

By now we all know that the mortgage lending free-for-all, encouraged by our friends in regulatory capacities, has brought both national and international financial markets to a grinding halt. I'm not being sanctimonious here: I was a real estate investor during those times, and on more than one occasion told my lender I couldn't believe they would lend me more money. That has since come back to haunt me, but we won't go there.

To go back to basics for a second, a mortgage is a loan secured by real estate, and requires a note and deed of trust (or other legal instrument) that gives the lender the right to take back the property through judicial or non-judicial foreclosure if the mortgagor fails to pay on the note. Both the note and the deed of trust, or other security instrument, must be recorded in the county in which the real estate is located to insure chain of title to the property. The public record makes clear who owns the property, and who has beneficial interest (i.e., who can foreclose). The key to the current MERS emerging crisis is the act of recordation, or lack thereof.

So the mortgage free-for-all propelled itself by the creation of mortgage-backed securities, which were securities that derive their value from their claim on the cash flow from pooled mortgages. They were most often sold as bonds, but the financial industry's innovation created a variety of instruments that derive their value from mortgage pools. These securities were bought and sold on an open market. However, it soon became virtually impossible to update the recordation for every transfer, or assignment, of the note and deed of trust as these securities continuously changed hands.

To solve this problem, the banking industry created the Mortgage electronic Registration Systems, Inc. (MERS), a privately held company that controls a confidential electronic registry designed to track mortgages and the changes in servicing rights and ownership of mortgage loans. MERS was essentially intended to act as mortgagee of record for lenders, investors and their loan servicers in the county land records. In [The Problem with Assignments of Mortgages](#), Larry Rothenberg states that "MERS acts as nominee for the lender. When a mortgage is executed or assigned to MERS as nominee for the lender and the mortgage is registered on the MERS system, the burdensome process of executing assignments from the seller to the buyer of the mortgage upon each sale of a loan, became unnecessary." Or so they thought.

As always, all was well until it wasn't, and enter the law of unintended consequences. As MERS began attempting to enforce its foreclosure rights under the deed of trust, the question arose: who owns the note? Actually, MERS, where is your name on the note or deed or trust? Well, nowhere, Your Honor. Or, better yet: MERS, where is the original note? Well, we don't really know, Your Honor. . . Sir.

So this is where we are, and the courts are not excited. So far, courts in Nevada, Arkansas, California, Alabama, Florida and now Kansas have ruled that MERS has no standing to bring foreclosure proceedings on the security instrument because it was not the beneficiary on the note. In [Landmark National Bank v Kesler](#), 2009 Kan.LEXIS 834 (Aug. 29, 2009), the Kansas Supreme Court saw MERS as simply a "straw man" in a

mortgage transaction. In [The Problem with Assignments of Mortgages](#), Larry Rothenberg goes on to say:

The court [in [Landmark](#)] focused on the meaning of "nominee for the lender" as used in the mortgage. Because MERS had not lent the money to the borrower and was not a party entitled to collect under the note or to receive the proceeds of a sheriff's sale, nor did it demonstrate that it had a tangible interest in the mortgage, the Court found that MERS did not have an interest in the property that was impaired by the default judgment.

It is estimated that MERS serves as nominee of between 50 to 60 million loans. One of them could be yours. If you are facing the possibility of foreclosure, it would serve you well to have your mortgages documents reviewed by a real estate attorney to determine if you could challenge your foreclosure process based on the leanings of the courts so far.

Oh, and in case you think this whole thing borders on the absurd, try this: both Fannie Mae and Freddie Mac are among the shareholders of the MERS corporation. Fannie Mae and Freddie Mac were taken over by the FHA September 2008. The FHA is an agency of the U.S. Government. Absolutely no one knows the implications of that, and most likely we never will.