

# Massachusetts Bankruptcy Court Voids Foreclosure of MERS Mortgage, Raising Troubling Implications For MERS Registration System

By Richard D. Vetstein, Esq., Vetstein Law Group, P.C., Framingham, MA ©

## Judge Tells Lenders You Can't Have Your MERS Cake & Eat It Too



*The sophisticated financial minds who wrought the MERS regime sought to simplify the process of repeatedly transferring mortgage loans by obviating the need and expense of recording mortgage assignments with each transfer. No doubt they failed to consider the possibility of a collapse of the residential real estate market, the ensuing flood of foreclosures and the intervention of state and federal courts.*

—Judge Melvin S. Hoffman, U.S. Bankruptcy Court Judge for Massachusetts, *In Re. Schwartz*, Aug. 22, 2011. Link to case: [In Re Schwartz](#)

Coming off a [ruling](#) (In re. Marron) that the MERS mortgage registration system does not run afoul of Massachusetts law, the same jurist, Bankruptcy Court Judge Melvin Hoffman, on Monday issued a ruling voiding a MERS-held mortgage which fell victim to sloppy paperwork. The case is potentially troubling for the foreclosure of any MERS held mortgage in default. The case is *In Re. Schwartz* and is embedded below.

## Debtor Challenges Foreclosure Of Securitized Mortgage

During her bankruptcy proceeding, the debtor, Sima Schwartz, challenged the May 24, 2006 foreclosure of her Worcester home by Deutsche Bank. She asserted that under the [U.S. Bank v. Ibanez](#) decision issued by the Massachusetts Supreme Judicial Court earlier in the year, Deutsche did not own the mortgage on the property when it first started the foreclosure process.

The “lender” on her original mortgage was Mortgage Electronic Registration System (MERS), as nominee for First NLC. Many housing advocates have criticized MERS’ role in the foreclosure crisis, with the [New York Times weighing in most recently](#). The mortgage loan was securitized and subsequently transferred at least 3 times, ultimately winding up held by Deutsche Bank. No assignments of mortgage were recorded with the registry of deeds until a day before the foreclosure sale on May 23, 2006. That assignment was executed by Liquenda Allotey, one of the hundreds of deputized vice presidents of MERS, and an [alleged “robo-signer”](#) for Lender

Processing Service (LPS) which has come under fire for document irregularities. The assignment ran to Deutsche Bank, which completed the foreclosure sale on May 24, bid its mortgage debt and purchased the property.

There was no dispute that under the U.S. Bank v. Ibanez case, the late-filed mortgage assignment rendered the foreclosure defective unless Deutsche could establish its ownership of the mortgage loan when the foreclosure process started. During the trial, Deutsche submitted all the various agreements documenting the securitization process including the pooling and servicing agreement (PSA), loan purchase agreement, bill of sale and custodial log.

### **Judge: Lenders Can't Have Their MERS Cake And Eat It Too**

Critically, as the judge noted, the PSA provided that for a MERS mortgage such as this, assignments of mortgages did not have to be prepared or delivered to the buyer of the loans. As is endemic with most securitized mortgages, the participants in the securitization did not deliver and record any assignments documenting such transfers, instead, relying on the internal MERS registration system, which is out of the public records view. Throwing this provision back in the lenders' faces, the judge basically said "you can't have your cake and eat it too" — rendering his ruling *that the mortgage itself (as opposed to the underlying loan) was never transferred through the securitization system from entity A, B, C, to Deutsche Bank, and that MERS had always held, and never relinquished, "legal title" to the mortgage.* Accordingly, the judge held, Deutsche Bank was never the owner of the mortgage in the first place, could not foreclose in its name, and its foreclosure sale was null and void.

### **Impact: Are Foreclosures Of MERS Mortgages Now Open To Challenge?**

I'm not sure what's going to happen with Ms. Schwartz's home. She's been living in it since 2006 probably mortgage/rent free! Certainly, MERS or Deutsche could (and should have) started a second foreclosure and done it the right way. I'm perplexed why Deutsche and MERS kept fighting this case in court. As for the broader implications, it's still unclear as to the effect on past and current foreclosures. One this is for certain, the ruling is yet another example of the legal fallout from the deficiencies in the MERS system.

Lastly, while I don't claim to be a mortgage securitization expert, if the mortgage was not assigned/transferred properly and if it is MERS that holds legal title, then there is a mortgage backed security investor somewhere who THINKS he owns this mortgage but, in fact, does not. Even if MERS wanted to transfer the mortgage to the relevant trust or foreclose, sell the property and transfer cash, they may not be able to for legal and tax reasons. Now multiply by a million. So how many mortgage backed securities are missing how many mortgages? Are there mortgage backed securities out there that don't actually own ANY mortgages? If someone sells a "mortgage backed" security that doesn't legally own the mortgages in question, hasn't that someone committed fraud? And furthermore, how the hell do we clean this up?

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[Richard D. Vetstein, Esq.](#) is an experienced real estate litigation attorney who's handled numerous foreclosure defense and title defect cases in Land Court and Superior Court. Please [contact him](#) if you are dealing with a Massachusetts foreclosure and title dispute.