

National Association of Land Title Examiners and Abstractors
7490 Eagle Road
Waite Hill, OH 44094

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Restoring Integrity to the Land Title Records – A Commentary on MERS

As the faults in the MERS system of mortgage tracking become ever more apparent, so do the consequences begin to take shape. And, as high profile cases of abuse of process rapidly hit the mainstream press, as details continue to emerge, we can see with ever increasing clarity the problems caused by the systematic omission of mortgage assignments from the public land records.

For the uninitiated, the Mortgage Electronic Recording System (MERS) was launched in 1997 by a consortium of lenders, loan servicers, government sponsored entities (GSEs) and – it's embarrassing to say – the most prominent industry association of land title professionals – the ALTA. The idea behind MERS was to utilize technology to bypass the expense and, often cumbersome, process of recording mortgage assignments in over 3,000 counties, parishes and municipalities across the United States. MERS created a private tracking system of mortgage ownership that would accommodate frequent transfers among investment trusts.

Why, in a nation that had relied on a land records system that had worked just fine for over 400 years, would the lending industry suddenly decide it didn't work well enough?

Because, we surmise, the banks grew and transcended the boundaries of their counties and states of origin, and because the promise of investor money, both foreign and domestic, opened up new possibilities to expand the lending industry to heights only imagined a couple of decades prior. A loan originator could now lend to people who would not previously have qualified had the originator been lending its own funds. Now, riskier loans could be packaged with others with a lower risk of nonpayment, and the aggregate risk, and reward, would be shared by a large pool of investors. As a commodity for trade on Wall Street, transfers of ownership of the debt became more frequent.

As day-to-day researchers of the county, parish, and town level public records, NALTEA members understand that there exists a lack of uniformity among locales in tracking interests in real estate. There exists a patchwork of laws, standards and practices that had never anticipated the mortgage as a commodity to be bought and sold in the same manner as pork bellies. We recognize the need to keep up with the times, to be able to accommodate the fast movement of money to fund new loans, and along with that, efficient methods of placing those financial interests of public record.

We also recognize the importance of the public record to the fundamental value of land ownership. It is long since established in these United States that a public record of all interest in real estate is necessary to maintain the confidence in the security of land ownership. When we purchase property, we seek to do so with a reasonable certainty that the property is free of unknown claims. Any claims of interest in that property, whether voluntarily granted (as in a mortgage or deed of trust) or involuntary (as in a mechanics lien or property taxes) are to be publicly noted. At, or prior to settlement of the land purchase, the known claims are paid or otherwise satisfied – with the exception of those which ‘run with the land’, such as easements conditions and restrictions.

While it would appear that only a small amount of information has been hidden from public view – the beneficiary of the mortgage note – the net result adds to the troubles of an already struggling real estate market flooded with foreclosures. The effect of the uncertainty created, in large part, by the failure to properly transfer the note and security interest (by assignment of the security instrument) to the intended beneficiaries of the debt, has the potential to be devastating. The level of severity will come to light as the courts sort through the issues brought in the hundreds, perhaps thousands, of lawsuits, present and future. We await answers to the following questions:

- 1) What will the courts decide with regard to property previously foreclosed in the name of MERS?

If the courts overwhelmingly overturn completed foreclosure cases, after which the property has been sold to bona-fide buyers, what confidence can the new owners have that the former owners will not attempt to reclaim the property through the courts? Can we expect to see a flood of litigation in all 50 states before this question is answered? And, in the meantime, will people continue to purchase the foreclosed properties, knowing of possible serious defects of title?

- 2) How will they regard the validity of liens currently registered with MERS as they go into future default?

We have already seen the lending industry put a hold on many foreclosures to examine their own processes and authority to foreclose. It is likely that we will see more frequent challenges to foreclosure cases in which MERS appears as a party. How will these challenges, and their outcomes, affect the willingness of investors to participate in a system under which the collateral is so frequently in question? In order to ensure the free flow of investor money into the mortgage market, proper recording practice is essential to restoring confidence in the soundness of the collateral.

- 3) And, how will bankruptcy judges regard the enforceability of mortgages that are not currently in default?

This question takes into account the significant powers of the federal bankruptcy courts to avoid the security of the mortgage by ruling it invalid. Thus, debt counselors may see a new incentive to advise clients into bankruptcy knowing that foreclosure of the client’s home is imminent. Will we witness a flood of bankruptcy cases by borrowers in default seeking to void their mortgages?

As the state courts continue to sort through the issues involving MERS mortgages, we hope to see a return to the practices that have served us well for centuries. At the same time, we recognize the need to modernize the record keeping to facilitate the fast pace of today's mortgage lending.

On November 30, 2010, Rep. Marcy Kaptur (D-OH) introduced the bill HR 6460 into the United States Congress. Known as the Transparency and Security in Mortgage Registration Act of 2010, the bills' stated purpose is "To prohibit Fannie Mae, Freddie Mac, and Ginnie Mae from owning or guaranteeing any mortgage that is assigned to the Mortgage Electronic Registration Systems for which MERS is the mortgagee of record."

The bill would effectively kill federal support for mortgages in the MERS system. It would require that each of the three corporations essentially divest itself of any interest or participation in MERS. It could also be the first step in restoring the integrity of the land title records system and, with it, the confidence of the public and markets.

HR 6460 would require that all current mortgages owned or guaranteed by the GSEs be assigned "to the servicer, holder or creditor, as defined by the guidelines of the corporation." That is a provision that NALTEA strongly supports.

The bill includes some ancillary provisions with regard to studies to be conducted by HUD, mostly to determine ways in which to improve the land title recording system to accommodate today's fast-paced environment. It also directs HUD to study the feasibility of a "Federal land title recordation system that would not interfere with, or preempt, state laws regarding land title transfer and perfection of title."

While this last provision has caused a great deal of concern among the greater title industry, we believe it is a nonstarter. It's doubtful whether a Federal land title recordation system can be implemented without preempting the laws of most states.

Kaptur introduced the bill late in the last congressional session, at which time it was referred to the House Committee on Financial Services. Since the committee took no action before the end of the Congress, she will need to reintroduce the bill under a new number for it to be considered by the current congress.

The original bill was a step in the right direction. It could do more to repair the current deficiencies, and work within the state land title systems to create an environment conducive to current lending needs – and less poking into the feasibility of any type of federal system to take their place.

NALTEA would welcome a new, more robust bill written with extensive input from the various participants in the traditional land title systems from a variety of states. We hope to see input from associations of title agents, abstractors, county recorders and clerks, banks – all who have a vital interest in the integrity of one of our most precious assets.

The Officers and Board of Directors of the National Association of Land Title Examiners and Abstractors

Contact: info@naltea.org