Arkansas

In *Mortgage Electronic Registration Systems, Inc. v. Stephanie Gabler, et al.*, (Circuit Court of Garland County # 2004-17-II) the borrowers claimed that MERS does not have standing because MERS is not the owner of the note. However, ownership of the note is not required to have standing. (*See* the discussion on Florida below). The court held that "**MERS has standing to seek relief for its Writ of Assistance and is the proper party to foreclose the mortgage as MERS is the mortgagee of record and holder of the promissory note."**

MERS obtained a foreclosure judgment, held the foreclosure sale, and obtained a post-judgment order for writ of assistance to remove the occupant(s), including the named defendant, Gabler. Shortly after the writ was obtained in June 2004, the pro se borrowers sought removal to federal court, and the Western District of Arkansas rejected jurisdiction. A subsequent emergency appeal to the 8th Circuit Court of Appeals was also denied. The borrowers then filed for bankruptcy, but voluntarily dismissed the bankruptcy action four months later.

The borrowers then went back to state court in the eviction action and filed an objection to the writ of assistance, a request for injunction, and a counterclaim. The borrowers claimed in their objection that they were not properly served in the foreclosure proceedings and that MERS does not have standing because it is not the owner of the note.

The court rejected all of the contentions made by the borrowers and ordered that MERS may execute its writ with the assistance of the county Sheriff.

California

Occasionally the case of *Sulak et al. v. Mortgage Electronic Registration Systems, Inc., et al.*, (Superior Court of Riverside County # RIC398123) comes up when researching challenges to MERS' standing. MERS prevailed at every stage in this action. MERS won all four appeals filed by the borrowers, including a judgment affirming an award of attorney's fees to MERS.

Sulak is a case in which the borrowers stopped making payments on their loan and initiated a suit for damages and injunctive relief against MERS, the servicer, the trustee, and the foreclosure firm (among others) to prevent a non-judicial foreclosure. The Sulaks stopped making payments on the loan because they believed that MERS could not enforce or collect the note and deed of trust 1) without holding a Certificate from the Secretary of State, 2) without responding to multiple requests for validation of the debt under the Fair Debt Collection Practices Act (FDCPA), and 3) without having endorsements on the note or recorded assignments to successors in interest to the original lender. In an unpublished opinion entered on September 20, 2004, the Appellate Division characterized the Sulaks approach as "[e]ssentially, plaintiffs called 'Olly olly oxen free' on the note and deed of trust, and stopped making payments."

The California courts have rejected the borrowers' theory at every procedural step in this litigation. All three of the Sulaks' motions for a temporary restraining order and both of their orders to show cause for a preliminary injunction have been denied for their inability to

demonstrate likelihood of success on the merits of the complaint. All of these rulings were upheld in full by the Fourth Appellate Division.

The trial court sustained demurrers against the borrowers' first amended complaint, second amended complaint and third amended complaint. The Sulaks were given 30 days to file a fourth amended complaint, but did not do so. Instead, the Sulaks filed another appeal, which was rejected by the Fourth Appellate District because the demurrer on the third amended complaint was not a final judgment subject to appeal.

MERS and its co-defendants moved to have the case dismissed, and that motion was granted on May 17, 2005. The borrowers attempted to have the order of dismissal vacated, but that motion was denied on July 25, 2005. The trial court subsequently awarded attorney's fees to MERS and the other co-defendants. The borrowers filed yet another appeal in September 2005.

In a December 7, 2006 ruling, the Fourth Appellate District upheld the dismissal of the Sulaks' claims, and thereby put this litigation to rest. (*Sulak, et al. v. Mortgage Electronic Registration Systems, Inc., et al.,* DCA No. E038916). In doing so, the Fourth Appellate District specifically held that MERS was not required to be registered with the California Secretary of State, because the mere act of enforcing deeds of trust does not constitute "doing business" in California under California law.

The Fourth Appellate District upheld the award of attorney's fees to MERS in a March 14, 2007 decision. (*Sulak v. Mortgage Electronic Registration Systems, Inc., et al.*, DCA No. E039775).

Connecticut

(i) Status of Foreclosures:

Connecticut judges rejected recent challenges to foreclosures brought in the name of MERS. *Mortgage Electronic Registration Systems, Inc. v. Ventura*, No. CV 054003168S, 2006 WL 1230265 (Conn. Super. Ct. April 20, 2006); *Mortgage Electronic Registration Systems, Inc. v. Leslie*, No. CV044001051, 2005 WL 1433922 (Conn. Super. Ct. May 25, 2005).

In *Ventura*, MERS brought a foreclosure action and moved for summary judgment on the issue of liability. In granting the motion for summary judgment, Judge John W. Moran held that, as the mortgagee, "there is no question that the named plaintiff [MERS] is the correct party to bring this action". The borrowers had challenged whether MERS could enforce the debt since the affidavit of indebtedness indicated that Chase Home Finance, LLC was "servicing" the note and mortgage. Judge Moran observed, "The obvious plain meaning of this is that Chase Home Finance, LLC services the note and mortgage in this case. In our current times where many mortgages are bundled and bought and sought in the mortgage investment world, the servicing of notes and mortgages by third-party companies is the rule rather than the exception." The court observed that the note was endorsed in blank, and was therefore bearer paper, and that MERS could therefore bring the action.

In *Leslie*, the borrowers moved to strike a MERS foreclosure complaint on the grounds of standing. Judge Jane S. Scholl held, "The facts alleged here support the Plaintiff's standing in this matter. The Plaintiff has alleged that it is the mortgagee and the holder of the note and mortgage from the Defendants. This is sufficient to support the Plaintiff's standing."

These recent decisions illustrate the fact that mortgages can be foreclosed in Connecticut by MERS because MERS is the record owner of the mortgage and is entitled to enforce the note. If the note is endorsed in blank, possession of the note is transferred to MERS prior to foreclosure and the original note is delivered to counsel for the plaintiff in the foreclosure action to be used at the foreclosure judgment hearing.

A note endorsed in blank is "bearer paper". Connecticut General Statutes Section 42a-3-109, provides:

> "(a) A promise or order is payable to bearer if it:
> "(1) States that it is payable to bearer or to the order of bearer or otherwise indicates that the person in possession of the promise or order is entitled to payment;
> "(2) Does not state a payee; or
> '(3) States that it is payable to or to the order of cash or otherwise indicates that it is not payable to an identified person.
>
> "(b) A promise or order that is not payable to bearer is payable to order if it is payable (i) to the order of an identified person or (ii) to an identified person or order. A promise or order that is payable to order is payable to the identified person.
>
> "(c) An instrument payable to bearer may become payable to an identified person if it is specially endorsed pursuant to section 42a-3-205(a). **An instrument payable to an identified person may become payable to bearer if it is endorsed in blank** pursuant to section 42a-3-205(b)." Connecticut General Statutes Section 42a-3-205(b), provides, "If an endorsement is made by the holder of an instrument and is not a special endorsement, it is a 'blank endorsement'. When endorsed in blank, an instrument becomes payable to bearer and may be negotiated by transfer of possession alone until specially endorsed."

The Uniform Commercial Code defines "holder," as follows: "'Holder', with respect to a negotiable instrument, means the person in possession if the instrument is payable to bearer or, in the case of an instrument payable to an identified person, if the identified person is in possession. 'Holder' with respect to a document of title means the person in possession if the goods are deliverable to bearer or to the order of the person in possession" (C.G.S. §42a-1-201(20).)

Therefore, where the instrument has been endorsed in blank or otherwise is bearer paper, the person in possession is the holder of the note. A holder is entitled to enforce a promissory note. Connecticut General Statutes Section 42a-3-301, provides, "'Person entitled to enforce' an instrument means (i) the holder of the instrument, (ii) a nonholder in possession of the instrument who has the rights of a holder, or (iii) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to section 42a-3-309 or 42a-3-418(d). A person may be a person entitled to enforce the instrument even though the person is not the owner of the

instrument or is in wrongful possession of the instrument." (It is important that the Complaint plead that MERS is a holder of the note, not that it is an owner of the note.)

The earlier decision in *Fleet National Bank v. Nazareth*, 75 Conn.App. 791, 818 A.2d 69 (2003) supports MERS' standing to foreclose. The Connecticut Appellate Court addressed the issue of standing in foreclosure actions. This is a seminal decision in Connecticut at the appellate level regarding the standing of the holder of a promissory note to pursue a foreclosure.

In *Nazareth*, the defendant-mortgagors appealed from the entry of judgment of foreclosure by sale in favor of the substituted plaintiff, R. I. Waterman Properties, Inc. The loan originator (Shawmut Mortgage) had merged with and into Fleet Mortgage Corporation. Prior to the foreclosure, Fleet Mortgage assigned its interest in the mortgage, but not the note, to Fleet National Bank. In turn, Fleet National Bank assigned the mortgage (but not the note) to the substituted plaintiff, which was a wholly owned subsidiary of Fleet National Bank and which handled Fleet National Bank's foreclosure accounts.

On appeal, the defendants claimed that the plaintiff lacked standing to foreclose the mortgage. The Appellate Court distilled the facts as follows, "It is undisputed that Fleet Mortgage is the holder of the note, while the plaintiff is the holder of the mortgage." (75 Conn.App. at 794.)

The plaintiff contended that it had standing and relied on *New England Savings Bank v. Bedford Realty Corp.*, 238 Conn. 745, 680 A.2d 301 (1996), rev'd after remand, 246 Conn. 594, 717 A.2d 713 (1998), and on *Connecticut National Bank v. Marland*, 45 Conn.App. 352, 696 A.2d 374, cert. denied, 243 Conn. 907, 701 A.2d 328 (1997). The Appellate Court distinguished those cases because in those cases it was not disputed that "the party seeking foreclosure had an interest in the note and the mortgage." (75 Conn.App. at 794.) In *Bedford Realty*, the foreclosing plaintiff had lost the original of the note, and in *Marland*, the court had made the specific finding that the foreclosing plaintiff was the holder of the note and mortgage. "In this case, however, the plaintiff was never the holder of the note," wrote the Court in *Nazareth*. The court pointedly observed that neither the plaintiff nor the court could cite any authority "to support [the plaintiff's] claim that it has standing to foreclosure on the mortgage without ever having been assigned the note". (75 Conn.App. at 795.) Finally, the Court observed that the Connecticut legislature had by statute allowed a holder of the note to foreclose even if it had not been assigned the mortgage (75 Conn.App. at 795, citing C.G.S. §49-17.), but that no statute provided for the converse, i.e. a holder of the mortgage to foreclose when it did not hold the note.

This decision supports the analysis that MERS has standing to foreclose because the owner of the note authorizes and transfers the note to MERS prior to the foreclosure so that MERS is a holder of the note (and of the mortgage, too). Under the analysis used by the Court in *Nazareth*, MERS would have standing to foreclose the mortgage. Please see MERS Recommended Foreclosure Procedures on the MERS Website at www.mersinc.org.

Some may mistakenly think *MERS v. Rees* (No. CV03081773, 2003 Conn. Super. LEXIS 2437 (9/4/03) cast doubt on MERS standing to foreclose. The Court in *Rees* did not issue any adverse ruling pertaining to MERS standing to commence a foreclosure proceeding on behalf of a principal. To the contrary, the *Rees* case involved procedural issues. The counsel in *Rees* had erroneously pled that MERS commenced the suit as the current owner of the note and mortgage

but the papers supporting the motion for summary judgment reflected that MERS served as an agent/nominee. As such, the *Rees* court found sufficient issue of fact warranting the denial of summary judgment. Being consistent in the pleadings is crucial.

(ii) Department of Banking Opinion:

The Department of Banking issued a March 9, 2006 letter in response to a consumer filing a complaint with the Department alleging that Mortgage Electronic Registration Systems is an unlicensed consumer collection agency. This complaint was filed in conjunction with a foreclosure initiated in MERS' name against this consumer. The Department of Banking found that MERS is not in violation of Connecticut General Statutes Sections 36a-800 et seq. MERS role is limited to being the plaintiff in the legal foreclosures themselves and is not in the business of contacting the borrowers by telephone or letter to demand payment. All loan administration and efforts to resolve the default without foreclosure are handled directly by the mortgage servicer and not MERS. Even if MERS was acting as a consumer collection agency, the Department of Banking held that MERS would be exempt from the provisions of the Consumer Collection Agency statute because MERS provides significant services to its members for loans that are current as well as for loans that are in default.

Florida

MERS had two important victories in Florida appellate courts, which have unanimously decreed that MERS is permitted to foreclose mortgage liens when it is the holder of the note and mortgage. *See Mortgage Electronic Registration Systems, Inc. v. Azize*, (Fla. DCA Case No. 2D05-4544, opinion filed February 21, 2007) [32 Fla. L.Weekly D546]; *Mortgage Electronic Registration Systems, Inc. v. Revoredo, et al.*, (Fla. 3d DCA No. 3D05-2572, opinion filed, March 14, 2007).

As background, in September 2005, we suspended the option of allowing MERS members to foreclose in MERS' name in Florida. We did so because we were in the process of appealing two adverse decisions against MERS' standing as a proper plaintiff in foreclosure actions in local trial courts. The first trial court decision came from Judge Logan in Pinellas County in the *Azize* case. Judge Logan issued an August 18, 2005 Decision on an Order to Show Cause why the Complaint should not be Dismissed for Lack of Proper Plaintiff. He dismissed with prejudice as to MERS and dismissed without prejudice as to the "proper Plaintiff". He ruled that a party had to own the "beneficial interest" in the promissory note in order to foreclose on the note. Judge Logan made this ruling despite the fact that the borrower had never appeared in the case to contest the foreclosure. We filed an appeal on September 14, 2005. A joint amicus brief was filed on our behalf by Fannie Mae, Freddie Mac, the MBA, JP Morgan Chase, and Countrywide. The Jacksonville Area Legal Aid (JALA) filed an Amicus Brief in opposition.

We also appealed a similar Order in the *Revoredo* litigation entered by Judge Jon I. Gordon in Dade County on September 28, 2005. Judge Gordon held that a plaintiff must establish ownership of the note in order to have standing. JP Morgan Chase filed an Amicus Brief in support of our position.

MERS prevailed in the Pinellas County Appeal in the *Azize* decision, filed by the Second District Court of Appeal ("Second DCA") on February 21, 2007. A unanimous appellate panel reversed Judge Logan's Order, and held that MERS could foreclose when it alleges that it is the holder of the note, and observed "standing is broader than just actual ownership of the beneficial interest in the note". The Second DCA stated that Judge Logan's conclusion that MERS could never be a proper plaintiff since it did not have a beneficial interest in the notes was "an erroneous conclusion." The Second DCA also observed in a footnote that, frequently, multiple entities hold a beneficial interest in a particular note, and that courts have routinely allowed agents, such as servicers, to bring foreclosure suits to enforce the note on behalf of the holders of beneficial interests in the note. Finally, the Second DCA explained that Florida's rules of civil procedure permit an action to be prosecuted "in the name of someone other than, but acting for, the real party in interest."

Shortly after our victory in the Second DCA, the Third District Court of Appeal ("Third DCA") reversed Judge Gordon's Order in Dade County in the *Revoredo* decision. The unanimous panel indicated that it agreed with the Second DCA's ruling that MERS had standing to foreclose, and that ruling was consistent "with the clear majority of cases which have considered the question of MERS' standing to maintain foreclosure proceedings." The Third DCA observed, "[t]o the extent that courts have encountered difficulties with the question . . . the problem arises from the difficulty of attempting to shoehorn a modern innovative instrument of commerce into nomenclature and legal categories which stem essentially from the medieval English land law." Although MERS does not actually "own" the note it is foreclosing, the Third DCA stated "[w]e simply don't think this makes any difference" and noted that the Florida rules of civil procedure allow an action to be brought by an authorized agent on behalf of the real party in interest. The Third DCA concluded that, since "no substantive rights, obligations, or defenses are affected by the use of the MERS device" there is no reason why mere form should overcome the salutary substance of permitting the use of this commercially effective means of business." As a result of these two decisive victories in the Florida appellate courts, the right of MERS to foreclose in Florida is now firmly-established.

At the end of July 2007, MERS successfully defeated a putative class action case captioned *Sandy S. Trent, etc., et al. v. Mortgage Electronic Registration Systems, Inc., United States District Court, Middle District of Florida –Jacksonville Division, Case No. 3:06-cv-374-J-32HTS.* This case involved an original complaint, a removal from state court to federal filed by MERS under the Class Action Fairness Act of 2005, an amended complaint and then finally the seconded amended complaint that the Court dismissed with prejudice. The Plaintiffs in this putative class action sought relief under two Florida statutes, the Florida Consumer Collection Practices Act (FCCPA) and the Florida Deceptive and Unfair Trade Practices Act (FDUTPA). After the plaintiffs' revised the complaint twice in an attempt to state of cause of action, the FCCPA count essentially alleges that MERS "engaged in a pattern and practice of illegal debt collection practices" by sending pre-suit communications representing MERS as a "creditor" of the plaintiffs. The FDUTPA allegations were similar to the FCCPA count, but further alleged that MERS violated the ACT because it engaged in the unlicensed practice of law and used deceptive means to collect debts owed by class members.

The 20-page opinion stated that MERS is the mortgagee of the mortgages and has the ability to foreclose. By pointing to the language in the mortgage contract, the Court held that the mortgagors (Plaintiffs) were aware at the outset of MERS' role in the mortgage transaction and that MERS obtained legal title to the note and the ability to foreclose. The findings were that MERS did not attempt or threaten to enforce a debt obligation that it knew was not legitimate. In reviewing the pre-suit notices and the transaction itself, the Court stated, "it cannot identify any root abusive conduct." The Court concluded that "MERS role was not hidden or materially misrepresented and a reasonable consumer in the plaintiffs' position would not likely to be misled in any material way by the pre-suit communications."

Georgia

Georgia courts recognize the right of MERS to foreclose, as illustrated by the decision in *American Equity Mortgage, Inc. and Mortgage Electronic Registration Systems, Inc. v. Chattahoochee National Bank*, # 05-cv-1951 (Forsyth Cty. Sup. Ct., Dec. 29. 2005, J. Dickinson). This was an action to enjoin an immediate judicial sale due to equitable subrogation in which the court recognized the validity of a lien held by MERS and the authority of MERS to enforce it.

The borrower executed a security deed naming CitiFinancial Services as the grantee in exchange for a loan. The deed was recorded. On June 15, 2004, the borrower re-financed the loan by obtaining a home equity credit line from American Equity Mortgage. The deed to secure the debt named MERS as the grantee in a nominee capacity for American Equity. The deed was recorded on June 24, 2004, and CitiFinancial's loan was paid off by the refinance.

Approximately a month prior to the re-finance, Chattahoochee Bank obtained a writ due to a judgment lien obtained against the borrower in the amount of $679,240.01. Chattahoochee provided a Notice of Levy on Land to the borrower, which indicated that it intended to conduct a judicial sale of the property.

American Equity, claiming it had no knowledge of Chattahoochee's interest in the land when it loaned the money for the refinance, brought suit and obtained a temporary restraining order. Following the entry of the temporary restraining order, the issue was raised as to which entity should be the plaintiff in an effort to determine whether American Equity/MERS has priority over Chattahoochee Bank.

After briefing and an evidentiary hearing, the Honorable David L. Dickinson determined that "MERS, in its capacity as grantee in the deed to secure debt and as nominee for American, or its successor in interest as the holder of the note, is the entity that would suffer irreparable harm if [Chatahoochee] foreclosed on its judgment lien and is the entity entitled to seek an injunction in this case. **MERS is entitled to enforce the American Deed to Secure Debt per its terms."**

The court awarded MERS a permanent injunction precluding Chatahoochee or its successors or assigns from selling or foreclosing on the property so long as the deed held by MERS remains in effect.

Illinois

Mortgage Electronic Registration Systems, Inc. v. Estrella, 390 F.3d 522 [7th Cir. 2004] shows ample authority for MERS to commence a foreclosure proceeding, in its agency capacity on behalf of its principal. In *Estrella,* the Seventh Circuit issued a "public chastisement" to counsel for "failing to do any research into the requirements of federal appellate jurisdiction before filing this appeal" (390 F.3d at 524). Some borrowers have mistakenly tried to use this case to support a challenge to the standing of MERS to foreclose. To the contrary, the *Estrella* case did not negatively rule upon the standing of MERS to commence a foreclosure proceeding on behalf of its principal. At issue was an application to confirm a sale. On appeal, the Seventh Circuit dismissed the appeal based upon well-settled law that Court orders denying confirmation to judicial sales are not final decisions, and thus are not appealable.

In addition, the court opined that the district Court may lack federal subject matter jurisdiction over the proceeding because for diversity of citizenship purposes "it is the citizenship of the principal, and not that of the agent that matters." (390 F.3d at 525). Because the principal in *Estrella* was an Illinois corporation and the suit was brought against Illinois residents, the Seventh Circuit opined that subject matter jurisdiction "is doubtful." Implicit in the holding was recognition by the Seventh Circuit that MERS has standing to commence a foreclosure proceeding as agent on behalf of its principal. Indeed, the *Estrella* Court did not dismiss the proceeding in its entirety for lack of standing by the agent, rather cited to *Indiana Gas Co. v. Home Insurance Co.,* 141 F.3d 314, 319 [7th Cir. 1998] which recognizes the capacity of an agent to commence a proceeding "[w]hen the principal's interests are affected by the litigation, the principal's citizenship counts even if the agent is the sole litigant" (emphasis added). In short, the federal appellate Court did not issue a blanket ban to suits commenced by MERS as an agent on behalf of its principals. Instead, in suits brought by agents, it directs federal district Courts to ascertain the citizenship of the principal of the plaintiff to determine whether federal diversity jurisdiction exists.

Illinois statutory law specifically permits an agent to commence a foreclosure proceeding on behalf of a principal. Section 735 ILCS 5/15-1504(a)(3)(N) provides in pertinent part:

> A foreclosure complaint may be in substantially the following form:…(N) capacity in which plaintiff brings this foreclosure (here indicate whether plaintiff is the legal holder of the indebtedness, a pledge, *an agent*, the trustee under a trust, deed or otherwise, as appropriate.) (Emphasis added).

Kentucky

In 2005, the Master Commissioner in Jefferson County issued a document entitled, "Guidelines For Lien Enforcement Actions in Jefferson County, Kentucky." The Master Commissioner expressly stated that MERS could foreclose when it is the holder of the note. The Master Commissioner concluded by stating that MERS would be the "real party in interest" and thus a

proper plaintiff in a foreclosure action if the note was endorsed to MERS, either by specific assignment or allonge naming MERS, or an endorsement in blank.

The MERS Rules of Membership require that when foreclosing in MERS' name, our Members must have the note endorsed in blank so that MERS can be the holder. As such, MERS' practice and procedures are consistent with the Master Commissioner's interpretation of the necessary elements for standing to foreclose. So long as MERS brings the action as the holder of the note, MERS can foreclose in Jefferson County, Kentucky. We are not aware of any instances where a MERS foreclosure was rejected in any county in Kentucky where the note was endorsed in blank and MERS pled that it was the holder.

Louisiana

In Louisiana, the foreclosure process will normally require at the end for MERS to take title to the property for a short period. This is because in Louisiana only the foreclosing creditor may make a credit bid for the full amount owed at sale. This bid cannot be assigned. All other parties must pay in cash. If MERS is to be the foreclosing entity (creditor), then only MERS can make a credit bid. A successful credit bid will lead to title being conveyed to MERS.

When conveying title out of MERS, Louisiana parishes may require an original MERS resolution as evidence that the signing officer has authority to convey title in the name of MERS. (The MERS corporate resolution provides authority for members to convey title out of MERS.) This requirement is not specific to MERS and would be required for any entity conveying title. An alternative way to handle it is to record one resolution with a parish, get certified copies, and then record them in all the other parishes.

Michigan

MERS has repeatedly proven its right to foreclose in Michigan, and attempts to challenge MERS' standing have been rejected by the trial courts. The validity and enforceability of MERS mortgages was affirmed by the Attorney General of Michigan in formal Opinion No. 7116, August 28, 2002, (2002 Mich AG Lexis 19). Specifically, the Attorney General stated that the Register of Deeds is required to accept MERS mortgages and index them as either mortgagee for the disclosed nominee or an undisclosed nominee. The Attorney General described MERS and the legal acceptance of the use of a "nominee," and concluded that, "No provision in the Recording Requirements Act suggests that a discrepancy will exist to the mortgage interest instrument simply because the mortgagee is listed as a nominee" for an undisclosed party.

Since that time, MERS has prevailed in several actions brought by borrowers seeking to set aside a MERS foreclosure based upon this same mistaken theory that MERS lacked standing under the foreclosure-by-advertisement statute. It appears that in these challenges borrowers are using a form complaint with identical arguments and case citations. The Circuit Court judges are repeatedly granting summary disposition to MERS, holding that the borrower's complaint must be dismissed because MERS "has an interest in the mortgage sufficient to foreclose and to exclude any other party from foreclosing and such foreclosure was proper and unobjectionable as to all issues raised in this case or that could have been raised." *See Pope v. Mortgage Electronic Registration Systems, Inc.,* Civ. No. 06-611918-CH (Wayne Cty. Circ. Ct., March 2, 2007, J.

Torres); *James A. Murray, et al. v. Mortgage Electronic Registration Systems, Inc.*, Civ. No. 06-623719-CH (Wayne Cty. Cir. Ct. Feb. 6, 2007, J. Baxter); *James and Shawneen Murray v. Mortgage Electronic Registration Systems, Inc.*, Civ. No. 06-623719-CH (Wayne Cty. Cir. Ct., Feb. 6, 2007, J. Baxter); *Carrington v. Mortgage Electronic Registration Systems, Inc., et al.*, Civ. No. 06-625557-CH (Wayne Cty. Cir. Ct. Jan. 26, 2007, J. Giovan); *Amera Mortgage Corporation v. Schatz*, LT-05-6565 (Wayne Cty. Dist. Ct. Feb. 17, 2006, J. Moiseey).

In each case, MERS established its right as a proper party plaintiff by showing numerous precedents supporting the right of MERS to foreclose. MERS demonstrated that it acts as a nominee for the owner of the indebtedness, and therefore has standing to bring a foreclosure by advertisement pursuant to MCL 600.3204. MERS further demonstrated that it had standing to act as mortgagee and enforce notes under both MCR 2.201.(B)(1) and MCL 600.2041. Michigan law, like the laws of many other States, permits a party "with whom or in whose name a contract has been made for the benefit of" to file suit. MERS also cited case law from the Michigan Supreme Court holding that a corporate entity can be the mortgagee without having any beneficial interest in the underlying debt. *See Canvasser v. Bankers Trust Company of Detroit*, 284 Mich. 634, 280 N.W. 71 (1938).

Minnesota

MERS had a significant victory in the Minnesota Court of Appeals in the decision of *In re Sina*, No. A06-200, 2006 WL 2729544 (Minn. Ct. App. Sept. 26, 2006). In this case, the Court expressly held that MERS had standing to foreclose because it was the assignee of the mortgage.

MERS was the assignee of a mortgage given by the borrowers to Maribella Mortgage, LLC in 2002. In 2003, MERS commenced a foreclosure by advertisement after the Sinas defaulted on their mortgage loan. The property was sold to MERS in a sheriff's sale. The borrowers then brought an action in state court to set aside the foreclosure based upon an alleged failure by MERS to comply with the Federal Fair Debt Collection Practices Act. MERS removed the case to federal court, and the United States District Court for the District of Minnesota dismissed on MERS' motion for summary judgment. The borrowers appealed to the United States Court of Appeals for the Eighth Circuit, but the Eighth Circuit affirmed the judgment for MERS in 2005.

The borrowers then brought another state court action in the District Court for Hennepin County challenging the 2003 foreclosure, this time alleging that MERS did not comply with Minnesota's statutory foreclosure requirements because, among other reasons, MERS lacked standing. MERS again filed for summary judgment, contending that MERS had standing, complied with all statutory requirements, and that the borrowers' claims were barred by virtue of the prior decisions against them in their federal court litigation. In 2005, the trial court granted summary judgment to MERS, determining that the suit was barred by the doctrines of *res judicata* and collateral estoppel by virtue of the federal court litigation. The borrowers again appealed, this time to the Court of Appeals of Minnesota.

The Court of Appeals noted that the trial judge had decided the case on *res judicata* and collateral estoppel grounds, so the standing issue was not even properly on appeal. Nonetheless, the appellate court decided to comment on the standing issue, observing, "the record shows MERS had standing to foreclose the property." The appellate court rejected the notion that

MERS was not the real party-in-interest, stating, "the assignment [of the mortgage] was recorded in MERS's name. And by agreement, MERS retained the power to foreclose the mortgage in its name. Because MERS is the record assignee of the mortgage, we conclude that MERS had standing to foreclose the property by advertisement." The Court of Appeals then concluded that the foreclosure complied with all statutory requirements, and that the trial court properly ruled that the borrowers' claims were barred by *res judicata* and *collateral estoppel*.

New York

There has been some speculation that the case of *LaSalle Bank National Association, as Trustee v. Michael Lamy* (2006 NY Slip Op 51534(U), decided August 7, 2007, Supreme Court, Suffolk County, Burke, J.) creates an issue for MERS foreclosing as a plaintiff. However, MERS is not foreclosing on this mortgage loan as the plaintiff, but rather executed an assignment of the mortgage to LaSalle Bank to commence the foreclosure. The issues surrounding this case are the result of procedural defects. The Judge pointed out that the assignment from MERS to LaSalle is dated after the commencement date of the foreclosure as well as the note allonge is undated. Justice Burke points out that only the owner of the note and mortgage at the time of the commencement of a foreclosure action may properly prosecute the foreclosure. We have corrected these defects and on August 15, 2007, Judge Burke signed the Order of Reference and cited to the appellate level case *Mortgage Electronic Registration Systems, Inc. v. Coakley,* 41 AD3d 674, 838 NYS2d 622 as support that the Plaintiff has sufficiently demonstrated its entitlement to the relief requested.

The Coakley decision correctly finds that MERS has standing to bring a foreclosure action. The court found that the promissory note is a negotiable instrument within the meaning of the Uniform Commercial Code (UCC). At the time of the commencement of the foreclosure, MERS was the lawful holder of the promissory note and of the mortgage. Moreover, the Court held that MERS' standing is further supported by the language in the mortgage instrument itself. The borrower expressly agreed without qualification that MERS had the right to foreclose upon the premise in the event of a default.

Some may want to continue to focus on an incorrect legal assumption of two cases: *Mortgage Electronic Registration Systems, Inc. v Burek,* 4 Misc 3d 1030, 798 NYS2d 346; *Mortgage Electronic Systems, Inc. v. Bastian,* 12 Misc 3d 1182(A), 2006 WL 1985461. These cases held that Mortgage Electronic Registration Systems, Inc. (MERS) may not prosecute a mortgage foreclosure action in its own name as nominee of the original lender because it lacks ownership of the note and mortgage at the time of the prosecution of the action. MERS did not appeal either of these cases because of underlying procedural problems that would have sidetracked the appeal away from the issue of whether one needs to own the note to have standing to foreclose. The Coakley case controls these cases and rightly concludes that to have standing one must be the holder of the note and does not need to own the note.

Furthermore, New York law recognizes the rights of an agent to sue on behalf of his principal (CPLR 1004; *Airlines Reporting Corp. v. S&N Travel, Inc.*, 238 A.D.2d 292 [2d Dep't 1997]), and specifically recognizes the right of an agent to commence a foreclosure proceeding on behalf of a principal. (*See* Bergman on New York Mortgage Foreclosures; section 16.02[1][a] (Matthew Bender Co., Inc 2004) and *Fairbanks Capital Corp v. Nagel*, 289 A.D.2d 99 [1st Dep't

2001] (Court rejected mortgagor's argument that servicing agent lacks standing to maintain an action in its capacity as servicing agent for a trustee)).

Any foreclosures brought to MERS' attention as having issues were the result of the complaint not being pleaded properly. For example, in *Mortgage Electronic Registration Systems, Inc. v. Burek*, 4 Misc. 3d 1030A [Sup. Ct. Richmond County 2004], the complaint alleged that MERS is "the sole, true, and lawful owner of the bond/note and mortgage securing the same." We do not recommend or support complaints making this allegation and when we become aware of it, we advise to amend the complaint or dismiss it. Interestingly, the summary judgment papers reflected that the action was brought in an agency capacity.

However, the case does not stand for MERS not being able to foreclose. Instead, citing to issues of fact, the *Burek* Court denied summary judgment, but did not question or disturb New York procedural law and case law, which specifically permits an agent to commence a suit on behalf of its principal. With respect to the pending summary judgment application, the *Burek* Court found sufficient issues of fact warranting its denial, namely conflicting proof the mortgagor produced showing that he was not in default on his mortgage obligations, outstanding discovery sought of plaintiff on its claim of default, and counsel's presentation of conflicting allegations concerning the standing of the plaintiff. Although the *Burek* Court cited to issues of fact in denying summary judgment, it did not issue any ruling barring MERS from commencing a foreclosure proceeding on behalf of its principal. The Court did not dismiss the proceeding for lack of standing.

North Carolina

In 2006, a few counties in North Carolina were delaying non-judicial foreclosures of MERS liens, for varying reasons. Some clerks did not understand that MERS was the beneficiary under the original MOM deed of trust. Accordingly, these clerks were requiring assignments from the original lender to whichever entity was initiating the foreclosure through the trustee, whether that entity was MERS or a subsequent lender or servicer who had acquired the loan from the original lender. Requiring such assignments was in direct conflict with N.C.G.S. § 47.17.2, which specifically provides that there is no need for an assignment of the deed of trust to be prepared or recorded in order to foreclose.

We contacted the Administrative Office of the Courts ("AOC"), the entity that provides legal counsel to all of the county clerks in North Carolina. The AOC issued a letter on January 24, 2007 to all of the Clerks of Superior Court throughout North Carolina. The letter states that MERS' "nominee status does not make any difference with regards to whether it is the holder of the note and has the right to foreclose." The letter further states that, "MERS should be treated like any other note-holder seeking to foreclose in North Carolina."

With regard to assignments, the letter states, "There is no need or requirement that an assignment of a deed of trust be recorded. See G.S. § 47-17.2. Under North Carolina law, when the note is duly assigned or transferred, the rights under the deed of trust follow the note. As a result, whichever party is holder of the note is entitled to foreclose under the deed of trust." (Emphasis in original).

The letter goes on to explain what is required when the note-holder foreclosing a MERS deed of trust is the original lender, MERS, or a subsequent lender. If MERS is designated as the foreclosing entity, it need only produce a copy of the original deed of trust, an original or copy of the note endorsed in blank or endorsed specifically to MERS, an affidavit stating that MERS is the holder and the debt is outstanding, and proof that the borrowers and any other known lien holders have received notice of the foreclosure. The same rules apply if a subsequent lender is the foreclosing entity. There is no need for an assignment of the deed of trust, as any entity bringing the foreclosure just needs to demonstrate that it is the holder of the note and that the note is secured by a recorded deed of trust.

Oklahoma

We have received favorable rulings in Oklahoma trial courts when MERS' standing is challenged. *See Mortgage Electronic Registration Systems, Inc. v. William C. Warden, et al.*, CJ-2005-7027 (District Court of Oklahoma Cty., March 3, 2006, J. Swinton). In that case, a borrower attempted to vacate a foreclosure judgment on several grounds, including the contention that MERS lacks standing to sue because it is not registered to do business in Oklahoma and because MERS was not the "real party in interest" since it did not own the note.

MERS argued that it was not required to register with the Secretary of State in order to foreclose in Oklahoma, pursuant to the exception from the registration requirement for entities that create or acquire mortgages found in Okla. Stat. Ann. Tit. 18 §§ 1132(A)(6), 1132(A)(7). MERS further argued that it had standing to foreclose because it held the recorded mortgage and at all times indicated that it was appearing as the designee of the trustee, Bank of New York.

The Court entered an order denying the motion to vacate the foreclosure judgment. This judgment was not appealed.

Pennsylvania

The standing of MERS to foreclose was affirmed by a Pennsylvania appellate court in *Mortgage Electronic Registration Systems, Inc. v. Estate of Harriet L. Watson, et al.*, Superior Court of Pennsylvania # 637 WDA 2006, filed December 27, 2006. The case involved affirmative defenses and counterclaims filed by the estate of a deceased borrower in response to a foreclosure suit brought by MERS in 2003 to foreclose a MOM mortgage. Among the estate's defenses and counterclaims was the theory that MERS somehow lacked standing because it was not the "real party-in-interest" and because MERS allegedly could not bring a foreclosure suit in Pennsylvania if it did not register as a foreign corporation doing business in Pennsylvania.

The trial court and appellate court disregarded the estate's challenges to MERS' standing to foreclose due to the clear language of the mortgage itself, and held that MERS was not required to register as a foreign corporation because the act of acquiring, recording, or enforcing a mortgage lien constituted a specific exception under 15 Pa.C.S.A. § 4122 to the general requirement that companies "doing business" in Pennsylvania must obtain a certificate of authority in order to file suit in Pennsylvania. Such actions, by statutory definition, do not constitute "doing business." The unanimous appellate court ruled observed, "In the instant case, Appellee [MERS] was identified as the mortgagee in the mortgage documents. Therefore,

Appellee did not need a certificate of authority to commence mortgage foreclosure proceedings, because this activity falls within the exclusions under 15 Pa.C.S.A. § 4122."

Pennsylvania law has long recognized the standing of a named mortgagee to foreclose on the security interest, even if there are other entities interested in the amount claimed. *Metal Products Co. v. Levine,* 1 D& C 271, 273 (Beaver Cty. 1921).

Wisconsin:

A very favorable opinion was rendered in *Mortgage Electronic Registration Systems, Inc. v. Diana M. Schroeder and American General Finance, Inc.,* Circuit Court, Branch 31, Milwaukee County (June 23, 2005). Plaintiff MERS filed the foreclosure when defendant Schroeder failed to make payments on her mortgage. The mortgage was a MOM (MERS as Original Mortgagee) with Paragon Home Lending, LLC as the original lender. MERS filed a motion for summary judgment and defendant responded contending that MERS is not the correct real party of interest because MERS is not the lender and that the loan is unconscionable. The Defendant claimed that, if the Court were to permit MERS' claim to remain, the lender could attempt to obtain a deficiency judgment against Defendant because MERS has not received a written assignment or request from the lender, JP Morgan Chase Bank, to proceed with the foreclosure.

The Court found that the mortgage was not unconscionable. As to MERS standing, the Court found that "according to the Mortgage, Ms. Schroeder is the borrower and mortgagor, and MERS is the mortgagee under the security instrument. See Mortgage, page 1 of 13." The Court further examined the Mortgage document and found, "According to the Mortgage, MERS is also the nominee for the Lender to exercise rights to foreclose and sell the property. See Mortgage, page 3 of 13."

The defendant tried to use *Mortgage Electronic Registration Systems, Inc. v. Estrella* (Case mentioned in materials under Illinois) as holding that only the lender is the proper party. The *Estrella* case did not stand for this proposition, and did not hold that MERS lacked standing to foreclose. The Wisconsin Court rightly observed that Schroeder's citation to *Estrella* "is to court dicta regarding subject matter jurisdiction, indicating the parties did not brief this matter."

The Court held that "In this case, MERS/Plaintiff has elected to foreclose on Defendant's property according to Wisconsin Statute 846.101 Foreclosure without deficiency. That statute does not require specifically that the "lender" be the plaintiff in a foreclosure case. The statute specifically refers to the "plaintiff." In this case, it appears MERS is properly enforcing the lender's interest according to the Mortgage. MERS has interest in the mortgage as mortgagee. It also has interest as "nominee" for the lender."

The Court also held that "Res judicata will act as a bar to Lender to pursue any judgment because the Lender, is a party in privity with MERS according to the Mortgage."

Mortgage Electronic Registration Systems, Inc. v. Degner, et al., (Circuit Court for Waukesha County # 05CV1982) is a more recent case in which a Wisconsin Court rejected an attack on the standing of MERS to foreclose. In his counterclaim and affirmative defenses, the borrower alleged various violations of federal lending laws. The borrower then brought a motion to dismiss which asserted that MERS could not foreclose because MERS was not registered as a

foreign corporation and because MERS allegedly lacked standing because "it never takes possession of any funds" and "is not the servicing agent".

On February 6, 2006, the Honorable James R. Kieffer denied the motion to dismiss and stated at the motion hearing: "**MERS does have standing to bring and continue this foreclosure action**, and that is under . . . Section 803.01(2) of the Wisconsin Statutes. I'm satisfied given the legal relationship of MERS and how it relates to HSBC and Household Finance and how these entities all work, I believe that Wisconsin law does provide for that . . ." (emphasis added). The final written order of denying the motion to dismiss was entered on February 23, 2006.

Section 803.01(2), the statute cited by Judge Kieffer, provides that a "party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in the party's name without joining the person for whose benefit the action is brought . . ." This language is quite similar to Rule 17(a) of the Federal Rules of Civil Procedure, which addresses the issue of whether a party is a "real party in interest" entitled to bring suit. Most states have a rule that incorporates almost identical language regarding standing to sue.

MERS obtained summary judgment in this action, and the borrower appealed the judgment. In a decision issued January 31, 2007, the Wisconsin Court of Appeals, District II, issued a unanimous decision affirming the judgment in MERS' favor. *Mortgage Electronic Registration Systems, Inc. v. Degner*, (2006AP690).