**MERS - Questions Remain as the Fight Continues**

Patrick Hughes
phughes@dbllaw.com

Real estate law and real estate transactions in the United States have been subject to state regulations and county-level recordation requirements since the country's founding. As such, every time a financial instrument containing mortgages is sold, various state laws require that the sale of each such mortgage (or deed of trust) be recorded in the local county courts in order to preserve certain rights. These requirements also trigger obligations to pay corresponding recording fees. However, beginning in the early 1980s, such regulations and recordation requirements made it cumbersome for financial companies to develop the smooth operation of a market based on U.S. mortgages. As a result, the financial industry, eager to trade in mortgage-backed securities, needed to find a way around these costly and time-consuming requirements.

Thus emerged Mortgage Electronic Registration Systems, Inc. (typically referred to as "MERS"), a privately held company that operates an electronic registry designed to track servicing rights and ownership of mortgage loans in the United States. MERS is owned by holding company MERCORP, Inc., and began as a project in October of 1993 when Fannie Mae, Freddie Mac, and Ginnie Mae produced a White Paper about the need for an electronic mortgage registration system. Recognizing an opportunity, the Mortgage Bankers Association became involved, and MERS was incorporated in October of 1995. In 1997, MERS was officially launched.

MERS serves several mortgage industry purposes. It permits lenders and investors to transfer mortgages without recording assignments in local public registries, saving them recording fees and costs. It also enables consumers, title companies, and other real estate professionals to easily identify the current holders of registered mortgages and obtain discharges – despite transfers of the mortgages (or mergers or acquisitions of the lenders) and investors in interest that may otherwise make it difficult to trace ownership. Moreover, information contained in the MERS System can help to identify possible mortgage fraud involving the identity of a prospective buyer, as well as owner-occupancy issues. Finally, the centralized database of MERS can help detect property-flipping schemes and purchases.

Cost savings to members who have joined the MERS registry have been meaningful. In 2007, MERS calculated that it had saved the industry $1 billion during the previous decade. It widely-recognized now that the impact of MERS has been truly vast, as some 60 million loans have been registered in its name.

However, when the bottom fell out of the real estate market, and delinquencies began to soar, thousands of foreclosure proceedings were filed through MERS. As cases filed by MERS grew, lawyers representing troubled borrowers began to question how an electronic registry with no ownership claims had the right to evict people. The system also led to confusion: When MERS was involved, borrowers who hoped to work out their loans couldn't identify who they should turn to.

The problems with MERS really began to emerge when "vice presidents" of the firm began to submit affidavits in foreclosures, saying the original note had been lost. In some cases those notes were signed by people who signed thousands of such affidavits, and have now admitted they did not actually review the files, as their affidavits had said they did. Nor were those people actually employees of MERS.

As a result, in September of 2010, a number of the nation's largest mortgage lenders suspended evictions after it was discovered that employees of MERS signed documents without ascertaining the accuracy of the material, a legal requirement. Thereafter, Attorney General Eric Holder instructed the federal Financial Fraud Enforcement Task Force to examine the foreclosure issue, while the attorneys general in as many as 40 states began planning a coordinated investigation.

While the outcry has mostly centered on the question of forged or overly rushed reviews of foreclosure documents, figuring out the role of MERS will be important in the federal and state investigations because it acts as a middleman in the mortgage market, allowing the loans to be sold to investors while keeping track of who actually owns them.

The question being raised by many lawyers for homeowners right now is whether or not MERS should be allowed to act in court as the owner of the mortgage, when in fact it is not the owner of them, but only represents a bank who owns the note — or a bank who later sold shares of a pool of mortgages to investors, who could have turned around and resold the shares themselves. If it turns out that this new system does not fit properly into the foreclosure process, then the value of the billions of dollars of mortgage-backed securities sold to investors could also be called into question. This could lead to further litigation against the banks and investment firms that sold mortgage securities if the ability to foreclose on home mortgages is not what it was portrayed to be in the documents used to sell the securities in the first place.

Moreover, it appears the MERS system has also impacted taxpayers and county recorders across the country. One of the driving forces of MERS's creation was the desire to avoid county-level recording fees for mortgage transactions. As the MERS system expanded over time, and mortgages began to change hands at dizzying speeds, county recorders were deprived of the valuable recording fees associated therewith. Because of this, taxpayers in many jurisdictions have had to make up for these resulting losses in revenues.

As these questions linger and the fight over MERS continues, many wonder what the future for MERS – and the recordation requirements it sought to evade – may hold.

Patrick Hughes is a partner at DBL Law, a full-service law firm in Cincinnati and Kentucky. He recently returned to private practice, having served as Chief Deputy Attorney General to Kentucky Attorney General Jack Conway. As Chief Deputy, Patrick was responsible for all aspects of the operations of the Office of the Attorney General. He is also the former legal counsel to the Secretary of the Kentucky Finance and Administration Cabinet, where he oversaw capital projects, property management, procurement and financial management. Patrick's practice at DBL focuses on banking, commercial transactions, economic development, government licensing and administrative law matters. He is also the Manager of Excel Title Services, LLC, a multi state commercial title agency.