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States Fight Back Against MERS Mortgage Fraud

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MERS: The Center of the Mortgage Scam

A prominent economist said about the 2008 financial crisis:

> "At the root of the crisis we find the largest financial swindle in world history", where "counterfeit" mortgages were "laundered" by the banks.

The Mortgage Electronic Registration Systems – MERS – was one of the main ways the swindle was done, and the main way in which counterfeit mortgages were laundered by the banks.

MERS is a shell company with no employees, owned by the giant banks.

MERS threw out centuries of well-established law about how real estate is transferred – and cheated governments out of many tens or hundreds of billions of dollars in recording fees.

Matt Taibbi pointed out:

> MERS ... is essentially an effort at systematically evading taxes ... and hiding information from homeowners in ways that enabled the Countrywides of the world to defraud investors and avoid legal consequences for same.
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> MERS was at least in part dreamed up by Angelo Mozilo of Countrywide.
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> For those of you wondering why so many localities are broke, here's one small factor in the revenue drain. Counties typically charge a small fee for mortgage registration, roughly $30. But with MERS, ... you don't need to pay the fee every time there's an ownership transfer. Multiply that by 67 million mortgages and you're talking about billions in lost fees for local governments (some estimates place the total at about $200 billion).
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> Outrageously, MERS actually marketed itself to its customers as a way to save money by avoiding the payment of legally-mandated registration fees. Check out this MERS brochure from 2007. It brags on the face page about its fee-avoiding qualities ("MINIMIZE RISK. SAVE MONEY. REDUCE PAPERWORK") and inside the brochure, in addition to boasting about helping clients "Foreclose More Quickly," it talks about how clients save money because MERS "eliminates the need to record assignments in the name of the Trustee."

> All of this adds up to a system that enabled the mortgage industry to avoid keeping any kind of proper paperwork on its frantic, coke-fueled selling and re-selling of mortgage-backed securities during the bubble, and to help the both the Countrywide-style subprime merchants and the big banks like Goldman and Chase pull off the mass sales of crappy loans as AAA-rated securities.

Harper's reported:

> "What's happened," said Christopher Peterson, a law professor at the University of Utah who has written extensively about MERS, "is that, almost overnight, we've switched from democracy in real-property recording to oligarchy in real-property recording." The county clerks who established the ownership of land, who oversaw and kept the records, were democratically elected stewards of those records, said Peterson. Now a corporation headquartered outside Washington, D.C., oversaw the records. "There was no court case behind this, no statute from Congress or the state legislatures," Peterson told me. "It was accomplished in a private corporate decision. The banks just did it." Peterson said it was "not a coincidence" that more Americans than at any time since the Great Depression were being forced out of their homes just as records of home ownership and mortgages were transferred wholesale to a privatized database.

The Securitized Sausage Maker

MERS was also the engine which allowed securitization of mortgages. Bloomberg reported:

> MERS played a key role in the bundling of mortgages into securities that reached a frenzy before the economic decline of 2008, critics including Grayson of Florida said. It allowed banks to sell and resell home loans faster, easier and cheaper, he said.
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> "MERS was a facilitator of securitization," said Grayson, a Democratic member of the House Financial Services Committee.

How?

Steve Liesman explained in 2007:

> How do you create a subprime derivative? …You take a bunch of mortgages… and put them into one big thing. We call it a Mortgage Backed Security. Say it's $50 million worth… Now you take a bunch of these Mortgage Backed Securities and you put them into one very big thing… The one thing about all these guys

> here [in the one very big thing] is that they're all subprime borrowers, their credit is bad or there's something about them that doesn't make it prime...
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> Watch, we're going to make some triple A paper out of this... Now we have a $1 billion vehicle here. We're going to slice it up into five different pieces. Call them tranches... The key is, they're not divided by "Jane's is here" and "Joe's is here." Jane is actually in all five pieces here. Because what we're doing is, the BBB tranche, they're going to take the first losses for whoever is in the pool, all the way up to about 8% of the losses. What we're saying is, you've got losses in the thing, I'm going to take them and in return you're going to pay me a relatively high interest rate... All the way up to triple A, where 24% of the losses are below that. Twenty-four percent have to go bad before they see any losses. Here's the magic as far as Wall Street's concerned. We have taken subprime paper and created GE quality paper out of it. We have a triple A tranche here.

Ellen Brown explained the significance of MERS in this process:

> The top tranche is triple A because it includes the mortgages that did NOT default; but no one could know which those were until the defaults occurred, when the defaulting mortgages got assigned to the lower tranches and foreclosure went forward. That could explain why the mortgages could not be assigned to the proper group of investors immediately: the homes only fell into their designated tranches when they went into default. The clever designers of these vehicles tried to have it both ways by conveying the properties to an electronic dummy conduit called MERS (an acronym for Mortgage Electronic Registration Systems), which would hold them in the meantime. MERS would then assign them to the proper tranche as the defaults occurred. But the rating agencies required that the conduit be "bankruptcy remote," which meant it could hold title to nothing; and courts have started to take notice of this defect.

(Gonzalo Lira made the same point.)

Indeed, the secretary and treasurer of MERS admitted this in a deposition, stating (page 32, lines 9-20):

> As a requirement for mortgages that were securing loans or promissory notes that were sold to securitize trust, the rating agencies would only allow mortgages MERS — well let me step back. They required that a bankruptcy remote single purpose entity be created in order for transactions holding loans secured by MERS, by mortgages MERS served as mortgagee to be in those pools and receive a rating, an investment grade rating without any changes to the credit enhancement. They required that to be a bankruptcy remote single purpose subsidiary of MERS, of Merscorp.

Many *commercial* mortgages may be held by MERS as well, and for the same reason.

Harper's points out:

> [MERS] facilitated the buying and selling of mortgage debt at great speed and greatly reduced cost. It was a key innovation in expediting the packaging of mortgage-backed securities. Soon after the registry launched, in 1999, the Wall Street ratings agencies pronounced the system sound. "The legal mechanism set up to put creditors on notice of a mortgage is valid," as was

> "the ability to foreclose," assured Moody's. That same year, Lehman Brothers issued the first AAA-rated mortgage-backed security built out of MERS mortgages. By the end of 2002, MERS was registering itself as the owner of 21,000 loans every day. Five years later, at the peak of the housing bubble, MERS registered some two thirds of all home loans in the United States.
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> Without the efficiencies of MERS there probably would never have been a mortgage-finance bubble.

(In addition, the *same* mortgage was sometimes pledged to *numerous* buyers at the *same* time. This wouldn't have been possible without the vaporware title given by MERS. And some – like foreclosure attorney Neil Garfield – think that the ability to pledge the same mortgage multiple times is a feature, rather than a bug, of MERS. And see this.)

Relief Must Come at the State Level

Property recording laws are state laws, and the states have always been the bedrock for property rights.

Given that the head of the U.S. Department of Justice used to represent MERS – and that the D.C. politicians are lackeys for the big banks which own MERS – the only hope is at the state level.

Some state courts have, in fact, declared MERS illegal ... or at least without power to foreclose on property.

Harper's notes:

> After the housing market collapsed, however, MERS found itself under attack in courts across the country. MERS had singlehandedly unraveled centuries of precedent in property titling and mortgage recordation, and judges in state appellate and federal bankruptcy courts in more than a dozen jurisdictions—the primary venues where real estate cases are decided—determined that the company did not have the right to foreclose on the mortgages it held.
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> In 2009, Kansas became one of the first states to have its supreme court rule against MERS. In Landmark National Bank v. Boyd A. Kesler, the court concluded that MERS failed to follow Kansas statute: the company had not publicly recorded the chain of title with the relevant registers of deeds in counties across the state. A mortgage contract, the justices wrote, consists of two documents: the deed of trust, which secures the house as collateral on a loan, and the promissory note, which indebts the borrower to the lender. The two documents were sometimes literally inseparable: under the rules of the paper recording system at county court-houses, they were tied together with a ribbon or seal to be undone only once the note had been paid off. "In the event that a mortgage loan somehow separates interests of the note and the deed of trust, with the deed of trust lying with some independent entity," said the Kansas court, "the mortgage may become unenforceable."
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> MERS purported to be the independent entity holding the deed of trust. The note of indebtedness, however, was sold within the MERS system, or "assigned" among various lenders. This was in keeping with MERS's policy: it was not a bank, made no loans, had no money to lend, and did not collect loan payments. It had no interest in the loan, only in the deed of trust. The company—along with the lenders that had used it to assign ownership of notes—had thus entered into a vexing legal bind. "There is no evidence of record that establishes that MERS either held the promissory note or was given the authority [to] assign the note," the Kansas court found, quoting a decision from a district court in California. Not only did MERS fail to legally assign the notes, the company presented "no evidence as to who owns the note."
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> Similar cases were brought before courts in Idaho, Massachusetts, Missouri, Nevada, New York, Oregon, Utah, and other states. "It appears that every MERS mortgage," a New York State Supreme Court judge recently told me, "is defective, a piece of crap." The language in the judgments against MERS became increasingly denunciatory. MERS's arguments for standing in foreclosure were described as "absurd," forcing courts to move through "a syntactical fog into an impassable swamp."

The next key battle is taking place right now in Rhode Island. Specifically, the Rhode Island Attorney General and state legislators are trying to slay the MERS dragon within their state:

> Citing the irregularities with the recording of mortgages and assignments that negatively impact municipalities and consumers, Attorney General Peter F. Kilmartin filed legislation to require that all transfers of a mortgage interest on residential property be recorded to provide a clean chain of title. The legislation, S0547 sponsored by Senator William Conley (District 18, East Providence, Pawtucket) and H5512 sponsored by Representative Brian Kennedy (District 38, Hopkinton, Westerly), is scheduled to be heard before both the Senate Committee on Judiciary and House Corporations Committee on Tuesday, March 26, 2013.
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> The legislation makes it easier for borrowers and regulators to determine who owns loans secured by mortgages on Rhode Island property. Borrowers facing foreclosure will be able to more easily discover who owns their loans before it

is too late, and municipalities will be able to identify lenders who are responsible for abandoned homes. The legislation will [stop] the practice of having the vast majority of mortgages held in the name of a private registry with no interest in the loans known as … "MERS."

Since 1997, the banking industry has been using MERS, which lenders claim has minimized their administrative and financial burdens of the recording process. However, this practice has basically privatized the local land recording process, thereby undermining the accuracy of public records and leading to negative consequences for consumers and municipalities.

"The changing of servicing and subservicing rights within the lending history often leaves the borrower confused regarding which entity they are supposed to be dealing with on a monthly basis and why," said Attorney General Kilmartin. "The legislation is designed to give borrowers a public record of who ultimately owns their loans, increasing the ability of homeowners to negotiate with their lenders and their ability to have full knowledge of their rights, counterclaims and defenses if they are faced with litigation."

"Rhode Island has experienced a record number of foreclosure and short sales since the mortgage crisis," said Representative Kennedy, "This legislation will assist homeowners in knowing who maintains the note on their property while also ensuring that local cities and towns will know the potential owner of a property after a forced sale has occurred, to ensure that municipalities have the proper information available on the documentation for taxation and municipal recording fees."

"With this legislation, we are taking another step toward easing the pain of the housing and mortgage foreclosure crisis, which has affected both the state's municipalities and individual consumers," Sen. William J. Conley Jr. said. "It is common sense to record these transfers and take out the unnecessary middle man. Rhode Islanders need to know exactly who they are dealing with and how they can protect themselves. The foreclosure process is tough enough already without adding the frustration of MERS."

By having a nominee entity listed as the mortgagee, the banking industry has privatized Rhode Island's mortgage recording system, and left the accuracy of public land records at the mercy of a private company's database. Federal banking authorities have already concluded that the private mortgage system contains numerous inaccuracies and has not been accessible to homeowners. Moreover, the nominee frequently has no contractual relationship with the actual noteowner, despite the contention in the mortgage documents of a nominee relationship.

Not only has this private system deprived cities and towns the recording fees that they are owed for over 15 years, it has also hampered the ability of municipalities to adequately address abandoned property and nuisance issues because the mortgagee liable for these issues is not clear from the chain of title.

Consumers are adversely impacted due to the fact that their mortgage loans change hands multiple times through the life of the loan without proper recording. The lack of a contemporaneous public record hampers their ability to deal directly with their lenders and enforce their legal rights.

The banking industry's practice of using a nominee entity process for recording deeds has become a highly litigated issue by consumers, municipalities and counties throughout the country. This very issue is currently being litigated in Rhode Island with private citizens and municipalities calling into question the legality of using the nominee process to record mortgage interests. The multitude of legal issues surrounding the nominee process has caused

> confusion and delay in foreclosure proceedings in our State, and has raised the critical issue of whether a nominee entity can enforce the power of sale. High Courts in other States, including Massachusetts and Washington, have already ruled that a nominee cannot utilize the power of sale [i.e. MERS cannot foreclose on property]. This legislation resolves this issue in Rhode Island by simply eliminating the nominee recording process and restoring accuracy and transparency to the public land records [i.e. killing MERS].
