

## Big Trouble in Kansas

Written by Sinclair

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This one is kind of long but I am certain you won't hear about it on your nightly news, so I really think it is worth reading.

Have the banks been stealing homes? An important legal decision handed down by the Kansas Supreme Court indicates that the bankers and their proxies have been stealing houses; lots and lots of houses. Foreclosure filings were reported on more than 3.1 million properties in 2008. There were more than 2.2 million foreclosure filings in 2007. We are on track for 5.2 million foreclosure filings in 2009. Not all those foreclosure filings result in the loss of the home to foreclosure. The foreclosure process takes time. Meanwhile 20 million homes in the US sit vacant. The banks are in no rush to write off the valuations, but eventually these homes will be stolen.

Who's doing the stealing?

MERS, the Mortgage Electronic Registration System, and they are the registered nominee on about 50 million mortgages. MERS is a private company that registers mortgages electronically and tracks changes in ownership; if you don't pay your mortgage then MERS will foreclose. The Kansas Supreme Court says MERS is nothing but a "straw man" and they have no standing to foreclose. In *Landmark National Bank v. Kesler*, 2009 Kan. LEXIS 834, the Kansas Supreme Court held that nominee company MERS has no right or legal standing to bring action for foreclosure. We'll get into the decision in a moment but first a word of warning.

This ruling might help you fight a foreclosure in Kansas, or not. If you do not have a home in Kansas this ruling may or may not help you. The law in Kansas is not binding on the rest of the country, but you can still cite this in your case. Your foreclosure fight boils down to the luck of the draw; do you get an honest, intelligent judge or a pig assigned to your case. Good luck. The truth is that most judges are too damn stupid and lazy to do honest research and they are just Corporatist lackeys. The quick and lazy judicial response is to say that you got a mortgage and if you don't make the monthly payment you lose the house. The law is different.

Here's what happened with MERS. The securitization of mortgages meant that a mortgage loan was chopped into pieces and sold off to investors, bundled together with other mortgage loans to create Mortgage Backed Securities (MBS), and the income stream was bundled into Collateralized Mortgage Obligations (CMO) or Collateralized Loan Obligations (CLO) or

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Collateralized Debt Obligations (CDO). These financial products were then “insured” with Credit Default Swaps (CDS). These derivative financial products were

sold

to pension funds, hedge funds, foreign investment funds, offshore units of banks (for tax evasion purposes), and other investors. For more detail on this process please read:

[“How to Stop Foreclosures.”](#)

There were many parties who

bought

these derivative financial products that were presumed to be backed by mortgage loans secured by real property.

MERS supposedly kept track of all these changes electronically – at least that was the theory. The reality is that MERS would register and record the mortgage loans in its name. To have tracked all the parties in the derivative financial products would have been like making apples out of apple sauce. And if homeowners missed their payments, MERS would bring foreclosure action in its name. Did MERS hold the promissory note? No, it just tracked the note electronically, and did a poor job at that. The MERS website says: “MERS is an innovative process that simplifies the way mortgage ownership and servicing rights are originated, sold and tracked. Created by the real estate finance industry, MERS eliminates the need to prepare and record assignments when trading residential and commercial mortgage loans.” Sounds good but it doesn’t sound legal.

Let’s back up and review the way a mortgage works. A mortgage is a combination of a promise to pay (the Promissory note) and a security instrument (the deed of trust). State law governs foreclosure and most states’ laws require that these two items remain intact. Most states require that to foreclose you must present proof that you actually have an enforceable interest; that is, the actual original signed document from the debtor confirming agreement to be bound to the terms (real ink and real signature). In addition you must establish ownership of that document - that is, you must show an unbroken chain of assignments from the originating bank to your hand. This is where the problem comes in - the originating lender has no standing to foreclose once he sells off the mortgage. He was paid in full and thus has no standing to appear in court. And since he was paid in full he can’t demand payment again. Can just anybody force collection on a promissory note? Try walking into a bank and asking them to cash a check (which is a type of promissory note). You have to have a real check in your hand to cash the check. Why? Because if they pay you, the real holder of the check may walk in with the actual check and demand payment – and they don’t want to pay twice. MERS tried to force collection on promissory notes, but the notes were nowhere to be found.

Another problem: MERS not only facilitated the rapid turnover of mortgages and mortgage-backed securities, but it has served as a sort of corporate veil that protects investors

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from claims by borrowers concerning predatory lending practices. This cast a dark pall over transparency. Homeowners could no longer identify the true holder of their note. MERS would foreclose even though they had no financial interest in the property – just being a nominee and tracking agent did not make MERS the holder in due course of the promissory note. The problem is that the securitization process cut off the homeowners' ability to due process with respect to discovery of the origination and servicing and payment of predatory loans that may have been chock full of lending violations. Any discovery ends with the proxy MERS. The real holder of the note? Who knows? MERS doesn't know. And there is a good chance the real holder doesn't really want to step forward and be exposed to tax evasion charges for funneling the cash flow from the security conduits into offshore tax havens. The Kansas Supreme Court stated that MERS' relationship "is *more akin to that of a straw man* than to a party possessing all the rights given a buyer."

In *Landmark v. Kesler*, MERS was the appellant who claimed they were denied due process rights when they failed to receive notice that their interest in the mortgage loan had been wiped out by a prior foreclosure. Irony can be delicious.

The Kansas Supreme Court cited several other cases from across the nation: "When the role of a servicing agent [MERS] acting on behalf of a mortgagee is thrown into the mix, it is no wonder that it is often difficult for unsophisticated borrowers to be certain of the identity of their lenders and mortgagees." In *re Schwartz*, 366 B.R. 265, 266 (Bankr. D. Mass. 2007) and then cited the Supreme Court of New York (Kings County) that said: "[T]he practices of the various MERS members, including both [the original lender] and [the mortgage purchaser], in obscuring from the public the actual ownership of a mortgage, thereby creating the opportunity for substantial abuses and prejudice to mortgagors . . . , should not be permitted to insulate [the mortgage purchaser] from the consequences of its actions in accepting a mortgage from [the original lender] that was already the subject of litigation in which [the original lender] erroneously represented that it had authority to act as mortgagee." Johnson, 2008 WL 4182397, at \*4, 873 N.Y.S.2d 234 (2008).[17][18]

The KSC also said, "The relationship that MERS has to (the holder of a loan) is more akin to that of a straw man than to a party possessing all the rights given a buyer. A mortgagee and a lender have intertwined rights that defy a clear separation of interests, especially when such a purported separation relies on ambiguous contractual language. The law generally understands that a mortgagee is not distinct from a lender: a mortgagee is "[o]ne to whom property is mortgaged: the mortgage creditor, or lender."

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"By statute, assignment of the mortgage carries with it the assignment of the debt. K.S.A. 58-2323. Although MERS asserts that, under some situations, the mortgage document purports to give it the same rights as the lender, the document consistently refers only to rights of the lender, including rights to receive notice of litigation, to collect payments, and to enforce the debt obligation. The document consistently limits MERS to acting "solely" as the nominee of the lender." [17][18]

"MERS never held the promissory note, thus its assignment of the deed of trust to Ocwen separate from the note had no force." 284 S.W.3d at 624; see also *In re Wilhelm*, 407 B.R. 392 (Bankr. D. Idaho 2009) (standard mortgage note language does not expressly or implicitly authorize MERS to transfer the note); *In re Vargas*, 396 B.R. 511, 517 (Bankr. C.D. Cal. 2008) ("[I]f FHM has transferred the note, MERS is no longer an authorized agent of the holder unless it has a separate agency contract with the new undisclosed principal. MERS presents no evidence as to who owns the note, or of any authorization to act on behalf of the present owner."); *Saxon Mortgage Services, Inc. v. Hillery*, 2008 WL 5170180 (N.D. Cal. 2008) ("[F]or there to be a valid assignment, there must be more than just assignment of the deed alone; the note must also be assigned. . . . MERS purportedly assigned both the deed of trust and the promissory note. . . . However, there is no evidence of record that establishes that MERS either held the promissory note or was given the authority . . . to assign the note.").

"What stake in the outcome of an independent action for foreclosure could MERS have? It did not lend the money to Kesler or to anyone else involved in this case. Neither Kesler nor anyone else involved in the case was required by statute or contract to pay money to MERS on the mortgage. ("MERS is not an economic 'beneficiary' under the Deed of Trust. It is owed and will collect no money from Debtors under the Note, nor will it realize the value of the Property through foreclosure of the Deed of Trust in the event the Note is not paid."). If MERS is only the mortgagee, without ownership of the mortgage instrument, it does not have an enforceable right."

"The mortgage instrument states that MERS functions "solely as nominee" for the lender and lender's successors and assigns. The word "nominee" is defined nowhere in the mortgage document, and the functional relationship between MERS and the lender is likewise not defined."

KSC summarized: "MERS's contention that it was deprived of due process in violation of constitutional protections runs aground in the shallows of its property interest. . . . MERS did not demonstrate, in fact, did not attempt to demonstrate, that it possessed any tangible interest in the mortgage beyond a nominal designation as the mortgagor. It lent no money and received no

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payments from the borrower. It suffered no direct, ascertainable monetary loss as a consequence of the litigation. Having suffered no injury, it does not qualify for protection under the Due Process Clause of either the United States or the Kansas Constitutions."

MERS as straw man lacks standing to foreclose, but so does original lender, although it was a signatory to the deal. The lender lacks standing because title had to pass to the secured parties for the arrangement to legally qualify as a security. The lender has been paid in full and has no further legal interest in the claim. Only the securities holders have skin in the game; but they have no standing to foreclose, because they were not signatories to the original agreement. They cannot satisfy the basic requirement of contract law that a plaintiff suing on a written contract must produce a signed contract proving he is entitled to relief.

*The pretender lenders are gaming the system every day and literally stealing homes from both homeowners and investors who thought they had an interest in those homes when they bought mortgage backed securities. This leaves the borrower in a position of financial double jeopardy wherein the true owner of the loan can still make a claim and the investor is simply out of luck because they have been misinformed about the payments or status of the pool of assets the investor bought into.*

Judge Gordon of the KSC also commented that there might be uncertainty about the good title of other properties related to MERS foreclosures.

This is not the first time the holder in course of a note could not be found. In October 2007 U.S. District Court Judge Boyko ruled that Deutshce Bank had not filed the proper paperwork to establish its right to foreclose on 14 home is was suing to repossess as trustee. For anyone interested I have a PDF file from the Boyko case that shows a \$77,000 mortgage loan transferred, in whole or part, 660 different times in less than one year. Many of the entities are from tax havens such as the Channel Islands and the Grand Caymans. If you want a copy of the file just send me an email at [Sinclair@bank-o-meter.com](mailto:Sinclair@bank-o-meter.com).

So why don't the real holders in due course of the notes step forward? Tax evasion is one big problem. The other big problem is that nobody actually holds these notes. You cannot make apples out of apple sauce. There was no chain of transfer. The mortgage backed securities were never honestly backed by the mortgages. Only the cash flow was sold. This effectively took 30 years of mortgage payments and monetized it to the here and now. And the other big problem is who is responsible for paying off people who bought securitized derivatives? The

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Credit Default Swaps were supposed to insure the derivatives, and for some people they paid off. Former Treasury Secretary and former Goldman Sachs CEO Henry Paulson made sure AIG paid off on Credit Default Swaps held by Goldman Sachs, but there are still trillions of dollars of outstanding derivatives, many held by foreign investors and if they default, who pays?

There is a reason for the massive bailouts of the banks. They were stealing and if more courts realize the pretender lenders were stealing then some 60 million mortgages could be affected. The bankers have two options: clean up their mess before the house of cards tumbles, or for the more dastardly bankers – stuff as much money in their pockets before the house of cards tumbles. One card just fell to the floor in Kansas. Meanwhile, the bankers and their proxy MERS continue to steal Americans' homes.

Sinclair Noe

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