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THE BIGGEST THREAT

TO THE NATION'S HOUSING RECOVERY:
MORTGAGES

GEN Y... NOT NOW

The housing market has reached a critical juncture, and so-called echo boomers are staring it down
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OUT OF TOWNERS

Shipping servicing work overseas comes with huge risk. Could there be a home-based tech solution?
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By Kerri Ann Panchuk

Much ado about MERS

How the real estate registry took its battle to court and survived



Say the word – MERS – and critics come out of the woodwork.

It's become one of the most well-known acronyms in the mortgage finance space and a repeat defendant in countless lawsuits filed by foreclosure defense attorneys since the housing crisis kicked off in 2007.

But how did MERS, short for Mortgage Electronic Registration Systems, become so controversial in the first place?

And how did the electronic registry of mortgages end up winning so many legal disputes if its design is as off-kilter as critics claim?

The answer lies in MERS' unique origins and the interplay between what state courts say about the scope of MERS' power against the backdrop of local real estate law.

What's officially known as MERS was created back in the 1990s as an electronic registry for tracking mortgage assignments during the mass home loan securitization craze that lasted for well over 10 years.

Created for the sake of efficiency – so mortgage assignments could easily be tracked from bank to bank – MERS existed under the radar, never causing a stir until several years ago.

But MERS' relative anonymity ended when the registry landed at the epicenter of numerous court cases in the wake of the housing dust-up.

As foreclosure activity picked up, MERS found itself a named defendant in a plethora of legal cases where the scenario was roughly the same: a homeowner battling a foreclosure challenges MERS' role as an electronic registry or its power to actually transfer foreclosing authority through assignments made in the system.

The registry's unique position prompted numerous litigants to challenge the idea that such

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a registry could pass valid mortgage assignments, granting the receiving party the power to foreclose.

Lawyers searching for clarity have spent the past few years searching for precedent cases to determine how each MERS challenge will pan out.

The answers inevitably hinge on contract law and court interpretations of what a MERS assignment actually means against the backdrop of local real estate law.

Fast forward to 2013, and it's clear that while MERS remains the subject of much litigation, enough state supreme courts

have either validated or invalidated various challenges to MERS, giving the registry and plaintiffs an idea of how survivable a court challenge to MERS is within certain jurisdictions.

The takeaway after reviewing many of these cases: MERS is known to win some and lose some, but more often than not it wins.

A district court judge in Arkansas recently threw out a recording-fee suit against MERS, saying state law does not require mortgage assignments to be recorded.

The suit revolved around the question of whether the MERS system and banks using it owed back fees on the grounds that they never paid local recording fees on new MERS assignments tracked through the data registry.

Dozens of similar cases have popped up in jurisdictions across the country, with plaintiffs claiming a right to reimbursement on recording fees.

But MERS has prevailed in other recording fee cases, securing favorable opinions in Florida, Illinois, Iowa and Missouri on the same issue.

Recently, Oklahoma State District Judge Lori Walkley ruled in the County of Cleveland v. MERS that Oklahoma does require the recording of mortgages — an argument that is a potential negative for MERS.

But the judge added that the commissioners who filed the suit possessed no private right of action to enforce the state provisions in court, resulting in a favorable opinion for MERS.

On the issue of whether MERS possesses the right to transfer foreclosure rights, state courts as high as the Idaho Supreme Court have held that the registry is empowered to transfer foreclosure rights as the rightful beneficiary of a deed of trust.

And lest we forget, Oregon's Supreme Court recently paved the way for MERS to go back to filing nonjudicial foreclosures in the state, but with a few zingers built into the opinions.

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precedential cases: *Niday v. GMAC* and *Brandrup v. ReconTrust Co.*

The Oregon Supreme Court held that Oregon's foreclosure statute does not require the recording of assignments of the trust deed by operation of law — a boon for MERS.

But the cases reviewed by Oregon's highest court showed other areas of potential weakness.

In its final ruling, the Oregon Supreme Court agreed with a lower appellate ruling, holding MERS is not a rightful "beneficiary of the trust deed" when analyzing its construction against the Oregon Deed Trust Act.

The court said MERS may have maintained some authority to assign foreclosure rights if it had provided evidence of an agency relationship with the financial firms on whose behalf it worked, but that information was not apparent on the lawsuit's face.

And in May, MERS won a very public court battle waged against the registry by the register of deeds for Guilford County, N.C.

The registry wanted the court to appoint a special master to investigate MERS as well as document processing firm, Lender Processing Services.

MERS contended that both firms mishandled the mortgage documentation process, creating a recording mess in the county.

The registry specifically requested the appointment of a master to look into potential fraud claims or document issues. Judge John Jolly, a chief special superior court judge for complex business cases in North Carolina, dismissed the suit.

The chief takeaway from all of the litigation is simple: MERS may be controversial, but it's still around. And attempts to deflate it in court have been inconsistent at best. ■

KEY CONCEPTS

MERS' relative anonymity ended when the registry landed at the epicenter of numerous court cases in the wake of the housing dust-up.

In 2013, it's clear that while MERS remains the subject of litigation, enough state supreme courts have either validated or invalidated such challenges.

So MERS may be controversial, but it's still around — and looks likely to be for some time to come. Attempts to deflate it have been inconsistent.