EAST VS. WEST:
CLEAR SUPPORT AND POTENTIAL HEARTACHE FOR MERS AND OTHER SIMILAR MORTGAGE ASSIGNMENT SYSTEMS

By Kathleen E. Kraft[1]
Thompson Coburn LLP
www.thompsoncoburn.com

Two recent decisions – one from the United States District Court for the District of Arizona, the other from the Trial Court, Land Court Department, for the Commonwealth of Massachusetts – offer varying degrees of support (the Arizona case) and heartache (the Massachusetts case) for the Mortgage Electronic Registration Systems, Inc. ("MERS") and other similar mortgage assignment systems. Below the author summarizes both decisions.

In *Cervantes v. Countrywide Home Loans, Inc.*, 2:09-CV-00517-JAT, 2009 WL 3157160 (D. Ariz. Sept. 24, 2009) ("*Cervantes*"), the United States District Court for the District of Arizona considered multiple motions to dismiss claims made by three individual plaintiffs who granted deeds of trust to two different banks that used MERS as the listed beneficiary on the deeds of trust. Among other things, the plaintiffs alleged that the various named defendants (members of the MERS system) conspired to commit fraud through the MERS system because, first, MERS is a "sham" beneficiary because it never acquires a true beneficial interest under a deed of trust, and second, the MERS system operates to circumvent the public recording requirements and allows for a lack of notice to future buyers of mortgages in the MERS system. The district court rejected the plaintiffs' allegations as having "no effect upon [the plaintiffs'] status as borrowers." *Id*. *10-11. In response to the plaintiffs' first allegation, that MERS is a "sham" beneficiary, the court noted the absence of Arizona cases finding that the MERS system is fraudulent and that the plaintiffs' "allegations would foreclose the very splitting of a promissory note from a deed of trust….[and] intrude into the realm of third-party beneficiary contracts, as well as assignments and delegations." *Id*. *10. The court also found that the plaintiffs failed to allege what effect, if any, MERS's listing as beneficiary had upon their obligations as borrowers. *Id*. As to the plaintiffs' second objection to the MERS system, the court found that also had no effect on their status as borrowers for two reasons. First, any lack of notice to future buyers of the plaintiffs' mortgages would not alter the plaintiffs' obligations under the mortgages. Second, the plaintiffs did not argue that had they been fully apprised of the MERS system they would not have entered into their loans or that they were somehow induced into entering into their loans based on a misunderstanding of the MERS system. *See id*. *11. Thus, the court dismissed the plaintiffs' claim for conspiracy to commit fraud through use of the MERS system and in doing so, offered support for MERS in contesting future allegations that the recording of MERS as beneficiary under a deed of trust is a "sham."

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[1] KATHLEEN E. KRAFT is an associate with Thompson Coburn LLP, 1909 K Street N.W., Suite 600, Washington, D.C. 20006, where she concentrates her practice in the areas of business bankruptcy, corporate restructuring and creditors' rights. Ms. Kraft graduated *magna cum laude* from Saint Louis University with an honors Bachelor of Arts degree in English. She received her J.D., *magna cum laude*, from Saint Louis University School of Law. Ms. Kraft is admitted to practice in Missouri, Illinois, and the District of Columbia. She is a member of the American Bar Association, the American Bankruptcy Institute and the Walter B. Chandler American Inn of Court. She can be reached at kkraft@thompsoncoburn.com; 202.585.6922 (ph) or 202.508.1035 (fx).

In *U.S. Bank National Association v. Ibanez*, Nos. 08 MISC 384283(KCL), 08 MISC 386755(KCL), 2009 WL 3297551 (Mass. Land Ct. Oct. 14, 2009), a Massachusetts Land Court refused to vacate a judgment entered against plaintiffs U.S. Bank National Association and Wells Fargo Bank, N.A. finding that foreclosure sales conducted by the plaintiffs were invalid under Massachusetts law and in particular under G.L. c. 244, § 14. The issue before the court on the motions to vacate judgment, and the issue on which the court previously entered judgment against plaintiff, was "[t]he right of the Plaintiff[s] to foreclose the subject mortgage[s] in light of the fact that the assignment[s] of the foreclosed mortgage[s] into the Plaintiff[s] [were] not *executed or recorded* until *after* the exercise of the power of sale." *Id.* *4 n.20 (internal quotations omitted; emphasis in original). In the motion to vacate, the plaintiffs' presented the court with "newly supplemented" facts and two new arguments for the validity of the foreclosure sales. The plaintiffs argued that "they *were* the 'present holder of the mortgage' within the scope and meaning of G.L. c. 244, § 14 at the time of notice and sale…because they possessed the note (endorsed in blank), an assignment of the mortgage in blank (*i.e.*, without an identified assignee), and a contractual right to obtain the mortgage at those times." *Id.* *2 (emphasis in original). They also argued that "in the event the court disagree[d] that their possession of the note, a mortgage assignment in blank, and a contractual right sufficed to make them 'present holders of the mortgage,' they contend that the foreclosure sales were nonetheless valid because they were authorized by the last record holder of the mortgage and the plaintiffs acted as the 'agent' of that holder." *Id.*

In each instance, the note endorsed in blank and an assignment of mortgage in blank (an assignment that was never recorded, was not legally recordable, and in the court's view was ineffective to transfer an interest in the mortgage because it did not name the assignee) were passed from entity to entity as the loans were sold, ultimately ending up in the hands of the plaintiffs, acting as trustees for two different trusts. None of the transfers were recorded in the public records, and although the offering documents issued for purposes of selling certificates in the trusts to investors required that the custodian of each mortgage loan in the trust pool obtain an original assignment of the mortgage in recordable form, no such assignments were made. Thus, the court found that at the time the foreclosure sales were noticed and conducted, the plaintiffs held only the notes; the mortgages securing the notes remained with the loan originator, Option One. And because neither plaintiff was a valid assignee under the mortgages nor "held" the mortgages at the time of the notice and sale, neither plaintiff possessed the statutory or contractual power to sell under the mortgages.

The court also found that the plaintiffs could not validate the foreclosures by arguing that they were "authorized" by the actual mortgage holders to conduct the sales for two reasons. First, the plaintiffs received their direction to initiate the foreclosure sales not from Option One, but from another entity in its capacity as loan servicer, and there was nothing in the record to show that the directing entity had the capacity to act for Option One generally or as originator and holder of the mortgage or that the entity had any authority to order the disposition of Option One's assets. Secondly, the court found that G.L. c. 244, § 14 "requires complete transparency." *Id.* *12. Because the plaintiffs explicitly represented that they were the present holders of the mortgages and failed to disclose the name of their principals (the true holders of the mortgages), the required transparency and strict compliance with the statute was not achieved, invalidating the foreclosure sales.