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MERS and the Mortgage Crisis: Obfuscating Loan Ownership and the Need for Clarity

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MERS AND THE MORTGAGE CRISIS: OBFUSCATING LOAN OWNERSHIP AND THE NEED FOR CLARITY

INTRODUCTION

The number of mortgage foreclosure proceedings has rapidly ballooned since the economic crash of 2008.[1] In November 2011, foreclosure actions were filed against one out of every 579 homeowners throughout the United States.[2] In some states, such as Nevada, one out of every 175 homeowners received foreclosure notices.[3] While never simple, the foreclosure process in recent years has become increasingly wrought with unsettling complications. In the past, local banks handled mortgages,[4] and borrowers had an identifiable business to consult and even negotiate with in the event of a default. In many states today, borrower-homeowners face foreclosure at the hands of a little-known company called "Mortgage Electronic Registration Systems, Inc." (MERS).[5] MERS claims to hold title to approximately 60 million mortgages—half of the mortgages in this country[6]—and yet many borrowers are unaware of its existence until the company is removing them from their homes.[7]

Adding to homeowners' confusion, state courts are far from reaching a consensus as to whether MERS, a company that tracks mortgage ownership but has no actual interest in the mortgages themselves, even has the power to initiate a foreclosure.[8] While some states are growing ever more protective of their consumers by limiting the entities eligible to participate in foreclosures,[9] others are embracing MERS and allowing the organization

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1. "Foreclosure notices were filed against a record 2.9 million properties last year, and an additional 1.2 million in the first half of this year." *See* Craig E. Pollack & Julia F. Lynch, *Foreclosures Are Killing Us*, N.Y. TIMES, Oct. 3, 2011, http://www.nytimes.com/2011/10/03/opinion/foreclosures-are-killing-us.html.

2. *U.S. Foreclosure Trends and Foreclosure Market Statistics*, REALTYTRAC, http://www.realtytrac.com/trendcenter/ (last visited Dec. 22, 2011). RealtyTrac is an online marketplace for foreclosure properties and also collects data related to foreclosure for 90 percent of U.S. property values. *An Introduction to RealtyTrac*, REALTYTRAC, http://www.realtytrac.com/company/backgrounder.html (last visited Nov. 12, 2012).

3. *Id.*

4. *See* Gerald Korngold, *Legal and Policy Choices in the Aftermath of the Subprime and Mortgage Financing Crisis*, 60 S.C. L. REV. 727, 729 (2009).

5. *See* Michael Powell & Gretchen Morgenson, *MERS? It May Have Swallowed Your Loan*, N.Y. TIMES, Mar. 5, 2011, http://www.nytimes.com/2011/03/06/business/06mers.html?ref=mortgageelectronicregistrationsystemsinc.

6. *See id.*

7. *See* Greg Collard, *Local Governments File Suits Against MERS*, NPR (Nov. 28, 2011), http://www.npr.org/2011/11/28/142864277/local-governments-file-suit-against-mers.

8. Christopher L. Peterson, *Foreclosure, Subprime Mortgage Lending, and the Mortgage Electronic Registration System*, 78 U. CIN. L. REV. 1359, 1378 (2010).

9. *See, e.g.*, U.S. Bank Nat'l Ass'n v. Ibanez, 941 N.E.2d 40 (Mass. 2011).

to foreclose without owning the mortgage.[10] MERS not only goes unnoticed by many homeowners, but also by federal lawmakers, as national legislation currently does not reach the company despite its growing reputation for engaging in questionable business practices.[11] To provide clarity for homeowners and some regulation for this small corporation that deals with millions of mortgages, Congress must pass federal legislation that clarifies which entities can foreclose on borrowers, compels MERS to tell borrowers who owns their mortgage, and places MERS under the supervision of the Consumer Financial Protection Bureau established by the Dodd-Frank Act.

Part I of this note discusses local recording systems, how MERS first came about, and its original contributions to the mortgage industry. Part II identifies and explores the problems with the varied approaches of state courts as to whether MERS has standing to foreclose on homeowners, the incomplete federal laws regarding homeowner protection, and MERS's recent quasi-fraudulent practices. Part III recommends that Congress pass federal legislation that: (1) clearly establishes uniform standing requirements for foreclosures among the states; (2) requires MERS to make its electronic records of mortgage transfers public and requires disclosure to borrowers; and (3) groups MERS with other agencies regulated by the Consumer Financial Protection Bureau under the Dodd-Frank Act so that individuals in financial trouble have the guarantee of a fairer foreclosure process. Finally, Part IV explores alternative means for increased consumer protection.

I. BACKGROUND ON MERS

Traditionally, under the mortgage system,[12] a mortgagor[13] borrowed money from a mortgagee,[14] or lender.[15] The mortgagor then acquired the

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10. *See, e.g.*, Gomes v. Countrywide Home Loans, Inc., 121 Cal. Rptr. 3d (Ct. App. 2011); *see also* Harvey v. Deutsche Bank Nat'l Trust Co., 69 So. 3d 300 (Fla. Dist. Ct. App. 2011); Calvo v. HSBC Bank USA, N.A., 130 Cal. Rptr. 3d 815 (Ct. App. 2011).

11. Karen Weise, *A Wall Street Mortgage-Tracking Tool is on Trial*, BLOOMBERG BUSINESSWEEK: MARKETS & FINANCE, Oct. 23, 2012, http://www.businessweek.com/articles/2012-10-23/a-wall-street-mortgage-tracking-tool-is-on-trial. MERS is rapidly falling out of favor with the big banks that created it. JPMorgan Chase stopped using MERS in 2007 and Washington Mutual stopped using the company in 2008. *See* Eric Dash, *Chase Acts to Broaden Foreclosure Reviews*, N.Y. TIMES, Oct. 13, 2010, http://www.nytimes.com/2010/10/14/business/14morgan.html. Now, MERS is facing adverse legal actions for participating in deceptive trade practices from various states, including a subpoena from New York's and a lawsuit from Delaware's Attorneys General. Bloomberg News, *Merscorp Faces Deception Suit*, N.Y. TIMES, Oct. 27, 2011, http://www.nytimes.com/2011/10/28/business/delaware-suit-accuses-merscorp-of-deception-in-mortgage-registry.html.

12. Some states use deeds of trust instead of mortgages as means to secure real property. *See* Robert E. Dordan, *Mortgage Electronic Registration Systems (MERS), its Recent Legal Battles, and the Chance for a Peaceful Existence*, 12 LOY. J. PUB. L. 177, 197 (2010) (provided that "*Southwest Homes* involved Jason and Julie Lindsey, who entered into a deed of trust on their home to secure a loan"). This note focuses only on mortgages. However, some of the case law

house and the mortgagee gained an ownership interest in the property through the mortgage documents, which included a promissory note and mortgage.[16] The promissory note, or simply "note," obligated the mortgagor to repay the debt, and the mortgage put up the property as collateral in the event that the mortgagor did not repay the money owed under the note.[17] As owner of the mortgage loan, the mortgagee or lender received or held these documents, which identified it as the owner.[18] The mortgagee also serviced the loan, which included collecting interest or accepting monthly payments.[19] If the borrower could not pay his share, the mortgagee foreclosed on him,[20] often taking back the house.

Most states have acts requiring that every real property transfer of ownership be recorded.[21] "Recording" generally entails "deliver[ing] a copy of the document in question . . . to a county clerk that time stamps, indexes, and files the document."[22] Recording statutes are designed to protect the holders of an interest in land.[23] Without documenting the transfer of that interest, the original holder can re-convey it, with clear title, to another person.[24] Theoretically, without these statutes and where a transfer is not recorded, a person could sell a mortgage to a buyer and then sell it to another bona fide purchaser unaware of any prior claim, leaving the second

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discussed throughout this article comes from states that use the deed of trust system, as MERS has come under fire in both jurisdictions. The distinctions between the two systems are not relevant to this argument, as MERS simply "operates a computer database designed to track servicing and ownership rights of mortgage loans anywhere in the United States" but does not "actually own any mortgage loans." Peterson, *supra* note 8, at 1361.

13. *See* Nolan Robinson, *The Case Against Allowing Mortgage Electronic Registration Systems, Inc. (MERS) to Initiate Foreclosure Proceedings*, 32 CARDOZO L. REV. 1621, 1625–26 (2011) (noting that the mortgagor is either the person purchasing the home, or the borrower).

14. BLACK'S LAW DICTIONARY 1104 (9th ed. 2009) (stating that a mortgagee is "one to whom the property is mortgaged; the mortgage creditor, or lender").

15. 4 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 37.03 (Michael Allan Wolf ed., 2009).

16. Robinson, *supra* note 13, at 1626.

17. *Id*.

18. Holding the note gives the mortgagee the right to enforce the mortgagor's obligation to pay. RESTATEMENT (THIRD) OF PROP.: TRANSFER OF MORTGAGES AND OBLIGATIONS SECURED BY MORTGAGES § 5.4 (1997).

19. Beau Phillips, *MERS: The Mortgage Electronic Registration System*, 63 CONSUMER FIN. L.Q. REP. 262, 262 (2009).

20. *See* Peterson, *supra* note 8, at 1372 ("Historically, when a homeowner defaults on a home mortgage the owner of a mortgage loan, or a servicer hired to collect borrower payments, sues the homeowner in a foreclosure action.").

21. POWELL, *supra* note 15, § 82.01 ("Recording acts . . . require the public preservation of written documents of title to land, or of other written evidences of certain proprietary interests.").

22. Peterson, *supra* note 8 at 1365.

23. BLACK'S LAW DICTIONARY, *supra* note 14, at 599 (stating recording acts "are designed to protect bona fide purchasers from earlier unrecorded interests").

24. POWELL, *supra* note 15, § 37.27 (stating that because of the recording acts, "bona fide purchasers who acquire an interest without notice of a prior claim will be protected from the enforcement of the previously existing claim").

buyer with no right to the property.[25] If the mortgagee decided to sell the loan, he assigned the mortgage to the new mortgagee and usually recorded that sale in the county records.[26]

During the 1990s, it became increasingly popular to split up mortgages, combine the pieces of different mortgages, and sell the repackaged mortgage to other mortgagees—in other words, to "securitize" them.[27] Mortgage owners often sold the servicing rights to one entity and the ownership of the mortgage to another.[28] However, parties to these sales generally did not record each transfer at the county clerk's office because recording proved too burdensome due to the number of actors involved, the frequency of the transfers, and the speed with which those transfers were otherwise executed.[29] In the early 1990s, Fannie Mae, Freddie Mac, and other major banks established MERS in order to speed up the recording process.[30] MERS offered an electronic database to record titles, which gave parties a way to expeditiously document the transfer.[31] MERS, a private company based out of Virginia with only a few employees,[32] runs this electronic recording system known as "the MERS."[33]

Now, when a MERS mortgage is initially recorded, MERS is the only name listed with the county.[34] When subsequent transfers are made, they are documented in the MERS electronic database instead of with the local county records office.[35] However, MERS merely operates the database that lists these transfers; it does not purchase an interest in the actual mortgages.[36] Because MERS tracks the mortgages in its database and purchases neither an interest in the ownership nor servicing rights to the

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25. *Id*.

26. Robinson, *supra* note 13, at 1626.

27. Phillips, *supra* note 19, at 262–63.

28. *Id.* at 263.

29. *Id.* "[B]y the 1990s, the centuries-old system of land records was showing its age. Many county clerk's offices looked like something out of Dickens, with mortgage papers stacked high. Some clerks had fallen two years behind in recording mortgages." Powell & Morgenson, *supra* note 5.

30. Powell & Morgenson, *supra* note 5.

31. *Id.*

32. "[MERS is a] private corporation . . . with a full-time staff of fewer than 50 employees." *Id.*

33. Christopher L. Peterson, *Predatory Structured Finance*, 28 CARDOZO L. REV. 2185, 2211 (2007) [hereinafter Peterson, *Predatory Structured Finance*].

34. *Id.* at 2212. Note that MERS alleges that it does not replace county records. MERSCORP HOLDINGS, INC., MYTHS VS. FACTS: MERS SYSTEM, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., AND MERSCORP HOLDINGS, INC. 2 (June 2012), http://www.mersinc.org /component/docman/doc_download/48-june-2012-myths-v-facts?Itemid=. However, MERS's own founder conceded that the MERS database does in fact replace the records once MERS is recorded at the county, "Because MERS remains the mortgagee of record in the public land records throughout the life of a loan, it eliminates the need to record later assignments in the public land records." R.K. Arnold, *Yes, There is Life on MERS*, PROB. & PROP., July–Aug. 1997, at 33 (1997).

35. *See* Phillips, *supra* note 19, at 263.

36. *See* Peterson, *supra* note 8, at 1361.

loan, the company does not own these mortgages.[37] It acts merely as a "nominee" for the lender and successor lenders.[38] While state courts accorded varied meanings to the term "nominee," Black's Law Dictionary defines the term as "a person designated to act in place of another, usu. in a very limited way. . . . A party who holds bare legal title for the benefit of others or who receives and distributes funds for the benefit of others."[39] In theory, only individuals or organizations who actually acquire the rights to real property record their name in the local county records;[40] in actuality, despite lacking ownership title, MERS is listed in the county records as the "nominee."[41]

Many hail the invention of MERS as a success for the mortgage industry, as it eliminates the need to go through "a terribly cumbersome, paper-intensive, error-prone, and therefore costly process for transferring and tracking mortgage rights" with the counties.[42] MERS expedites the mortgage issuing process for both buyers and sellers, and also saves the lenders money.[43] However, the newer, privately-run electronic system does not make public its information about ownership transfers by default, and only recently began disclosing such information "as is needed."[44]

Unfortunately, the MERS system has several other downsides. For example, only paying members can record in their system and each transaction is burdened with a fee.[45] Since MERS's inception, it is estimated that the government has lost nearly $1 billion in fees to MERS as banks frequently chose to record in the MERS database over those of the counties.[46]

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37. *Id.* at 1377–78. Peterson lists three reasons why MERS cannot be a mortgagee or owner of the mortgage: "First, MERS does not fund any loans. Second, no homeowners promise to pay MERS any money. Finally, and most important, MERS is never entitled to receive the proceeds from a mortgage foreclosure sale." *Id*. MERS's money is not given to homeowners, and, additionally, the promissory note never designates MERS as the payee and MERS cannot accept any monthly payments from borrowers. *Id*. at 1377–78.

38. Phillips, *supra* note 19, at 263.

39. BLACK'S LAW DICTIONARY, *supra* note 14, at 486.

40. Phillips, *supra* note 19, at 263.

41. Dordan, *supra* note 12, at 178.

42. Phyllis K. Slesinger & Daniel McLaughlin, *Mortgage Electronic Registration System*, 31 IDAHO L. REV. 805, 808 (1995).

43. Phillips, *supra* note 19, at 263–64.

44. *Id.* at 264. As of September 2012, MERS alleges that it will release loan ownership information to homeowners who call a hotline. MERSCORP HOLDINGS, INC., *supra* note 34 at 1. However, this statement is merely included in a MERS company fact sheet, and is not guaranteed or regulated by any external entity.

45. Peterson, *supra* note 33, at 2211.

46. Adam Leitman Bailey & Dov Treiman, *The Brewing MERS Crisis: Everyone Loses*, 246 N.Y. L.J. 5 (2011). Dallas County is currently suing MERS on behalf of itself and all other Texas counties to recover recording fees that it claims MERS improperly diverted away from the company by establishing its own private recording system. Margaret Cronin Fisk, *Dallas Revises MERS Filing-Fee Suit to Add All Texas Counties*, BLOOMBERG (Nov. 3, 2011), http://www.bloomberg.com/news/2011-11-01/dallas-seeks-to-add-all-texas-counties-to-mers-filing-fee

In another example, MERS is not required to notify homeowner-borrowers when ownership of its mortgages changes hands.[47] Creating a further barrier to ascertaining loan ownership, homeowners consulting the local land records find only the name "MERS" listed.[48] In addition, while MERS may electronically record transfers of title in its private database, some of the actual mortgage notes are themselves left blank and do not identify an owner.[49] These blank notes can later create problems for the foreclosure process.[50] For example, state courts[51] are split on whether an entity that does not own a stake in the actual mortgage, is not listed on the documents, and acts only in a "nominee" capacity for the lender[52] has standing to foreclose on a borrower.[53]

II. PROBLEM: NO REAL REGULATION OVER THE RECORDING SYSTEM

Without regulation, MERS and its electronic recording system have created three major problems. First, state laws take disparate views on MERS's standing to foreclose,[54] so borrowers are impacted in vastly different ways based on their jurisdictions. Second, existing federal legislation mostly targets predatory lending practices or simplifies loan application forms,[55] and overlooks the need for disclosure in the recording process. For example, lenders must use the same loan application forms

-suit.html. Similar actions were initiated in counties in Kentucky, Michigan, Ohio and Oklahoma. *Id.*

47. Phillips, *supra* note 19, at 264. The homeowner borrowers must be notified, however, when the servicing entity changes pursuant to federal laws. *Id.* at 263.

48. Peterson, *supra* note 33, at 2212.

49. Phillips, *supra* note 19, at 263.

50. "We have long held that a conveyance of real property, such as a mortgage, [in blank] that does not name the assignee conveys nothing and is void." U.S. Bank Nat'l Ass'n v. Ibanez, 941 N.E.2d 40, 50 (Mass. 2011).

51. For example, Massachusetts law requires the foreclosing entity actually listed on the mortgage documents execute the foreclosure. *See, e.g.*, *id.* at 40. In contrast, Kansas started off with more stringent foreclosure requirements but has recently changed its laws to better accommodate MERS. *Contra* 2 MICHAEL T. MADISON, JEFFRY R. DWYER & STEVEN W. BENDER, LAW OF REAL ESTATE FINANCING § 12:35 (West 2011).

52. Phillips, *supra* note 19, at 263.

53. *Compare Ibanez*, 941 N.E.2d at 54 ("If the plaintiffs did not have their assignments to the Ibanez and LaRace mortgages at the time of the publication of the [foreclosure] notices and the [foreclosure] sales, they lacked authority to foreclose under G.L. c. 183 § 21, and G.L. c. 244 § 14 . . . ."), *with* Jackson v. Mortg. Elec. Registration Sys., Inc., 770 N.W.2d 487, 494 (Minn. 2009) ("[Minnesota] statute provides MERS with the authority to record assignments or power of attorney for foreclosure on behalf of its members.").

54. *See, e.g.*, *Ibanez*, 941 N.E.2d at 40. Florida, on the other hand, does not have such strict rules about foreclosure actions. *See, e.g.*, Harvey v. Deutsche Bank Nat'l Trust Co., 69 So.3d 300, 304 (Fla. Dist. Ct. App. 2011).

55. *Learn About the Bureau*, CFPB, http://www.consumerfinance.gov/the-bureau/ (last visited Dec. 22, 2011); COMPTROLLER OF THE CURRENCY: ADMINISTRATOR OF NATIONAL BANKS, HOME MORTGAGE DISCLOSURE: COMPTROLLER'S HANDBOOK 2 (2010), http://www.occ.gov/publications/publications-by-type/comptrollers-handbook/hmda.pdf.

pursuant to federal regulations,[56] but homeowners do not have a guaranteed way to determine who owns their loans. Additionally, during the initial home buying process, federal consumer protection laws necessitate disclosing information to the borrower about fees and interest rates,[57] but such protections do not require mortgage owners to record their interests. Third, the lack of federal oversight has allowed MERS to engage in quasi-fraudulent practices such as robo-signing.[58]

A. DISPARATE TREATMENT BY STATE COURTS

State courts mandate a wide variety of requirements prior to executing a foreclosure. Yet, the United States Supreme Court recently declined[59] to grant certiorari to a case that would possibly have streamlined these requirements and clarified MERS's standing.[60] The vastly different state of foreclosure law throughout the country is not only confusing for the borrowers at risk of losing their homes, but also problematic for the banks and entities, such as MERS, that initiate the foreclosure.[61]

Many state courts originally favored MERS in their rulings, but recently this trend has reversed with courts increasingly supporting borrowers.[62] Nonetheless, state court rulings generally fall into three distinct categories: (1) a strict foreclosure approach where the foreclosing entity must be the one named on the mortgage note prior to executing the foreclosure;[63] (2) a moderate approach that includes enhanced protections

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56. *Learn About the Bureau*, *supra* note 55.

57. COMPTROLLER OF THE CURRENCY: ADMINISTRATOR OF NATIONAL BANKS, *supra* note 55, at 2.

58. Floyd Norris, *MERS, Created to Aid Mortgages, Proves Problematic*, N.Y. TIMES, Oct. 18, 2010, http://www.nytimes.com/2010/10/19/business/19norris.html.

59. *Supreme Court Documents*, U.S. SUPREME COURT, http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/11-195.htm (last visited Oct. 12, 2012).

60. Gomes v. Countrywide Home Loans, Inc., 192 Cal. App. 4th 1149 (Ct. App. 2011). Gomes claimed that the "lower court stripped [him] of due process by allowing MERS to foreclose without ensuring that the registry had the noteholder's authority to foreclose." Kerri Panchuk, *Case Against MERS Reaches Supreme Court*, HOUSING WIRE: FIN. NEWS FOR THE MORTG. MKT. (Aug. 17, 2011), http://www.housingwire.com/2011/08/17/case-against-mers-reaches-supreme-court.

61. Parties have looked to the courts for clarification in the foreclosure process, resulting in even more cases filed. The massive amount of foreclosure cases have left court dockets so overcrowded that "in New York State it would take lenders 62 years at their current pace, the longest time frame in the nation, to repossess the 213,000 houses now in severe default or foreclosure." David Streitfield, *Backlog of Cases Gives a Reprieve on Foreclosures*, N.Y. TIMES, June 19, 2011, http://www.nytimes.com/2011/06/19/business/19foreclosure.html.

62. MADISON ET AL., *supra* note 51 at 2.

63. *See, e.g.*, U.S. Bank Nat'l Ass'n v. Ibanez, 647 N.E.2d 40, 54 (Mass. 2011) ("If the plaintiffs did not have their assignments to the Ibanez and LaRace mortgages at the time of the publication of the notices and sales, they lacked authority to foreclose . . . ."). MERS, on the other hand, alleges that it in fact has standing in all fifty states. MERSCORP HOLDINGS, INC., *supra* note 34 at 1. However various precedents do not fit with MERS's declaration. *See generally* Mortg. Elec. Registration Sys., Inc. v. Sw. Homes of Ark., 301 S.W.3d 1 (Ark. 2009); Bain v. Metropolitan Mortg. Group, Inc., 285 P.3d 34 (Wash. 2012).

for homeowners such as mandatory recording provisions[64] or required options in the alternative to foreclosure proceedings;[65] or (3) a lenient approach that allows a variety of entities loosely associated with the mortgage to execute a foreclosure.[66]

1. Strict Foreclosure Requirements

The Massachusetts Supreme Court has led the way in pro-borrower jurisprudence with its highly publicized decision *U.S. Bank National Ass'n v. Ibanez*.[67] Though not dealing specifically with MERS, Massachusetts' highest court held that "the foreclosing entity must hold the mortgage at the time of the notice and [foreclosure] sale in order accurately to identify itself as the present holder in the notice and in order to have the authority to foreclose under the power of sale."[68] Where a mortgage note is blank and does not list the owner of the mortgage, a foreclosure cannot proceed under *Ibanez*.[69] Blank notes, which MERS uses to foreclose on behalf of lenders,[70] cannot be executed by anybody.[71] This ruling also prohibits the foreclosing entity from filling its name in the blank foreclosure documents and backdating them to get standing.[72] Any such documents void the entire foreclosure.[73] Furthermore, any entity that subsequently acquires the foreclosed property cannot obtain clear title to that property if the foreclosure sale was based on void documents.[74] This prohibition applies even if the subsequent purchaser was not involved with executing the actual foreclosure proceeding.[75] The ruling flows from Massachusetts statutory

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64. *See, e.g.*, OR. REV. STAT. ANN. § 86.735 (2011) (providing a trustee may foreclose if the trust deed is recorded); IDAHO CODE ANN. § 45-1505 (2011) (requiring the deed to be record in the county of the property); WYO. STAT. ANN. § 34-4-103 (2011) (requiring the mortgage and all assignments to be recorded).

65. In Nevada, a foreclosing entity must provide the borrower with adequate notice of the upcoming foreclosure proceeding and include information that describes the borrower's option to try foreclosure mediation prior to the actual eviction proceeding. *See, e.g.*, Pasillas v. HSBC Bank USA, 255 P.3d 1281, 1284 (Nev. 2011) (applying Act of June 10, 2011, ch. 306, 2011 Nev. Laws 388, Sec. 20.7).

66. *See, e.g.*, FLA. STAT. ANN. § 673.3011 (2011) (allowing foreclosures even by an entity that improperly possesses the mortgage documents).

67. *Ibanez*, 941 N.E.2d at 53.

68. *Id.*

69. *Id.*

70. "The MERS Rules of Membership require that, when foreclosing in MERS' name, MERS Members must have the note endorsed in blank so that MERS can be the holder." Sharon McGann Horstkamp, *MERS Case Law Overview*, 64 CONSUMER FIN. L.Q. REP. 458, 467 (2010).

71. *Ibanez*, 941 N.E.2d at 53.

72. *Id.* at 55.

73. *Id.* at 53.

74. Bevilacqua v. Rodriguez, 955 N.E.2d 884, 892–93 (Mass. 2011).

75. *See id.* at 892. In this case, the bank improperly acquired the property through a foreclosure deed. *Id.* Bevilacqua then obtained the property through a quitclaim deed and proceeded to move into the house, only to have the court determine that he did not in fact own the property. *Id.* at 892–94.

law, which requires that the mortgage owner clearly identify himself as the owner of the note and publish a notice of the upcoming foreclosure sale in the newspaper in order to alert the mortgagors.[76]

Similarly, the Arkansas Supreme Court has issued new interpretations that restrict MERS's power in *Mortgage Electronic Registration Systems, Inc. v. Southwest Homes of Arkansas*.[77] The court rejected the argument that "once [MERS] becomes the agent on a security interest, it remains so for every MERS member lender who acquires ownership."[78] Additionally, the court held that the trustee must specifically designate MERS as its agent.[79] In this case, the MERS name was not listed on the deed as "trustee," so MERS did not have a legal right to foreclose.[80] The court further stated that even listing MERS as a beneficiary on the deed of trust does not guarantee MERS the power to foreclose.[81] In this case, the deed of trust listed MERS as a beneficiary, but instead the court found that the mortgage company was the beneficiary because the mortgage company actually "receive[d] payments on the debt."[82] The Supreme Court of Washington similarly held that MERS is not a beneficiary "if it never held the promissory note secured by the deed of trust."[83]

On the other hand, in New York, MERS can in theory successfully bring a foreclosure action, although it must demonstrate that it had physical custody of the note and mortgage at the time the case was commenced.[84] The Appellate Division, Second Department, explained its reasoning, "[T]he law must not yield to expediency and the convenience of lending institutions. Proper procedures must be followed to ensure reliability of the chain of ownership, to secure the dependable transfer of property, and to ensure the enforcement of the rules that govern real property."[85] However, as a practical matter, a foreclosure by MERS in New York State under this

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76. MASS. GEN. LAWS ANN. TIT. 3, § 244 (2011).

77. Mortg. Elec. Registration Sys., Inc. v. Sw. Homes of Ark., 301 S.W.3d 1 (Ark. 2009).

78. *Id.* at 3.

79. *Id.* at 2.

80. *Id.* at 2, 4. It was widely discussed that after *Southwest Homes*, MERS no longer had standing to bring foreclosure actions in Arkansas. Norris, *supra* note 58. Similarly, after *Bain*, some have argued that MERS may no longer be able to bring foreclosure actions in the state of Washington. Connie Thompson, *State Supreme Court Rules Against MERS in Mortgage Foreclosure Challenge*, KOMONEWS.COM (Aug. 20, 2012), http://www.komonews.com/news/consumer/State-Supreme-Court-rules-against-MERS-in-mortgage-foreclosure-challenge-166842226.html.

81. *Sw. Homes of Ark.*, 301 S.W.3d at 5.

82. *Id.* at 4.

83. Bain v. Metropolitan Mortg. Group, Inc., 285 P.3d 34, 37 (Wash. 2012).

84. Mortgage Elec. Registration Sys., Inc. v. Coakley, 41 A.D.3d 674, 674 (N.Y. App. Div. 2007) (explaining that the note must be "transferred and tendered" to MERS, and the mortgage "passe[s] as an incident to the . . . note"). *But see* Bank of N.Y. v. Silverberg, 86 A.D.3d 274, 283 (N.Y. App. Div. 2011) ("The Court's holding in *Coakley* was dependent upon the fact that MERS held the note before commencing the foreclosure action.").

85. *Silverberg*, 86 A.D.3d at 283.

rule is impossible; as the company writes on its own website, "MERS *doesn't hold* any documents on behalf of the servicer or investor."[86] Therefore, when taken together, foreclosure by MERS should be impossible in New York if holding notes is a prerequisite and it is against company policy to do so.

2. Moderate Homeowner Protections

While Nevada courts deem MERS to be a proper foreclosing entity,[87] the state offers borrowers and lenders the chance to pursue mediation.[88] Mediation holds the promise of arranging a feasible loan modification plan for both parties[89] and hopefully avoids foreclosure altogether.[90] Many critics fault MERS as an obstacle to loan modification because there is no guarantee that it will readily share the identity of a mortgage note's owner with a borrower,[91] making negotiation and subsequent loan modification that much more difficult. However, sixty days before executing a power of sale, Nevada law mandates that the foreclosing entity serve the borrower with papers that notify him of his right to participate in Nevada's Foreclosure Mediation Program,[92] so that any borrower facing foreclosure can exercise his right to negotiate a loan modification. Furthermore, the Nevada Supreme Court explicitly ordered that, in order to procure a foreclosure certificate, MERS must "(1) attend the mediation, (2) participate in good faith, (3) bring the required documents, and (4) if

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86. MERSCORP HOLDINGS, INC., *supra* note 34 at 2 (emphasis added).

87. *See, e.g.*, Smith v. Cmty. Lending, Inc., 773 F. Supp. 2d 941, 944 (D. Nev. 2011) (finding that the court does not take issue with language in a deed of trust stating that "MERS . . . may initiate a foreclosure").

88. Whenever a property is sold, the seller must include a form to request mediation upon being informed of an upcoming foreclosure for the new homebuyers, as that homebuyer has the right to request mediation if he is facing foreclosure. Act of June 10, 2011, ch. 306, § 20.7, 2011 Nev. Stat. 1665, 1683–84.

89. Mediation procedures must be followed, but in the event that they are not, parties can seek relief from the courts. *See e.g.*, Pasillas v. HSBC Bank USA, 255 P.3d 1281, 1282 (Nev. 2011). For example, when the foreclosing party fails to bring the required documents to the mediation and to have someone present at the mediation with the authority to modify the loan, the borrower has a right to petition the court for judicial review before foreclosure. *Id.*

90. On a federal level, the Obama administration's loan modification plan has already saved an estimated $8.8 billion in monthly mortgage payments. U.S. DEP'T OF TREASURY, MAKING HOME AFFORDABLE: PROGRAM PERFORMANCE REPORT THROUGH SEPTEMBER 2011, at 1 (2011), http://www.treasury.gov/initiatives/financial-stability/results/MHA-Reports/Documents/Sept %202011%20MHA%20Report_Final.pdf. Additionally, six months after entering the loan modification program, more than 94 percent of homeowners remain. *Id.*

91. Under its prior company policy, MERS "refuse[d] to disclose the owner of a note, and instead direct[ed] the homeowner to contact her loan servicer. If the servicer is unable or unwilling to disclose the requested information, the frustrated borrower is left with no way of identifying the equitable owner of her loan." Robinson, *supra* note 13, at 1638. Although MERS claims to now disclose the identity of a loan's owner to a borrower, whether MERS actually honors this new policy has not been determined. MERSCORP HOLDINGS, INC., *supra* note 34, at 1.

92. Act of June 10, 2011, ch. 306, § 20.7, 2011 Nev. Stat. at 1683–84.

attending through a representative, have a person present with the authority to modify the loan or access to such a person."[93]Additionally, as of 2010, all homeowners in New York are entitled to a similar process with a guaranteed settlement conference before the case can be referred to foreclosure.[94]

While Nevada shields homeowners from otherwise entering the foreclosure process unaware of their opponent's identity and without an opportunity to negotiate an alternative to foreclosure through mediation,[95] other states promote disclosure by requiring parties to record each transfer of an interest.[96] Oregon takes such an approach and requires that assignments of trust deeds be "recorded in the mortgage records in the counties in which the property described in the deed is situated."[97] Idaho similarly calls for recording an assignment of the deed of trust in order to foreclose by advertisement and sale.[98] Therefore, even if MERS will not reveal a mortgage owner's identity,[99] homeowners in danger of foreclosure in both Idaho and Oregon can consult local records and rely on them to find out who owns their mortgage.[100]

Wyoming law adds one more consumer protection measure to those embraced in Idaho and Oregon by not only requiring all assignments to be recorded, but also that borrowers receive written notice of intent to foreclose by certified mail.[101] The Wyoming Supreme Court upheld a foreclosure when the mortgage and any subsequent assignments were recorded and notice of the foreclosure was served on the delinquent homeowner.[102] While these statutes do not place quite as many restrictions on the foreclosure process as the Massachusetts court decreed,[103] they do protect borrowers by requiring a more transparent foreclosure process. In these states, borrowers have a guaranteed right to ascertain the identity of the mortgage note owner because ownership must be recorded in local

93. Heredia-Bonnet v. First Am. Loanstar Tr. Servs., LLC, No. 56571, 2011 WL 5006303, at *1 (Nev. Oct. 18, 2011).

94. Mandatory Settlement Conference in Residential Foreclosure Actions, N.Y.C.P.L.R. § 3408 (McKinney's 2010).

95. Act of June 10, 2011, ch. 306, § 20.7, 2011 Nev. Stat. at 1683–84.

96. *See* WYO. STAT. ANN. § 34-4-103 (West 2011); OR. REV. STAT. ANN. § 86.735 (West 2011); IDAHO CODE ANN. § 45-1505 (West 2011).

97. OR. REV. STAT. ANN. § 86.735.

98. IDAHO CODE ANN. § 45-1505, *cited in* PHH Mortg. Serv. Corp. v. Perreira, 200 P.3d 1180, 1196 (Idaho 2008) (finding that in a dispute over whether two trustees were separate legal entities, if such entities are legally separate, the deed must be recorded in one's name in order for that person to execute the foreclosure).

99. *See* Phillips, *supra* note 19, at 264.

100. IDAHO CODE ANN. § 45-1505; OR. REV. STAT. ANN. § 86.735.

101. WYO. STAT. ANN. § 34-4-103.

102. Bitker v. First Nat'l Bank in Evanston, 98 P.3d 853, 856 (Wyo. 2004) (citing WYO. STAT. ANN. § 34-4-103).

103. U.S. Bank Nat'l Ass'n v. Ibanez, 941 N.E.2d 40, 53 (Mass. 2011) (requiring "proof that the assignment was made by a party that itself held the mortgage").

records.[104] By looking at the local records, the borrower has a name of the party that they can contact to attempt to negotiate a loan modification agreement and possibly avoid foreclosure altogether.

Homeowners in California face an especially tenuous situation, as property owners in that state can have either mortgages or trusts,[105] with varying recording requirements depending on the form of ownership. In theory, California joins Oregon, Idaho, and Wyoming by dictating that a mortgage assignee[106] can exercise the power of sale "if the assignment is duly acknowledged and recorded."[107] However, no such protections apply to deeds of trust in California,[108] and deeds of trust have become much more popular in that state over mortgages.[109] Therefore, the pro-recordation law for mortgages has "become practically obsolete and [is] generally ignored by borrowers, creditors, and the California courts,"[110] leaving borrowers in trust agreements without the guaranteed protection of being able to ascertain the deed's owner in the county records. In this state, homeowners face some particularly difficult challenges in the foreclosure process due to the lack of restrictions on who can foreclose based upon trust agreements,[111] the different forms of financing property acquisitions,[112] and the state's acceptance of the role MERS plays.[113]

3. Lenient Foreclosure Procedures

The last category includes states with few limitations on which entities can execute foreclosures. Florida[114] has even more lax foreclosure standards than the MERS company itself.[115] In Florida, a person "may be . . . entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument,"[116] whereas the

104. *See* WYO. STAT. ANN. § 34-4-103; OR. REV. STAT. ANN. § 86.735; IDAHO CODE ANN. § 45-1505.

105. *See* CAL. CIV. CODE § 725a (West 1986).

106. Note: Mortgages are used in Wyoming, *see* § 34-4-103, but trusts are more common in both Idaho, *see* IDAHO CODE ANN. § 45-1505, and Oregon, *see* OR. REV. STAT. ANN. § 86.735.

107. CAL. CIV. CODE § 2932.5.

108. "Nothing in the comprehensive statutory scheme governing nonjudicial foreclosures . . . contains a requirement that OneWest's assignment of the [deed of trust] to Fannie Mae must be acknowledged and recorded before the foreclosure sale . . . Section 2932.5 [requiring the recordation of mortgage assignments] is inapplicable." Herrera v. Fed. Nat'l Mortg. Assoc., 141 Cal. Rptr. 3d 326, 338 (Ct. App. 2012).

109. Calvo v. HSBC Bank USA, N.A., 130 Cal. Rptr. 3d 815, 821 (Ct. App. 2011).

110. *Id.*

111. For example, a California court said, "Notwithstanding that the right of sale is formally with the trustee, both the beneficiary and the trustee may commence the non-judicial foreclosure process." *Herrera*, 141 Cal. Rptr. 3d at 338.

112. *Id.* at 337–38.

113. *See* Gomes v. Countrywide Home Loans, Inc., 192 Cal. App. 4th 1149 (Ct. App. 2011).

114. FLA. STAT. ANN. § 673.3011 (West 2011).

115. In order to execute a foreclosure, the MERS company rules require that it properly possess the note. *See* Horstkamp, *supra* note 70, at 467.

116. FLA. STAT. ANN. § 673.3011.

MERS company bylaws require MERS's certifying officers to properly possess the note.[117] Furthermore, while jurisdictions such as Idaho,[118] Oregon,[119] and Wyoming[120] have statutes mandating that each transfer must be recorded, in Florida recording is not a dispositive factor in considering whether a party has standing to bring a foreclosure action.[121]

A few states have passed legislation specifically designed to accommodate MERS.[122] In Minnesota, the legislature addressed the question of standing with the "MERS Statute" that specifically empowered nominees such as MERS to foreclose on mortgages.[123] Further frustrating homeowner-borrower interests, the Minnesota Supreme Court held in 2009 that these nominee mortgagees have no statutory requirement to record an assignment of the mortgage interest.[124]

Kansas recently became more MERS-friendly with new foreclosure statutes that "recognize the reality of the MERS system and . . . confer rights on nominees such as MERS."[125] Previously, in *Mortgage Electronic Registration System, Inc. v. Graham*, the Kansas court held that MERS foreclosures were invalid because "MERS acts 'solely as nominee' . . . [and] [t]here is no evidence that MERS has suffered any injury caused by Graham and Martinez' failure to make payments on the promissory note."[126] One year later, however, the Kansas bankruptcy court reinterpreted *Graham* in *In re Martinez*, claiming that the *Graham* court did not completely bar MERS from bringing foreclosure actions but merely denied MERS standing because "there [was] no evidence that MERS received permission to act as an agent."[127] Based on the *Martinez* holding and the

117. "[I]f a Member chooses to have MERS foreclose, the note must be endorsed in blank and in possession of one of the Member's MERS Certifying Officers." Horstkamp, *supra* note 70 at 459. MERS's June 2012 rules mark a strong departure from previous rules on two fronts and an even greater contrast with Florida's requirements: MERS allegedly no longer holds notes nor brings foreclosure actions. MERSCORP HOLDINGS, INC., *supra* note 34, at 1.

118. IDAHO CODE ANN. § 45-1505 (West 2011).

119. OR. REV. STAT. ANN. § 86.735 (West 2011).

120. WYO. STAT. ANN. § 34-4-103 (West 2011).

121. "Because Deutsche [Bank] possessed the original note and filed it with the circuit court, its standing may be established from its status as the note holder, regardless of any recorded assignments." Harvey v. Deutsche Bank Nat'l Trust Co., 69 So.3d 300, 304 (Fla. Dist. Ct. App. 2011).

122. *See, e.g.*, MINN. STAT. ANN. § 507.413 (West 2004) (accounting for nominee mortgagees, just as in MERS); KAN. STAT. ANN. § 60-219 (West 2011) (requiring nominees to be joined to the litigation as a party).

123. "An assignment, satisfaction, release, or power of attorney to foreclose is . . . sufficient to assign, satisfy, release, or authorize the foreclosure of a mortgage if . . . a mortgage is granted to a mortgagee as nominee or agent." MINN. STAT. ANN. § 507.413.

124. *See* Jackson v. Mortg. Elec. Registration Sys., Inc., 770 N.W.2d 487, 487 (Minn. 2009).

125. MADISON ET AL., *supra* note 51 (citing KAN. STAT. ANN. § 60-219 (West 2011)).

126. Mortg. Elec. Registration Sys., Inc. v. Graham, 247 P.3d 223, 229 (Kan. Ct. App. 2010).

127. *In re* Martinez, 444 B.R. 192, 204–05 (D. Kan. 2011) (interpreting *Graham*, 247 P.3d 223).

new foreclosure statutes, Kansas now allows an agent to carry out a foreclosure as long as it has permission from the mortgage owner.[128]

B. EXISTING FEDERAL LAWS LEAVE RECORDING UNTOUCHED

The United States has a variety of laws in place to protect consumers[129] against the most obvious dangers in obtaining a mortgage. These laws address problems with higher cost loans, accurate disclosure of prices, and other predatory lending practices.[130] Still, these reforms overlook the recording process, leaving homeowners without a right to learn who will execute the foreclosure proceeding against them. The federal laws also do not clarify the widely inconsistent state views on standing to foreclose, and whether MERS has authority to do so.

One of the most important consumer financial protection laws, the Truth in Lending Act (TILA), was passed in 1968, initially as the Consumer Credit Protection Act.[131] TILA's 2008 Regulation Z amendment takes some steps to help consumers figure out who owns their mortgage. It provides that "no later than 30 calendar days after the date of transfer of a mortgage loan to a 'covered person,'[132] the covered person shall notify the consumer in writing, clearly and conspicuously" and provide various forms of identification information.[133] However, TILA does not help all homeowners learn the identity of their mortgage's owner because the statute does not apply to securitized mortgages, as only covered persons that acquire the *entire interest* must notify the consumer of the transfer.[134] Thus, even under TILA, as amended in 2008, the securitized mortgages split and assigned to numerous mortgagees but recorded in the MERS database do not trigger consumer notification requirements.[135] Even though it may have mortgage

128. *Id.* The Kansas Court of Appeals again found that MERS needed permission to act as an agent, stating, "Because . . . there was no evidence that MERS received permission to act as an agent for the lender, this court held that MERS lacked standing to bring a foreclosure action." U.S. Bank, N.A. v. Howie, 280 P.3d 225 (Kan. Ct. App. 2012).

129. *See, e.g.*, 15 U.S.C.A. § 226.1(b) (2006). For example, the statute states, "The purpose of this regulation is to promote the informed use of consumer credit by requiring disclosures about its terms and cost." *Id.*

130. *See, e.g.*, *id.* ("The regulation provides for a fair and timely resolution of credit billing disputes . . . requires a maximum interest rate to be stated in the variable-rate contracts secured by the dwelling . . . [and] imposes limitations on home-equity plans.").

131. OCC, TRUTH IN LENDING ACT: COMPTROLLER'S HANDBOOK, 1 (2010) [hereinafter TRUTH IN LENDING ACT: COMPTROLLER'S HANDBOOK], *available at* http://www.occ.gov/publications/publications-by-type/comptrollers-handbook/truth-in-lending-handbook.pdf.

132. A person means "a natural person or an organization, including a corporation, partnership, proprietorship, association, cooperative, estate, trust, or government unit." 15 U.S.C.A. § 226.2(a)(22) (West 2006).

133. *Id.* § 226.39 (citation added).

134. Securitizing interests involves splitting the parts of one interest between multiple owners and re-pooling them with other interests; therefore, TILA has no protections for securitized mortgages because it excepts from its scope those entities that "acquire only a partial interest in the loan" as long as the borrower on the other side stays the same. *Id.* § 226.39(c)(3).

135. *See id.*

ownership information readily available, MERS escapes any duty to notify this significant population of borrowers under TILA.

The Home Mortgage Disclosure Act of 1975, another set of laws that protects consumers, only reaches parties involved in the actual home buying transaction.[136] It mandates that financial institutions and independent mortgage bankers report data about the pricing of the loan and the borrower's race, ethnicity, and income to the government.[137] MERS, as a recording database, does not have the same liability under federal consumer protection statutes that other lenders have.[138] Another federal statute, the Real Estate Settlement Procedures Act (RESPA), does offer borrowers some protection with a disclosure requirement.[139] The disclosure requirement mandates that borrowers receive notification when the loan servicing function is transferred.[140] However, only the parties that effect the transfer are responsible for communicating such information, and MERS falls outside of this requirement because MERS does not actually have a stake in the transfer; it never holds or even services the mortgage, but rather only records the mortgage transfers.[141] Additionally, RESPA's disclosure requirement only covers loan servicing, and there is no such disclosure requirement when the actual ownership of the mortgage note is transferred.[142] Therefore, RESPA does not help homeowners ascertain who will execute the foreclosure proceeding, especially in states that limit standing to do so to entities listed on the mortgage documents.[143]

The most unsettling aspect of current federal statutes is that they leave MERS, a company with the same authority as banks to carry out acts with severe consequences such as foreclosures, essentially unregulated while banks and other lenders operate with strict consumer protection regulations and oversight. Currently, there exists the basic framework to address this issue. The Consumer Financial Protection Bureau, established pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act),[144] has streamlined requirements for mortgage application forms under existing Truth In Lending laws seeking consumer data.[145] This Bureau has the untapped potential to regulate MERS, with the permission of the Federal Trade Commission, because MERS participates in the market

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136. OCC, HOME MORTGAGE DISCLOSURE: COMPTROLLER'S HANDBOOK 3–4 (2010).
137. *Id.* at 2.
138. *See* Peterson, *supra* note 8, at 1378.
139. Real Estate Settlement Procedures Act, 24 C.F.R. § 3500.21 (2010).
140. *Id.*
141. Phillips, *supra* note 19, at 263.
142. *Id.*
143. *See, e.g.*, U.S. Bank Nat'l Ass'n v. Ibanez, 941 N.E.2d 40 (Mass. 2011).
144. *Learn About the Bureau*, *supra* note 55.
145. *Id.*

for consumer financial products and services.[146] However, Congress has yet to recognize and address this problem.

C. PROTECTIONS FROM CHARGES OF FRAUD

Although no courts have found evidence of actual fraud to date, MERS nonetheless has employed questionable practices. MERS was allegedly "designed to operate within the existing legal framework in all U.S. jurisdictions."[147] However, MERS faced criticism when individuals who did not in fact work at the company acknowledged that they signed thousands of affidavits as "vice presidents"—without reading the case files[148]—as part of a practice generally known as robo-signing.[149] When courts asked for the official mortgage note, MERS filed these bogus affidavits as evidence of ownership in order to carry out the foreclosure proceedings.[150]

While MERS has not been successfully sued for the robo-signing or other suspect activities of the "vice presidents,"[151] courts have voiced their concerns with the practice on a number of occasions. For example, Judge William Young, of Massachusetts's District Court, opined, "This Court is deeply troubled that, with little to no oversight, individuals without any tie to or knowledge of the company on whose behalf they are acting may assign mortgages . . . ."[152] However, that same judge also identified deficiencies in the legal system surrounding the practices: "As the MERS system demonstrates, even strict compliance with the statutory terms does nothing to ensure that real property is not conveyed fraudulently. Homeowner-mortgagors, as non-parties to the assignments of their mortgages, are left with little recourse where they suspect impropriety."[153] Further supporting Judge Young's suspicions, one individual who

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146. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), Pub. L. No. 111-203, § 1024(a)(1)(B), (a)(2), 124 Stat. 1376, 1987 (2010) (codified at 12 U.S.C. § 5514) ("The Bureau shall consult with the Federal Trade Commission prior to issuing a rule, in accordance with paragraph (1)(B), to define covered persons subject to this section.").

147. Arnold, *supra* note 34, at 32, 35.

148. Norris, *supra* note 58.

149. Nathalie Tadena, *Delaware Files Complaint Against Mortgage Registry*, WALL ST. J., Oct. 27, 2011, http://online.wsj.com/article/SB10001424052970203687504577002173640854262.html.

150. Norris, *supra* note 58; *see also 60 Minutes: Mortgage Paperwork Mess: The Next Housing Shock* (CBS television broadcast Apr. 3, 2011). While the broadcast does not specifically identify MERS by name, it provides photographs of these bogus affidavits that bear MERS's title. *Id.*

151. For example, a judge in Brooklyn found it suspect that MERS uses these "vice presidents," who also work for other banks, to assign mortgages between their other bank of employment and MERS, and he routinely required them to give details of their employment history and explain why a conflict of interest does not exist in those transactions. Bank of N.Y. v. Myers, 880 N.Y.S.2d 871, 873 (Sup. Ct. 2009); Onewest Bank, F.S.B. v. Drayton, 910 N.Y.S.2d 857, 872 (Sup. Ct. 2010). However, MERS has not ultimately been held accountable for this in the courts, as the appellate judges did not agree that explanations for such behavior needed to be submitted. HSBC Bank USA, N.A. v. Betts, 888 N.Y.S.2d 203, 204 (App. Div. 2009).

152. Culhane v. Aurora Loan Servs. of Neb., 826 F. Supp. 2d 352, 374 (D. Mass. 2011).

153. *Id.* at 378.

personally discussed legal issues with members of the MERS company said, "So far as anyone can tell their real theory was: 'If we can get everyone on board, no judge will want to upend something that is reasonable and sensible and would screw up 70 percent of loans.'"[154]

MERS has also exploited uncertainty in the judicial system to obtain favorable outcomes. In one case, MERS itself used the same argument advanced by borrowers in foreclosure actions and argued that it did not have the same power as a mortgage owner.[155] MERS's winning claim allowed the organization to avoid the license and registration requirements in place for banks in Nebraska.[156] The court held that "MERS has no independent right to collect on any debt because MERS itself has not extended credit, and none of the mortgage debtors owe MERS any money."[157] While MERS often stresses its similarities to mortgage owners in court in order to get the authority to foreclose on borrowers, it has also highlighted its differences from lenders[158] when convenient to the company.

Recently, some states have begun taking harsher stances against such fraudulent practices as robo-signing. The state of Nevada recently took a particularly aggressive stance against robo-signing by criminally indicting two title officers.[159] The officers faced more than 600 charges for ordering employees to forge their names on foreclosure paperwork and then notarize the signatures.[160] However, although it offers a new opportunity to harshly punish robo-signing, the Nevada case only threatens two individuals and not the corporation, and therefore does not go far enough to change the broader institutional problem of robo-signing.

Nevada is not the only state to initiate litigation against MERS to combat its questionable business practices. In October 2011, Delaware Attorney General Beau Biden filed a lawsuit against MERS, claiming that the organization "knowingly obscured information from borrowers," submitted inaccurate information to courts in order to get standing, and used "robo-signed" documents.[161] Attorney General Biden's suit holds the promise of more consumer-friendly foreclosure practices going forward, as it seeks to enjoin MERS from initiating foreclosures in the state and to

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154. The authors also noted that no one did an in-depth study of the individual state laws, and also lobbied Congress to be excluded from regulation legislation during the 1990s. Powell & Morgenson, *supra* note 5.

155. Mortg. Elec. Registration Sys., Inc. v. Neb. Dep't of Banking & Fin., 704 N.W.2d 784, 788 (Neb. 2005).

156. *Id.*

157. *Id.*

158. *See generally id.* at 784 (winning claim that MERS is not a "mortgage banker" and not subject to licensure requirements).

159. Ruth Simon, *Nevada Grand Jury Indicts Two in Alleged Robo-Signing Scheme*, WALL ST. J., Nov. 16, 2011, http://online.wsj.com/article/SB10001424052970203699404577042961074968218.html.

160. *Id.*

161. Tadena, *supra* note 149.

require that MERS record the correct chain of title with the counties.[162] However, in the past, Delaware has not been particularly receptive to homeowners' claims of fraud against MERS. In one case, the court refused to pierce the corporate veil when plaintiff-borrowers alleged that MERS improperly overcharged them, as well as millions of other mortgagors, for attorneys' fees.[163] The court found that the plaintiffs failed to "plead facts that would give rise to an inference that the Shareholder Defendants, through their alter ego, [had] created 'a sham entity designed to defraud investors and creditors.'"[164]

New lawsuits at local and state levels contend that the very essence of the MERS operation is fraudulent because it does not properly record land transfers.[165] In Massachusetts, Attorney General Martha Coakley recently initiated a lawsuit against major banks for various unfair practices against consumers.[166] She included MERS as a defendant in the suit, claiming that the company "'corrupted' the state's public land recording system by not registering legal transfers properly."[167] At the local level, a county official in Pennsylvania sued MERS claiming that their electronic system allowed parties in real estate deals to circumvent state laws that require recording with the county, and that these practices have cost Pennsylvania more than $100 million in forgone recordation fees.[168]

Importantly, however, even if this current litigation proves successful, the resulting changes in the foreclosure practices of these jurisdictions do not guarantee to alleviate consumers' confusion throughout the rest of the country.

III. PROPOSED CHANGES

The opaque nature and unregulated status of MERS, combined with its uncertain powers as a recording company, leave homeowner-borrowers in a legal quagmire. To combat the uncertainty surrounding the entire foreclosure process and to address these specific issues, the United States needs sweeping federal consumer financial legislation that: (1) establishes uniform standing requirements; (2) compels MERS to open its records to

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162. Karen Freifeld & Aruna Viswanatha, *MERS Subpoenaed by New York, Sued by Delaware*, REUTERS, (Oct. 27, 2011, 7:21 PM), http://www.reuters.com/article/2011/10/27/us-mers-subpoena-idUSTRE79Q7SD20111027.

163. Trevino v. Merscorp, Inc., 583 F. Supp. 2d 521, 524 (D. Del. 2008).

164. *Id.* at 531.

165. Gretchen Morgenson, *Massachusetts Sues 5 Major Banks Over Foreclosure Practices*, N.Y. TIMES, Dec. 1, 2011, http://www.nytimes.com/2011/12/02/business/major-banks-face-new-foreclosure-suit.html; *PA County Official Sues Firm Over Mortgage Recording System*, 17 NO. 15 WESTLAW J. BANK & LENDER LIAB. 1, 1–2 (Dec. 5, 2011).

166. Morgenson, *supra* note 165.

167. *Id.*

168. *PA County Official Sues Firm Over Mortgage Recording System*, *supra* note 165.

borrowers; and (3) ensures that MERS complies with the previous two tenets.

A. FEDERAL LAW MUST ARTICULATE A UNIFORM STANDARD FOR FORECLOSURE PROCEEDINGS

First, the state courts have radically different ways of approaching foreclosures executed by MERS. A uniform standing rule applied evenly throughout the country[169] would not only clarify the procedure for MERS itself, as the company allegedly does not pay close attention to local state regulations,[170] but would also ease the uncertainties of the borrowers and those who may subsequently purchase the foreclosed property. Establishing one standard for foreclosure standing will help Americans in all jurisdictions to navigate the already complicated and devastating foreclosure process. Exasperating this problem, the courts not only differ in their standing requirements between the states,[171] but also change their positions within a single state.[172] With clear standing requirements, recipients of foreclosure notices would know that the foreclosure will go through. This allows the recipient to dedicate their time and resources to negotiating a better loan agreement, fighting the merits of the foreclosure, or finding a new place to live, instead of disputing the procedural aspects of the foreclosure such as standing. Even if a borrower wins the standing dispute, he might still face a foreclosure action—if only brought by another

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169. The authority to pass these regulations falls under Congress's interstate commerce powers, as MERS, holder of so many mortgages, has a major impact on real estate markets throughout the nation. Powell & Morgenson, *supra* note 5. Furthermore, in the past, the Supreme Court has held that Congress can regulate local activities that are part of a "class of activities" that affect supply and demand in the national market. Gonzales v. Raich, 545 U.S. 1, 17 (2005). The Federal Controlled Substances Act was constitutional in proscribing Raich from growing marijuana for personal medical use in compliance with local California law because marijuana is part of a "class" of things that, even when grown and consumed locally, has an impact on the national market. *Raich*, 545 U.S. at 31. Buying real estate is a commercial activity, and gains and losses, if large enough in scale, impact the national economy. So, any regulation similar to the one recommended here should stand under *Raich's* reasoning. However, in the event that Congress's authority to pass such regulation under the Interstate Commerce Clause is challenged, history indicates that Congress has stepped outside its traditional confines to improve the state of Americans' housing on a national level. For example, in *Jones v. Alfred H. Mayer Co.*, the Supreme Court allowed Congress to regulate racial discrimination in private rental and sales real estate markets, claiming that such discrimination was a "badge[] and incident[] of slavery" even one hundred years after the Civil War. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 439–41 (1968). While conditions today do not match the intensity of those issues in the housing market of 1968, a court might be able to stretch that ruling to find legislation that preserves peoples' homes on a major constitutional scale.

170. Powell & Morgenson, *supra* note 5.

171. *See, e.g.*, U.S. Bank Nat'l Ass'n v. Ibanez, 941 N.E.2d 40, 50 (Mass. 2011) (finding that only the mortgagee or a person properly assigned the mortgage can carry out a foreclosure sale). *But see* Harvey v. Deutsche Bank Nat'l Trust Co., 69 So.3d 300, 304 (Fla. Dist. Ct. App. 2011) (holding that a bank has standing to foreclose simply because it holds the note "regardless of any assignments").

172. MADISON ET AL., *supra* note 51.

party. Finally, through this regulation, the government can ease overburdened court dockets,[173] as judges will not have to dedicate their scarce time and resources to adjudicate party standing.

B. FEDERAL LAW MUST COMPEL MERS TO OPEN ITS BOOKS

Second, the legislation should compel MERS to open its records to the public—or at least to the relevant borrower. MERS has the resources to track mortgage ownership through its electronic system, and that system has undoubtedly benefitted many actors involved in real estate.[174] By providing these records, the system could also support the vast numbers of homeowners confused about who owns their mortgage.

The federal government recognizes the significant financial impact of home ownership and has responded accordingly with protective legislation on the front end of acquiring a mortgage, for example, by requiring brokers to use understandable forms.[175] On the back end, where consumers are also vulnerable, the federal government must pass legislation protecting borrowers in danger of losing their homes, as American tradition has resisted unfairly depriving individuals of their property.[176] Requiring MERS to disclose the mortgage owner's name will allow the borrower to identify the owner and attempt negotiations to avoid foreclosure. For example, if a borrower facing foreclosure wanted to contact the owner of his mortgage note to arrange a new payment plan as a possible alternative to losing his house, he could go to the local county records office to ascertain the owner's identity. However, most county records simply list "MERS" in their database,[177] and while MERS probably has the owner's identity in its system, it has no obligation to reveal the owner's identity without a court order.[178] This results in significant frustration for the borrower in efforts to modify his payment plan, especially if he is facing imminent foreclosure. Nevada has found loan modification negotiations so helpful to borrowers that the statute requires such negotiations before a foreclosure can be executed.[179] Such negotiations, as an alternative to foreclosures, can

173. Streitfield, *supra* note 61.

174. MERS easily provides information about mortgage ownership if required to in court proceedings. Peterson, *supra* note 8, at 1378. MERS has made transfers more convenient by offering a speedier recording alternative to that offered by the county. Phillips, *supra* note 19, at 264.

175. TRUTH IN LENDING ACT: COMPTROLLER'S HANDBOOK, *supra* note 131.

176. *See, e.g.*, U.S. CONST. amend. IV (protecting property from "unreasonable searches and seizures").

177. "Now, the public record doesn't reveal who owns the loans. Instead, it just says . . . MERS is the owner. And county recorders are recording documents that say MERS – over and over and over and over again." Collard, *supra* note 7.

178. Peterson, *supra* note 8, 1378.

179. Act of June 10, 2011, ch. 306, § 20.7, 2011 Nev. Stat. 1665, 1683–84.

potentially ease docket pressures and save both MERS and borrowers money by avoiding the foreclosure process altogether.

C. ENFORCEMENT

Third, a government agency must ensure that MERS does indeed open its books and abide by the proper, uniform standing requirements in foreclosure proceedings that this new law will require. The newly established[180] Consumer Financial Protection Bureau (CFPB) is the appropriate and best positioned agency to ensure that MERS complies with the new statute, as the agency is specifically aimed at protecting consumers in their interactions with providers of financial products and services.[181] MERS, a financial service provider, should be included in the CFPB's purview.

However, saddling the young agency with the task of policing such a prominent force in the foreclosure arena might not achieve the most favorable results for consumers, since the CFPB is new[182] and does not have any longstanding traditions of prosecuting corporations that violate consumer protection laws. Yet, because of the vast scale of the foreclosure crisis in America, the CFPB can possibly grow to address such widespread problems. The Federal Trade Commission (FTC) does, however, have a long history of protecting consumers from predatory advertising and sales practices.[183] While the FTC derives most of its enforcement power from the Federal Trade Commission Act of 1914,[184] the Dodd-Frank Act provides that the CFPB and FTC must coordinate their efforts to police compliance with federal consumer financial legislation.[185] This allows the FTC to act as an alternative enforcer in the event that the CFPB fails to adequately monitor MERS.

The Dodd-Frank Act also guarantees that an entity will not simultaneously face unduly harsh punishment from the agencies, as it permits only one to pursue a claim at a time.[186] The Dodd-Frank Act

180. The Consumer Financial Protection Bureau was established in 2011 as part of the Dodd-Frank Act. *Learn About the Bureau*, *supra* note 55.

181. *Id.*

182. The Consumer Financial Protection Bureau was established in 2011. *Id.*

183. The FTC was formed in 1914, and has been protecting consumers ever since that time. *About the Federal Trade Commission*, FTC, http://ftc.gov/ftc/about.shtm (last visited Nov. 21, 2011).

184. *See A Brief Overview of the Federal Trade Commission's Investigative and Law Enforcement Authority*, FTC, http://www.ftc.gov/ogc/brfovrvw.shtm (last visited Nov. 21, 2011).

185. Dodd-Frank Act, Pub. L. No. 111-203, § 1024(c)(3), 124 Stat. 1376, 1989 (2010) (codified at 12 U.S.C. § 5514). Additionally, the FTC and CFPB have entered into a memorandum of understanding specifically addressing this coordination. JON LIEBOWITZ & RICHARD CORDRAY, MEMO. OF UNDERSTANDING BETWEEN THE CFPB AND THE FTC 1 (2012), http://www.ftc.gov/os/2012/01/120123ftc-cfpb-mou.pdf. Such efforts include each agency's responsibility to notify the other of any intention to begin an investigation or bring an action. *Id.* at 5–6.

186. Dodd-Frank Act § 1024(c)(3)(B), 124 Stat. at 1989 (codified at 12 U.S.C. § 5514).

empowers the CFPB to levy sanctions against entities that violate federal consumer financial statutes.[187] By including MERS within the definition of a mortgage-related business under the Dodd-Frank Act, the CFPB would be able to enforce compliance with the proposed legislation.

Currently, the CFPB can "examine . . . all mortgage-related businesses."[188] However, MERS does not automatically fall within this category because it is considered a recording company. The Dodd-Frank Act provides that the CFPB can supervise three types of entities: (1) nondepository covered persons; (2) very large banks, savings associations, and credit unions; and (3) other banks, savings associations, and credit unions.[189] Because MERS does not actually provide loan servicing, does not originate loans, and is not a bank, it is not really a "nondepository" entity subject to Dodd-Frank regulation.[190] However, the "nondepository" category is elastic, as Dodd-Frank provides that the CFPB, after consulting the FTC,[191] can also reach businesses that are "larger participant[s] of a market for other consumer financial products or services."[192]

If interpreted flexibly, MERS should fall into this category. Thus, assuming that the CFPB consults the FTC and defines MERS as a "covered person," the Dodd-Frank Act sufficiently empowers the CFPB[193] to ensure that MERS will comply with the proposed requirements of disclosure and proper foreclosure practices. Broadly, the Dodd-Frank Act gives the CFPB the general power to "collect, investigate, and respond to consumer complaints."[194] This authorization provides critical on-the-ground enforcement powers.

First, the legislation requires the CFPB to conduct regular examinations of covered entities to make sure that they follow federal consumer financial laws and to detect any participation in risky activities.[195] The CFPB is also empowered to study the risks that a covered person might pose to

187. *Id.* §§ 1024(c)(1), 1055(a), 124 Stat. at 1989, 2029–30 (codified at 12 U.S.C. §§ 5514, 5565).

188. Victoria McGrane & Maya Jackson Randall, *Banking's Scourge on Charm Offensive*, WALL ST. J., Mar. 15, 2011, http://online.wsj.com/article/SB10001424052748703749504576172510974842034.html.

189. *See* Dodd-Frank Act §§ 1021(c)(4), 1024, 1025, 1026, 124 Stat. at 1980, 1987–95 (codified at 12 U.S.C. §§ 5511, 5514, 5515, 5516).

190. The "nondepository" entities covered by Dodd-Frank include any business that "offers or provides origination, brokerage, or servicing of loans," "is a larger participant of a market for other consumer financial products or services," is a "covered [entity] . . . engaging . . . in conduct that poses risks to consumers," "offers or provides to a consumer any private education loan," or "offers or provides to a consumer a pay-day loan." *Id.* § 1024(a)(1)(A)–(E), 124 Stat. at 1987 (codified at 12 U.S.C. § 5514).

191. *Id.* § 1024(a)(2), 124 Stat. at 1987 (codified at 12 U.S.C. § 5514).

192. *Id.* § 1024(a)(1)(B), 124 Stat. at 1987 (codified at 12 U.S.C. § 5514).

193. *Id.* § 1024(a)(1)(C), (b)(1), 124 Stat. at 1987 (codified at 12 U.S.C. § 5514).

194. *Id.* § 1021(c)(2), 124 Stat. at 1980 (codified at 12 U.S.C. § 5511).

195. *Id.* § 1024(b)(1), 124 Stat. at 1987 (codified at 12 U.S.C. § 5514).

consumers in a particular geographic area,[196] which will be especially helpful in the case of MERS because of the company's widely varying practices in different state jurisdictions.

Second, in addition to examining these entities, the CFPB can "impose fines or ask courts to order relief."[197] The CFPB can hold its own hearing[198] after investigating a possible violation of federal consumer financial protection laws, and within ninety days, make a decision.[199] The CFPB can also address situations that need more immediate attention, such as foreclosure proceedings, by issuing cease and desist orders, which take effect within thirty days.[200] The losing party may appeal the CFPB's decision to the court of appeals in their jurisdiction.[201] While these administrative proceedings cannot result in exemplary or punitive damages for defendants,[202] possible remedies might include "rescission or reformation of contracts; refund of moneys or return of real property; restitution; disgorgement or compensation for unjust enrichment; payment of damages or other monetary relief; public notification . . . ; limits on the activities . . . of the person; and civil money[203] penalties."[204]

Third, aside from administrative proceedings, the CFPB can, upon notifying the Attorney General,[205] also prosecute a violation of federal consumer financial law in civil court for both legal and equitable relief.[206] The CFPB can bring these proceedings in either a U.S. district court or any appropriate state court where the defendant resides or does business.[207]

IV. ALTERNATIVE SOLUTIONS

Some may argue that national legislation is not necessary because, according to MERS's 2012 internal rules, the company claims that it will not pursue foreclosure actions and will allow homeowners to access loan ownership information.[208] However, MERS has dramatically changed its

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196. *Id.* § 1024(b)(2). 124 Stat. at 1987–88 (codified at 12 U.S.C. § 5514).
197. McGrane & Randall, *supra* note 188.
198. Dodd-Frank Act § 1053(a), 124 Stat. at 2025 (codified at 12 U.S.C. § 5563).
199. *Id*. § 1053(b)(3), 124 Stat. at 2026 (codified at 12 U.S.C. § 5563).
200. *Id*. § 1053(b)(2), 124 Stat. at 2026 (codified at 12 U.S.C. § 5563).
201. *Id*. § 1053(b)(4), 124 Stat. at 2026 (codified at 12 U.S.C. § 5563).
202. *Id*. § 1055(a)(3), 124 Stat. at 2030 (codified at 12 U.S.C. § 5565).
203. Civil money penalties are broken up into three tiers: (1) any violation of a written rule carries a civil penalty of less than $5,000 per day of the violation; (2) reckless violations of federal consumer financial law carry a civil penalty of less than $25,000 per day of the violations; and (3) knowing violations carry a civil penalty of less than $1,000,000 per day. Civil money penalties can be imposed in both administrative and civil cases. *Id*. § 1055(c)(2), 124 Stat. at 2030 (codified at 12 U.S.C. § 5565).
204. *Id*. § 1055(a)(2), 124 Stat. at 2030 (codified at 12 U.S.C. § 5565) (citations added).
205. *Id*. § 1054(d)(1), 124 Stat. at 2028 (codified at 12 U.S.C. § 5564).
206. *Id*. § 1054(a), 124 Stat. at 2028 (codified at 12 U.S.C. § 5564).
207. *Id*. § 1054(f), 124 Stat. at 2029 (codified at 12 U.S.C. § 5564).
208. MERSCORP HOLDINGS, INC., *supra* note 34, at 1–2.

policies,[209] indicating that any internal regulation from the company may not be reliable and can easily change. Additionally, considering how lengthy foreclosure litigation can be,[210] there are still a number of cases on the dockets with MERS as plaintiff. Finally, MERS's history of engaging in unethical and probably fraudulent practices[211] necessitates government regulation, no matter how the company has modified its behavior.

Recent legal scholarship suggests amending both state and federal legislation to include supervision of MERS.[212] However, new state laws will do little to clarify the already non-uniform foreclosure laws for homeowners throughout the states. Others suggest that Congress should establish uniform federal standing requirements and empower the loan servicer to modify loan terms.[213] Under current federal law, the borrower must be notified of the servicer's identity, but not that of the loan owner.[214] However, in the actual foreclosure proceedings, homeowners face the owner of the mortgage, not the servicer;[215] so, the consumer would benefit only from negotiating with that owner, whose identity MERS may obscure.[216] Therefore, in some states it would be in the consumer's best interest to negotiate with only the mortgage-owning entity, since only that entity can carry out the foreclosure.[217]

Additionally, some contend that the best solution is to nationalize the mortgage recording system altogether,[218] but because of its contentious political environment, such a dramatic proposal has little chance of succeeding.[219] Furthermore, if MERS was nationalized as a recording

209. For example, MERS once vigorously defended its standing to pursue foreclosure actions. Currently, it does not pursue foreclosure actions. *Id.* at 2. Additionally, MERS once required its members to hold the note in blank before bringing foreclosure actions. *See* Horstkamp, *supra* note 70, at 467. At present, the company alleges that it does not even hold notes and mortgages. MERSCORP HOLDINGS, INC., *supra* note 34, at 2.

210. *See* Streitfield, *supra* note 61.

211. Norris, *supra* note 58.

212. "State and federal legislatures must amend the scope of consumer protection laws to more explicitly cover the variety of business actors engaged in the structured finance of predatory lending." Peterson, *supra* note 33, at 2279.

213. Victoria V. Corder, *Homeowners and Bondholders as Unlikely Allies: Allocating the Costs of Securitization in Foreclosure*, 30 NO. 5 BANKING & FIN. SERVS. POL'Y REP. 19, 27 (2011).

214. Referring to the RESPA. *See* Phillips, *supra* note 19, at 263–4.

215. U.S. Bank Nat'l Ass'n v. Ibanez, 941 N.E.2d 40 (Mass. 2011).

216. *See* Phillips, *supra* note 19, at 264.

217. *See, e.g.*, *Ibanez*, 941 N.E.2d, at 53.

218. Tanya Marsh, *Foreclosures and the Failure of the American Land Title Recording System*, 111 COLUM. L. REV. SIDEBAR 19, 19 (2011).

219. One article described Congress's inability to come to an agreement as only "the latest sign of partisan deadlock in Washington, which members of both parties do not expect to lift until the 2012 election has clarified which party has the upper hand." Eric Lipton, *Lawmakers Trade Blame as Deficit Talks Crumble*, N.Y. TIMES, Nov. 21, 2011, http://www.nytimes.com/2011/11/21/us/politics/lawmakers-concede-budget-talks-are-close-to-failure.html. Therefore, a more radical proposal that includes nationalizing a private corporation like MERS has an extremely low chance of succeeding in today's Congress.

agency and continued to exercise foreclosures, the entity would expose itself to an entirely new claim for lawsuits: violations of the Due Process Clause.[220]

CONCLUSION

When MERS streamlined the laborious task, previously reserved to the county clerk's office, of manually recording deeds and mortgages by creating a new digital system, the loan application process became easier for everyone involved.[221] At the peak of the housing boom, banks could, and frequently did, transfer a mortgage or even a piece of a mortgage to other banks almost instantaneously by recording with MERS instead of in the public land records.[222]

This formerly government-run operation, nearly taken over by a single private corporation with especially opaque business practices, continued in its new electronic form for years without any sort of formal federal regulation. When numerous borrowers could not pay their mortgages subsequent to the 2008 economic meltdown, it became evident that MERS's electronic recording and transfer system, while expedient, only facilitated increased confusion over mortgage ownership due to the company's aim to help move as many mortgages as possible[223] unbeknownst to borrowers. Adding to borrowers' confusion, MERS, though not the true owner of the mortgage,[224] often initiated foreclosure proceedings.

Recognizing the difficulties facing homeowners, courts in some states, such as Massachusetts, have recently held that a foreclosure must be executed by a company named in the official papers as the mortgage holder.[225] Massachusetts's holding threatens MERS's ability to foreclose since MERS does not hold mortgages.[226] Many other states, however, do

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220. As a decision from the federal court for the Eastern District of Michigan pointed out, "As to the due process claim, there is no allegation and no showing that MERS is a state actor, a predicate to finding a Fourteenth Amendment due process violation." Ramseur v. Federal Nat'l Mortg. Ass'n, No. 06-14316, 2007 WL 2421523, at *2 (E.D. Mich. Aug. 24, 2007).

221. By digitally recording mortgage transfers and eliminating the need to visit the county clerk to manually document any change in mortgage ownership, MERS promised reduced costs. Slesinger & Mclaughlin, *supra* note 42, at 811. Also, digital recording "facilitates the flow of global capital, bringing investment funds into areas without local mortgage financing. Potential homeowners, as well as those seeking the most favorable rates, can benefit from MERS." Korngold, *supra* note 4, at 742.

222. *See generally* Powell & Morgenson, *supra* note 5.

223. *See id.* ("Each of [the vice presidents of MERS] could file loan transfers and foreclosures in MERS's name. The goal, as with almost everything about the mortgage business at that time, was speed. Speed meant money."). Creator of MERS, R.K. Arnold, indicated his desire to reach as many residential mortgages as possible, stating, "Almost any secured real estate transaction is a candidate for life on MERS." Arnold, *supra* note 34, at 36.

224. Peterson, *supra* note 8, 1378.

225. U.S. Bank Nat'l Ass'n v. Ibanez, 941 N.E.2d 40 (Mass. 2011).

226. MERSCORP HOLDINGS, INC., *supra* note 34, at 1.

not have such strict requirements about standing to bring a foreclosure action.[227]

The federal statute proposed in this note would provide for a uniform standing requirement that clearly defines when a party has the ability to foreclose. Between the lack of federal regulation and quasi-fraudulent activities of MERS, the federal government should pass legislation to regulate this company in its exercise of what was traditionally a government function: recording mortgages. With physical recording of each transfer much less common at the county office,[228] borrowers on the MERS registry can only determine who owns their mortgage at the discretion of the MERS company.[229] The proposed federal statute mandates that MERS disclose their records—at least to the mortgagor on the other end. This would provide borrowers with a right to know who owns their mortgage, which would help to ensure that losing their property is only the last resort. In the event of noncompliance, the legislation must also provide the CFPB or FTC with authority to impose sanctions. With this legislation, MERS can not only return to its roots as a celebrated digital recording company that expedites the transfer process,[230] but will also guarantee clarified mortgage ownership, hopefully resulting in less pressure on the court systems, more informed borrowers, and fewer foreclosures.

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227. *See, e.g.*, FLA. STAT. ANN. § 673.3011 (West 2011) (allowing foreclosures to go through even if the foreclosing entity improperly possesses the mortgage documents). *Cf.* MINN. STAT. ANN. § 507.413 (West 2004) (allowing nominees, as opposed to actual owners of the note and mortgage, to bring the foreclosure); KAN. STAT. ANN. § 58-2323 (West 2011) (same).

228. *See* Peterson, *supra* note 33, at 2211 (explaining that over half of mortgages are on the MERS system); Dordan, *supra* note 12, at 178 (illustrating that once in the MERS system, each transfer is documented solely in their database instead of the county's).

229. For example, MERS previously initiated foreclosures in its own name if it held the note. *See* Horstkamp, *supra* note 70, at 467. Now, MERS claims that it does not hold mortgage documents or bring foreclosure actions. MERSCORP HOLDINGS, INC., *supra* note 34, at 1.2.

230. According to a 1997 article about MERS's creation, "Some have called MERS the most significant event for the mortgage industry since the formation of Fannie Mae and Freddie Mac. Others have compared it to the creation of uniform mortgage instruments, which have become standard throughout the residential mortgage industry." Arnold, *supra* note 34, at 33.

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