By Wendy Lathrop, LS, CFM

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Something Borrowed

In all likelihood, title searches and your current record research are turning up more mentions of Mortgage Electronic Registration Systems, Inc. (MERS) as the nominee for lenders. However, although the actual lender may have changed, a named lender may not be the institution currently holding the loan. MERS is making more headlines these days as the foreclosure mess and stories of robo-signing move to the forefront, but it has been around for much longer than just the past couple of years. MERS and the approach it takes to managing mortgages affects more than those unfortunate people in foreclosure (sometimes wrongfully so); it can also affect those who are current with their payments and simply want to sell their real estate. Before explaining MERS, let me tell you a parallel real life story to illustrate this latter dilemma from an earlier era of national financial turmoil.

Between signing the agreement and getting to the closing table to buy my first house in 1980, interest rates skyrocketed from 8% to beyond 14%, but I bit the bullet and took on the larger payments with the local savings and loan I had been patronizing for years. When rates settled around 6% I refinanced, reducing the terms from 30 years down to 15. All went well until my bank, along with a slew of other small institutions, was seized by the Resolution Trust Corporation (RTC) just about the time I had refinanced once again to take advantage of another 2% drop in interest rates. The RTC liquidated the assets (loans due) of the closed institutions over a period of time, farming them out to numerous other lenders regulated under the Federal Deposit Insurance Corporation.

My account was transferred multiple times in under two years; more than once I sent in my payment just days before receiving a letter announcing a new lender owned my mortgage. But all went well – until it came time to sell my house. The RTC still had its finger in the pie, and somehow was demanding a document sealed by my original lender (which RTC had closed) certifying that the first refinanced loan was satisfied (it was paid off with the second refinance just as RTC was picking up the reins) before RTC would allow transfer of title. Catch 22? Part of the problem was lack of public recordation in the seizure process. It took months for my attorney to solve this. Ouch, but I finally sold my house.

MERS, a "member-based organization" of banking institutions formed in the mid 1990s, is guilty of similar record and notice transgressions. But these are part of its nature rather than oversights. MERS sells itself as benefiting borrowers by eliminating breaks in the chain of title and lowering fees paid by lenders, "fees that would ultimately be passed down to the homeowner." It does this by separating the Deed of Trust from the Promissory Note, the first being a document by which legal title is placed in one or more trustees to secure repayment of the loan (a mortgage that serves as a security and not the loan itself) and the second being the document containing the terms of loan repayment (specified amount, specified time) to a named entity or a holder named by that entity. This approach differs from a standard mortgage in that a neutral third party called the "trustee" can be named in the Deed of Trust/Mortgage or appointed under state statute, and this trustee holds an interest in the title to the borrower's real property on behalf of the lender.

When MERS is nominee for the original lender on a mortgage, it holds the Deed of Trust, but not the Promissory Note - which it can (and does) transfer

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from one member lender to another without recording any assignment of the Notes. MERSCORP Holdings, of which MERS is a wholly owned subsidiary, claims that this saves recording fees and preserves chain of title by continuing on under the name of MERS as the servicing nominee. So–no public records (and no fees to county recorders, a different issue). How do borrowers find out who holds their loans? MERS says this is easy; just search its website. MERS claims this as another benefit to title companies, being a "single, electronic source for identifying the current servicer of a loan."

But "servicer" and "lawful beneficiary" are two different things, and in contrast to the string of cases listed on the MERS web site supporting its existence and activities, there are many others in direct contrast. In *Bain v. Metropolitan Mortgage Group* (No. 86206-1, consolidated with No. 86207-9, filed August 16, 2012), Washington State's Supreme Court has issued an opinion in the most recent and newsworthy of cases upholding consumer protection, in response to a suit initiated by Kristin Bain when MERS moved to foreclose her mortgage despite not being the holder of the Promissory Note. The Court declined to generalize in reviewing one of the three certified questions before it, due to variations in fact scenarios (the response being "It depends"), but is explicit that under Washington state law, MERS does not have the right to initiate foreclosures as holder of only Deeds of Trust.

A short aside in explanation: When a federal court, in this instance the United States District Court for the Western District of Washington, must ascertain state law in a proceeding before it, the federal court may send questions, or "certify" them, to the state's supreme court for answers relating to the local laws involved. Ms. Bain's suit and another by Kevin Selkowitz against his lender for similar reasons were both heard in US District Court, and questions from their consolidated cases certified to Washington State's Supreme Court.

Following the earlier history of Ms. Bain's case makes it very clear that MERS does not make it easy for borrowers to ascertain who is holding their loans. Ms. Bain had originally taken out her loan with IndyMac Bank, F.S.B., which failed and so OneWestBank, F.S.B. purchased its assets, including the Bain loan. But during the case Ms. Bain became aware that possibly Deutsche Bank National Trust Company might be the holder of the Promissory Note and had to amend her wrongful foreclosure suit to include the proper defendant.

Reading only the material posted at www.mersinc.org gives the impression that MERS benefits both lenders and borrowers. Reading cases like this makes it clear that there are large gaps in the public record in the practice of naming MERS as nominee for the lender. Your record research is not as easily accomplished when MERS is involved. Has your professional liability increased as a result of presumably public documents being missed? (Remember, MERS may end up holding legal title when a loan defaults, by virtue of its holding the Deed of Trust/Mortgage.) Public notice is at the very least obfuscated, if not obliterated. Is the Statute of Frauds also side-stepped in the process? Watch for more activity in the various states with increasing awareness of what MERS is and how it operates.