

**“CLARIFYING” LANDMARK V. KESLER:  
THE KANSAS LEGISLATURE AMENDS THE KANSAS CODE OF  
CIVIL PROCEDURE AND GIVES COMFORT TO NOMINEES**

By Kathleen E. Kraft<sup>i</sup>

In recent years, courts across the country have focused on the role that Mortgage Electronic Registration Systems, Inc. (MERS) plays in the foreclosure process. And now it seems that legislators are entering the fray to answer questions left open by the courts regarding MERS' role and rights in the foreclosure process. In Kansas, both judges and legislators have weighed in on the debate -- the judiciary in the opinions rendered in Landmark National Bank v. Kesler, 40 Kan. App. 2d 325, 192 P.3d 177 (2008), aff'd, 289 Kan. 528, 216 P.3d 158 (2009), and the legislature in House Bill No. 2656.

***The Landmark Decisions.*** In Landmark National Bank v. Kesler, Landmark National Bank, the holder of the senior mortgage on real estate owned by Boyd Kesler, brought suit to foreclose its mortgage. Landmark named Millennia Mortgage Corporation as a defendant. Millennia's second mortgage on the property had been filed of record based on a loan between Millennia and Kesler. Landmark obtained a default judgment of foreclosure when neither Kesler or Millennia responded to the suit.

Subsequent to the entry of the default judgment, Sovereign Bank, the owner of the Millennia loan, moved to set aside the judgment. MERS also filed a motion to set aside the judgment on the basis that MERS held legal title to the mortgage, originally on behalf of Millennia and then on behalf of Sovereign. Both claimed that MERS was a necessary party to the foreclosure suit and that the failure to include MERS as a defendant justified setting aside the judgment. The Court of Appeals disagreed. It determined that MERS was not a contingently necessary party in a mortgage-foreclosure proceeding because MERS, although called the mortgagee in the mortgage, was not the lender, had no right to repayment of the underlying debt, and had no role in handling the mortgage payments. Thus, Landmark's failure to name MERS as a defendant in the foreclosure action and serve MERS with notice of the foreclosure did not affect the foreclosure judgment.

The Kansas Supreme Court affirmed. Without deciding whether MERS was technically entitled to notice and service in the initial foreclosure action, the Supreme Court found no abuse of discretion in the decision to deny Sovereign's and MERS' motions to vacate the default judgment and join Sovereign and MERS as necessary parties to the action.

Landmark's bottom line left MERS and others wondering -- When must foreclosure plaintiffs name and serve a nominee of record? Can MERS lenders no longer rely on the MERS system to obtain notice of actions affecting their collateral? Are MERS lenders in jeopardy of losing their interests absent a recorded assignment?

***The Legislature's Response.*** With encouragement from MERS,<sup>ii</sup> the Kansas legislature responded to Landmark by enacting changes to the Kansas Code of Civil Procedure's provisions on joining "contingently necessary" parties. As amended, K.S.A. 60-219 now requires that nominee of a mortgagee be joined and served with process, even if the nominee does not meet the definition of a "contingently necessary" party.<sup>iii</sup> The amendment provides the certainty that the Landmark decision lacked -- certainty that nominees of record will receive notice of actions potentially affecting the mortgage for which they serve as nominee. The amendment to K.S.A. 60-219 became effective July 1, 2010.

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<sup>ii</sup> See Conference Committee Report Brief for House Bill No. 2656, as agreed to March 25, 2010, at <http://skyways.lib.ks.us/ksleg/KLRD/ConfCommBriefs.htm>.

<sup>iii</sup> When Landmark was decided, K.S.A. 60-219 read:

(a) *Persons to be joined if feasible.* Whenever a "contingently necessary" person, as hereafter defined, is subject to service of process, he shall be joined as a party in the action. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

A person is contingently necessary if (1) complete relief cannot be accorded in his absence among those already parties, or (2) he claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action in his absence may (i) as a practical matter substantially impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

(b) *Determination by court whenever joinder not feasible.* If a contingently necessary person cannot be made a party, the court shall determine whether in equity and good conscience the action ought to proceed among the parties before it or ought to be dismissed. The factors to be considered by the court include: First, to what extent a judgment rendered in the absence of the contingently necessary person might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the absence of the contingently necessary person would be adequate; fourth, whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

(c) *Pleading reasons for nonjoinder.* A pleading asserting a claim for relief shall state the names, if known to the pleader, of contingently necessary persons who are not joined, and the reasons why they are not joined.

(d) *Exception of class actions.* This section is subject to the provisions of K.S.A. 60-223.

K.S.A. 60-219 now reads:

(a) Persons required to be joined if feasible. (1) Required party. A person who is subject to service of process must be joined as a party if:

(A) In that person's absence, the court cannot accord complete relief among existing parties; or

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(B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:

- (i) As a practical matter, impair or impede the person's ability to protect the interest; or
- (ii) leave an existing party subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations because of the interest.

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(e) Nominee. In an action in which any relief sought would determine title or affect a security interest in real property, a person who is subject to service of process must be joined as a party if the person is a nominee of record on behalf of a beneficial owner of a claimed interest in the property that is the subject of the action. The nominee need not be a party required to be joined under subsection (a)(1).