



General Practice, Solo & Small Firm Division

General Practice, Solo & Small Firm Division Best of ABA Sections

SPRING 1998 - VOLUME 2, NUMBER 1

Real Estate Law

Yes, There Is Life on MERS®

By R.K. Arnold

After nearly four years on the drawing board, Mortgage Electronic Registration Systems, Inc., (MERS®), is a reality. MERS® is the result of an industry effort to reduce the need for mortgage assignments in the residential mortgage market and thus increase efficiency and reduce costs. MERS® will act as mortgagee of record for any mortgage loan registered on the computer system MERS® maintains, called the MERS® System. It will then track servicing rights and beneficial ownership interests in those loans and provide a platform for mortgage servicing rights to be traded electronically among its members without the need to record a mortgage assignment in the public land records each time.

MERS® is a Delaware nonstock corporation owned by its members, who, in most cases, are also its users. Members pay annual fees to belong and transaction fees to execute electronic transactions on the MERS® System. Members control the company through a board of directors, which is empowered to set rules, fees, and penalties for operating the System.

The MERS® System is a secure network. Access levels depend on a member's relationship to a particular mortgage loan. The software is Windows-based and designed to run on a 386 computer. At present, the MERS® System is limited to single-family first mortgage loans.

A mortgage note holder can sell a mortgage note to another in what has become a gigantic secondary market. The negotiability of notes under the UCC is the foundation for the secondary market for mortgage loans.

As investors bought more and more loans in the secondary market, many of them contracted with servicing companies to handle loan servicing obligations.

For these servicing companies to perform their duties satisfactorily, the note and mortgage were bifurcated. The investor or its designee held the note and named the servicing company as mortgagee, a structure that became standard.

A servicing contract is not an interest in real estate. Even before MERS®, servicers had no reason to appear in the public land records, except to receive the legal process they needed to service loans properly.

The sheer volume of transfers between servicing companies and the resulting need to record assignments caused a heavy drag on the secondary market. Loan servicing can trade several times before even the first assignment in a chain is recorded, leaving the public land records clogged with unnecessary assignments. Sometimes these assignments are recorded in the wrong sequence, clouding title to the property.

When a mortgage loan is registered on the MERS® System, it receives a mortgage identification number (MIN).

The borrower executes a traditional paper mortgage naming the lender as mortgagee, and the lender executes an assignment of the mortgage to MERS®. Both documents are executed according to state law and recorded in the public land records, making MERS® the mortgagee of record. From that point on, no additional mortgage assignments will be recorded because MERS® will remain the mortgagee of record throughout the life of the loan. In states where deeds of trust are used instead of mortgages, MERS® is typically named as beneficiary of the deed of trust.

The MIN is unique and will not change during the life of the loan, avoiding the confusion of multiple loan numbers that may be assigned when loans are sold on the secondary market. The MIN is never used again for another loan, reducing the risk of multiple funding of the same loan by different lenders, which is a significant cause of fraud loss for the mortgage industry.

As mortgagee of record or beneficiary of the deed of trust, MERS® receives service of all legal process related to the property. When mail is physically received in the MERS® mailroom, it is imaged and forwarded electronically to the company shown as servicer for that loan on the MERS® System. The servicer then responds as required under its servicing contract with the investor.

Once a member registers a mortgage loan on the MERS® System, later transfers of the servicing contract are executed electronically through MERS®. When one servicer trades servicing rights to another, the transfer is initiated by the old servicer. After the new servicer confirms the transfer, the MERS® System is updated to reflect the new servicer as the proper recipient of future legal process. The Real Estate Settlement Procedures Act (RESPA) requires both the old servicer and the new servicer to notify the homeowner in writing when loan servicing is traded.

MERS® keeps track of the new servicer electronically and acts as nominee for the servicing companies and investors. 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. Usually, legal title to the property is not affected again until the loan is paid and the mortgage is released. Foreclosures can be done in the name of MERS® without the need to reassign the mortgage.

MERS® was designed to operate within the existing legal framework in all U.S. jurisdictions. No change in state or federal law is necessary. Activity on the MERS® System does not affect legal title to land. MERS® does not create electronic assignments; it eliminates the need for subsequent assignments altogether. After MERS® becomes mortgagee, there are no more assignments, except on the rare occasion when a member wants an assignment from MERS®. In that case, the assignment from MERS® would be recorded in the public land records and would have the effect of de-registering the loan.

Of course, many state laws are dissimilar. For example, although every state provides for some type of foreclosure if a mortgage is not paid, each has its own procedures. MERS® will operate within those local procedural requirements. MERS® members presumably already comply with the law in those states where they do business. Those same members are responsible to MERS® for ensuring that they continue to comply with those laws after a loan is registered. The important point is that MERS® is bound by the laws of the state where the property is located just as any mortgagee would be; MERS® will comply with those laws through its members.

Some county recorders have expressed concerns that MERS® will eliminate their offices nationwide or destroy the public land records by breaking the chain of title. As implemented, MERS® will not create a break in the chain of title, and, because MERS® is premised on an assignment recorded in the public land records, MERS® cannot work without county recorders.

MERS® presents a dramatic change in mortgage loan practices. Adjusting to that change may not be as difficult as it first appears. Moreover, this change should ultimately benefit lenders, title insurers, consumers, and their counsel.

MERS® is owned and operated by and for the mortgage industry. Right now, the focus is on single-family first mortgages. The next step could be second mortgages. Multifamily or commercial mortgage loans might follow in the future. Almost any secured real estate transaction is a candidate for life on MERS®.

R.K. Arnold is Senior Vice President, General Counsel and Secretary of Mortgage Electronic Registration Systems, Inc., in McLean, Virginia.

This article is an abridged and edited version of one that originally appeared on page 16 in *Probate and Property*, September/October 1997 (11:5).

Search GPSOLO

Go

Search archives since 1995

[Browse Past Issues of GPSOLO](#)



Enjoy the benefits of membership:

Award-Winning Periodicals
Special Member Discounts
Practice Area Committees
Continuing Legal Education
Networking Opportunities
Leadership Opportunities

Not a Member?

Join Now!

2010/11 Editorial Board

GPSOLO Magazine

Editor-In-Chief

Jennifer J. Rose jjrose@jjrose.com

Editorial Board

Jeffrey M. Allen
Stephen D. Beam
Joan M. Burda
Sharon Campbell
George C. Johnson
John D. Kitch
James P. Menton
Joshua Paulin
James Schwartz
Bryan Spencer
Judy Toyer

Technology & Practice Guide Issue

Special Issue Editor

Jeffrey M. Allen allenlawtek@aol.com

Editorial Board

Wells Anderson
Brett Burney
James Calloway
Andrew Clark
Aviva Cuyler
Alan Klevan
Alan Pearlman
Nerino J. Petro Jr.
J. Anthony Vittal
Ex Officio: Andrew C. Simpson

Best of ABA Sections Issue

Special Issue Editor

Jennifer J. Ator jj@hankinsator.com

Editorial Board

Elizabeth Bleakley
Leslie Caldwell
Lloyd D. Cohen
David Zachary Kaufman

ABA Publishing

Director of Publishing: Bryan L. Kay
Editorial Director: Claire L. Parins
Editor: Robert M. Salkin
Editorial Associate: Oreather McLin
Design and Production Director: Russell Glidden
Senior Art Director: Tamara Nowak
Production Coordinator: Rhonda Majot

This page was printed from: <http://www.abanet.org/genpractice/magazine/1998/spring-bos/arnold.html>

[Close Window](#)

© 2010. American Bar Association. All Rights Reserved. [ABA Privacy Statement](#)