



## REAL ESTATE

### MICHIGAN COURT RULING QUESTIONS VALIDITY OF FORECLOSURE SALES

by Geoffrey A. Fields  
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In recent years, Michigan foreclosures hit record highs in the wake of the subprime mortgage crisis. Now, the Michigan Court of Appeals has decided to invalidate certain foreclosures conducted by the Mortgage Electronic Registration System, Inc., commonly known as "MERS." This holding by the Court of Appeals immediately calls into question many other foreclosure sales performed by MERS, and requires the attention of numerous parties interested in Michigan real estate.

#### MERS, and the MERS Ruling

MERS, as the Court of Appeals explained in its opinion, began as a means for several large participants in the real estate mortgage industry to track ownership interests in residential mortgages. Mortgage lenders and others paid annual fees for electronic processing and tracking of ownership and transfers of mortgages. One practical benefit for mortgage lenders in Michigan has been avoiding the need to prepare and record assignments when mortgage interests change hands.

In many cases where the borrowers defaulted on their loans, MERS conducted foreclosures by advertisement as the nominee for lenders owning the mortgage and debt at the time of the sale. A foreclosure by advertisement is a statutory remedy that, in general, is much faster and simpler than judicial foreclosure sales. Judicial foreclosure sales, unlike foreclosures by advertisement, require a lawsuit, waiting period, more notice, and other procedures relating to parties that might claim an interest in the property.

On April 21, 2011 the Michigan Court of Appeals ruled that MERS may not conduct certain foreclosures by advertisement in the case entitled *Residential Funding Co, LLC v. Saurman*. The *Saurman* Court ruled that Michigan law does permit an "owner of the indebtedness or of an interest in the indebtedness secured by the mortgage" - as well as "servicing agents" - to conduct a foreclosure by advertisement. However, the *Saurman* Court found that MERS was neither an owner of any indebtedness interest, nor a servicing agent, for the particular mortgages in question. In such instances, the *Saurman* Court concluded, MERS may only foreclose by a judicial foreclosure.

Plaintiffs in the *Saurman* action filed an Application for Leave to Appeal with the Michigan Supreme Court on June 2, 2011.

#### Stakeholder Concerns

Until the Michigan Supreme Court acts, or declines to address the appeal, the effect of the *Saurman* ruling on MERS, and sales conducted by MERS, remains to be seen. Already, class actions have been filed against MERS in federal court; government officials, such as the Washtenaw County Sheriff's Department, have placed a moratorium on sales by MERS; and there is litigation by individual owners against MERS and others holding interests from similar sales.

In the meantime, many other stakeholders need to assess the effect of the *Saurman* case on their interests, including:

**Banks.** Every bank that has owned a mortgage that was improperly foreclosed, in addition to every bank that subsequently loaned money to parties buying property from any such invalid sales, faces the possibility of litigation involving ownership and priority interests for the involved parcels.

**Bankruptcy Trustees.** Bankruptcy cases involving debtors who lost real estate interests through foreclosure sales conducted by MERS may invite the trustee, or other parties in interest, to seek to set aside the sales.

**Contractors.** Builders and other professionals asserting construction liens on property acquired from an invalid sale face the risk of holding a junior interest for any foreclosure sale that is set aside. While the Michigan Construction Lien Act affords contractors significant lien rights in property, such rights are typically only superior to property liens established after the first date of construction.

**Home buyers.** Anyone who purchased a home that was the subject of an improper foreclosure sale faces the risk of litigation over their property interests.

**Municipalities.** Even before the *Saurman* ruling, government bodies, including Wayne County, were considering whether to impose a moratorium on foreclosure sales. The *Saurman* ruling could furnish another reason for officials to act.

**Professionals.** Lawyers who assisted MERS in conducting invalid foreclosure sales will need to evaluate their exposure.

**Title Companies.** Title companies that insured foreclosure sales by MERS, or that insured sales to subsequent buyers, could face policy claims by parties who are sued, or otherwise face a cloud on their title interests.



## Conclusion

The *Saurman* ruling has already invalidated two foreclosure sales by MERS and prompted lawsuits over other sales. While it is difficult to predict the outcome on Michigan's housing market, let alone how the Michigan Supreme Court might address the matter, it is easy to see that there will be consequences of the ruling for more than just these two Michigan properties, and interested parties.

FOR MORE INFORMATION, PLEASE CONTACT:



**Geoffrey A. Fields** is a member in Dickinson Wright's Grand Rapids office and can be reached at 616.336.1017 or [gfields@dickinsonwright.com](mailto:gfields@dickinsonwright.com).

**Leslee M. Lewis** is a member and Practice Department Manager of Real Estate, Environmental and Energy & Sustainability in Dickinson Wright's Grand Rapids office. She can be reached at 616.336.1042 or [llewis@dickinsonwright.com](mailto:llewis@dickinsonwright.com)

**Steven G. Howell** is a member and Practice Department Manager of Banking & Finance, Bankruptcy & Insolvency and Municipal Finance in Dickinson Wright's Detroit office. He can be reached at 313.223.3033 or [showell@dickinsonwright.com](mailto:showell@dickinsonwright.com)

**John G. Cameron, Jr.**, is a member in Dickinson Wright's Grand Rapids office and can be reached at 616.336.1010 or [jcameron@dickinsonwright.com](mailto:jcameron@dickinsonwright.com)

**Stephen E. Dawson** is a member in Dickinson Wright's Bloomfield Hills office and can be reached at 248.433.7214 or [sdawson@dickinsonwright.com](mailto:sdawson@dickinsonwright.com)

**J. Benjamin Dolan** is a member in Dickinson Wright's Bloomfield Hills office and can be reached at 248.433.7535 or [bdolan@dickinsonwright.com](mailto:bdolan@dickinsonwright.com)

**Monica J. Labe** is a member in Dickinson Wright's Bloomfield Hills office and can be reached at 248.433.7226 or [mlabe@dickinsonwright.com](mailto:mlabe@dickinsonwright.com)

**Robert V. Peterson** is a member in Dickinson Wright's Bloomfield Hills office and can be reached at 248.433.7230 or [rpeterson@dickinsonwright.com](mailto:rpeterson@dickinsonwright.com)

**Katheryne L. Zelenock** is a member in Dickinson Wright's Bloomfield Hills office and can be reached at 248.433.7384 or [kzelenock@dickinsonwright.com](mailto:kzelenock@dickinsonwright.com)