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IN MERS WE TRUST

BY THOMAS BROM

WHEN YOU GET YOUR POCKET PICKED BY A REAL PRO, SOMETIMES ALL you can do is appreciate the artistry. Such, apparently, is the case with MERS, a national electronic database of home mortgages that effectively swiped millions of dollars from local governments just when they could have used the revenue most.

By now homeowners across the country are familiar with Mortgage Electronic Registration Systems Inc. (MERS) and MERSCORP Holdings Inc., its corporate shell based in Reston, Virginia. Launched in 1997 by the Mortgage Bankers Association, Fannie Mae, and Freddie Mac, MERS was created to bypass perceived logjams at county recording offices, speeding the flow of notes to Wall Street for bundling, securitizing, and sale to investors. The casino needed more chips.

According to boilerplate on its security agreements, MERS owns all the mortgages in the registry, "acting solely as a nominee for Lender and Lender's successors and assigns." MERS also claims to be "the beneficiary under this Security Instrument" and "a common agent for the mortgage industry" — admitting to no contradiction in assuming multiple roles. MERS Inc. is listed as mortgagee on an estimated 70 percent of all home mortgages.

Member banks, however, may or may not track assignments, and they do not reveal the chain of title that extends from the loan originator to the securitized trusts controlled by pooling and servicing agreements. The registry operates with a handful of employees, relying on a small army of designated "vice-presidents" at loan servicing offices to process assignments and foreclosures.

On its website MERS states that it is "not a system of public record nor a replacement for the public land records." Nonetheless, designating MERS Inc. as the mortgagee for all subsequent transfers between members has saved mortgage bankers more than $2 billion in recording fees, according to a 2009 deposition by former MERSCORP president and CEO R. K. Arnold.

MERS neither sought nor received

permission to sidestep the public system. By using "a hollow placeholder as the grantee of their property interests," writes Christopher L. Peterson of the University of Utah College of Law, "mortgage bankers have attempted to create a completely fungible mortgage in which the true owner of the lien, or the land itself in title-theory states, becomes whomever the ... loan servicers say it is." Peterson laments, "For the first time in the nation's history there is no longer an authoritative, public record of who owns land in each county." (53 Wm. & Mary L. Rev. 111, 117 (2011).)

> "For the first time in the nation's history there is no authoritative, public record of who owns land in each county." —CHRISTOPHER L. PETERSON, UNIVERSITY OF UTAH COLLEGE OF LAW

You'd think someone would have noticed. At first, the National Association of County Recorders, Election Officials and Clerks protested that there was no need for MERS to create a federal land-titling system, but to no avail. Most counties simply took the revenue loss on the chin—until the housing bust of 2007 produced a flood of foreclosures that exposed gaps in tracking assignments.

Homeowners in many states sued MERS alleging wrongful foreclosure. Those filings continue in many states, but they are now rare in California. In 2011 a state appellate court ruled that MERS has no obligation to disclose documents prior to initiating a nonjudicial foreclosure, and that a homeowner has no private right of action to determine the identity of the beneficiary. (*Gomes v. Countrywide Home Loans, Inc.*, 192 Cal. App. 4th 1149 (2011).)

A spate of contrary rulings in federal bankruptcy court gave some California homeowners relief. But last year a federal district court—citing a state appellate ruling that deeds of trust in California need not be recorded (*Calvo v. HSBC Bank USA N.A.*, 199 Cal. App. 4th 118 (2011))—reversed a plaintiff's bankruptcy court judgment. The district judge held that MERS had a statutory right to foreclose under the express language of the deed of trust. (*In re Salazar*, 470 B.R. 557, 562 (S.D. Cal. 2012).)

Attorneys general in dozens of other states have sued MERS for deceptive trade practices, but very few complaints include claims for lost recording fees. The barriers to recovery are formidable: Depending on state law, recording title assignments may be mandatory or permissive; a private right of action must exist; county recorders must have standing to sue, and also be able to collect damages for failing to record.

To date, lost-fee cases filed by county recorders have survived motions to dismiss in only three states—Alabama, Texas, and Pennsylvania. In October a trial court ruled that Pennsylvania's mandatory recording statute allows "any person in any manner interested in a conveyance" to bring a quiet title action. The judge permitted a claim for unjust enrichment but threw out a civil conspiracy claim. (*Montgomery County Recorder v. MERSCORP, Inc.*, 2012 WL 5199361 (E.D. Pa. 2012).)

MERS, however, has appeals pending in all three cases. In a 2010 article, former Ginnie Mae CEO Joe Murin asserted, "[A]voiding these fees in no way constitutes any type of tax avoidance or fraud. Fees are paid in exchange for a service. If the service is not needed ... then there is no 'lost' revenue." In November a Massachusetts state court agreed, finding that MERS's failure to register mortgage transfers was not unlawful. (*Commonwealth v. Bank of America*, 2012 WL 6062747.)

California officials have been noticeably quiet on the lost-fee issue. In February 2011 Phil Ting—then San Francisco's Assessor-Recorder—issued an audit of about 400 recent foreclosures that concluded about 84 percent of the files contained what appeared to be clear violations of law, and two-thirds had at least four violations or irregularities. But the *Gomes* ruling denied homeowners a private right of action.

That same year, Ting coauthored AB 1321, a bill introduced by Assemblyman Bob Wieckowski (D-Fremont) requiring that any deed of trust assignment be recorded in the county where the property is located. But the measure died in committee, and wasn't reintroduced. "It was seen as too burdensome on the industry, and also on county recorder offices," says Heather Falkenthal in Wieckowski's office. "They said we were addressing a problem that had already passed, and the bill fizzled."

Last November, Ting and former Orange County Clerk-Recorder Tom Daly—both critics of MERS—were elected to the Legislature. But so far, no

bills addressing lost recording fees have been introduced.

With little case law to support a complaint, state Attorney General Kamala Harris's office also has done nothing on the recording issue. "We aren't aware of recording fee–type cases in California," says Jason Lobo, MERS communications director.

Nor does Congress appear interested. In 2010 Rep. Marcy Kaptur (D-Ohio) introduced a bill to prohibit Fannie Mae, Freddie Mac, and Ginnie Mae from owning or guaranteeing any mortgage assigned to MERS or for which MERS is the mortgagee of record. It died in committee in 2011 and again last year; in January, Kaptur reintroduced the bill as H.R. 189.

Whether MERS Inc. can sustain a private, members-only registry of home mortgages remains to be seen. "There can be no national solution—each state governs its own recording system," maintains David E. Woolley, principal of Harbinger Analytics Group in Tustin and a licensed land surveyor. In a 2011 report—later published as a law review article—Woolley predicted that a wave of boundary suits would eventually hit title insurers. "[T]ens of thousands of titles have been lost or diluted in a sea of MERS transactions, and may take a hundred years to fix," he and Manhattan Beach lawyer Lisa D. Herzog lament. (8 HASTINGS BUS. L.J. 365, 367 (2012).)

But Roger Bernhardt, professor of real estate law at Golden Gate University in San Francisco, says Woolley's contentions are nonsense. "If the endorsement is done right, the only question is who's got the note," he says. "In California there *are* no title recording questions—all the rest is smoke." Still, Bernhardt concedes that a "deed of trust disconnected from its supporting promissory note is an odd creature."

Title insurers show no signs of concern. In fact, the American Land Title Association, their trade group, was a founding MERS shareholder. Kurt Pfotenhauer, its chief executive at the time, called MERS "an elegant solution" to the inefficiencies of state recording systems. In 2009 Pfotenhauer became a MERS director and two years later he was elected its chairman.

You have to at least admire the audacity of this scheme. Under our very noses, the banking industry created a private registry of mortgages that offers homeowners little accountability, slashes millions of dollars from county revenue, and skates over hundreds of years of state property laws.

Anybody have a problem with that?