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DEMOCRATIZE BANKING: Occupy the Neighborhood, How Counties Can Use Land Banks and Eminent Domain

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An electronic database called MERS has created defects in the chain of title to over half the homes in America. Counties have been cheated out of millions of dollars in recording fees, and their title records are in hopeless disarray. Meanwhile, foreclosed and abandoned homes are blighting neighborhoods. Straightening out the records and restoring the homes to occupancy is clearly in the public interest, and the burden is on local government to do it. But how? New legal developments are presenting some innovative alternatives.

John O'Brien is Register of Deeds for Southern Essex County, Massachusetts. He calls his land registry a "crime scene." A formal forensic audit of the properties for which he is responsible found that:

• Only 16% of the mortgage assignments were valid.
• 27% of the invalid assignments were fraudulent, 35% were "robo-signed," and 10% violated the Massachusetts Mortgage Fraud Statute.
• The identity of financial institutions that are current owners of the mortgages could be determined for only 287 out of 473 (60%).
• There were 683 missing assignments for the 287 traced mortgages, representing approximately $180,000 in lost recording fees per 1,000 mortgages whose current ownership could be traced.

At the root of the problem is that title has been recorded in the name of a private entity called Mortgage Electronic Registration Systems (MERS). MERS is a mere place holder for the true owners, a faceless, changing pool of investors owning indeterminate portions of sliced and diced, securitized properties. Their identities have been so well hidden that their claims to title are now in doubt. According to the auditor:

What this means is that . . . the institutions, including many pension funds, that purchased these mortgages *don't actually own them* . . . .

The March of the AGs

When Massachusetts Attorney General Martha Coakley went to court in December against MERS and five major banks—Bank of America Corp., JPMorgan Chase, Wells Fargo, Citigroup, and GMAC—John O'Brien said he was thrilled. Coakley says the banks have "undermined our public land record system through the use of MERS."

Other attorneys general are also bringing lawsuits. Delaware Attorney General Beau Biden is going after MERS in a suit seeking $10,000 per violation. "Since at least the 1600s," he says, "real property rights have been a cornerstone of our society. MERS has raised serious questions about who owns what in America."

Biden's lawsuit alleges that MERS violated Delaware's Deceptive Trade Practices Act by:

· Hiding the true mortgage owner and removing that information from the public land records.

· Creating a systemically important, yet inherently unreliable, mortgage database that created confusion and inappropriate assignments and foreclosures of mortgages.

· Operating MERS through its members' employees, whom MERS confusingly appoints as its corporate officers so that they may act on MERS' behalf.

· Failing to ensure the proper transfer of mortgage loan documentation to the securitization trusts, which may have resulted in the failure of securitizations to own the loans upon which they claimed to foreclose.

Legally, this last defect may be even more fatal than filing in the name of MERS in establishing a break in the chain of title to securitized properties. Mortgage-backed securities are sold to investors in packages representing interests in trusts called REMICs (Real Estate Mortgage Investment Conduits). REMICs are designed as tax shelters; but to qualify for that status, they must be "static." Mortgages can't be transferred in and out once the closing date has occurred. The REMIC Pooling and Servicing Agreement typically states that any transfer after the closing date is invalid. Yet few, if any, properties in foreclosure seem to have been assigned to these REMICs before the closing date, in blatant disregard of legal requirements. The whole business is quite complicated, but the bottom line is that title has been clouded not only by MERS but because the trusts purporting to foreclose do not own the properties by the terms of their own documents.

Courts Are Taking Notice

The title issues are so complicated that judges themselves have been slow to catch on, but they are increasingly waking up and taking notice. In some cases, the judge is not even waiting for the borrowers to raise lack of standing as a defense. In two cases decided in New York in December, the banks lost although their motions were either unopposed or the homeowner did not show up, and in one there was actually a default. No matter, said the court; the bank simply did not have standing to foreclose.

Failure to comply with the terms of the loan documents can make an even stronger case for dismissal. In Horace vs. LaSalle, Circuit Court of Russell County, Alabama, 57-CV-2008-000362.00 (March 30, 2011), the court permanently enjoined the bank (now part of Bank of America) from foreclosing on the plaintiff's home, stating:

[T]he court is surprised to the point of astonishment that the defendant trust (LaSalle Bank National Association) did not comply with New York Law in attempting to obtain assignment of plaintiff Horace's note and mortgage. . . .

[P]laintiff's motion for summary judgment is granted to the extent that defendant trust . . .

is permanently enjoined from foreclosing on the property . . . .

Relief for Counties: Land Banks and Eminent Domain

The legal tide is turning against MERS and the banks, giving rise to some interesting possibilities for relief at the county level. Local governments have the power of eminent domain: they can seize real or personal property if (a) they can show that doing so is in the public interest, and (b) the owner is compensated at fair market value.

The public interest part is obvious enough. In a 20-page booklet titled "Revitalizing Foreclosed Properties with Land Banks," the U.S. Department of Housing and Urban Development (HUD) observes:

The volume of foreclosures has become a significant problem, not only to local economies, but also to the aesthetics of neighborhoods and property values therein. At the same time, middle- to low income families continue to be priced out of the housing

market while suitable housing units remain vacant.

The booklet goes on to describe an alternative being pursued by some communities:

To ameliorate the negative effects of foreclosures, some communities are creating public entities — known as land banks — to return these properties to productive reuse while simultaneously addressing the need for affordable housing.

States named as adopting land bank legislation include Michigan, Ohio, Missouri, Georgia, Indiana, Texas, Kentucky, and Maryland. HUD notes that the federal government encourages and supports these efforts. But states can still face obstacles to acquiring and restoring the properties, including a lack of funds and difficulties clearing title.

Both of these obstacles might be overcome by focusing on abandoned and foreclosed properties for which the chain of title has been broken, either by MERS or by failure to transfer the promissory note according to the terms of the trust indenture. These homes could be acquired by eminent domain both free of cost and free of adverse claims to title. The county would simply need to give notice in the local newspaper of an intent to exercise its right of eminent domain. The burden of proof would then transfer to the bank or trust claiming title. If the claimant could not prove title, the county would take the property, clear title, and either work out a fair settlement with the occupants or restore the home for rent or sale.

Even if the properties are acquired without charge, however, counties might lack the funds to restore them. Additional funds could be had by establishing a public bank that serves more functions than just those of a land bank. In a series titled "A Solution to the Foreclosure Crisis," Michael Sauvante of the National Commonwealth Group suggests that properties obtained by eminent domain can be used as part of the capital base for a chartered, publicly-owned bank, on the model of the state-owned Bank of North Dakota. The county could deposit its revenues into this bank and use its capital and deposits to generate credit, as all chartered banks are empowered to do. This credit could then be used not just to finance property redevelopment but for other county needs, again on the model of the Bank of North Dakota. For a fuller discussion of publicly-owned banks, see http://PublicBankingInstitute.org.

Sauvante adds that the use of eminent domain is often viewed negatively by homeowners. To overcome this prejudice, the county could exercise eminent domain on the mortgage contract rather than on title to the property. (The power of eminent domain applies both to real and to personal property rights.) Title would then remain with the homeowner. The county would just have a secured interest in the property, putting it in the shoes of the bank. It could then renegotiate reasonable terms with the homeowner, something banks have been either unwilling or unable to do. They have to get all the investor-owners to agree, a difficult task; and they have little incentive to negotiate when they can make more money on fees and credit default swaps on contracts that go into default.

Settling with the Investors

What about the rights of the investors who bought the securities allegedly backed by the foreclosed homes? The banks selling these collateralized debt obligations represented that they were protected with credit default swaps. The investors' remedy is against the counterparties to those bets—or against the banks that sold them a bill of goods.

Foreclosure defense attorney Neil Garfield says the investors are unlikely to recover on abandoned and foreclosed properties in any case. Banks and servicers can earn more when the homes are bulldozed—something that is happening in some counties—than from a sale or workout at a loss. Not only is more earned on credit default swaps and fees, but bulldozed homes tell no tales. Garfield maintains that fully a third of the investors' money has gone into middleman profits rather than into real estate purchases. "With a complete loss no one asks for an accounting."

Not only homes and neighborhoods but 400 years of property law are being destroyed by banker and investor greed. As Barry Ritholtz observes, the ability of a property owner to confidently convey his property is a bedrock of our society. Bailing out reckless financiers and refusing to hold them accountable has led to a fundamental breakdown in the role of government and the court system. This can be righted only by holding the 1% to the same set of laws as are applied to the 99%. Those laws include that a contract for the sale of real estate must be in writing signed by seller and buyer; that an assignment must bear the signatures required by local law; and that forging signatures gives rise to an actionable claim for fraud.

The neoliberal model that says banks can govern themselves has failed. It is up to county governments to restore the rule of law and repair the economic distress wrought behind the smokescreen of MERS. New tools at the county's disposal—including eminent domain, land banks, and publicly-owned banks—can facilitate this local rebirth.

*Ellen Brown is an attorney and president of the Public Banking Institute, **http://PublicBankingInstitute.org**. In Web of Debt, her latest of eleven books, she shows how a private cartel has usurped the power to create money from the people themselves, and how we the people can get it back. Her websites are **http://WebofDebt.com** and **http://EllenBrown.com**.*
