BEYOND ROBO-SIGNING: MORTGAGE FORECLOSURE DEFENSE BASICS

Representing Homeowners: MERS and the Robo-Signers

In order to understand the current legal status of foreclosure proceedings, basic terms must be defined and the fundamentals of the law of real property, secured transactions and mortgage foreclosure must be reviewed.

For purposes of this article, certain basic terms must be defined:

1. MERS. Mortgage Electronic Registration System, Inc. (MERS) is a Delaware corporation formed in 1998 to act as nominee to hold mortgages in order to allow the transfer of mortgage backed securities into investment trusts and to commence foreclosures without naming the real party in interest.

2. Loan Servicers. Loan servicers are often the new Plaintiffs replacing MERS in actions to foreclose and collect payment for the investment trust which claims the rights to payments though beneficial interests in investment trusts. (Banks and Trustees of Investment Trusts also appear as Plaintiffs but are usually also loan servicers.)

3. Investment Trusts. Investment Trusts are the entities which have sold beneficial interests to investors in mortgage backed securities, also known as collateralized debt obligations (CDOs.)

4. CDOs. CDOs are "collateralized debt obligations." They are securities, sometimes registered, sometimes not registered or actually deregistered with the SEC, which have been sold to investors throughout the world on the basis of promissory notes and mortgages signed by United States homeowners.

5. Original Lender. This entity is also known as the "table funder" and appears at the closing as the originator of the funds. It usually nominated MERS as its nominee to pursue

foreclosure on the face of the mortgage. Courts refer to this entity as the original lender.

How Foreclosure Judgments Have Been Obtained in Wisconsin

The basis for granting judgments of foreclosure in Wisconsin has been: (1) A complaint is filed by a named Plaintiff claiming the right to foreclose; (2) Plaintiff alleges default in payments by the borrower Defendants; and (3) Judgment is granted in favor of the Plaintiff by default Judgment due to failure of the Defendant homeowners to appear and upon a Motion for Summary Judgment which swiftly follows, supported by an Affidavit of an individual claiming to be the agent of the foreclosing entity swearing that the foreclosing entity is entitled to payments from the Defendant borrowers and that there has been default in payments by the Defendant(s).

After Judgment a Sheriff's Sale is conducted and the foreclosing party Plaintiff states the opening bid of the amount of judgment which usually exceeds the current value of the home, after the accumulation of various charges including late fees, escrow costs which are often duplicative and incorrect, along with Plaintiff's attorneys' fees and costs of the foreclosure proceedings. No deposit of funds is required at the Sheriff's Sale by the foreclosing entity, which sets the original bid based upon a number provided to the circuit court in the Judgment prepared by the attorneys for the foreclosing entities.

The Basic Law of Secured Transactions

In order to claim a security interest, the promissory note and the mortgage must be owned by a single party. The two volume Real Estate Finance Law, Fifth Edition by Professors Grant S. Nelson, *William H. Rehnquist Professor of Law, Pepperdine University, Professor of Law Emeritus, University of California Los Angeles* and Dale A. Whitman, *Professor of Law Emeritus, University of Missouri-Columbia* is the recognized professional text in real estate

finance law. At Real Estate Finance Law, Fifth Edition, sec. 5.27, pages 529-533, copyright 1994, WEST PUBLISHING COMPANY pages 532 and 533, the basic point is stated:

> The security is virtually inseparable from the obligation unless the parties to the transfer expressly agree to separate them. The reason is that the security is worthless in the hands of anyone except a person who has the right to enforce the obligation; it cannot be foreclosed or otherwise enforced. Hence, separating the security and the obligation is ordinarily foolish, since it will leave one person with an unsecured debt and the other with a security instrument that cannot be enforced.

See also, The Law of Promissory Notes, Section 7.06, et seq. by Richard B. Hagedorn, *Professor of Law, Willamette University College of Law*, copyright 1992, Research Institute of America, as updated, at page 7-21 on the issue of the disputed transfer herein:

> The transfer may still fail for want of efficacy for any one of three reasons, namely, (1) failure to record, (2) failure to notify the mortgagor or his successor in interest of the fact of the assignment, or (3) failure of the transferee to take physical possession of the original instrument, creating the obligation.

The failure to follow the basic law of secured transactions is poised to thousands of foreclosure judgments invalid. Missing these basic principles of law puts homeowner defense lawyers at risk of the easiest way homeowners can recover their losses from invalid foreclosures: suing their lawyers.

Failures in Foreclosure Defense

Homeowners and their foreclosure defense counsel have usually tried to resolve the state court foreclosure issues prior to foreclosure or after a judgment of foreclosure before the sheriff's sale with the foreclosing entity or its law firm by seeking loan modifications and trying to bring

payments current. Failing to resolve issues, a Chapter 13 proceeding is then attempted. Homeowner defense counsel win a few settlements and lose most state court action, preserving some homes in Chapter 13 proceedings. Homeowners counsel appear to have done all they can. Right? Not so.

Refusing Payments/Creating Defaults and the Failure of HAMP

Loan servicers create and perpetuate defaults and fight against receiving payments before and during bankruptcy under Chapter 13 Plans. Loan servicers charge the investment trusts more servicing fees for loans in default than they make in servicing. There is more profit to be made in taking back properties and re-selling them than in re-working the mortgages. The Home Affordable Modification Program (HAMP) actually makes matters worse for the homeowners who try to work with the loan servicers. Of the 3-4 million homeowners who were to benefit from the program, only 579,659 permanent modifications were made. The United States Treasury originally set aside roughly $46 billion in Troubled Asset Relief Program funds for HAMP, but, according to the Congressional Budget Office, it has spent only $12 billion in payouts to servicers and homeowners.[i] 729,109 trial modifications were cancelled in November, 2010 alone. [ii] Foreclosure processes continue as the efforts to obtain a temporary modification distract the homeowners from their real peril.

Defending Foreclosure Actions Based on the Facts and the Law

Pro se homeowners (and a relatively small number of lawyers) who know or have researched and learned the law of mortgages and secured transaction have been identifying violations of law and by the foreclosing entities throughout the nation. Court decisions in favor of homeowners and against foreclosing entities have been proliferating rapidly.[iii] The courts (state and federal) are now beginning to find in favor of homeowners. Effective homeowner

defense relies on long-established laws of secured transactions, the law of mortgages and principles of jurisdiction (standing) and civil procedure.

Class action lawsuits are being filed throughout the nation alleging violations of federal consumer protection statutes such as the Real Estate Settlement Act (RESPA), Fair Debt Collection Practices Act (FDCPA), fraud and racketeering against foreclosing entities and, in some cases, against the foreclosing entities' law firms.[iv]

Becoming Informed on the Real Issues

Homeowners' defense counsel now risk malpractice issues if they continue to believe the allegations on the face of the pleadings against their clients and fail to require strict proof of the standing of the foreclosing entity through verification of the ownership of the promissory note (if it has not been destroyed) and that the assignments of mortgages are valid. Assignments from MERS to other entities outside the chain of title must be strictly scrutinized. Otherwise, homeowners lawyers fail to provide their clients with the complete defenses to which the homeowners are entitled under the law and facts of each case. Whether malpractice claims are made or not, homeowners' lawyers must be fully informed on the basic legal issues in the residential foreclosure crisis.

MERS as "Nominee"

The use of the MERS "nomination" from the presumed holder of the promissory notes and mortgages was promoted as a new efficiency in the market. Those pesky laws dating back to the Statute of Frauds at common law stood in the way of the boom market in mortgage lending and creation of investment trusts containing what were marketed as new financial instruments, the CDOs.

As courts throughout the nation determined that the "MERS as nominee" designation on foreclosure pleadings did not denote that MERS was the actual agent of the mortgage lender. MERS was the foreclosing entity of choice by the unnamed parties in interest to foreclose on Wisconsin homes. After MERS was questioned, homeowner defense counsel throughout the nation have found:

1. The promissory note in a MERS transaction was never endorsed in favor of MERS and

2. No lawful assignment of the mortgage from the lender at the closing, who was, in fact, only the "original lender" ever occurred beyond the assignment to MERS.

The MERS "nomination" was intended by the creators of this experiment in changing the fundamental requirements of the laws of mortgages and secured transaction to be the means by which the MERS system would transfer the note and promissory note to an investment trust without the formality of actually endorsing the promissory notes and properly assigning the mortgages to the investment trusts. The original promissory notes were generally destroyed. MERS could assign only the interest it had in the mortgage: its status as nominee. In Schuh Trading Co. v. Commissioner of Internal Revenue, 95 F.2d 404, 411 (7th Cir. 1938), [the Court] defined a nominee as follows: "The word nominee ordinarily indicates designated to act for another as his representative in a rather limited sense. It is sometimes used to signify an agent or trustee. It has no connotation, however, other than that of acting for another, or as grantee of another…" Black's Law Dictionary defines a nominee as "[a] person designated to act in place of another, usually in a very limited way." MERS' status as "nominee", without more, is not sufficient to vest MERS with the authority to effect a proper assignment of a note and mortgage.[v]

MERS "as nominee" is a failing, and in some jurisdictions, a failed attempt to allow foreclosures to take place without establishing the standing of any real party in interest as required by the law of secured transactions. With the MERS foreclosures under attack, new foreclosing entities were needed. To get around the issue of standing of a mere nominee, new Plaintiffs began to foreclose.

Post-MERS Actions in Wisconsin/Creating Documents

As the concept of MERS as "nominee" of the original named lender began to foment questions as to MERS' standing to foreclose, the mortgage industry attempt to create documents to appear as if a real party in interest seeking the equitable remedy of foreclosure. This involved a two step process: (1) recreating the promissory note and (2) creating assignment of the mortgages.

1. Recreating the Promissory Note

The courts have been flooded by foreclosure actions brought in the names of loan servicers. These actions attempt to use copies of destroyed promissory notes as originals, creating multiple endorsements without dates or warranties of authority or submitting "Lost Note Affidavits" to the Courts in lieu of the original promissory notes, which must retired from commerce upon payment or foreclosure.

2. Creating the assignment from MERS to the Loan Servicer

The foreclosing entities are now create in-house assignments from MERS to the loan servicer. This attempt fails because MERS can only assign the interest it has. Many original lenders are in bankruptcy from which they cannot assign any assets or have been sold to other entities. Therefore, it became necessary for loan servicers to attempt to create a chain of title from MERS to the loan servicer or investment trust. This is done by the creation of a mortgage

assignment which appears to be from MERS but in countless cases is actually an in-house robo-signed assignment purporting to be from MERS to the loan servicer.

Such assignments are actually signed by loan servicer employees claiming to have authority to sign for MERS and using titles such as Vice-President and Assistant Secretary when the loan servicers' employees re not in any way associated with MERS. A now famous example of the loan servicers assigning mortgages in-house were established in the depositions of loan servicer GMAC Mortgage's employee Jeffrey Stephan in the GMAC v. Bradbury case[vi] in Maine and in GMAC v. Neu[vii] in Florida, which alerted the public and the press to "robo-signing." Behind the urgent "robo-signing" efforts is the fact that Stephan and his colleagues at GMAC were not what they represented themselves to be. They were not, as stated on the assignments, officers of MERS, the assignor. They were employees of the assignee. Additionally, an assignment cannot transfer a greater interest than that held by the assignor. MERS was a mere nominee and for all their efforts, the GMAC employees could not self-assign any interest and, while there will be claims that MERS (a company with approximately 40 employees who handle data entry) authorized loan servicers to be MERS officers, any assignment purporting to be from MERS cannot be greater than that of MERS, a mere nominee. Depositions of the now famous GMAC robo-signer Jeffrey Stephan are available on-line and are a must read.

Necessary Steps in Homeowner Defense

In order to properly analyze a mortgage foreclosure case originating in the MERS scheme, it is necessary to examine the following:

1. Obtain the MERS registry "MIN" data on the homeowners' loan. The use of the MERS data base that is the fundamental tool to establish that the endorsements to promissory notes have been manufactured. The "MERS as nominee" mortgages procured by original

lenders will be in the MERS data base, there will be a MIN number assigned to all MERS nominated mortgages and homeowners and their attorneys will see which investment trust holds the unsecured interest in payments from the loan servicer. The website for this search is https://www.mers-servicerid.org/sis/

2. Demand the production of the original promissory note. Copies will be produced that have been photo-shopped (usually badly) with multiple stamps from multiple entities, without warranties of corporate authority, claimed but not attached powers of attorney or dates. Compare this false impression of multiple endorsements to the actual MIN record. Most promissory notes were never endorsed and were simply transferred to an investment trust.

3. Watch out for "allonges." An allonge is a separate document attached to a copy of a promissory note to make it look like the promissory note was actually endorsed by the original lender to the loan servicer. These are also "robo-signed" by the loan servicers in favor of themselves and lack warranties of corporate authority, will not usually have a date on the allonge and are an attempt to make it appear that a long-destroyed promissory note was endorsed in favor of the loan servicer from a bankrupt, defunct or otherwise by-passed endorsement from a original lender.

4. Examine the assignment of the mortgage. You will often find that the assignments of mortgages where MERS was nominee were executed in-house by employees of the loan servicer. This can be called nothing other than self-assignment and it is outside the chain of title. The self-assignment of the mortgage is an attempt to put a loan servicer into the chain of title. The loan servicer, without having the original promissory note and without having the assignment of mortgage from the original lender, is unsecured and has no standing to seek the remedy of foreclosure. The best clue to this for a beginner is to check the notary public's state of

registration. MERS is located in Virginia. You will find many assignments executed by notaries in other states, establishing that the assignment was not executed by a MERS employee.

5. Remember, MERS is a nominee and can only assign the powers it was given as such. See Endnote 5.

6. Demand the accounting of the payments and charges made. The accounting used by loan servicers is almost uniformly erroneous. There will be charges for improperly assessed late fees, wrongly assessed charges, force-placed insurance, unnecessary and unauthorized property inspections and for the use of electronic payment processing service, along with the failure to credit payments under trial loan modifications.

5. It is absolutely essential to examine the issue of standing in all mortgage foreclosure cases. Key court cases on the issue of standing are set forth in the Endnote 3 below.

6. Review class actions brought against mortgage banks, servicers, MERS, MERSCORP and law firms acting as their agents, using Google and PACER. You can locate class action lawsuits by following the instructions set forth at Endnote 4.

Homeowner Defenses of Standing, False Documents and Erroneous Accounting Must Be Pursued

Homeowners' defense lawyers must require the foreclosing Plaintiff to establish that it has standing to foreclose. They must examine the documents whereby the Plaintiffs attempt to establish standing to make sure that the Plaintiff seeking funding is the real party in interest as the true holder of both the properly endorsed promissory note and the properly executed assignment of mortgage from the original lender/original lender, using the tools described above. Finally, loan servicers' accountings must be carefully reviewed and objections must be made to accounting errors in both state court and, if applicable, bankruptcy court, by objection to the

claim. To do otherwise leaves the homeowners' defense counsel as the easiest target for damages suffered by homeowners whose homes are taken by parties without the lawful right to foreclose on claimed secured debt.

i.http://www.housingwire.com/2011/01/26/sigtarp-hamps-failure-devastating-permanent-mods-flat-in-december

ii.Minneapolis Star Tribune, "Mortgage Aid: Help Can Turn Into Disaster," January 23, 2011.

iii. Start with U.S. Supreme Court Carpenter v. Longan, 83 U.S. 16 Wall. 271 271 (1872) and Shepardize; see In re: Foreclosure Cases, Northern District of Ohio, the Honorable Christopher Boyko, dated October 31, 2007 on PACER, alternatively search Boyko decison in Google; the following new decisions are searched most easily on Google: US Bank v. Ibanez Massachusetts, January 7, 2011; Wells Fargo v. Ford New Jersey, January 28, 2011; Pino v. The New York Bank of Mellon Florida, February 2, 2011. The Google seaches on the recent cases will usually take you to scribd.com which will allow you to download the complete decisions. Google is the most effective and efficient means of keeping up current on case law developments.

iv. Google the name of the foreclosing entity and the term class action to find legal issues identified by other lawyers regarding the foreclosing entity's alleged unlawful conduct and compare the allegations to the facts in your case.

v.Bank of N.Y. v Alderazi, 2010 NY Slip Op 20167 [28 Misc 3d 376] (easily found on Google)

vi.http://www.scribd.com/doc/33129394/2nd-Deposition-of-Jeffrey-Stephan-%E2%80%93-GMAC-s-Assignment-Affidavit-Slave

vii.http://www.scribd.com/doc/28762965/Full-Deposition-of-Jeffrey-Stephan-GMAC-s-Assignment-Affidavit-Slave-10-000-Documents-a-Month