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Why Mortgage-Backed Securities Aren't (Backed by Securities): How MERS Toasted the Banks

In a [series of pieces](#) I have argued that MERS, a creation of the mortgage banking industry, has effectively destroyed the institution of private property in America. Ironically, MERS was created to facilitate quick and easy and cheap securitization of mortgages -- what are called mortgage-backed securities. In fact, what it did was to eliminate any backing of the securities by mortgages. Of the total securitized asset universe, something like \$7 trillion are (supposedly) backed by residential mortgages. However, MERS helped to delink the securities from the mortgages. At best, they are unsecured debt -- there is no property backing the securities. What this means is that foreclosure is not permitted. As I have said before, it is likely that most or even all foreclosures occurring in the US are illegal seizures of property -- home thefts. We are talking about 100,000 completed home thefts per month, with another 250,000 new foreclosures started to steal homes every month. Projections are that 13 million homes will have been "foreclosed" (read: stolen) by 2012.

Worse, from the perspective of the banks, they've got to take back all the fraudulent MBSs, most of which are toxic.

In what follows I want to present the most favorable case for the mortgage industry. That is to say, I will ignore fraud and criminal conspiracies. Let us look at the current predicament as if it resulted from a series of monumental errors. With that in mind, what is the best-case scenario? First a caveat: I am not a lawyer nor am I an investigative reporter. I have relied on my perusal of reported evidence, plus a discussion with James McGuire who has put together an entirely convincing argument that the securitizations of mortgages resulted in securities that are not backed by mortgages. I urge interested readers to go to [his website](#).

With that caveat, let us work through the problems now facing the banks.

1. A valid "mortgage" requires a ("wet signature") note and a security instrument; these must be kept together, and any subsequent transfer of lien rights to the security instrument must be recorded at the appropriate public office. The mortgage note must be properly indorsed each time the mortgage is transferred. In the era of securitized mortgages this can be a dozen times or more. If ever presented for foreclosure, endorsements should demonstrate a clear chain of title, from origination through to foreclosure; and this should match the records at the public office.

2. MERS intended to provide an electronic registry of all mortgages. By appointing a "vice president" in every financial firm, it believed that all transfers of lien rights among these firms were "in house". Hence it operated on the belief that no subsequent public recording was necessary, and no further endorsement of the mortgage note was necessary for in-house transfers of the payment intangible as it kept a record of transfers of the mortgage. It claimed to be a nominee of these firms (purported to hold the mortgage) but also to be the holder of the mortgages including the "Unidentified Indorsees In Blank" -- mortgages that were never properly endorsed over to purchasers. We know, however, that MERS recommended that mortgage servicers retain notes, so MERS's claim to be the holder rests on its claim that appointed VPs are employees. But these employees are not an agent/employee of the "Unidentified Indorsee In Blank", nor are they paid by MERS or in any way supervised by MERS.

3. This practice is in violation of numerous laws. Property law requires filing sales in the public record. Notes must be affixed (permanently) to the security instrument -- a mortgage without the note has been ruled a "nullity" by the Supreme Court. MERS's recommended business practice (with the servicer retaining the note) would make the mortgages a "nullity". A complete chain of title is required to foreclose on property -- every sale of a mortgage must be endorsed over to the purchaser, and properly recorded. Without this, it is illegal to foreclose on property -- no matter how many payments the homeowner has missed.

4. However, if the notes can be found and if MERS can provide records, it is possible that the mortgages can be made valid ("proved up") for purposes of collecting upon the indebtedness, but foreclosure would not be possible without a valid continuous perfected mortgage showing a chain of title from origination through to the current party trying to enforce the mortgage note. Any break in the chain of endorsements along with any break in the chain of title renders the Power of Sale clause in the security instrument to be a nullity and therefore no party can foreclose on the real property. So long as there is no fraud affecting the mortgage note, then rights to enforce the indebtedness can be further negotiated. If there is no break in the chain, when fraud is shown affecting the security instrument (such as robo-signers, etc), this does not affect the rights to enforce the mortgage note -- but such fraud will affect the validity of the security instrument perhaps making foreclosure impossible. Fraud affecting the mortgage note would affect the right to foreclose.

5. If the notes cannot be found and a Lost Note Affidavit can not reestablish the indebtedness, then foreclosure is not possible and collecting of the indebtedness is also not possible. Homeowners still can be sued for collection of owed moneys upon a "proved up" note or lost note affidavit but a current perfected lien is required to foreclose.

6. However since the mortgage-backed securities are governed by PSAs (pooling and service

agreements), the practices above make the securities unsecured debt and there is no solution. The securities are no good. (This would be a Representation & Warrant violation as the MBSs stated that a secured indebtedness was to be purchased, but since the Trustees of the securitization would not have the notes, the securities cannot be "secured".)

What does all this mean? In plain simple language, the banks are royally screwed. They cannot foreclose on the properties. Holders of the "mortgage-backed" securities can turn them back to the banks because they are actually unsecured debt. In previous pieces I have also explained why MERS's recommended practice also violates US tax code -- so back taxes are owed. And we know that the mortgages stuffed into the securities did not meet the "reps" of the PSAs.

So, in short, banks have got to take the whole lot of toxic waste securities back. Trillions of dollars worth. The banks are toast. There is no cooking of the books that will turn this blackened toast back to bread.