

## Was Your Foreclosure Legal

The story is becoming all too common among real estate attorneys. A family misses a couple payments on their mortgage. The lending institution tells the family they are in default but there are modification programs they qualify for so they can avoid foreclosure. After a long and frustrating few months, the family is not approved for the loan modification and their home has been sold at a sheriff's sale.

The real tragedy of these stories is that often the missed payments were a mere financial hiccup due to a medical issue or a employment transition where if the lending institution would forgive those two missed payments the family would be able to stay in their home and there would be no need to foreclose.

These lending institutions are under attack in the media and in the courtroom for the way they have been conducting business. They have been cited for advising people to purposely miss payments so they can lower their monthly payment through a modification. They have been accused of merely going through the motions of trying to get people approved for modifications with no true intent of modifying the loan. They have been said to give people the run around citing missing paper work or lost documents for their reasoning for not approving modifications. They have even been charged with fraudulent behavior for passing around mortgages to so many different entities that the people trying to stay out of foreclosure do not even know who is holding their mortgage.

Individuals and attorneys have been trying for years now to gain some momentum in the fight against these large financial institutions. Unfortunately most of these efforts have fallen short due to one technicality or another. The large lenders seemed almost untouchable despite all the harm they were causing with their despicable acts. That was until April 21, 2011 when the Michigan Court of Appeals opened a crack that has let in a light of hope.

Many of the large lending institutions created Mortgage Electronic Recovery System, Inc. ("MERS"). MERS was to be an instrument of these lending institutions that would allow for them to not only cost effectively and quickly transfer mortgages amongst one another but it would also stream line foreclosure proceedings for them. When the homeowner would default on its mortgage MERS would step in for the lending institution and foreclose on the property. It was this action by MERS that the Michigan Court of Appeals ruled was illegal in [Residential Funding Co, LLC v. Saurman](#).

The Court of Appeals in that case essentially said that MERS did not have a legal right to foreclose on individuals homes because it did not have legal or rightful title to the promissory note. MERS did not lend the money pursuant to the promissory notes. MERS could not enforce the terms of the promissory notes. MERS could not collect payments on the promissory notes. MERS could not service the accounts of these individuals. The Court of Appeals in interpreting [MCL 600.3204\(1\)\(d\)](#), stated that the true legal owner of the indebtedness was the only party that could commence a foreclosure by advertisement. MERS, because it was not the true legal owner of the indebtedness, could not foreclose on the property. Thus, the Court of Appeals ruled that

MERS could not comply with the statutory requirements for a foreclosure by advertisement and the foreclosure proceedings were void.

There are thousands of individuals and families out there right now that have been foreclosed on by MERS under these exact same circumstances. These foreclosure proceedings are just as voidable as those in Residential Funding Co, LLC v. Saurman. Voiding these proceedings is these individuals and families right. This will give them valuable time in which other arrangements and alternatives can be explored. This can give them the time to get approved for a modification. Time to arrange a short sale. Time to file bankruptcy. Time to catch up on those missed payments. Time to negotiate a payment plan with the lending institution.