



MICHIGAN SUPREME COURT UPHOLDS MERS MORTGAGE FORECLOSURES

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In an opinion that will likely preserve the validity of hundreds, if not thousands, of mortgage foreclosures across the state, the Michigan Supreme Court recently confirmed the ability of Mortgage Electronic Registration System (MERS) to perform non-judicial foreclosures by advertisement (as opposed to a court-supervised foreclosure). In doing so, the Court reversed the contrary holding of the Michigan Court of Appeals. The case is *Residential Funding Co, LLC v Saurman*, ___ Mich ___ (Docket No. 143178, November 16, 2011).

As the Court of Appeals explained, "MERS was developed as a mechanism to provide for the faster and lower cost buying and selling of mortgage debt." Although the lender retains ownership of the loan (i.e., the "note"), MERS typically is designated as the mortgagee and given rights of foreclosure in the event of a default on the loan. By operating through MERS, lenders can "buy and sell loans without having to record a mortgage transfer for each transaction because the named mortgagee would never change; it would always be MERS even though the loans were changing hands." MERS tracks those transactions in its system so that in the event of a default, MERS can foreclose on the property and then quit claim the property to "whatever lender own[s] the loan at the time of foreclosure."

In *Residential Funding*, two property owners whose property was foreclosed on challenged the foreclosures as invalid, asserting that MERS did not have authority under MCL 600.3204(1) to foreclose by advertisement because although it was the mortgagee, it was not "the owner of the indebtedness or of an interest in the indebtedness secured by the mortgage or the servicing agent of the mortgage," as required by the statute. Although there was no dispute that MERS was "neither the owner of the indebtedness, nor the servicing agent of the mortgage," the lenders argued that MERS was authorized to foreclose by advertisement on the defendants' properties because it was "the owner . . . of an interest in the indebtedness secured by the mortgage." According to the lenders, this was because MERS had an "interest in the mortgage."

Although the district and circuit courts agreed with the lenders, the Court of Appeals reversed in a split, 2-1 decision issued on April 21, 2011. The Court of Appeals majority held that since "[t]he indebtedness, i.e., the note, and the mortgage are two different things," MERS' designation as mortgagee gave it an interest in "the *property* as security for the note," but not "in the note itself." This is because it "could not attempt to enforce the notes nor could it obtain any payment on the loans on its own behalf or on behalf of the lender." The majority thus concluded that "[g]iven that the notes and mortgages are separate documents, evidencing separate obligations and transactions, MERS' interest in the mortgage did not give it an interest in the debt."

The Court of Appeals dissent disagreed, arguing that "as mortgagee, MERS owned a contractual interest in the indebtedness" because "[i]f the indebtedness is paid in conjunction with the note, MERS has the contractual obligation to cancel the security agreement because its title is defeated. If the indebtedness is not paid, however, MERS has the contractual right and obligation[] to exercise the rights granted to it by the mortgagors, including the right to foreclose by advertisement under the statute." In other words, the dissenting judge explained, "MERS['] interest in the indebtedness is derived from the fact that its contractual obligations as mortgagee were dependent upon whether the mortgagor met the obligation to pay the indebtedness which the mortgage secured."

After hearing oral argument on November 10, 2011 on the lenders' request that it grant leave to appeal, the Michigan Supreme Court quickly issued a short order reversing the Court of Appeals' decision and adopting the position of the Court of Appeals dissent:

As the Court of Appeals dissenting opinion explained, "pursuant to MCL 600.3204(1)(d), Mortgage Electronic Registration System (MERS) is 'the owner . . . of an interest in the indebtedness secured by the mortgage' at issue in each of these consolidated cases" because "[MERS'] contractual obligations as mortgagee were dependent upon whether the mortgagor met the obligation to pay the indebtedness which the mortgage secured."

The Court, clarified, however, that MERS' interest in the "indebtedness" did not "equate to an ownership interest in the note." Rather, the Court explained, "as record-holder of the mortgage, MERS owned a security lien on the properties, the existence of which was contingent upon the satisfaction of the indebtedness. This interest in the indebtedness – i.e., the ownership of legal title to a security lien whose existence is wholly contingent on the satisfaction of the indebtedness – authorized MERS to foreclose by advertisement under MCL 600.3204(1)(d)." Finally, the Court observed that this construction of the statute was consistent with "established legal principles governing Michigan's real property law," which had long held that "the mortgage and the note are to be construed together," and that the mortgagee's right to foreclose did not depend on who held the note.

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