

Oh My, Oh MERS! NY Bankruptcy Judge Rules That Mortgage Electronic Registration Systems (MERS) Lacks Right To Assign Mortgages

by Richard D. Vetstein, Esq. © 2011

First the robo-signing controversy. Then the *U.S. Bank v. Ibanez* ruling. Now the next bombshell ruling in the foreclosure mess has just come down from a New York federal bankruptcy judge.

The case is [In Re Agard \(click here to download\)](#), and essentially throws a huge monkey wrench into a hugely important cog of the entire U.S. mortgage market, the **Mortgage Electronic Registration System, Inc. known as MERS**.

What Is MERS?

MERS, even for many seasoned real estate professionals, is the most important entity you've never heard of. In the mid-1990s, mortgage bankers created MERS to facilitate the complex mortgage securitization system where hundreds of thousands of mortgage loans were (and still are) packaged and bundled as securities for sale on Wall Street. Each mortgage entered into the MERS system has a unique 18 digit Mortgage Identification Number (MIN) used to track a mortgage loan throughout its life, from origination to securitization to payoff or foreclosure. The MERS system was vital to the proliferation of the \$10 trillion U.S. residential securitization mortgage market.



Critics say that the decision to create MERS was driven, in large part, to avoid paying recording fees charged by county registry of deeds which required that all mortgage transfers and assignments be properly recorded and indexed in publicly available registries of deeds. Thus, MERS was designed essentially as a privately run, national registry of deeds under which MERS would act as the record “owner” and depository of all mortgages participating in the system, while the mortgage notes and loans themselves were freely bought and sold on the secondary market. About 50% of all U.S. mortgages participate in the MERS system.

The Ruling: MERS Cannot Legally Transfer & Assign Mortgages

Bankruptcy court judge Robert E. Grossman’s ruling is a bombshell and appears to be the first federal ruling holding that MERS cannot legally do what it was set up to do: transfer and assign mortgages through its electronic registry. Judge Grossman ruled that the foreclosing lender had to show that it owned both the note and the mortgage — rejecting the popular theory that the

“note-follows-the-mortgage” — and there was no evidence that it held the note. “By MERS’s own account, the note in this case was transferred among its members, while the mortgage remained in MERS’s name,” Grossman wrote. “MERS admits that the very foundation of its business model as described herein requires that the note and mortgage travel on divergent paths.”

The judge found that the MERS membership agreement wasn’t enough to assign the mortgage and that to do so the lender would have to give power of attorney or similar authority to MERS. MERS’s membership rules don’t create “an agency or nominee relationship” and don’t clearly grant MERS authority to take any action with respect to mortgages, including transferring them, Grossman wrote. Because the interests at issue concern “real property” — land and buildings — under state law, any transfer has to be in writing, which isn’t done under the MERS system, he said.

The judge concluded, rather harshly, that “MERS’s position that it can be both the mortgagee and an agent of the mortgagee is absurd, at best.”

Impact of the Decision

This ruling comes from the lowest level of the federal bankruptcy court system in New York, and will surely be appealed to a federal appeals court, and then possibly to the U.S. Supreme Court. Other courts have [ruled](#) in favor of MERS on the same issues, as well. The ruling could be overturned ultimately—if it gets there.

Further, Congress and state legislatures could intervene, and bless what MERS has been doing for the past decade. The judge invited lawmakers to do just that.

Thus, it’s hard to say how much, if any, impact this ruling will have in other states or nationally.

That said, the decision definitely sends a shot across the bows of MERS and its partners (Fannie and Freddie), and should be watched closely by industry experts.

More Coverage

[Wall Street Journal](#)

[Bloomberg News](#)

For more information, contact Richard D. Vetstein at rvetstein@vetsteinlawgroup.com.