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THE MORTGAGE ELECTRONIC REGISTRATION SYSTEM – ISSUES IN FORECLOSURE

If your practice involves real estate in any way, then you are probably familiar with MERS. For the uninitiated, MERS stands for Mortgage Electronic Registration System, Inc. The Web site for MERS (www.mersinc.org) states that "MERS was created by the mortgage banking industry to streamline the mortgage process by using electronic commerce to eliminate paper. Our mission is to register every mortgage loan in the United States on the MERS System." From a practitioner's standpoint, MERS allows banks to transfer mortgages among themselves without recording anything in the real property records.

A trust deed that involves MERS typically says that MERS is the mortgagee, although it also says "solely as nominee for Lender." The trust deed also has a MERS Identification Number (MIN) used by MERS and its affiliated lenders for tracking the mortgage.

So why would you care about MERS? If you plan to take any action against real property (such as foreclosure of a construction lien claim or a trust deed), MERS raises several issues that will affect your lawsuit. The most pressing questions are: (1) Who is the current lender? and (2) Should your foreclosure action name MERS as a party?

To use the example of a construction lien foreclosure, the usual practice is to obtain a judicial foreclosure guarantee policy from a title company. That policy will list the mortgagees of record for the parcel of real property. Let's say there is a single lender named "Generic Bank." You would name Generic Bank as a defendant in your foreclosure lawsuit. (If you are foreclosing a construction lien claim, you may even be asserting a senior priority over Generic Bank.) Typically, you might then receive a call or letter from counsel for Generic Bank, who informs you that Generic Bank transferred all of its interest in the mortgage to "Second Bank" quite some time ago. Assuming this is correct, does this raise the question of whether you have failed to name a necessary party to your lawsuit? See ORS 87.060(7).

A Kansas case illustrates some of these issues. In *Landmark National Bank v. Kesler*, 216 P.3d 158 (Kan. 2009), the Kansas Supreme Court upheld its lower courts' rulings that MERS was not a necessary party to a foreclosure action by a senior lender. After the senior lender had served and taken a default against Millennia Mortgage Corp. (a junior lender whose trust deed involved MERS), both Sovereign Bank (a subsequent transferee of Millennia's junior trust deed) and MERS filed motions to set aside the judgment against Millennia. Sovereign and MERS claimed that, because neither was served, the default judgment could not be enforced because the plaintiff had not joined a necessary party. In finding that MERS was not a necessary party, the Kansas Supreme Court noted that MERS was not a real party in interest. The court also agreed with the trial court's finding that Sovereign's failure to register its interest with the county recorder precluded it from asserting its interests after the senior lender's foreclosure.

The Kansas Supreme Court expressly analyzed MERS's interests in the real property. The trust deed language quoted by the court is virtually identical to the language found in MERS trust deeds commonly recorded in Oregon. Showing a sense of humor, the court described MERS's definition of the crucial words

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"as nominee for Lender" as similar to that used by "the blind men of Indian legend" describing an elephant. The court concluded that MERS's relationship to the lender was "more akin to that of a straw man than to a party possessing all the rights given a buyer." The court noted that if MERS was correct that it had some rights separate from the lender's, then the mortgage may become unenforceable. The court cited several other courts from around the country that have reached that conclusion. Finally, the court cited a Nebraska Supreme Court case in which MERS won a favorable decision that it was not a mortgage broker because it had no independent right to collect on the debt – in other words, the exact opposite position that MERS took in the case at issue.

In the matter of *In re MERSCORP*, 8 N.Y.3d 90 (2006), New York Chief Justice Kaye noted the following in a dissenting opinion: "Although creating efficiencies for its members, there is little evidence that the MERS system provides equivalent benefits to home buyers and borrowers – and, in fact, some evidence that it may create substantial disadvantages."

Despite the Kansas case, a careful practitioner would be well served to try to avoid such arguments by naming both MERS and the current trust deed holder in a construction lien foreclosure lawsuit (as well as the original lender named in the title report). While it may be easy to determine that MERS could assert an interest (if it is named in the recorded trust deed), how do you determine who might be a current trust deed holder? Fortunately, MERS itself has provided a Web-based search engine (www.mersservicerid.org/sis) that purports to name the current lender. It is unclear whether the party found via the MERS search engine is the current mortgage holder or only the servicing company. In an abundance of caution, it may be prudent to include that party.

A few other issues are outside the scope of this article but might be of interest to lenders' counsel. For example, does the subsequent trust deed holder have an obligation to defend and indemnify the initial trust deed holder? Part of that answer may lie in the documents between the two lenders when they transfer a mortgage through the MERS system. Another question is, what if a transfer occurs but neither lender notifies MERS of the transfer? Does that affect any defense or indemnity obligations?

Another somewhat more practical question is whether to send to MERS the ORS 87.021 Notice of Right to a Lien, and/or the ORS 87.039 Notice of Filing Lien Claim, and/or the ORS 87.057 Notice of Intent to Foreclose. Again, an abundance of caution may suggest that including MERS as a recipient of each notice is the prudent action.

In conclusion, the Mortgage Electronic Registration System can produce a great deal of confusion. Practitioners need to decide whether naming MERS in their foreclosure actions is most beneficial for their clients.

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