

Courts Uphold MERS Serving as “Nominee” on Mortgage Instruments

In recent weeks, several courts have issued opinions upholding the use of Mortgage Electronic Registration Systems, Inc. (MERS)—an electronic registry created by the mortgage banking industry to track transfers in servicing rights and beneficial ownership of millions of mortgage loans around the nation. Although some courts require a greater showing of an agency relationship between MERS and the noteholder than others (see *In re: Agard*, discussed below), the opinions confirm that there is nothing improper about MERS serving as mortgagee of record in a capacity as “nominee” for the original lender and its successors and assigns.

When a mortgage loan is originated by a member of MERS, the originator typically identifies MERS as the mortgagee of record on the mortgage (or deed of trust) and appoints it to serve in that capacity as “nominee” for the originator (who holds the promissory note) or any subsequent holder of the promissory note. Numerous cases around the country have attempted to challenge MERS’ status as “nominee” on mortgages and deeds of trust.

In the recent case of *In re: Martinez*, No. 10-7027, 2011 WL 489905 (Bankr. D. Kan. Feb. 11, 2011), Judge Janice Miller Karlin granted motions for summary judgment filed by MERS and the originator, Countrywide Home Loans, Inc., rejecting plaintiffs’ claims that sought to challenge MERS’ core business model. Plaintiffs alleged that because they owed their mortgage

debt to the originator (who also still held the promissory note), and not to MERS, no one was allowed to enforce the mortgage that plaintiffs executed to MERS.

The court squarely rejected plaintiffs’ theories, holding that MERS was properly acting as Countrywide’s agent. Relying on the plain language of the mortgage instrument, MERS’ Terms and Conditions, and state agency law, Judge Karlin held:

Based upon this evidence, the Court concludes that MERS was clearly acting as an agent for Countrywide at all relevant times. MERS held the Mortgage as “nominee” for Countrywide, and agreed to act on Countrywide’s behalf and at Countrywide’s direction with respect to the Mortgage. The fact that MERS and Countrywide chose to use the word “nominee,” rather than “agent,” does not alter the underlying relationship between the two parties. There is no requirement that parties to an agency relationship specifically refer to the agent by the name “agent.”

In so holding, Judge Karlin carefully distinguished the Kansas Supreme Court’s holding in *Landmark National Bank v. Kesler*, 216 P.3d 158 (Kan. 2009) (holding under Kansas law that MERS had not presented evidence that it was entitled to joinder as a contingently necessary party in foreclosure action). According to Judge Karlin, “[a]lthough the Kansas

Supreme Court did address the relationship between MERS and its members...the court did not specifically hold that no agency relationship existed.”

Similarly, in the case of *In re: Lopez*, No. 09-10346, 2011 WL 576820 (Bankr. D. Mass. Feb. 9, 2011), Judge William C. Hillman upheld the validity of MERS serving as “nominee” in granting a servicer’s motion for relief from stay in a Chapter 13 bankruptcy proceeding. Judge Hillman noted that “the Mortgage specifically identified MERS as the mortgagee under the instrument and granted it and its ‘successors and assigns’ a power of sale.” Judge Hillman went on to uphold MERS’ assignment of the mortgage as “nominee,” holding that “[t]hough MERS never held the Note, it could, by virtue of its nominee status, transfer the Mortgage on behalf of the Note holder.”

An appellate court in California also recently upheld the use of MERS on deeds of trust. In *Gomes v. Countrywide Home Loans, Inc.*, No. D057005, 2011 WL 566737 (Cal. Ct. App. 4th Dist. Feb. 18, 2011), the court rejected the plaintiff’s attempt to challenge his non-judicial foreclosure, emphasizing that “under California law MERS may initiate a foreclosure as the nominee, or agent, of the noteholder.” The court also ruled that plaintiff could not challenge MERS’ status to foreclose because he specifically granted MERS such authority in his deed of trust.

Taken together, the *Martinez*, *Lopez* and *Gomes* cases clearly uphold MERS’ role as “nominee” for the holder of the promissory note in mortgages and deeds of trust, and uphold the validity and enforceability of such instruments. However, in another recent case, a New York court reached a different result, stating that “nominee” language in a mortgage instrument and MERS’ Rules of Membership were insufficient to demonstrate MERS’ ability to assign a mortgage as the agent for the holder of the promissory note.

In *In re: Agard*, No. 810-77338, 2011 WL 499959 (Bankr. E.D.N.Y. Feb. 10, 2011), Judge Robert E. Grossman granted a motion for relief from stay brought by the servicer of the mortgage loan at issue, but then went on to issue what amounts to an advisory opinion regarding MERS because of “numerous other cases before this Court which present identical issues with respect to MERS.” Judge Grossman stated that “MERS did not have authority, as ‘nominee’ or agent, to assign the Mortgage absent a showing that it was given specific written directions by its principal.” The advisory opinion in *Agard* demonstrates that while many courts (e.g., *Martinez*, *Lopez* and *Gomes*) continue to uphold the validity of MERS serving as “nominee” based on the language used in mortgages and deeds of trust, some courts require even more proof of an agency relationship between MERS and the noteholder.

In addition to the case law developments discussed above regarding MERS’ role as “nominee,” on February 16, 2011, MERS announced to its members several significant planned changes to its operations.¹ According to MERS, the proposed changes are due to recent allegations involving purported irregularities and improprieties in the foreclosure process, commonly referred to in media reports as “robo-signer” allegations. The proposed changes include:

- Amending Membership Rule No. 8 so that MERS members no longer foreclose in the name of MERS. Instead, MERS encourages its members to “to bring foreclosures only in the name of the holder of the note, in the name of the trustee or the servicer of record acting on behalf of the trustee.”²
- Requiring MERS’ certifying officers to execute mortgage assignments prior to initiating foreclosures and to record the assignment in county land records, even if not required by state law.³
- Requiring that all future mortgage assignments, and the execution of other documents in MERS’ name, be executed by

certifying officers appointed under MERS' new certifying officer process, which includes additional training.⁴

In our experience from litigating a number of MERS cases, *Martinez, Lopez and Gomes* are consistent with longstanding case law upholding the role of MERS. *See, e.g., Cervantes v. Countrywide Home Loans, Inc.*, 2009 WL 3157160, at *10 (D. Ariz. Sept. 24, 2009) (The Court fails to see how the MERS system commits a fraud upon Plaintiffs. Plaintiffs' argument that MERS is a "sham" beneficiary is unconvincing. Otherwise, any situation where a beneficiary obtains less than the full rights possessed by the entity or person granting the beneficiary status would likewise result in a "sham" beneficiary. The fact that MERS does not obtain such rights as to collect mortgage payments or obtain legal title to the property in the event of non-payment does not transform MERS' status into a "sham.").

Endnotes

¹ See MERS Announcement No. 2011-01, Foreclosure Processing and CRMS Scheduling, available at: <http://www.mersinc.org/news/details.aspx?id=288>

² *Id.* at 1.

³ *Id.*

⁴ *Id.*

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