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MERS Remains Afloat

in a Sea of Foreclosures

By Shelby D. Green and JoAnn T. Sandifer

The 2008 housing market collapse was monumental in its proportions and effects. The subprime mortgage crisis led to the demise of scores of banks and venerable financial institutions that had invested too heavily in mortgage-backed securities. Those left standing are now the target of a plethora of lawsuits seeking to lay blame for the collapse. The banks are not alone. Regulators, government agencies, and bond rating companies have all been accused of contributing to the financial crises; lawsuits against these entities continue to mount. Even participants on the periphery, such as the Mortgage Electronic Registration System, Inc. (MERS), being neither servicers nor originators of loans, have been pulled into the litigation fray.

Whether MERS should rightfully bear any blame for the crisis seems beside the point. As the entity holding or enforcing a defaulted mortgage that is in—or heading toward—foreclosure, MERS has become an obvious target for distraught borrowers and distressed debtors. These borrowers have asserted hundreds of offensive and defensive claims against MERS, generally designed to invalidate a defaulted mortgage or bar foreclosure.

The hostility against MERS revealed in many of these claims apparently stems from the basic fact that MERS makes transfers of mortgage loans possible without the transparency of the public mortgage recording system. But as the vast majority of courts have now recognized, MERS's mortgage role is not sinister or even unorthodox; rather, it is grounded in traditional agency relationships. And while that agency relationship may vest MERS with the power to exercise the lender's rights in the mortgage, it was not created to facilitate improper transfers of the loans or to shield information from borrowers or other market participants.

MERSCORP Holdings, Inc., is a privately held corporation that owns and manages the MERS System. It is a member-based organization made up of about 3,000 lenders, servicers, sub-services, investors, and government institutions. The MERS System was conceived in 1993 by a group of leading mortgage market participants, including the Mortgage Bankers Association, the Federal National Mortgage Association, the Federal Housing Administration, the Department of Veteran Affairs, JP Morgan Chase, Bank of America, and Wells Fargo Bank, that were looking for an efficient and reliable system for tracking transfers of residential mortgages in the increasingly securitized mortgage market. What emerged was a system whereby MERS, a wholly-owned subsidiary of MERSCORP Holdings, is designated as the mortgagee of record serving for loans registered in the MERS System. MERS does not hold the promissory note, which means that it holds no beneficial interest in the loan transactions or right of repayment; it merely serves as nominee for the lender and the lender's successors and assigns.

Land records are designed to show subsequent transfers of mortgage lien interests (not transfers of promissory notes or servicing rights). In most states, transfers of mortgage lien interests are not required to be recorded, and transfer of notes and servicing rights are evidenced in the records of the parties involved.

Before MERS, when an interest in a mortgage loan was transferred, the parties would often change the mortgagee by recording an assignment of the mortgage in the land records. This process was time-consuming, costly, and liable to all the vagaries of public recording, like misindexing and contested priorities. In contrast, when a loan is registered on the MERS System, MERS remains the record mortgagee as nominee, or agent, for the new beneficial owner of the promissory note. MERS tracks transfers in the underlying promissory note and the servicing rights in MERS's electronic database. Borrowers have access to both a toll-free number and an Internet web site (www.mers-serviceid.org/sis/index) that provide the identity of the servicer and, in many cases, the beneficial owner of their mortgage loans. As MERS's web site states, MERS was created "to streamline the mortgage process by using electronic commerce to eliminate paper." See *About Us*, MERS, www.mersinc.org/about-us/about-us.

Despite the simple premise of the MERS System, opponents—or those simply trying to invalidate or forestall enforcement of their mortgages—have leveled various challenges to MERS's practices and even its basic business model. Taking an aerial view of the challenges, it is possible to discern a certain pattern as one challenge seemed to morph into the next (often following rejection of the earlier one in the courts).

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Some borrowers have asserted that MERS lacked legal standing to foreclose because it was a mere nominee and not the owner of the note. Even if MERS's legal standing was upheld, borrowers pointed to the nominee status as an empty formality, arguing that it deprived MERS of the requisite beneficial interest to commence foreclosure or assign the security instrument, even to the holder who had since acquired the beneficial interest. When the lender or note owner commenced foreclosures or sought to enforce the lien instead of MERS, borrowers still challenged the security instrument, arguing that MERS's designation as nominee constituted an impermissible split of the note from the mortgage, rendering both unenforceable.

Standing, one of the earliest challenges to the MERS System, refers to the legal right to set judicial machinery in motion.

From this distant vantage, all the challenges might be viewed as permutations of the same theme—who has the legal power and interest sufficient to enforce the security given for a loan? The overarching response is that MERS, as nominee or agent for the beneficial owner, has the power to enforce the lien and security interest.

MERS's Status as Nominee for the Lender Provides Standing to Foreclose

Standing, one of the earliest challenges to the MERS System, refers to the legal right to set judicial machinery in motion. Borrowers have maintained that MERS lacks standing because it is merely the nominee for the lender and not the lender in fact and that, as mere nominee, its lack of a beneficial interest in the underlying indebtedness means it has suffered no injury by the default.

Both of these challenges ignore the basic idea of standing. One can rightfully invoke the jurisdiction of the court where one holds, in an individual or representative capacity, some real interest in the cause of action, or a legal or equitable right, title, or interest in the subject matter of the controversy. *RMS Residential Props., LLC v. Miller*, 32 A.3d 307 (Conn. 2011); *Trotter v. Bank of N.Y. Mellon*, 275 P.3d 857 (Idaho 2012). In other words, standing requires that a litigant have a sufficient and adversarial stake in the matter, with substantial potential for real harm flowing from the outcome of the case. *Bank of N.Y. v. Raftogianis*, 13 A.3d 435 (N.J. Super. Ct. Ch. Div. 2010); *Mortgage Elec. Registration Sys., Inc. v. Barnes*, 940 N.E.2d 118 (Ill. App. Ct. 2010).

MERS's legal rights and interest in the mortgage transaction are set out in the security instrument executed by the borrower at loan origination. The standard language in a security instrument registered in the MERS System names MERS as "mortgagee, solely as nominee for Lender and Lender's successors and assigns" and further states:

> Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower . . . . MERS . . . has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell a Property; and to take any action required of Lender including, but not limited to, releasing and cancelling this [] Instrument.

See *Barnes*, 940 N.E.2d at 120; *Culhane v. Aurora Loan Servs. of Neb.*, 826 F. Supp. 2d 352, 370 (D. Mass. 2011), aff'd, 708 F.3d 282 (1st Cir. 2013).

With such an express conferral of the power to foreclose, why have challenges to MERS's standing not been dismissed out of hand? The use of the term "nominee" may provide the answer. The term is not widely used or understood, and challengers have pointed to what they perceive as limitations inherent in that status. They argue that the term is dichotomous: a nominee seeks the power to foreclose because it stands in the place of the lender, but does not have the power to foreclose because it is not the lender in fact. MERS cannot, it is claimed, be both the agent and the principal.

In discerning the meaning of "nominee" in the MERS context, courts have not confined their inquiry to the text of the security instrument but instead have consulted extrinsic sources, most notably *Black's Law Dictionary*. See *Edwards v. Mortgage Elec. Registration Sys.*, 300 P.3d 43, 49 (Idaho 2013); *U.S. Bank, N.A. v. Howie*, 280 P.3d 225, 231 (Kan. Ct. App. 2012); *Butler v. Deutsche Bank Trust Co. of Ams.*, No. 12-10337-DPW, 2012 U.S. Dist. LEXIS 114196, at *21 (D. Mass. Aug. 14, 2012). "Nominee" is defined as "[a] person designated to act in place of another, usu. in a very limited way," or "[a] party who holds bare legal title for the benefit of others." *Black's Law Dictionary* (9th ed. 2009). Thus, MERS is an agent for the lender, and its successors and assigns, for the limited purpose of holding and enforcing the security agreement. It holds the security instrument in its own name, but it does so in a representative capacity.

That MERS lacks an economic or beneficial interest in the underlying indebtedness does not deprive it of the standing this status confers. Although a few courts have questioned MERS's interest in the mortgage for purposes of asserting rights relating to the mortgage, *Mortgage Elec. Registration Sys., Inc. v. Southwest. Homes of Ark., Inc.*, 301 S.W.3d 1 (Ark. 2009), *Mortgage Elec. Registration Sys., Inc. v. Saunders*, 2 A.3d 289, 295 (Me. 2010), *Landmark Nat'l Bank v. Kesler*, 216 P.3d 158 (Kan. 2009), most courts confronted with the issue have found that MERS's status as record mortgagee, holding legal and record title to the security instrument and the power to act for the note holder, is sufficient for MERS to commence a foreclosure in its own name. *Edwards*, 2013 WL 1760620, at *16; *Bucci v. Lehman Bros. Bank, FSB*, 2013 WL 1498655, at *8–15 (R.I. Apr.

12, 2013); *Eaton v. Federal Nat'l Mortg. Ass'n*, 969 N.E.2d 1118 (Mass. 2012); *In re Mortg. Elec. Registration Sys., Inc.*, No. A12-0387, 2012 WL 5289866, at *6 (Minn. Ct. App. Oct. 29, 2012); *Jackson v. Mortgage Elec. Registration Sys., Inc.*, 770 N.W.2d 487 (Minn. 2009); *Barnes*, 940 N.E.2d 118. For instance, the Minnesota Supreme Court held that MERS has the ability to institute foreclosure by advertisement because "a party can hold legal title to the security instrument without holding an interest in the promissory note." *Jackson*, 770 N.W.2d at 500–1. The Rhode Island Supreme Court has agreed, holding that MERS had the contractual authority to foreclose under the terms of the mortgage. *Bucci*, 2013 WL 1498655, at *8-15. Likewise, in *Edwards*, the Idaho Supreme Court upheld the dismissal of the brrower's challenge to a nonjudicial foreclosure and rejected the borrowers' argument that MERS could not act as the beneficiary on the deed of trust absent an interest in the promissory note. 2013 WL 1760620, at *4–5.

Thus, MERS's lack of an economic interest in the loan is beside the point. MERS's status as mortgagee with authority to act on behalf of the party that holds that economic interest is the key. Courts have explained that, because MERS "enforce[s] the mortgage on behalf of the owner of the note, a party that is unquestionably entitled to enforce the obligation the mortgage secures[,]" MERS has the power to foreclose, *Bucci*, 2013 WL 1498655, at *16, and that foreclosure can be brought by MERS even though beneficial ownership of the note is in another. *Barnes*, 940 N.E.2d 118. These courts are cognizant of the difference between ownership of an interest in the note and "ownership of the mortgage" and have explained that the latter is sufficient to render MERS a real party in interest, with standing to foreclose. See, e.g., *Residential Funding Co., LLC v. Saurman*, 805 N.W.2d 183, 184 (Mich. 2011); *Culhane v. Aurora Loan Services*, 708 F.3d 282 (1st Cir. 2013) ("The mortgage need not possess any scintilla of a beneficial interest in order to hold the mortgage").

In jurisdictions that require evidence of the promissory note as a prerequisite to a judicial foreclosure, foreclosure of a MERS mortgage requires that same proof. See, e.g., *U.S. Bank, N.A. v. Alexander*, 280 P.3d 936 (Okla. 2012); *U.S. Bank Nat'l Ass'n v. Kimball*, 27 A.3d 1087 (Vt. 2011). The holder of the mortgage must demonstrate rightful possession of the promissory note as the original payee, assignee by a valid assignment, or lawful holder of the note. *In re Miller v. Deutsche Bank Nat'l Trust Co.*, 666 F.3d 1255 (10th Cir. 2012); *CPT Asset Backed Certificates v. Cin Kham*, 278 P.3d 586 (Okla. 2012); *Deutsche Bank Nat'l Trust Co. v. Richardson*, 273 P.3d 50 (Okla. 2012). In deed of trust jurisdictions, in which foreclosures take place by power of sale, courts have been nearly uniform in ruling that the party commencing foreclosure need not possess the promissory note. See, e.g., *Burnett v. Mortgage Elec. Registration Sys., Inc.*, 706 F.3d 1231, 1243 (10th Cir. 2013). These courts recognize that the original parties are free to contract at the outset to have someone other than the beneficial owner of the debt act on behalf of that owner to enforce rights granted in the security instrument. Id.; see also *Patterson v. CitiMortgage, Inc.*, No. 1:11-CV-0339-CC, 2012 WL 4468750, at *12 (N.D. Ga. Sept. 26, 2012) (possession or holding the note not required). According to these cases, when a deed of trust expressly provides for MERS to have the power of sale, then MERS has the power of sale. See *Grubbs v. CitiMortgage, Inc.*, No. 4:12CV472, 2012 WL 5463865 (E.D. Tex. Nov. 8, 2012).

In a few limited cases, when a foreclosure statute prescribes specific interests required to invoke the statute, courts have interpreted the language to require that the foreclosing party hold an economic interest in the underlying debt. The Washington Supreme Court, in *Bain v. Metropolitan Mortgage Group, Inc.*, 285 P.3d 34 (Wash. 2012) (en banc), read the trust deed statute quite literally and found that "MERS is an ineligible 'beneficiary' within the terms of the Washington Deed of Trust Act, if it never held the promissory note or other debt instrument secured by the deed of trust." Id. at 47. Similarly, in *Niday v. GMAC Mortgage, LLC*, 284 P.3d 1157 (Or. Ct. App. 2012), the Oregon Court of Appeals read "beneficiary" of a trust deed, for purposes of the Oregon Trust Deed Act, to mean the person named or otherwise designated in the trust deed as the person to whom the secured obligation is owed, that is, the original lender. Id. at 1164. When the beneficiary assigns its interest in the trust deed without recording that assignment, under Or. Rev. Stat. § 86.735(1), a predicate to nonjudicial foreclosure may not be satisfied. Id. at 1169. These cases, however, are the exception rather than the rule, and they have been construed narrowly. See *Zalac v. CTX Mortg. Corp.*, No. C12-01474 MJP, 2013 WL 562892 (W.D. Wash. Feb. 14, 2013) (distinguishing *Bain* and dismissing claim that MERS's role on deed of trust violated the state consumer protection act).

As a general rule, the broad language in a MERS security instrument establishes that MERS, the record mortgagee as nominee for the lender, possesses and can assert all the powers of a mortgagee, including the power to foreclose. The vast majority of the courts have recognized this, and challenges to MERS's standing to foreclose have accordingly dwindled. Nevertheless, MERS has recently amended its Membership Rules to require that, before initiation of any foreclosure, the security instrument must be assigned from MERS to the note owner or servicer. Foreclosures may no longer be initiated in MERS's name. See MERS System Rules of Membership Rule 8 (2011 amendment).

MERS Has the Authority to Assign the Security Instrument

Even before the rule change above, MERS often assigned the mortgage or deed of trust to the note owner or holder in anticipation of foreclosure. This provided yet another basis for challenge by defaulting borrowers—the claim that MERS lacks the authority to assign the security instrument. Although courts will scrutinize the form and sufficiency of the actual assignment between note holders, *Citimortgage, Inc. v. Stosel*, 934 N.Y.S.2d 182 (N.Y. App. Div. 2011) (failure to prove ownership of the note by delivery or valid assignment), they have had little difficulty finding MERS's power to assign the security instrument as inherent in the powers originally granted. In *Culhane*, the First Circuit held that MERS had

the authority "twice over" to assign the mortgage. This authority derived frm MERS's status as equitable trustee for the note holder and from the terms of the mortgage contract. 708 F.3d at 293.

The Bankruptcy Court for the District of Wyoming also addressed the issue of "whether MERS had authority to assign the mortgage to the [loan servicing company], on behalf of the Lender. . . ." *In re Relka*, No. 09-20806, 2009 WL 5149262, at *4 (Bankr. D. Wyo. Dec. 22, 2009). Relying on the standard language in a MERS security instrument, the court concluded that "[o]ne of the actions that this Court would include in this non-exclusive listing of rights, is the right to assign the mortgage." Id. at *5.

Alternatively, courts often find the power to assign immune from challenge by one who is not a party to the assignment. *Allemon v. Countrywide Home Loans, Inc.*, No. 11-15400, 2012 WL 5300344, at *4 (E.D. Mich. Oct. 25, 2012); but see *Culhane*, 708 F.3d 289-91 (mortgagor has standing to challenge the assignment of a mortgage to the extent necessary to contest a foreclosing entity's status quo mortgagee, by showing the assignment was void because the assignor had nothing to assign or lacked authority to assign, but not by showing that an assignment, otherwise effective to pass legal title, was merely voidable at the election of one party).

MERS's Role as Nominee Does Not Sever the Note and Mortgage

Because the challenges to MERS's right to foreclose and its ability to assign have been largely unsuccessful, defaulting borrowers turned to a more fundamental attack on the MERS System. They claim that MERS's status as the mortgagee on the security instrument separates the ownership of the note and the mortgage and renders the mortgage unenforceable. The prevalence of this argument is somewhat surprising because an arrangement whereby a note holder appoints another to enforce the obligations under the note was not invented by MERS, but, rather, is a long-standing practice in mortgage transactions that is well-grounded in agency law.

Mortgage Follows the Note, But Note Holder Can Appoint Another to Enforce

As a general rule, a promissory note and the mortgage securing it are inseparable; the transfer of the note is deemed to transfer the right to enforce the mortgage as well. But this does not prevent the note holder from appointing another to hold and enforce the mortgage on its behalf. The Restatement of Property expresses the widely held principle that "[a] transfer of an obligation secured by a mortgage also transfers the mortgage *unless the parties to the transfer agree otherwise*," Restatement (Third) of Property: Mortgages § 5.4(a) (emphasis added), but that "[a] mortgage may be enforced only by, or in behalf of, a person who is entitled to enforce the obligations the mortgage secures." Id. § 5.4(c).

When the mortgage and the right of enforcement of the obligation it secures are separated, the separation typically precludes the holder of the note from foreclosing and results in a practical loss of the efficacy of the mortgage. But "this result is changed if [a party] has authority . . . to enforce the mortgage on . . . behalf [of the holder of the note]." Id. § 5.4, cmt. e. Thus, as the Restatement explains, there is no separation in that scenario, and the note remains secured because the party holding the mortgage has the authority to enforce the mortgage for the owner or holder of the note. For example, the named mortgagee "may be a trustee or agent of [the note holder] with responsibility to enforce the mortgage at [the note holder's] direction." Id.

The Restatement explains that this position aims to avoid the economically wasteful consequences of an unenforceable mortgage; the common law strives to achieve unity of the note and mortgage interests even if the courts must supply gaps in the documents. Id. In fact, although the Restatement acknowledges "rare occasions" when the mortgagee may wish to disassociate the obligation and mortgage, "that result should follow only upon evidence that the parties to the transfer so agreed." Id § 5.4 cmt. a. The Restatement urges courts to be vigorous in seeking to find such "a[n agency] relationship, since the result is otherwise likely to be a windfall for the mortgagor and the frustration of [the note owner's] expectation of security." Id. § 5.4 cmt. e.

The plain language of MERS's standard security instrument does not establish an intent to separate the note and the mortgage. The very opposite is true.

Agency Relation Results from the Powers Granted in the Deed of Trust

As the Restatement suggests, a fatal split can also be avoided by examining the relation between the nominee and lender under the lens of agency law. An agency relationship exists when a principal (the original lender) manifests assent to have another, MERS (the agent), act on its behalf, subject to the principal's control and consent of the agent. Restatement (Third) of Agency § 1.01. An agent can act on behalf of both a disclosed principal (the original lender) and a later unidentified principal (lender's successor and assign). Id. § 1.04. A MERS mortgage names MERS as the mortgagee in its capacity as nominee for the defined "lender" under the mortgage, and for the lender's successors and assigns—the subsequent transferees of the note. That the parties used the term "nominee" instead of "agent" makes no difference, as the label affixed to the relation does not determine the nature of that relationship. Id. § 1.02. Instead, "the legal status of a nominee depends on the context of the relationship of the nominee to its principal." *Howie*, 280 P.3d at 231 (quoting *Landmark Nat'l Bank v. Kesler*, 216 P.3d 158, 166 (Kan. 2009)); Restatement (Third) Agency § 1.02 cmt. b.

As one court explained, the standard language in a MERS security instrument "is more than sufficient to create an agency relationship between MERS and the Lender *and its successors* in Missouri, regardless [sic] what term they used to describe that relationship." *In re Tucker*, 441 B.R. 638, 645 (Bankr. W.D. Mo. 2010) (emphasis added). All subsequent note holders take subject to the agency relationship created in the deed of trust. "[T]he effect of the MERS system in Missouri is that even if, as

here, the deed of trust is recorded in the name of the original lender . . . the holder of the note, whoever it is, would be entitled to foreclose, even if the deed of trust had not been assigned to it." Id. at 644–45.

Moreover, MERS's role as mortgagee for another is not novel. It is common practice for a trustee or straw man to hold a mortgage interest in the land records on behalf of another. Both before and since MERS was created, servicers on loans have often held the record interest in mortgages on behalf of the beneficial owners of the loans.

MERS's Governing Rules Confirm the Agency Relationship

MERS's rules of membership confirm the agency relationship created in the security instrument. The rules provide that MERS's members "shall cause [MERS] to appear in the applicable public land records as the Mortgagee of Record as Nominee for the Note Owner and its successors and/or assigns with respect to each Mortgage loan that the Member registers on the MERS System," and that "[i]n the absence of contrary instructions from the Note owner, MESRCORP Holdings, and MERS may rely on instructions from the Servicer or Subservicer shown on the MERS System with respect to transfers of legal title of the note or mortgage, transfers of contractual servicing rights, and releases of any security interests applicable to such mortgage loan." MERS Rules of Membership, Rule 2, §§ 4 & 5 (Mar. 2013).

These rules are incorporated into lenders' membership agreements. The deed of trust and membership agreements authorize MERS to perform specific delegable acts for the lender and its assigns, including holding legal title to the deed of trust and exercising any of the rights granted to the lender thereunder. MERS does so at the direction and control of the note owner. In this way, the holder of the note, the principal, always retains the right to enforce the secured obligation. The courts have found that these rules confirm the agency relationship between MERS and its members, noting that the lenders "signed up for this agency relationship in their membership agreements." *Tucker*, 441 B.R. at 646.

Severance Arguments Made and Rejected

The Kansas Supreme Court's decision in *Landmark National Bank v. Kesler*, 216 P.3d 158 (Kan. 2009), fueled MERS's "severance" argument, though the case is generally cited solely for the stray dicta it contains. There, the trustee under the first deed of trust (Landmark) filed a petition to foreclose but did not serve either MERS, the nominee for the lender under a second deed of trust, or the assignee of the note (Sovereign) on the second loan. Sovereign sought to set aside the default judgment and sheriff's sale on the ground that MERS was a contingently necessary party under Kan. Stat. Ann. § 60-219(a). The Kansas Supreme Court held that the trial court did not abuse its discretion in denying the motion to vacate. Because MERS had not demonstrated a direct, ascertainable loss from the foreclosure, it failed to establish the predicate for setting aside a judgment. Id. at 169–70.

In dicta, the court commented on MERS's role, likening it more to a "straw man than to a party possessing all the rights given a buyer" and stating that MERS had few rights, if any, other than acting on behalf of the lender to secure the lender's rights when necessary. Id. at 166. Although the court did not determine whether any severance existed in that case, it surmised that "in the event" that the mortgage loan somehow becomes separated from the security interest, the mortgage "may" become unenforceable. Id. at 166–67. In so doing, the court did not otherwise examine the relevant language of the mortgage and MERS's membership agreements with the lender. A close reading of the case reveals that reliance on that case in support of the proposition that naming MERS as nominee works a severance of the mortgage from the note is surely misplaced. Rather than a broad policy position, the case was in fact decided on something very mundane—procedure. Thus, *Landmark* merely stated the uncontroversial proposition that the enforceability of a MERS mortgage may turn on the relationship between MERS and the holder of the note.

Bellistri v. Ocwen Loan Servicing, LLC, 284 S.W.3d 619 (Mo. Ct. App. 2009), is also frequently cited on the severance issue, again inaptly. There, the court of appeals held that Ocwen, the assignee of the deed of trust, lacked standing to challenge a quiet title judgment following a tax sale absent evidence of the ownership of the promissory note. The court stated, in dicta, that the "practical effect of splitting the deed of trust from the promissory note is to make it impossible for the holder of the note to foreclose, *unless the holder of the deed of trust is the agent of the holder of the note*." Id. at 623 (emphasis added) (citing Restatement (Third) of Property: Mortgages § 5.4). As in *Landmark*, the *Bellistri* court did not decide whether an agency relationship existed that would validate the note under the cited Restatement provision because there was no evidence regarding the current holder of the note. Id. at 623. In a subsequent suit filed by MERS in federal court to set aside the tax sale, when evidence was presented to establish that MERS held legal title to the deed of trust on behalf of the note owner and note holder, the district court held that MERS was entitled to bring suit to redress the injury to its principal and had standing to challenge *the very same tax sale. Mortgage Elec. Registration Sys., Inc. v. Bellistri*, No. 4:09-CV-731 CAS, 2010 WL 2720802, at *15 (E.D. Mo. July 1, 2010).

Other courts from these jurisdictions, both federal and state, have rejected the severance argument alluded to in *Landmark* and *Bellistri I*. In *U.S. Bank, N.A. v. Howie*, 280 P.3d 225, the Kansas Court of Appeals held that MERS's role as mortgagee, as nominee for the lender, did not sever the interests in the note and the mortgage. The court found that the agency relationship was created by the mortgage

itself, which "explicitly authorize[d] MERS to act on behalf of U.S. Bank in all situations related to the enforcement of the Mortgage." Id. at 230. *Howie* acknowledged the potential issue of severance raised in *Landmark*, but explained that there could be no severance when the beneficial interest in the mortgage and note remained vested in the original lender and its successors and assigns by the clear language of both the note and the mortgage. Id. at 227; see also *MetLife Home Loans*, 286 P.3d at 1157 (the existence of an agency relationship between MERS and lender's assignee was evidenced by the language of the mortgage itself, which clearly stated that the borrowers mortgaged the listed property "to MERS, solely as nominee for [lender] *and [lender's] successors and assigns*").

Similarly, in *In re Martinez v. Mortgage Elec. Registration Sys., Inc.*, after a thorough review of Kansas law, including the Restatement of Property and other relevant authority, the court held that no severance of the note and the mortgage occurred in light of the language of the mortgage itself and MERS's membership agreements with the original lender and its successors and assigns. 444 B.R. 192 (Bankr. D. Kan. 2011). Instead, "MERS was clearly acting as an agent for [the lender] at all relevant times," holding the mortgage as "nominee" for the lender and agreeing to act on the lender's behalf and at its direction with respect to the mortgage. Id. at 205. "The fact that MERS and [the lender] chose to use the word 'nominee,' rather than 'agent,' [did] not alter the underlying relationship between the two parties," especially given the fact that the two terms have nearly identical legal definitions. Id. at 205–06. "[T]he [n]ote and [m]ortgage were never split, and remain[ed] enforceable." Id. at 206.

These rulings reflect the sensible position that, absent fraud, a mortgage may be held by MERS or another nominee for the security of the real creditor, whether the creditor is the person named as mortgagee or some other party, so far as the nature of the transaction is reasonably disclosed. In *Cervantes*, 656 F.3d 1034, the court explained that because the designation of MERS as nominee appears on the face of the security instrument, no credence would be given to claims of fraud or sham, nor claims that the borrower was misinformed or suffered any injury from either MERS's role as a beneficiary or the possibility that their loans would be resold and tracked through the MERS System.

This rule protects the important goal of facilitating mortgage transactions and recognizes that to hold such mortgages void would frustrate the intentions of both mortgagors and mortgagees. *RMS Residential*, 32 A.3d at 317. There is simply no reason that "the original parties to the Note and Deed of Trust cannot validly contract at the outset 'to have someone other than the beneficial owner of the debt act on behalf of that owner to enforce rights granted in [the security instrument].'" *Commonwealth*, 680 F.3d at 1204; *Horvath v. Bank of N.Y.*, 641 F.3d 617, 620 (4th Cir. 2011); *Trent v. Mortgage Elec. Registration Sys., Inc.*, 288 F. App'x 571, 572 (11th Cir. 2008). Instead, as one court recently noted, "the choice of a mortgagee is a matter of convenience." *Residential Funding*, 805 N.W.2d at 184 ("It has never been necessary that the mortgage should be given directly to the beneficiaries. The security is always made in trust to secure obligations, and the trust and the beneficial interest need not be in the same hands. . . .") (quoting *Adams v. Niemann*, 8 N.W. 719, 720 (Mich. 1881)).

In a somewhat different take on the issue, the Nevada Supreme Court has found that the designation of MERS as nominee does split the note and deed of trust at inception because an entity separate from the note holder is listed as the beneficiary and thus the deed of trust cannot be enforced. *Edelstein v. Bank of N.Y. Mellon*, 286 P.3d 249 (Nev. 2012). The court points out, however, that this split is not irreparable or fatal, but can be cured by having MERS assign, under its powers as agent, its beneficial interest in the deed of trust to the holder of the note. See id. at 252. The rejoined interests are then enforceable.

The Future of MERS

The flood of foreclosures following the 2008 housing crisis deluged MERS with hundreds, if not thousands, of claims from defaulting buyers seeking to avoid their mortgage obligations. MERS has survived, generally defeating the various permutations of the attacks on its business model and defending the validity of the mortgages registered on its system. As the courts have consistently recognized, MERS's role as mortgagee is nothing more than that of an agent holding the mortgage for its principal. And in so doing, MERS has benefitted borrowers by streamlining the mortgage recording process and reducing the costs associated with mortgage transactions.

Though few of the borrowers' challenges against MERS have prevailed, these challenges—and the broader challenges against the lending institutions—have sparked considerable debate on a variety of issues, such as what amount of disclosure to the borrower is necessary when entering into mortgage transactions, what systems or protocols are warranted for dealing with a borrower in financial distress, and whether existing rules on negotiable instruments are suitable for transfers of mortgages. These issues have led to a number of institutional changes, mostly in the practices of the lenders. See *State Attorneys General, Feds Reach $25 Billion Settlement with Five Largest Mortgage Servicers on Foreclosure Wrongs*, Nat'l Ass'n of Att'ys Gen. (last visited Apr. 20, 2013), http://naag.org/state-attorneys-general-feds-reach-25-billion-settlement-with-five-largest-mortgage-servicers-on-foreclosure-wrongs.php. Some changes have affected MERS administration and delivery of services to its members. See Consent Order for *In the Matter of MERSCORP, Inc.*, OCC No. AA-EC-11-20 (Apr. 13, 2011), www.occ.gov/news-issuances/news-releases/2011/nr-occ-2011-47h.pdf. These institutional changes will shore up the greater efficiency and reliability of the MERS System, which remains an essential player in the mortgage industry. ■