERS as Original Mortgagee) mortgages at all. As a result of his actions, MERS filed a lawsuit against Suffolk County and its Recorder, Edward Romaine. The New York Appellate Division, Second Department issued a Preliminary Injunction Order in June 2001, mandating that the Suffolk County Recorder must record all MERS documents pending the final resolution of the case. One factor that the Court must find to issue such an Order is that MERS has a likelihood of success on the merits of the case.

We had oral argument on a Summary Judgment Motion on May 15, 2003, and the Decision was rendered on May 12, 2004. We view the decision as a victory for MERS. The Judge found that the MOM mortgages are proper conveyances and are entitled to be recorded. That is what our case was all about. However, the Judge never understood how the MERS® System works and it was with that misunderstanding that he went on to talk about assignments and discharges. The Judge believes that the MERS® System is transferring mortgage interests, which is completely false. We've never even so much as suggested that mortgage rights can be transferred on MERS - they cannot be. The MERS® System is a tracking system that follows the changes in servicing rights (a non-recordable contractual right) and changes in the promissory note ownership (a negotiable instrument which can only be transferred by endorsement and delivery of the note). Nothing is transferred on MERS. There simply are no events taking place when using the MERS® System that triggers the need for an assignment. Therefore, we are in compliance with his Order because if there were assignments, we would record them. The same misunderstanding was used in his analysis regarding discharges. However, if you look at footnote 14 of the Opinion, it expressly states that if the mortgage is a MOM and there are no assignments (which we have already established that there simply are none), then a satisfaction issued by MERS should be recorded. So, again we are in compliance with the Order.

We chose to appeal the part of the decision that deals with assignments and discharges because we cannot allow such a misunderstanding of the MERS® System to remain in a legal Opinion. Oral argument to the Appellate Division, Second Department was held on October 27, 2005. We won our appeal in the Suffolk County litigation in a unanimous 4-0 decision. The Suffolk County Clerk filed a motion for permission to appeal to the Court of Appeals from the unanimous 4-0 Order of the Appellate Division, 2nd Department, issued on December 19, 2005. The appeal is not automatic and the Court of Appeals is a court of very limited jurisdiction. We filed a brief in opposition showing why the appeal should not be granted. It will take 6 to 8 weeks for the Court to rule on the Motion. We are optimistic that the Court of Appeals will deny the County's motion and the case will be concluded.

Even after the Opinion was rendered, it remains business as usual for our members in New York. Mortgages, assignments into and out of MERS as well as discharges continue to be recorded. We are confident that the Appellate Division will clear up the Opinion and set straight how the MERS® Systems lawfully operates under New York law. We do not have any members changing their operations in New York and continue to have new members come on board.

XVI. MERS® COMMERCIAL

The MERS® Commercial System was launched in July 2003.

- Bank of America, Wells Fargo, Morgan Stanley, Pinnacle and Bear Sterns among others have registered 2,439 loans secured by 6,113 properties with an aggregate original principal balance of \$44.8 billion.

The adaptation of MERS (Mortgage Electronic Registration Systems, Inc.) for the CMBS multifamily marketplace is designed to eliminate the repurchase risk and cost associated with preparing, recording and tracking mortgage assignments.

Mortgage assignments impose unnecessary costs on commercial originators and issuers. Additionally, servicers, special servicers, custodians and trustees are subjected to operational problems caused by incorrect, unrecorded and missing mortgage assignments over the life of the loan.

MERS® Commercial is a web-based, real-time application. Originators reserve a unique Mortgage Identification Number (MIN) for the web-based MIN generators within MERS Commercial. The MIN is affixed to the promissory note and associated security instruments that name MERS as the original mortgagee and nominee for the lender. With the recording of the security instrument, MERS becomes the mortgagee in the county land records and no assignments are required during a subsequent sale and transfer of the loan between MERS members.

The Originator or issuer enters the MIN, along with the required information to uniquely identify the loan and its collateral on MERS Commercial immediately after closing.

Once registered, the issuer (or custodian) updates MERS® Commercial to reflect changes in ownership due to securitization, foreclosure, repurchase or payoff. All parties with an interest in the loan can easily monitor progress towards achieving final certification and other major loan events.

Changes to Loan Documents:

- The only change to the closing transaction is to the promissory note, security instruments, UCC1 and the title policies. The payee of the promissory note does not change in the MERS process and remains payable to the order of the originating lender and, upon sale, is endorsed to the subsequent purchaser or in blank, depending on the purchaser's policies. MERS does not impact the chain of title to the mortgage promissory note.
- MERS does not require any particular forms of language, but the granting clauses of the security instruments need to be modified so that Mortgage Electronic Registration

Systems, Inc. holds valid legal title to the mortgage (or becomes the beneficiary in deeds of trust or the secured party under other types of security instruments).

- All major title insurers will issue title policies for loans secured by MOM security instruments. Title policies can be issued in the name of the originating lender or both the originating lender and Mortgage Electronic Registration Systems, Inc.
- Selected officers of the originating lenders and the servicers of loans registered on MERS® Commercial System can act for Mortgage Electronic Registration Systems, Inc. because they are also elected officers of that corporation and granted limited powers to act on its behalf. In their capacity as officers of Mortgage Electronic Registration Systems, Inc., they can execute releases of liens, satisfactions of mortgages, assignments to non-MERS members and initiate foreclosures in the name of Mortgage Electronic Registration Systems, Inc.

Changes to Securitization Documents:

- Pooling and servicing agreements, trust indentures and custodial agreements will need to be modified to reflect that change that assignments are not required for loans registered on the MERS® Commercial System.
- The rating agencies have also required a one-paragraph disclosure in the prospectus about MERS.

Sample Prospectus Disclosure

The original mortgages for some of the mortgage loans have been, or in the future may be, at the sole discretion of the originating lender, recorded in the name of Mortgage Electronic Registration Systems, Inc. (“MERS”), solely as nominee for the originating lender and its successors and assigns, and subsequent transfers of those loans have been, or in the future, may be, tracked electronically through the MERS® Commercial System. In some other cases, the original mortgage was recorded in the name of the originating lender of the mortgage loan, and record ownership of the mortgage was later assigned to MERS, solely as nominee for the owner of the mortgage loan, and subsequent transfers of the loan have been, or in the future, may be tracked electronically through the MERS® Commercial System. For each of these mortgage loans, MERS serves as mortgagee of record on the mortgage solely as a nominee in an administrative capacity on behalf of the note holder, and does not have any financial interest in the mortgage loan. For additional information regarding the recording of mortgages in the name of MERS see “Description of the Certificates—Assignment of Trust Assets” in the prospectus.

- The securitization trustee is required to be named as the Note Holder on the MERS® Commercial System.

Sample Changes to Mortgage and Security Agreement:

MERS does not mandate specific language changes to commercial mortgage loan documents, however, the following three requirements must be satisfied:

- 1) Legal title to the mortgage lien or the lien of other security agreements must be vested in Mortgage Electronic Registration Systems, Inc., a Delaware stock corporation with its principal offices at 1595 Spring Hill Road, Suite 310, Vienna, VA 22182.
- 2) The 18 digit mortgage identification number (“MIN”) required for each loan registered on the MERS® Commercial System must be placed on the cover page (or first page if there is no cover page) of each of the following documents: (a) promissory note, (b) mortgage or deed of trust, (c) other security instruments, (d) assignment of security instruments to or from MERS, (e) lien releases or reconveyances and (f) any other instruments recorded in the public land records in which MERS has a legal interest. Placement of the MIN on other loan documentation is optional for the Lender.
- 3) Notices provisions in the mortgage, deed of trust and other security instruments should be modified to add Mortgage Electronic Registration Systems, Inc. using the following address: MERS Commercial, P.O. Box 2300, Flint, MI 48501-2300.

The following is one approach to changes in the mortgage instrument. It requires only minimal changes to the mortgage; only the granting clauses are modified to reflect that Mortgage Electronic Registration Systems, Inc. is the mortgagee and the references to the Lender remain the same, except that the three paragraphs below are added to explain the relationship of MERS to the other parties to the instrument.

Nominee of Capacity of MERS. MERS serves as mortgagee of record and secured party solely as nominee, in an administrative capacity, for Lender and its successors and assigns and only holds legal title to the interests granted, assigned, and transferred herein. All payments or deposits with respect to the Secured Obligations shall be made to Lender, all advances under the Loan Documents shall be made by Lender, and all consents, approvals, or other determinations required or permitted of Mortgagee herein shall be made by Lender. MERS shall at all times comply with the instructions of Lender and its successors and assigns. If necessary to comply with law or custom, MERS (for the benefit of Lender and its successors and assigns) may be directed by Lender to exercise any or all of those interests, including without limitation, the right to foreclose and sell the Property, and take any action required of Lender, including without limitation, a release, discharge or reconveyance of this Mortgage. Subject to the foregoing, all references herein to "Mortgagee" shall include Lender and its successors and assigns.

Relationship. The relationship of Mortgagor and Mortgagee under this Mortgage and the other Loan Documents is, and shall at all times remain, solely that of borrower and lender (the role of MERS hereunder being solely that of nominee as set forth in subsection (a) above and not that of a lender); and Mortgagee neither undertakes nor assumes any responsibility or duty to Mortgagor or to any third party with respect to the Property. Notwithstanding any other provisions of this Mortgage and the other Loan Documents: (i) Mortgagee is not, and shall not be construed to be, a partner, joint venturer, member, alter ego, manager, controlling person or other business associate or participant of any kind of Mortgagor, and Mortgagee does not intend to ever assume such status; and (ii) Mortgagee shall not be deemed responsible for or a participant in any acts, omissions or decisions of Mortgagor.

No Liability. Mortgagee shall not be directly or indirectly liable or responsible for any loss, claim, cause of action, liability, indebtedness, damage or injury of any kind or character to any person or property arising from any construction on, or occupancy or use of, the Property, whether caused by or arising from: (i) any defect in any building, structure, grading, fill, landscaping or other improvements thereon or in any on-site or off-site improvement or other facility therein or thereon; (ii) any act or omission of Mortgagor or any of Mortgagor's agents, employees, independent contractors, licensees or invitees; (iii) any accident in or on the Property or any fire, flood or other casualty or hazard thereon; (iv) the failure of Mortgagor or any of Mortgagor's licensees, employees, invitees, agents, independent contractors or other representatives to maintain the Property in a safe condition; or (v) any nuisance made or suffered on any part of the Property.

Sample Changes to Promissory Note; Assignment of Leases and Rents; as well as the Pooling and Servicing Agreement

MERS does not mandate specific language changes to commercial mortgage loan documents, however, the following three requirements must be satisfied:

- Legal title to the mortgage lien or the lien of other security agreements must be vested in Mortgage Electronic Registration Systems, Inc., a Delaware stock corporation with its principal offices at 1595 Spring Hill Road, Suite 310, Vienna, VA 22182.
- The 18 digit mortgage identification number (“MIN”) required for each loan registered on the MERS® Commercial System must be placed on the cover page (or first page if there is no cover page) of each of the following documents: (a) promissory note, (b) mortgage or deed of trust, (c) other security instruments, (d) assignment of security instruments to or from MERS, (e) lien releases or reconveyances and (f) any other instruments recorded in the public land records in which MERS has a legal interest. Placement of the MIN on other loan documentation is optional for the Lender.
- Notices provisions in the mortgage, deed of trust and other security instruments should be modified to add Mortgage Electronic Registration Systems, Inc. using the following address: MERS Commercial, P.O. Box 2300, Flint, MI 48501-2300.

Instructions for UCC Filings

Borrower certificates will need to be modified to reflect the changes to documentation required by MERS® Commercial.

Whenever a UCC Financing Statement (Form UCC1) must be filed to perfect a security interest granted to Mortgage Electronic Registration Systems, Inc., the following information should be used to complete items 3 and 8 on the form as follows:

3. SECURED PARTY’S NAME

3a. ORGANIZATION’S NAME

Mortgage Electronic Registration Systems, Inc.

3c. MAILING ADDRESS CITY

P.O. Box 2300

Flint

STATE POSTAL CODE COUNTRY

MI

48501-2300

USA

8. OPTIONAL FILER REFERENCE DATA

Insert 18 digit MERS mortgage identification number (“MIN”) for the loan

Complete all other items using Lender’s normal closing instructions, and don’t use the MERS address in Item B.

If a security interest is assigned to Mortgage Electronic Registration Systems, Inc. and a UCC Financing Statement Amendment (Form UCC3) must be filed to perfect the security interest, then the following information should be used to complete items 7 and 10 on the form as follows:

7. CHANGED (NEW) OR ADDED INFORMATION

7a. ORGANIZATION'S NAME

Mortgage Electronic Registration Systems, Inc.

7c. MAILING ADDRESS CITY STATE POSTAL CODE COUNTRY

P.O. Box 2300 Flint MI 48501-2300 USA

10. OPTIONAL FILER REFERENCE DATA

Insert 18 digit MERS mortgage identification number ("MIN") for the loan

For either form, complete all other items using Lender's normal closing instructions, and don't use the MERS address in Item B.

XVII. MERS® E-REGISTRY

The MERS® eRegistry is a system of record that identifies the owner and custodian of registered eNotes. It satisfies the requirements of both E-SIGN and UETA for the establishment of a system reliably evidencing the transfer of interests in transferable records.

1st Advantage Mortgage, LLC registered the first eNote on the MERS® eRegistry on July 23, 2004. Its registration on the MERS® eRegistry ensures that only 1st Advantage Mortgage is recognized as the owner of the note, and provides any investor with the confidence that they can gain the benefits of purchasing this eNote while maintaining “Holder in Due Course” status. The borrower electronically signed the eNote and the entire closing document package during a standard settlement conference in the offices of Chicago Title in Lombard, Ill. Immediately after the borrower and the notary electronically “signed” the documents (using a mouse and clicking on boxes on the screen), 1st Advantage registered the loan on the MERS eRegistry, making the loan immediately available on the secondary market. As of the date of this material, April 30, 2006, members have registered 417 eNotes on the MERS® eRegistry.

eNotes are registered with MERS and uniquely identified in the eRegistry for tracking and verification. The eRegistry does not store the actual eNote. Rather, the eNote is stored by a legal fiduciary (“eCustodian”) in a secure electronic repository (“eVault”). However, the eRegistry stores information regarding the owner (or “controller”) and the location (or “custodian”) of the eNote. In turn, the eNote contains specific language referring to the eRegistry to identify its controller. In this manner, the eRegistry enables the rightful eNote owner to demonstrate conclusive legal control of the transferable record.

In performing initial registration of eNotes, the eRegistry:

- confirms the validity of the issuer;
- confirms that the registration dataset is complete;
- confirms that the eNote is not already registered by assigning a unique Mortgage Identification Number (MIN) and hash value to each eNote;
- creates a unique registration record; and
- sends a confirmation to the issuer.

Likewise, in recording a transfer of eNotes, the eRegistry:

- validates both the transferor and transferee;
- compares the hash value stored in the eRegistry with the value submitted by the transferor; and
- requires confirmation by the transferee within a specified time period after the transfer request.

The eRegistry performs additional functions, including (i) storing information about the location of an eNote; (ii) regulating access to the eRegistry by a controller or its delegatee; and (iii) providing functionality for handling the modification or liquidation of an eNote.

The MERS® eRegistry As Designed Satisfies the UETA/E-SIGN “Safe Harbor”

E-SIGN and UETA supplemented the traditional concept of “possession” of a paper instrument by a holder with an analogous concept of “control” over an electronic record.¹ “Control” in these circumstances serves as “the substitute for delivery, indorsement and possession” of a paper instrument.² In order for such control of an electronic record to be given meaning and effect, it is necessary pursuant to UETA and E-SIGN to establish a single, unique version of the electronic record with respect to which the rightful holder may assert “control.”

Specifically, under E-SIGN and UETA, “[a] person has control of a transferable record if a system employed for evidencing the transfer of interests in the transferable record reliably establishes that person as the person to which the transferable record was issued or transferred.”³ The statutes also contain a “safe harbor” provision, enumerating criteria according to which a system may be deemed as a matter of law to establish reliably the identity of the controller, provided that the criteria are satisfied. These criteria are:

- a single authoritative copy of the transferable record exists that is unique, identifiable, and unalterable (except as provided below);
- the authoritative copy identifies the person asserting control as the person to whom the record was issued or (if the authoritative copy indicates that a transfer has occurred) the person to whom the transferable record was most recently transferred;
- the authoritative copy is communicated to and maintained by the person asserting control or its designated custodian;
- copies or revisions that add or change an identified assignee of the authoritative copy can be made only with the consent of the controller;
- any copy that is not the authoritative copy is readily identifiable as such; and
- any revision of the authoritative copy is readily identifiable as authorized or unauthorized.⁴

Given the novelty of these issues, we think it likely that courts will seek to measure any eRegistry system against these criteria. Moreover, we expect that most courts will

¹ See UETA § 16 cmt. 3.

² *Id.*

³ UETA § 16(b); 15 U.S.C. § 7021(b).

⁴ UETA § 16(c); 15 U.S.C. § 7021(c).

be reluctant to conclude that a system falling outside the safe harbor nonetheless reliably establishes “control” for purposes of the statutes. In this regard, we believe that the design of the eRegistry system created by MERS, in which MERS operates a single, authoritative registry of controllers nationwide, satisfies the foregoing safe harbor criteria.

Specifically, the MERS® eRegistry system :

(i) identifies a single authoritative copy of the transferable record that is unique, identifiable, and unalterable – which the system accomplishes by storing information regarding the controller and the custodian of the authoritative copy of the eNote;

(ii) verifies that the person asserting control is the person to whom the record was issued or to whom the transferable record was most recently transferred – which the system accomplishes by confirming the validity of the issuer upon initial registration, and validating both the transferor and transferee in the event of any transfer;

(iii) ensures that the authoritative copy is communicated to and maintained by the person asserting control or its designated custodian – which the system accomplishes by storing information regarding the controller and the custodian of the eNote, and requiring validation and confirmation for any transfer request;

(iv) ensures that copies or revisions that add or change an identified assignee of the authoritative copy can be made only with the consent of the controller – which the system accomplishes by requiring validation by the controller for any transfer request, as well as confirmation by the transferee within a designated time period;

(v) ensures that any copy that is not the authoritative copy is readily identifiable as such – which the system accomplishes by storing information regarding the location of the eNote, regulating access to the eRegistry, and requiring confirmation from the controller for any requested transfer; and

(vi) ensures that any revision of the authoritative copy is readily identifiable as authorized or unauthorized – which the system accomplishes by assigning hash values, MINs, and registration records to each eNote, which are verified upon any transfer request.

Notably, although the safe harbor provisions require that the system “identif[y] the person asserting control,”⁵ the transferable record itself need not identify the individual by name. Rather, “[t]he control requirements may be satisfied through the use of a trusted third party registry system.”⁶ In the MERS® System the authoritative copy of the eNote identifies the rightful controller by reference to the eRegistry. Based on review of the legislative history and commentary to UETA and E-SIGN, it is our view that this design is consistent with the statutory criteria that the system “idenift[y] the person asserting control;” indeed, the comments to UETA state that “[a] system relying on a third party registry is likely the *most effective* way to satisfy the requirements of [the safe harbor provision] that the transferable record remain unique,

⁵ UETA § 16(c)(2); 15 U.S.C. § 7021(c)(2).

⁶ UETA § 16 cmt. 3.

identifiable and unalterable, while also providing the means to assure that the transferee is clearly noted and identified.”⁷

The MERS® eRegistry establishes a reliable method for identifying the controller of a transferable record through the use of a trusted third party registry system, and that its design is consistent with the requirements of E-SIGN and UETA.⁸

⁷ *Id.* (emphasis added).

⁸ *Id.* (“The control requirements may be satisfied through the use of a trusted third party registry system.”)