

MSC Order List: November 16, 2011

17. November 2011 By Julie Lam

In lieu of granting leave to appeal in [Residential Funding Co v. Saurman, No. 143178](#), the Michigan Supreme Court reversed the Court of Appeals' decision, which we discussed [here](#), because it erroneously construed MCL 600.3204(1)(d). The Court of Appeals majority held that Mortgage Electronic Registration System (MERS) could not exercise its contractual right to foreclosure by advertisement, as it was not "the owner ... of an interest in the indebtedness" under MCL 600.3204(1)(d), because MERS was the mortgagee, but not the noteholder.

The Michigan Supreme Court agreed with Judge Wilder's dissent that MERS is indeed "the owner ... of an interest in the indebtedness secured by the mortgage" because "[MERS'] contractual obligations as mortgagee were dependent upon whether the mortgagor met the obligation to pay the indebtedness which the mortgage secured." However, the Court clarified that MERS' status as an "owner of an interest in the indebtedness" did not mean that MERS has an ownership interest in the note. Rather, as the Court explained, as record holder of the mortgage, MERS owned a security lien on the properties, and the continued existence of the security lien was contingent upon the satisfaction of the indebtedness. The Court held that "[t]his interest in the indebtedness - i.e., the ownership of legal title to a security lien whose existence is wholly contingent on the satisfaction of the indebtedness - authorized MERS to foreclose by advertisement under MCL 600.3204(1)(d)." Justices Cavanagh, Marilyn Kelly, and Hathaway would grant leave to appeal.

Disclaimer: Warner Norcross & Judd LLP filed an *amici curiae* brief in support of the successful petitioners in this case.

The Michigan Supreme Court also denied the motion for stay in [People v. Kilpatrick, No. 143861](#). The application for leave to appeal remains pending.