

### **DISPELLING THE MYTH OF MERS AS A "SHAM" BENEFICIARY**

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In the current flood of mortgage litigation, plaintiffs often rely on myth to avoid paying their debts. One of the most pervasive concerns the Mortgage Electronic Registration System (MERS). Plaintiffs accuse MERS of being a "sham" entity, lacking authority to foreclose and used by lenders to engage in fraud. In *Cervantes v. Countrywide Home Loans, Inc.*, No. 09-17364 (9th Cir. Sept. 7, 2011), the Ninth Circuit Court of Appeals joins other recent courts in dispelling the Myth of MERS.

In affirming the trial court's dismissal with prejudice, the Court began by explaining that there is nothing inherently misleading or improper about MERS. MERS is a private electronic database that tracks the transfer of the "beneficial interest" in home loans, as well as changes in loan servicers. MERS was designed to avoid the need to record multiple transfers of deeds of trust by serving as the nominal record holder of the deed for the original lender and any subsequent lender. Accordingly, MERS holds legal title to the security interest conveyed even when the lender sells or assigns its beneficial interest in the loan. MERS serves a legitimate function.

Further, the deed of trust—"an essentially private contractual agreement"—spells out MERS' role. By signing it, the plaintiffs agreed to its terms, including those concerning MERS. So long as MERS acted consistently with the terms of the deed of trust, which it did, there can be no fraud.

Finally, the Ninth Circuit held that any amendment by plaintiffs would be futile. Even if MERS acted fraudulently or without authority—and it did not—plaintiffs admittedly defaulted on their loans. The lender was entitled to foreclose even if MERS was not. Try as they might, there is no mythical loophole recognized by law to avoid paying a mortgage debt.

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