Foreclosure, Subprime Mortgage Lending, and the Mortgage Electronic Registration System

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Abstract:
At the roots of the worst recession since the Great Depression were unaffordable home mortgages packaged into securities, sold to investors, and used as capital assets by financial institutions. The process of securitization, as well as financial institution over-leveraging associated with it, has been well documented and explored. However, there is one company that was a party to more questionable loans and foreclosures than any other and yet has received virtually no attention in the academic literature. Mortgage Electronic Registration Systems, Inc., commonly referred to as “MERS,” is the recorded owner of over half of the nation’s residential mortgages. MERS operates a computer database designed to track servicing and ownership rights of mortgage loans anywhere in the United States. But, it also acts as a proxy for the real parties in interest in county land title records. Most importantly, MERS is also filing foreclosure lawsuits on behalf of financiers against hundreds of thousands of American families. This Article explores the legal and public policy foundations of this odd, but extremely powerful, company that is so attached to America’s financial destiny. It begins with a brief explanation of the origins of the county real property recording systems and the law governing real property liens. Then, it explains how MERS works, why mortgage bankers created the company, and what MERS has done to transform the underlying assumptions of state real property recording law. Next, it explores controversial doctrinal issues confronting MERS and the companies that have relied on it, including (1) whether MERS actually has standing to bring foreclosure actions; (2) whether MERS should be considered a debt collector under the federal Fair Debt Collection Practices Act; and (3) whether loans recorded in MERS’ name should have priority in various collateral competitions under state law and the federal bankruptcy code. The article culminates in a discussion of MERS’ culpability in fostering the mortgage foreclosure crisis and what the long term effects of privatized land title records will have on our public information infrastructure. The Article concludes by considers whether the mortgage banking industry, in creating and embracing MERS, has subverted the democratic governance of the nation’s real property recording system.

Keywords: Mortgage, Electronic Registration, Recording, Priority, MERS, Predatory Lending, Foreclosure, debt collection, Fair Debt Collection Practices Act, standing