

Important update: The court case referenced in the article is Bank of New York, etc., respondent, v Stephen Silverberg, et al., appellants, et al., defendants. (Index No. 17464-08), 2010-00131, SUPREME COURT OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT, 2011 NY Slip Op 5002; 2011 N.Y. App. Div. LEXIS 4899, June 7, 2011, Decided.

MERS : Mortgage Electronic Registration System

A ruling out of the New York State Appellate Court is yet one more strike against MERS that will likely put a huge roadblock in front of the foreclosure process.

If you are not familiar with MERS, the video at MERS 101 will bring you up to speed.

In a nutshell MERS serves as an electronic database that allows mortgages to be sold with title transferred quickly. This was particularly important in the age of securitizations when mortgages could change hands many times over. One case was related to me where a mortgage was sold hundreds of times.

In addition to saving time MERS also allowed for a significant saving of money because after the original transaction was complete the loan documents from future transactions were no longer filed at the county clerks office.

The system was basically issue free until the collapse of the real estate market and the huge volume of foreclosures that resulted.

Because the mortgage was held in the name of MERS for tens of millions of mortgages, MERS would have to assign that mortgage back to the entity that was going to foreclose, or MERS would begin the foreclosures in its own name.

The problems are many, but for starters it has been determined that MERS cannot be the party to the foreclosure - Strike One

Because of the way that mortgage ownership was transferred in MERS by anyone who had a user name and a password, in many cases it is not known if the lender or servicer involved in the foreclosure actually has the "standing" to foreclose. Put another way, is the entity foreclosing actually the rightful owner of the mortgage and the note - Strike Two

Finally, the recent New York State Appellate Court ruling upholds the idea that the entity foreclosing needs to be in possession of both the mortgage and the note! Because MERS was a mortgage registry and not a holder of the note, in essence this ruling says that MERS cannot assign the right to foreclose because it was never in the possession of the note - Strike Three?

Said the judge in the case: "... This matter involves the enforcement of the rules that govern real property and whether such rules should be bent to accommodate a system that has taken on a life of its own..."

Stay tuned!