



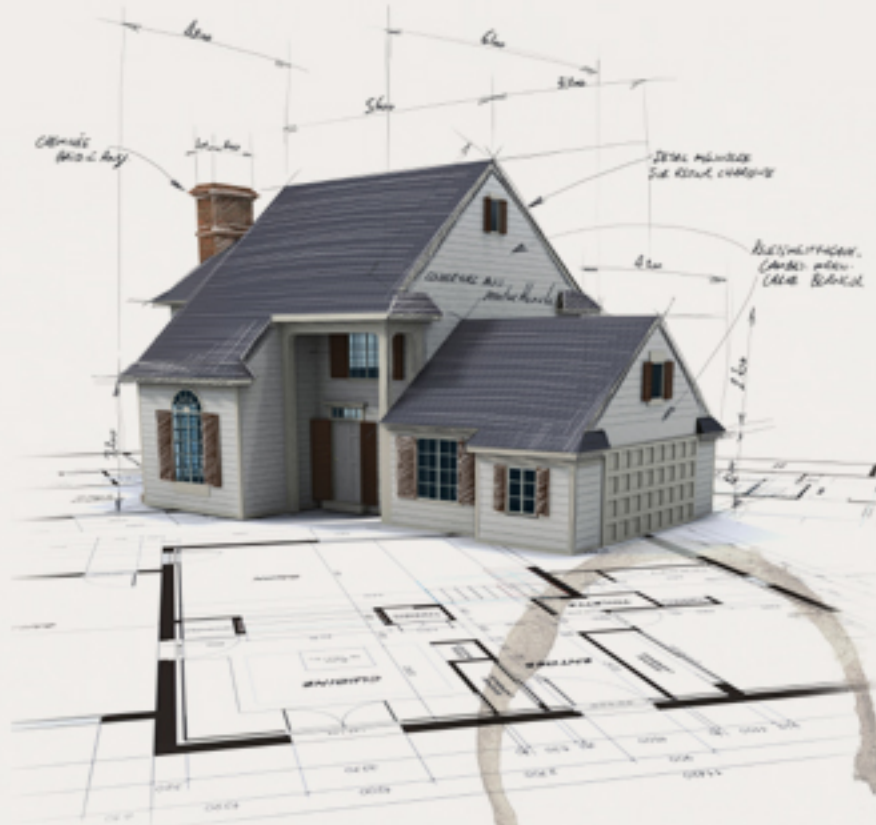
## YOUR TOWN USA

## Deed of Trust



### ... Who Really Owns Your Home?

OVER 62,000,000 TITLES TO PROPERTY MAY BE CLOUDED!  
Is Yours ONE OF THEM? THIS BOOK WILL HELP YOU  
FIND OUT!



*The guy who thinks he owns your home*  
SIGNATURE

John Q. Unknown, VP OF ?



## CLOUDED TITLES

By Dave Krieger

**"Dave has critical expertise in the detailed and complicated area of wrongful foreclosure, clouds on title and other cutting edge real estate matters. Don't look away from this searing analysis."**

**- Jill Smith, Esq.  
Natural Resources Law Group  
Seattle, Washington**

## **ACKNOWLEDGMENTS**

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# THE DISCLAIMER ... PLEASE READ!

## TO MY FELLOW TRUTH SEEKERS

It is a shame that I even have to “go here” (into this discussion over unauthorized practice of law). It is highly anticipated however that many of the purchasers of this work are bankers, their attorneys, unauthorized practice of law committee members and government officials whose sole purpose is to entrap the author’s mindset, intentions, legal purposes or for any other reason, utilizing this material and the author’s statements as being taken in context of the rendering of legal advice. If you have to stoop so low, you are wasting your time criticizing something that the author’s mindset may trigger in the nature of a “truth” in your brain. The real truth in this case, is reserved for a court of law or of equity. I didn’t set the system up. I just observed the goings-on. The First Amendment gives me the right to give you my impressions of it all; that’s what this book was designed to do.

Yes, ignorance of the law is no excuse ... just like many of you think that the “grass is greener over the septic tank”. The truth is ... the grass is greener over the lateral field; and there is a distinct difference between the two. One holds the effluent while the other disperses it. Now apply that to the practice of law and tell me which one you represent. I have been screwed over by attorneys before; but it doesn’t mean there aren’t good attorneys out there who can’t be trusted. It is for this reason that the author focuses on not just the uneducated attorneys but this insanely corrupt banking system and the mess it has caused for America. This book is not written to anyone but American homeowners who went out and got a mortgage loan and didn’t bother to read it (or seek legal representation instead) before they signed it. If you’re a mortgage loan officer (and I’ve been “had” by a few of them too) trying to figure out a way to circumvent your eventual prosecution for any wrongdoing ... shame on you. I worked for a mortgage company and I can tell you first hand there’s plenty of liability to go around.

This is frankly a big waste of time and space having to disclaim everything I research because it’s just that, research. I can share research ... I just can’t give you legal advice. That would be outside of my realm of authority and I do not purport to do that. Things that may seem finite in this book are not. They are my opinion based on legal research, but they are not legal advice. Only a bar licensed attorney can give you that.

Now let’s cut to the chase. For those attorneys out there who really do give a damn about their clients and would rather NOT take them down the road to bankruptcy, bully for you. The author can only hope that this work will serve as an inspiration to “fight the good fight” if you are here to help your fellow man as a legal practitioner. All of this commentary has to preface my understanding of the practice of law. Most of the attorneys in this area of law will understand where I’m coming from. I have spoken to many attorneys who I would put my trust in if I was being foreclosed on.

For those of you in financial trouble, you probably purchased this book just to get an insight. You still need to get an attorney because I cannot represent you.

## **THE DIFFERENCES BETWEEN AN ATTORNEY AND A PARALEGAL**

An attorney is licensed by the State Supreme Court in the state in which he or she practices, as well as in federal court (for which admission is also necessary). In virtually all states, one has to have a law degree in order to take the State Bar examination and must pass the “bar” before applying for licensure. Combine the law degree and all the extra time and effort needed to specialize in a given area of law and you have six to eight years of education and practice at hand. I AM NOT AN ATTORNEY! I’m not holding myself out as an attorney. I have researched this subject matter though ... and I’m still researching it. You will see evidence of that in this book. If you disagree with my theories or my conclusions, that’s okay. You’re entitled to. It’s research. It’s not legal advice. How many times do I have to repeat myself?

A PARALEGAL IS NOT LICENSED! Most paralegals are CERTIFIED because they’ve gone through a minimum 1-year program to teach them the basics of legal research and law. The certificate amounts to your basic education, not full-fledged experience. There are textbook paralegals and paralegals who think out of the box. I am one of the latter. PARALEGALS ARE NOT ATTORNEYS! If you can’t understand the difference, stop reading this book now! Even though my work has made law reviews and I’ve helped attorneys set case law and win cases, I’m still just a paralegal.

Paralegals ASSIST the attorney in case preparation; they do NOT have to be “certified” and there is currently no mandate for them to be “approved” by state bar associations to do anything besides legal research and attorney assistance. Paralegals cannot represent you in a court of law or equity! Since I know my place in the legal system, I don’t hold myself out as a lawyer; so don’t contact me and ask me to go into court to represent you!

The court system is based on a network of “good ‘ol boys” and I’m not a member of the club. Besides, I don’t smoke cigars and it’s been a long time since I’d played golf. Yes, the preceding sentence was a quip to give “the system” a chuckle.

An attorney can appear in court and argue your case for you. A paralegal sits in the gallery and takes notes and observes. Any paralegal or any other person (other than the Plaintiff or Defendant in an action) cannot stand before a judge in any court in this land and argue a case. Any person attempting to argue a case (other than the Plaintiff or Defendant themselves) in court could be deemed what is known as “Unauthorized Practice of Law”. Holding one’s self out as a lawyer when one is not is also a felony, punishable by fines and state jail time. I AM NOT AN ATTORNEY!

A friend of mine was wrongfully sentenced to prison for a number of years for unknowingly holding herself out as an attorney (she was “set up” by her attorney-boss) and the Unauthorized Practice of Law Committee for the State Bar of Texas had their way with her and got her indicted (just so you know that I know the difference between an attorney and a paralegal and I know how UPL committees operate). I hold the 73<sup>rd</sup> Texas Legislature partially responsible for her demise. Someday I may write an expose on it.

## **THIS IS NOT “DUH” RESEARCH**

By the time you get done reading this (especially if you're a homeowner who is about to go into foreclosure) you're going to thank me for my insights and my willingness to write this book. In essence, this book is written to homeowners, attorneys and judges in the United States of America. No State Bar is going to hold me accountable for doing legal research as an investigative journalist-paralegal and presenting it to you for your take on my understanding, especially since I've interviewed attorneys and specialists in the field of real estate, mortgages, securities, foreclosure and bankruptcy. If I quote them ... there is a reason for it. If you're going to quibble over the outcome, then the entire legal system is in trouble!

From interviewing attorneys, I have also gleaned that there are two types of justice: (1) Justice that you get out of statutes and case citations; and (2) Courtroom justice meted out by judges (some with agendas). While you may hang your hat on Justice #1, Justice #2 sometimes may run counter to your idea of an “outcome”.

The work that you are about to read comes to you through two different perspectives: (1) as a paralegal; and (2) as an investigative journalist. Much of the interviews conducted with attorneys on the “front lines” indicate that much of what I am seeing is (at this juncture) a mounting attempt to fight the tide of foreclosures that are sweeping across this country. The arguments of culpability as to who is responsible for this mess are still evolving; to say that one could definitively point a finger at a given single responsible element for the current mortgage crisis in America is absurd. You will see however, that the homeowner-borrower does have a clear cut reason to be concerned at my findings. Not every attorney and paralegal understands what you're about to read. Don't assume they do either. There are even judges who don't “get it fully” but at some point soon, I think they will. That's probably why they're buying this book!

Any attorney that knows intently the subject matter that I discuss in this work and can effectively apply it is a God-send and worth every penny! There are a few who do. I have probably interviewed them; or at least those that stand out that I could locate that were willing to talk to me. Because they know this stuff, they are swamped with work and limited as to caseload. This is what they tell me. This is NOT my assumption. That also means there is plenty more work out there for those who “get it”; or who want to study up on it so that they do “get it”!

I have been called in to bring attorneys up to speed on what I know. For what I don't know, they have to fill in the blanks. This is called information sharing, not practicing law. There are those who have said I probably know more about this subject matter than 95% of the attorneys out there. Some say I missed my calling. I am going to air on the side of humility as well as caution in telling the attorneys I talk to that wisdom is key in the application of knowledge.

## **WIDESPREAD ARGUMENTS ABOUT THIS SUBJECT MATTER**

After spending months upon months researching and reading blog sites, news reports, legal reviews, white papers and opinions, case law and statutes and interviewing “front line” attorneys, it became apparent to me that (due to the problems created by certain entities within America’s “financial system”) some 62,000,000 titles to property may have been slandered. Whether intentional or otherwise, I had to get past the “conspiracy arguments” and focus on the facts at hand. The further into the subject matter I got the more legally complex it became. I found myself being forced to scale down the legal complexities to keep this a simple read because many of the pre-release “reviewers” found themselves overwhelmed. For God sakes, I know everybody’s got a theory. Wisdom is knowledge applied. That in itself opens up many cans of worms.

At the time of this writing, allegations of improper and fraudulent recordations, lack of transparency and bifurcated notes have barely been proven (if at all) and investigated through any type of evidentiary process. Most of WHY this hasn’t happened is due to lack of knowledge and understanding; largely because your mind focuses on the NOTE and NOT on the MONEY TRAIL! A lot of things make up the money trail, starting with the original mortgage or deed of trust that was filed in the county courthouse as security for what backs up “the money trail” ... that “unsigned lottery ticket”. You do have rights as a homeowner, contrary to what you may think of today’s justice system. This is why I tend to lean more towards quiet title actions and less towards securitization arguments in this book. Arguing securitization in its fine points (without being able to effectuate discovery) is like trying to establish conspiracy theory as fact without having whistleblowers to back up your claims. Besides, securitization is so damned complex that judges are having a hard time applying it to the matters at hand, which when put in perspective and more simply defined the title to your property is clouded or it’s not.

I know many of you are already discouraged due to your personal financial situations. When you examine those situations, as I have, you will have to leave the emotions in check and start facing fact. How simple can I make this? There are two things common to the situation involving my intent to research:

Pro se (pro per, Sui juris ... whatever ...) litigants are in way over their heads in the foreclosure scenario. I can hold a seminar, present procedure and case law until the day you die and you will walk into court and fall all over yourself. This is your home we’re talking about; not some damned traffic ticket!

Not every attorney knows this stuff ... thus, this area of law is fraught with malpractice. I have attorneys telling me this! I’ve seen it firsthand! I didn’t make this stuff up! I’ve seen attorneys completely drop the ball and not even show up to a summary judgment hearing ... and afterwards, I looked at the documents they relied on and found glaring errors that could have made for a great, meritorious argument. Thus, how you perceive and utilize this information is up to you. It is my “argument”. If it in some way helped you, then for that I am grateful.

## The mindset of the author

Unfortunately, a limited number of attorneys have been exposed to the scenarios I talk about in this book. Virtually every court case the author has researched has ended up being state-specific, whether it's an issue of statutory violation, fraud and misrepresentation or some sort of lender liability tort. Every state has its own set of standards and case law in dealing with each of these issues. The difference in how homeowners are treated in each state is based on whether the state itself operates judicially (in 21 states) or non-judicially (in 29 states). My understanding of this is simply put:

In a judicial state the typical foreclosure involves the “lender” going to court, filing suit, properly serving the homeowner-borrower and allowing them to file an answer within a limited time frame, allowing them to “have their day in court”.

In a non-judicial state, the typical foreclosure involves the “lender” serving the homeowner-borrower with Notice of Default and then publishing the notice with intent to foreclose and sell the property in a (legal) newspaper of general circulation. To find out what your “State” allows (this is research), look in the Legal Notices of your area newspaper or legal publications and see what's printed on foreclosures there.

You can also call a lawyer's referral service or your state bar association and someone there can tell you what kind of “state” you're in to find this out. Either way, the “lender” is going to tell you that you haven't made your mortgage payments and they're going to foreclose on your home. In lieu of that, other strategies are emerging (according to what I've discovered in my research) ... like filing quiet title actions BEFORE your home goes into foreclosure! My take on this (and it's pure rationale, not legal advice):

- (1) Lenders don't want it. They're used to being the foreclosing party.  
If 5,000 suits a week get filed against lenders, their legal resources will be stretched thin. There aren't enough law firm foreclosure mills to handle all of the “traffic” and with that many lawsuits being filed, the courts are going to wake up to the “demon” that has been sitting idle for so long; and
- (2) There are going to be a lot of settlements. Judges are not going to want to hear all of these cases. A lot of states have mediation. You may end up in mediation or a settlement conference. You need to know what to demand and not every attorney knows about the “Money Trail”. It's there. It's real. And when you throw discovery at these lenders, you'll probably find out that they made enough money off of your loan in the first place where you were never in default to begin with!

The money trail goes all the way to Wall Street. I didn't make this stuff up; the Securities & Exchange Commission has a continuous bone to pick with all of the “players” in these brokerages houses and financial institutions.



If you don't know how to propose this to a judge, you will be "shot out of the saddle" in the first minute of your oral arguments. I didn't make this stuff up either. That's why I think about avoiding securitization arguments ab initio and looking at the simple stuff. We generally like to follow the path of least resistance, like electricity. Judges get that; and they'd rather "go there". I discovered this by interviewing attorneys who are winning cases; and some that sadly are learning from their mistakes.

Then there's the fact that better than 99% of all American homeowners at some point in their lives, took out a single family residential mortgage loan ... or two.

Attorneys have told me that judges in some of the California Superior Courts "won't let them get six words out" before slam dunking their cases! A lot of it is chalked up to preconceived notions about borrowing money. Part of it appears to be lack of control of the narrative. The rest of it is lack of understanding of the real issues. The better part of the truths sadly are coming to light in the bankruptcy courts, the last place the author wants to see anyone have to go to "save" their home. Let's just hope the judges hearing these cases don't have the banks in their back pockets. Sadly, the way a lot of current foreclosure cases are argued (using old-school methodology) the "proper party" arguments rarely ever come to light. As an author, I call for patience, research and time to test your arguments.

### **EVEN JUDGES HAVE TO GET AN EDUCATION**

Judges are supposed to be like referees. However, they are also homeowners too ... AND they have a conscience which can be easily "seared" based on their current belief systems. With the advent of frauds being brought on their Courts, judges now have to take extra time and effort to understand how and why this is happening. Even judges are having a hard time believing that their own "court officers" are letting them down.

If you're a judge in Florida that's been exposed to obvious fraud being brought into your courtroom by lenders, you are one step ahead of the rest of the country in understanding that these things can and do happen. The Honorable J. Michael Traynor in St. John's County, Florida and the Honorable Lynn Tepper in Pasco County, Florida know this full well from many cases they've presided over where lender's attorneys have presented evidence that would totally boggle the conscience. Now, to my chagrin, filing fees of up to \$1,900 are being charged by the Florida courts to bring an affirmative defense in foreclosure cases or original actions. Welcome to the justice system. As much as you the homeowner think they're being ripped off, you also have to understand that the court systems in this country are already overburdened and there is a price to pay when one wants to step outside the box and file a counterclaim (especially in Florida).

In a jury trial, the judge can strike what the jury hears and can instruct the jury to consider certain things in their deliberations. Unfortunately, just because a judge can tell a jury to "disregard" what they just heard, the jury heard it anyway. Jurors are homeowners too.

With the wide publication of the mortgage lending crisis and record number of foreclosures and arrests of mortgage loan officers, appraisers, real estate agents and the like, jurors are going to have a hard time with the lenders too. Lenders know this and they are scared! They have a right to be ... once you read this book, you'll see why!

### **PROBABLE ASSUMPTIONS**

To fairly assess the situation, I had to evaluate the attitudes and thought processes of distressed homeowners, attorneys and judges (from oral arguments). I knew when I decided to undertake this work that I would be faced with having to share the emotions of each category with total empathy for to do otherwise would have then promulgated bias. As an investigative journalist, all I had to do was read the oral arguments from transcripts in many of these cases and depositions to see just how frustrated each mindset became as it tried to get its head around the issues surrounding the mortgage loan crisis. The lenders definitely don't want the truth coming out in court! I undertook the partial task of trying to find out why that is so.

Even though I am technically "mortgage free" at the time of this writing, my own personal scenario has caused part of my mindset not to be placed in a neutral and unbiased position. I too was of the "old school" where you were taught that if you took out a mortgage loan you had to pay it back (no matter what the cost) or there would be consequences. If you couldn't afford to buy a home then you had to rent. If you wanted something bad enough, you saved up for it and paid for it with cash. These assumptions have certainly followed me through this work.

Therefore, I had to do some serious soul searching to understand how a "lender" (who I'm supposed to place my trust in) could commit fraud and misrepresentation against me. Another assumption is: this is research ... and it's subject to change. In the late 1990's, I started researching lender liability torts and tort law. I came to understand that there are "real issues" involving banking behaviors that I point out through several references on that subject. Breach of contract can happen from the inception of the mortgage loan and it follows all the way through to foreclosure; but if you want solid proof of that, talk to an attorney.

### **OPTIONS AT HAND**

Controversy is created when there are opposing views to subject matter. In the case of a mortgage loan, every state has options and listed causes of action to pursue litigation in an effort to right a wrong. I have had lengthy conversations with paralegals and attorneys over this subject matter. As a result of those conversations, you may also find some cutting-edge strategies in this book. But even in light of some of these new revelations, my own personal observations are just that, observations. While I understand the need for a standard and store of value and the need to protect America's financial interests, even having a checking account scares the hell out of me. Once you've gone through foreclosure, you wake up to some real truths.

I also have uncovered an exorbitant amount of chicanery unleashed by attorneys that represent mortgage lending institutions as well as banks and Wall Street firms; thus, being an investigative journalist and a homeowner that has been screwed by at least two mortgage loan officers has caused much inner turmoil in shaking off the bias. The paralegal side of me however seeks the truth (and justice for all ... not just for those who can afford it) no matter what the price.

As a paralegal communicating for the first time with a distressed homeowner or an attorney that has elected to start researching this topic for the purposes of entertaining litigation, I can only suggest things of a strategic nature to initiate what I impolitely term “an action” against your mortgage lender, based on certain circumstances of actual homeowners. This option is called “quiet title”.

Foreclosure in and of itself is mostly a defensive-based term, whereby the homeowner is in default and the lender is reclaiming their “interest” in the home; or business if it’s in the commercial realm. Lender liability for the most part started in the commercial realm; yet I notice a vast amount of similarities in new and evolving case studies. As a reader of this work, you’re probably wondering why the term, “clouded titles”? One only has to examine their own situation and ponder the following questions:

What if the title to your home was flawed within days of you entering into your mortgage loan? What if the subsequent assignments and security interests were never perfected? Could you then legally sell your home without recourse from a future buyer? Do the lenders legally have the right to foreclose if the relationship they have with the investors who really “own” the portfolio is purchased by them under illusory pretenses? Wait! There’s more ... (no, it’s not an infomercial!) ...

Do the parties attempting foreclosure legally have the right to foreclose if they never advanced any of the money in the transaction? Do the judges legally have the right to NOT ask questions about the suspected fraud committed by the lenders and just hand your homes over to them? Do attorneys have any kind of duty whatsoever to the distressed homeowner to help them seek relief when their first duty is to the court and their second duty is to the public? What if you’re looking at your Deed of Trust (finally) and you see a paragraph containing the acronym “MERS” on it ... naming them as a beneficiary? Did MERS loan you any money? Does MERS have standing to remove any case to federal court since it is “bankruptcy remote”? Some of you die-hard pro se researchers reading this already know where I’m going with that part of the subject matter. This again, is research ... not legal advice.

These are questions the author has pondered since late 2007 when the unsettling developments in the mortgage lending crisis began to occur. In late 2006, the author sold out of his last piece of real mortgaged property and “paid off” WaMu. Yes, it was a Hail Mary with one day to go before his mortgage payments would have tripled! As of this writing, more court rulings and case law are redefining the parameters of agency relationships, assignments between entities or the lack thereof.

## **FALSE ASSUMPTIONS**

Few attorneys have attempted to fully educate themselves on this mess. Some of those quests have ended in utter frustration and failure because cases were not properly litigated and thus failed on their merits. What started out being a journey down the path of justice for the homeowner has in many instances ended up in financial disaster and ruin due to lack of attorney education in dealing with unscrupulous lenders. Much of these failures were due to a lack of understanding of what I call “false assumptions”.

There is something else you should be made aware of: There are several actual “networks” of “foreclosure mills” throughout the U.S.! These networks of attorneys are well-educated in foreclosure procedure and they have “well-oiled” resource centers they can access to back that up. Knowing this up front can help mentally prepare you for the fight of your life because I discuss researching your adversaries. The rules of the courts are also being modified, particularly in Florida, one of a handful of states currently dealing with a continuing onslaught of foreclosure actions, where lenders’ attorneys are told that all of their documents must be in order. As long as the distressed homeowner lets the lender get away with filing assignments that “don’t connect the dots”, defense attorneys will have no reason to further educate themselves and therefore judges will continue to receive limited testimony and evidence on which to base sound decisions. However, as of this writing, the author is fully aware of several networks of foreclosure defense attorneys that are sharing information and strategies; and that’s a good thing.

It is apparent that “the system” was caught unaware. Some of the attorneys and their litigation support personnel (to whom I am deeply indebted) allege the banking system is responsible for its own demise. Certain articles and comments I make reference to within the context of this work will reflect that. The consensus stands to reason that when the body politic is affected, changes occur. Not all changes are for the good. Changes are still occurring that are tilted in favor of the banking lobbyists. Florida’s “new and improved foreclosure courts” appear to be nothing more than docket-clearing outhouses that hand houses over to the banks. As you will also see in this work, that “hopey-changey thing” is NOT really “the change” ... it is part of the problem! The author will go into detail as to why loan modifications and the HAMP program are virtual jokes!

“These programs were designed to fit certain criteria” according to Storm Bradford, a mortgage fraud examiner in the DC area. “If they input incorrect data, or if the borrower’s criterion doesn’t fit within the guidelines of the program, the software will kick it back out because it doesn’t fit the criteria for modification.”

## **MY PERSONAL SETBACKS ARE YOUR PERSONAL GAINS**

While I attempt to keep my personal bias in check, I am not disaffected. My own personal life was tainted by foreclosure in 2003. The lender that foreclosed on me did NOT advance any loan proceeds; it was simply a mortgage servicer.

To my understanding, it didn't even "own" the note. I walked away from my home because I was upside down in it. It was over-appraised to begin with. So when I talk about strategic default, I think I understand the subject matter fairly well. A majority of the subprime loans out now were over-appraised. This is fraud. You know it. I know it. Bradford says he finds a lot of appraisal fraud in a majority of the cases he reviews.

The emotions, passion and struggles with which I conducted my research become evident here and for damned good reason. Lenders and their attorneys will be reading this book too ... and for damned good reason. The resulting effects of the mortgage lending crisis will continue to get worse because dutifully-paying homeowners will sit idly by and do nothing. The lenders are counting on it! The judges reading this book are as much "on the firing line" of this mess. Because they too are probably paying off a mortgage loan while sitting on the bench, one can only question their partiality. Many judges have seen the light though and have ruled accordingly as I have seen in the instances of the Hons. Shack, Spinner, Traynor, Tepper, Hollowell and Bufford to name a few. Of course it stands to reason that the banks and their attorneys are going to disagree with my observations. I just wish I could rub the magic lamp and ask the genie to put our system back that way it used to be before the repeal of the Glass-Steagall Act.

My question to the judges in the system from the side of the American homeowner is: What if your property's title is clouded and you didn't bother to investigate and act? Are you going to contemptuously regard all other homeowners because they bothered to question the mechanics, frauds or legal construction of their mortgage loan? What if you're ruling on a foreclosure where you're a shareholder of that bank? Would you be honest enough to recuse yourself? What if a homeowner could more than reasonably prove his Deed of Trust violated state statute? Would you void it, thus rendering his note unsecured?

The problem gets fixed when homeowners decide to fight BEFORE the first sign of personal financial turmoil. Do NOT do what I did and vacate your residence. It just tells the lender to come steal your equity (if you have any to begin with). When frauds are committed upon borrowers by unscrupulous and predatory lenders, it all comes back to bite each somewhere. This book is no different in helping the homeowner come to grips with the issues he now faces in the wake of this national financial turbulence and what many perceive as economic terrorism. It's either "pay" or lose your house!

It works somewhat differently in business, which I will also describe in some detail, especially in common law tort actions inside the parameters of lender liability. The banks know about lender liability and have been warned by their overseers as early as the mid-1980's. However, with all of the temptations available to the banks to make unregulated money (by virtue of the repeal of the Glass-Steagall Act in 1999) it is apparent that many of our morals were taken for granted.

## **WHAT AMERICAN DREAM?**

For those of you that think the “American Dream” is your God-given right (as promoted to you by some President or some “Frank” politician seeking re-election) you are woefully mistaken. It is a privilege to own a home, especially one that you can afford. It’s not my fault you bit off more than you could chew. But after all, this is America, right? Land of the free and home of the slave?

Shelter is one of the three basic necessities required to sustain a decent living standard in America. Having affordable shelter that a borrower doesn’t constantly have to be in fear of losing every month is entirely another concept. If you have to struggle to make mortgage payments as you struggle to make ends meet, you have exceeded your financial capability. Those “old school” advocates will continue to argue that if you can’t pay “cash” for it, you didn’t need it in the first place. Mortgage financing has made it all too easy to become enslaved in debt. I cannot decide for you the moral obligations you wish to pursue; but if a wrong has been committed against you (such as a clouded title or a fraud resulting from a mortgage loan) you have the duty as an American property owner to correct it. Filing a suit (in my book) reflects one’s personal responsibility.

Creating new laws is not necessarily the answer either; enforcing the existing ones is. The real truths about the “American Dream” will be discussed in some detail even though the reader may not like to identify with certain apparent truths contained herein. I originally set out to write this work as a “think piece”. Of course, after doing extensive research and dealing with and feeling the passion and emotion of many distressed borrowers, the work evolved into well more than that. I shared my emotions with these people and they gave me their honest opinions. Hopefully, I’ve made it simple enough so you won’t become overwhelmed. The concepts I came to understand were essential to my research in an effort to eliminate false assumptions.

## **HINDSIGHT: COULDA, SHOULDA, WOULD A**

### **To the distressed homeowner:**

You probably did not understand half of what you were signing at the closing table when you took out a mortgage. I believe you were told that if you didn’t understand what you were signing that you needed to get the advice of an attorney. Well, why didn’t you? The answer has a lot to do with emotion and impulse buying. You were conditioned by corporate advertising. I was in the media as a news reporter so you are “preaching to the choir” if you believe you can convince me otherwise. I won state and national news awards for spot news reporting and I also worked on several investigative pieces and have authored a 263-page workbook on credit repair (now in its 3<sup>rd</sup> edition). Yes, it is legal and it does work. I ran into some attorneys that were doing credit repair and that’s how I got an understanding of credit restoration procedures. When I applied them to my own situation, they worked and worked well. I’ve even been entrusted to clean up attorney’s credit reports (because they didn’t have time to do so themselves).

I do not claim this work as a “fix it” book. Please realize here and now that the legal system in America is anything but simple. Hiring an attorney is certainly recommended even though you may have a sinking feeling about placing your trust in one. I have a friend of mine who never trusted attorneys until I introduced him to one that actually cared about getting him his home back out of a wrongful foreclosure. There are attorneys who are as passionate about this subject matter as I am. They truly are good people.

I have spoken with attorneys who train attorneys in foreclosure defense; trust me, you do not have the legal acumen to represent yourself in these matters and not all attorneys do either! It is true that a few pro se litigants have actually gotten results. I will share what information I have gleaned in that regard. However, I’ve seen more pro se cases which I condemn should never have been filed in the first place, resulting in bad case law. When bad case law is set, it takes a multitude of good cases to outweigh it. When pro se litigants generate bad case law, it inures to the benefit of the banks. Again, it’s throwing good money after bad if you don’t know what you’re doing. This is why I certainly recommend interviewing attorneys in this book. Even attorneys have made mistakes by presenting 50+ page complaints that many judges don’t have the time to read; proving my theory of the KISS principle and sticking to the five or six strongest counts that have a chance of prevailing.

By jumping into the fray as a pro se litigant however, the untrained homeowner burdens the already-stressed judge with voluminous rantings, coupled with the indulgences of a whore and the ignorance of an ass. Our judges have enough on their plate than to have to deal with someone that brings meritless actions with no rhyme or reason. Certainly, most homeowners do not understand Rules of Procedure and Rules of Evidence and certainly aren’t that “quick on their feet” to be what I consider true litigators. I only know 3 who are and their cases are still “on hold”.

**To the attorneys who are trying to get a handle on this “problem”:**

I have attempted to behave as your source of inspiration. If I’ve come up with a new game plan, albeit inadvertently, bully for you if you decide to use my analysis. While the homeowner will view the simplicity of the overall perspective I am trying to achieve here, you attorneys on the other hand, have your work cut out for you. You may already have serious understanding of contract, real estate, securities and finance law; not to mention a real working knowledge of the rules of evidence and procedure. You are up against hordes of well-trained lawyers that have documented, winning track records. Well, let’s put it this way ... up until now, they’ve been winning.

After reading some of the oral arguments in many cases, I can only say that my observation has been that the merits of every homeowner’s case must be considered on an individual basis and not as a class action. Some attorneys think that all homeowners are similarly-situated (and as you will read in one excerpt from an oral argument I have provided). To me, it’s a false assumption. If I was an attorney, I couldn’t bring myself to do a class action as I find myself immersed in other ways to impact American Jurisprudence. That’s why I decided to remain an author and paralegal.

It is because every mortgage loan falls under different set of circumstances, that the way the cases are treated is certainly different. Besides, class actions are cumbersome. They appear to be extremely time-consuming to develop. Once presented, they take too long to mature and if you look at the amount of hours spent nursing them along the outcome may not be as rewarding as you might think. Attorneys have families too and they deserve some quality time. Most homeowners will agree with me on this as they're not getting rich off of these class-actions suits.

After much research, the remedy I keep coming back to in my mind is the quiet title action. I believe honestly as an American that these actions are going to be the "thing" of the next decade. Attorney Neil Garfield agrees with me on this. These actions will gain momentum as new case law is set and enough proven pleadings become available to where legitimate strategies are developed.

Quiet title actions are rooted in state-specific statutes and case law, as April Charney has succinctly put it. The case laws I've read on this stuff give every property owner the right to bring an action. Once properly filed (and there's the kicker), they become more difficult to remove to a federal court by lenders' attorneys; mostly because very few homes sit on federal lands as compared to the number sitting on state lands. Most of the Defendants in quiet title actions are "state-based" Defendants (the property and sometimes the local title company). Soon, federal judges will reject these removals by lenders and their "nominee" and remand them back to state courts. I can only hope that my insights provided some sort of impetus for those that wish to act.

### **To the justices seated in this nation's court system:**

As a justice on the district, circuit, chancery or superior court level; state, federal or bankruptcy; you are entrusted to be a fair, impartial and honest referee, despite your personal feelings or moral obligations. You obviously didn't become a judge on good looks and credit rating alone. Many of you judges are homeowners, still paying on a mortgage loan. You probably already understand that there is more to this mortgage crisis than just borrowers who won't or can't pay their bills ... *and by golly, if you can pay your bills; those lazy, good-for-nothing homeowners can too!*

The author is going to ask you to hold back slamming down your gavel for a minute and think about what consequence you effectuate towards the truth and the moral good when it comes to dispensing justice. Many of you received "better than great" interest rates because of what you do for a living which I fully respect. If you find yourself up against a "searing conscience" because of your duty to repay what you've borrowed, remember where you sit (as opposed to the dilemma of the parties before you) and recuse yourself rather than to succumb to bias. I say this out of concern in adhering to those higher standards within the constitutional and administrative framework of America's justice system and not out of sarcasm. Of late, the court system has been laden with comments from lender's attorneys like, "these deadbeats just want their home free and clear, your Honor" or "take my word for it your Honor, we really do own the note."



As a judge, you understand what a contract is. You will be forced at some point (if not already) to have to deal with the overwhelming aspects of securitization. The arguments will come forward in your courtroom at some point, because there will be enough documentation and “outcome-based” case law and settlements from the Securities & Exchange Commission to assess blame and prove arguments.

The author is going to attempt to simplify what appears to be the securitization of a promissory note and what that means for some 62-million mortgage loans. Unfortunately, because Wall Street and its henchmen are involved, you may find at some point, that the Generally Accepted Accounting Principles (hereinafter “GAAP”), which have been approved for use by the Securities & Exchange Commission, have been deviated from to the point where a full accounting will expose fraud on both borrower and investor alike.

There will come a time when all the aspects of mortgages that you thought you knew to be true will sear your conscience even more because you will find out more and more of these brokerage houses and their “players” intended on defrauding the system of billions of dollars by trying to obfuscate the “Money Trail”. This is where it all is though ... Wall Street. This is what the lenders don’t want you to find: Every single loan ends up with the major banks that are in some way, shape or form members of Mortgage Electronic Registrations Systems, Inc. (MERS). All are generally founders, charter members or subscribers of MERSCORP, Inc. and its “little baby troublemaker” (according to many attorneys I’ve spoken with and judges’ comments I’ve read oral arguments on), Mortgage Electronic Registration Systems, Inc. (MERS).

Fannie Mae and Freddie Mac were founding members of MERS. Now these two “well-managed” (sic) operations sit under conservatorship of the Federal Housing Finance Agency (FHFA). As an American taxpayer, I can only hope that you will come to understand why the “qui tam” suits were initiated. Fannie and Freddie are in trouble. This should make you wonder about the reasons behind MERS’ creation. I’ve read that several federal judges aren’t too happy with MERS.

The issues surrounding securitization are complex and require a lot of patience, understanding and education. I am sure the experience of just one justice now serving on the bench that has heard and studied securitization arguments many times over is in of itself enough to write an entire thesis. The author here does not purport to do that. Yet, for the sake of argument, I will cover certain court rulings as necessary. As the entire “scheme of things” within the mortgage debacle begins to unravel, it is hoped that the debate over assignment and securitization will create new arguments that will change the outcome of the future cases being filed.

You will see more of these securitization arguments if you’re sitting on the benches of the U.S. District Court for New York, within arm’s length of Wall Street. Previous suits were presented in simple terms of “non-disclosure” and fraud and most of the suits will be brought by investors who have no other recourse than to claim they were deceived by fraudulent and misrepresentative prospectuses issued by the brokerage houses.

The hand slaps these Wall Street institutions have received don't even make a dent in the atonement factor for the mess these folks created on Main Street.

**The mortgage mess created by “MERS” and securitization is just beginning to unravel and is expected to continue to bog down the court systems for at least the better part of this decade until the justices come down on the side of the real truth. With the new 7-year contract with Genpact, MERS may outsource not only the help to foreign lands, but the databases as well! This will become a discovery nightmare!**

### **AD INFINITUM, AD NAUSEUM**

There also has to come a point in time where I have to “put down my pen”. As an experienced journalist covering a constantly-unraveling scenario, not having the immediacy of radio news reporting, there has to be a finite point given to when one set of circumstances in the foreclosure debacle ends and another begins. Therefore, I will end my perspective and my quest for uncovering the truth to the place in time where current rulings by the highest courts in the land form the parameters for this work. Of course, even though my direction can change with the discovery of new evidence; there is again, a caveat here to keep an open mind about my discourse. For the moment however, my discourse is pro-homeowner and the more cases that emerge proving lender fraud, the more convicted I become.

### **HOMEOWNERS ... HIRE AN ATTORNEY!**

During my interviews with attorneys, I received an occasional warning about caveats and disclaimers and the unauthorized practice of law. I can honestly say as a journalist, my first understanding of law was to know and understand the difference between right and wrong. Just the mere exercise of “right” constitutes the positive attitude and behavior that our system of laws was intended to influence.

The intent in this work is not to dispense legal advice (hence the foregoing bold-faced, capitalized statement) but rather to discuss it from a paralegal's viewpoint and direct its ideas towards someone who has spent thousands of hours of their time educating themselves in preparation for the bar exam; and then to further educate themselves in an area of law that most consumers might find boring yet essential in sustaining their means of survival. Despite the distrust of the legal system, you as a homeowner do not have too many other options available to “fix” your problem.

All one has to do is visit a “tent city” in California to understand and sympathize with a homeowner who did not bother to grasp the options the legal system had to offer him. There is nothing worse than being “on the street” only to find out the “proper party” wasn't the one who foreclosed on you!

Attorneys: My understanding of the current state of the economy means the distressed homeowner generally doesn't have much money on hand to pay for legal advice. He can barely make his mortgage payments and he sure wasn't planning for legal fees. These are complaints from homeowners. I didn't make this stuff up! I am not sure about the legality of setting clients up on monthly payments. Many of the homeowners now engaged in lawsuits are using their monthly mortgage payments to pay their attorneys to litigate for them. One would have to ask if that was necessary when the homeowner can just file a quiet title action for a fraction of the cost of defending a foreclosure. There are many options. Multi-count lawsuits I fear are not the real answer. From a frustrated homeowner's perspective, we're all looking for real answers.

Again, to the judges: I don't like seeing frivolous lawsuits filed any more than you do; however, the commercial lender liability cases of the 1980's have now morphed themselves into a different "animal" as the result of the creation of MERS. The securitization process has not helped matters much either. You will read quotes from the bench about it. There are millions of readers that subscribe to mortgage foreclosure blogs. They are seeking information. You will see more actions filed because of it; not just as a result of this book being published. There is a point in time that homeowners will need to become involved. They will be enriched with a true financial education that they never got in high school or college.

The foreclosure cases discussed herein are now demonstrating that the current "servicing lender" is probably not the true holder in due course because of a negated, disconnected or non-existent agency relationship through fraudulent assignment. I will reflect on cases where the lenders "lost" their paperwork.

The cause of this may or may not be proximally related to the creation of a derivative "SPV" or Pooling and Servicing Agreement [hereinafter "PSA"] on Wall Street; and of course, all of this is subject to judicial determination. Full investigation and discovery should not be circumvented for the sake of expediency. It is your duty to the moral good to allow investigation the ideas that have merit and determine your role in effectuating proper rulings from the bench. I also author this work not as an "authority" but as a front-line journalist who has keenly experienced some of what he writes about; so a lot of the stuff I put into this work is the same stuff you'd find if you knew you'd be facing an onslaught of cases where the truth "will out". I do not envy your position as a judge.

Please understand that I am not pontificating a homeowner has the right to a "free and clear" property. They did, after all, with full intent, engage in a contractual relationship with a mortgage lender. However, they thought their lenders were honest and now that is turning out NOT to be the case. It is the job of the justice system to seek the truth and rule on what's right, not to just kick the homeowner "to the curb". True, at the closing table, the new homebuyer was told that his loan would probably be sold to another lender. However, I am finding that those loans changed in character and status when they were turned into asset-backed securities; thus affecting not only the agency relationship between the intervening assignees but adversely affecting title to property.

Many attorneys I have interviewed have told me this. It's what happened AFTER the homeowner signed the contract that worries me ... and it should worry you as well. It's not all the homeowner's fault. Lenders like Washington Mutual, Countrywide Lending and IndyMac apparently knew what they were going to do with their notes, as many of them were proprietarily traded for securities on the open market; thus creating all new paperwork, deficient in or devoid of agency relationships, without the consent of the homeowner or the true investors who bought the portfolios wrapped in these so-called derivatives; devoid of GAAP.

The homeowner has no direct access to MERS' electronic record-keeping system to figure out exactly who has proper "ownership interest" (despite its efforts to be more consumer-friendly); that same homeowner won't really find much of anything in MERS' records any more than he will at the county recorder's [clerk's] office either; thus, he remains confused. It's this confusion that clouds titles to property.

I will reflect on the Kansas Supreme Court case (along with a handful of other significant rulings) that created the parameters as part of my research. There are other significant standards and "white papers" that have contributed to my research which I will share with you. I know that certain MERS rulings lend that entity more impetus in the court system, but I speak to the illegitimacy of this entity, as it has caused more trouble than it is worth.

To all the readers of this book: The use and consideration of this work is your responsibility! Again, to everyone reading this work, you need to understand that I am a paralegal. Even though I have consulted with attorneys and had them re-check this work in consort with my research, the use of this material comes at your own risk. I again also have to emphasize things for the benefit of those attorneys commissioned by the State Bar of (insert name) to investigate unauthorized practice of law, the following:

**Legal information is NOT legal advice! There are no warranties or guarantees, express or implied, connected with its use. This is why I waited until I was nearly finished with this book to write this disclaimer. From a paralegal standpoint, this material cannot be legitimately construed as legal advice, even though there is case law and legal analysis that frames my thoughts. For real legal advice, you must consult with an experienced attorney.**

It is perhaps a sound mindset to be able to apply the quote, "The best defense is a good offense!" This is why I had more than one attorney review this material prior to publication. The material in this work is designed to report my findings to those who advocate justice for the homeowner or investor regarding the obligations of his mortgage loan.

It also seeks to “point fingers at” those who perpetrated fraud upon American consumers. This work is not authored for learned understanding by anyone outside of the 50 United States and U.S. territories. It stands to reason that those who misrepresented themselves in some way (and in so doing clouded a homeowner’s title to property) be held legally accountable. As of this writing, the arm of the law is coming down upon dozens of questionable lending practices, along with indictment to those who “created” those loans and deviated from Generally Accepted Accounting Practices in putting together Special Purpose Vehicles (SPV’s) to fleece investors out of billions of dollars.

If in the end, the results involve the full quiet title to property as relief to right a wrong, then so be it. It is up to you, the reader and potential user of this material, that you and your attorney jointly research the contents herein for the purposes of understanding how simple it is to cloud a title.

### **QUIET TITLE ACTIONS ARE NOT NEW**

Quiet title actions are part of the American staple towards protection of property ownership and wealth. But what is new is the use of these actions when it comes to serving up a slice of “truth” on a claimant that says they own your mortgage when in fact they don’t and can’t prove it!

What’s even harder is to understand why Quiet Title Actions are appropriate. A lot of homeowners are going to have a hard time understanding WHY they have to list their own property as a Defendant! This will be explained in *Section 12*. Read the book first. Don’t jump ahead. When you get to *Section 12*, you will see WHY I put it there and not right up front where you can potentially stumble through it and virtually miss the predicated concepts of my research. This is also why the author has included the first three pages of his own quiet title action (less the verification portion, of course). I’ve redacted certain things that are irrelevant (because I don’t want you pestering my attorney).

The cause of action for which you file a legal claim is based on your given set of circumstances, which must be heavily documented, as you will see in this work. Quiet title actions sometimes involve a lot of documentation ... mostly as exhibits. There are a couple of other new “twists” you will enjoy reading about as these may be extremely helpful in researching your case. Should you decide to undertake your own cause of action, then it is hoped my diatribe will influence you in your efforts to seek justice and financial freedom.

You may not totally agree with every “take” I propound in this book; thus the reason there is a difference between legal education and legal advice. Again, things you don’t understand can easily be clarified by qualified legal counsel.

- The Author

# **PREFACE: How Did We Get Into This Mess?**

## **THE MINDSET OF THE DEPRESSED HOMEOWNER**

The default notices you used to get by mail have now snowballed into the Sheriff serving you with process entitled, “Suit to Foreclose” or “Forcible Detainer”. Life just became more complicated. It’s been a hassle just to keep the utilities on ... and now this.

It’s late at night and you are still up watching TV. You start counting commercials and get extremely emotional over political ads. You buy and eat more junk food than you need to be eating, but you do it because you’re depressed. You are more than likely unemployed or underemployed. You may also have a problem with drugs or alcohol. You curse at your spouse and children more than you’d like to. You sleep in late and are not motivated enough to get up at an appropriate hour. The alarm clock has become your enemy. You’re grumpy because you’ve had a hard time sleeping and three cups of coffee to try to wake up just doesn’t cut it anymore.

Going out and looking for a paycheck seems to be the avoidance of the day rather than the necessity. You know you’re going to have to because at some point the unemployment insurance is going to run out. You walk past the kitchen counter, right past that stack of bills that has to be paid, knowing there is only \$25 left in your checking account until your next unemployment check shows up.

Tell-tale signs of family conflict begin to emerge. Your kids are complaining because they’ve had macaroni and cheese for dinner three nights in a row and the food stamps have run out. Arguments with your spouse start to become more frequent as the sale date of your home (which you’ve been paying on dutifully for the last ten years) grows near.

More than likely, you’ve become distant from your family and close friends. You shudder every time the phone rings because you abhor the thought of collection agencies bugging you again. Embarrassment and humiliation have set in because it’s only a matter of time before the Sheriff pulls up with a moving truck and evicts you and your family (along with all of what possessions you haven’t sold to help pay bills) in front of all the neighbors.

Every time you walk through the front door of your home, you start regretting your spending decisions and wish you had it to do all over again. Buyer’s remorse now has a new meaning. You can’t seem to “find the time” to do the simple tasks that would come regularly to you. With all of the time you’re spending at home (even if you are self-employed), surfing on the Internet or playing solitaire seems to occupy more of your time than spending it with your family or spouse. After all, that is why you bought the house in the first place, right? Do you start blaming your family because you bought more house than you could chew on in the form of a mortgage payment? If all of these things start coming to the forefront every time you start thinking about divorce, you are not alone in your thinking.

Depression does funny things to a person; things that most middle-class Americans used to regard “happening to somebody else”. Life becomes a big “question mark”, especially when you start thinking about the inevitable while cleaning your gun. From friends and acquaintances the author has spoken to, a lot can be gleaned from attitudes involving people who are intimately involved in a foreclosure process.

### **THAT’S A FACT, JACK!**

The Glass-Steagall Act was an FDR-era, knee-jerk law that reacted to the stock market crash of the 1920’s by stating that firms that traded in bonds couldn’t open banks and banks couldn’t sell stocks and trade in bonds. Further, according to Jon Lindeman Jr. of Advocate Law Groups of Florida, stock companies couldn’t open banks. With the repeal of the Glass-Steagall Act in 1999 (which even recent articles in the mainstream press, including *Rolling Stone Magazine*, have pointed out), Lindeman says the market turned into a “free for all” and the stage was set to precipitate a repeat of history, as the stock market in 2008 also suffered a major decline in the wake of the mortgage meltdown.

It took over ten years for the mortgage mess to finally be fully exposed in the national media. Significantly, it appeared that the government just sat back and let it happen, even when it was warned by a Wall Street investigator named Harry Markopolos who was examining investment dealings involving the now-imprisoned Bernie Madoff. It wasn’t until the bailout by Congress that further investigations into the collapse of Countrywide Lending, IndyMac Bank, World Savings and Washington Mutual Bank (among others) were ordered.

Homeowners who had no business getting mortgage loans in the first place and for whatever reason, found themselves at the mercy of boilerplate foreclosure mills, only to succumb to having to live in their cars or in tent cities; moving in with relatives; or going back to renting. Then came the bailout and as you will see in this work, Congress was misled into furthering the fraud upon the American taxpayer by shoring up failing institutions on Wall Street. After all is said and done however, it would appear that the United States government was and still is “in bed with” the banks. The author opines that the banks are on top and the government is on the bottom [sic]; whereas, the consumer, is in the middle. Do you feel slightly “sandwiched” in there somewhere?

This work strives to bring a better understanding of what kind of shock the justice system in this country is in for ... cases involving predatory mortgage lending, outright fraud, violations of the Uniform Commercial Code, real estate law, common law, lender liability issues and outright fraud upon the court! The author foresees the United States court systems bogged down with these cases as more Americans come to realize just how badly they’ve been screwed by their lenders FOR THE NEXT 10 TO 20 YEARS!

The lenders are not alone in this. It also appears the Securities & Exchange Commission, the U.S. government’s “Wall Street Watchdog”, turned somewhat of a “blind eye” to everything that was going on behind the scenes because of the repeal of Glass-Steagall.

As was demonstrated by their failure to act, the Securities Exchange Commission seemingly ignored all of Madoff's actions until prosecutors finally got admissions directly from Bernie Madoff himself. Madoff's confessions certainly line up with the reasoning by prosecuting attorneys that 92% of their convictions come out of the mouth of the accused. If that's the case, where is the "justice" in that? Was 150 years enough? The author feels it most important to explain all of this in the simplest of terms so the American homeowner can comprehend that what happened on Wall Street was just the "tip of the iceberg" in America's moral dilemma.

## **DECEPTIVE TRADE PRACTICES?**

Even to homeowners that aren't in default, what they may have not realized at the time they signed their mortgage loan paperwork (and thus never questioned) was that an entity claiming to be a "nominee" for the lender; and many times a "beneficiary", was listed on their deed or mortgage. The author's research indicates that the moment the borrowers signed the mortgage paperwork in front of the notary, the "fraud via non-disclosure" involving Mortgage Electronic Registration Systems, Inc. (also known as "MERS") began. All paperwork subsequent to the mortgage or deed of trust being filed in the county courthouse was then electronically recorded and maintained by MERS and its 2500+ subscribers. One title company executive in Washington State referred to MERS as "the big black hole".

With the banking system that was created and allowed to operate by your government, lenders can loan ten times the value of their portfolios. In a fractionalized banking system, the author surmises that this is in of itself a recipe for failure, even with his college-level understanding of economics. When applied to the lax lending procedures of the turn of the millennial clock, what happened during the last 10 years is now going to severely impact America's judicial system over the next 10 to 20 years. As a result of the mass lending in the new millennium, the courts can expect to entertain a host of claims of violations involving RESPA, HOEPA, TILA, FCRA and FDCPA, along with quiet title actions associated with numerous state violations.

Until recently, lenders were allowed to get away with foreclosing on a whim. Owning a home was "the American Dream". The mortgage banking industry made it look so glamorous and easy to get a home.

Politicians in DC didn't help matters much by using "the American Dream" as a means to keep themselves in office by misleading the prospective homeowner into believing that home ownership was a right afforded to all Americans and not a privilege to those who could actually afford it. Only after the bailouts are the truths really coming to light. As a result of those who voted for the bailout, you are about to see a paradigm shift in politics. Those in Congress who voted to shore up Wall Street are going to find themselves politically dealing with Main Street, much to their chagrin. All of those in Congress who voted for the bailout have cause for concern.



## **PROPRIETARY TRADING AND SECURITIZATION OF MORTGAGES**

Even as of this writing, the Federal Reserve has issued a directive banning yield spread premiums (those hikes in interest rates to the borrower that padded the pockets of the brokers and lenders). This action may be fundamentally necessary, but it has not stopped the proprietary trading and securitization of home mortgages.

Securitization continues to fuel the greed of Wall Street, which has a penchant for propelling its greed into the world marketplace, screwing both borrowers and investors alike. It's a sad day for most American homeowners who now have absolutely no idea who actually owns their notes and mortgages because their loans were sold and resold many times over and turned into "obligations".

This practice appears to have been seriously exposed in 2008: that a majority of the securitized loans in the marketplace were worthless due to the high rate of borrower defaults; or so we were made to believe.

The actions of people like Bernie Madoff paled in comparison to the deliberate frauds now coming to light surrounding Countrywide Lending, IndyMac, World Savings and Washington Mutual Bank. When the onslaught of foreclosures hit the major markets, it soon became apparent that the "discreet" Wall Street mortgage financing mechanisms were about to crumble. Even CBS News Magazine "60 Minutes" jumped in to illustrate.

The American Dream backfired further when AIG officials disclosed the reinsurer was in dire financial straits due to insuring what became known as "credit default swaps". At the time, only the dutifully employed on Wall Street and the investment community even knew what credit default swaps were. The "non-recourse" bonds left investors holding the bag and the pension fund managers were hard-pressed to explain to the soon-to-be-retirees where their money went. On the Main Street playing field, more and more news stories surfaced that pointed fingers at the predatory lending practices of the banks, who enticed homeowners into signing away their financial freedom and trapping them into slavery via convoluted adjustable rate contracts, which upped the ante for mortgage loan servicers, who actually made more money when the homeowners' loans went into default. Overall, the publicity was bad for business. How many of you now trust banks? While the author downplays the effectiveness of securitization arguments in a court of law, seeing that one's note was securitized does add a whole new element to foreclosure defense. April Charney and others have extolled their understanding of this subject.

## **REDUCED TRANSPARENCY IN MORTGAGE RECORD KEEPING**

Long ago, when a bank made a loan, the original paperwork stayed with that bank. Due to today's runaway lending practices, things have drastically changed. When mortgage loans were generated, the original lenders packaged up all of their paperwork and sold the note and mortgage through what's known as a "warehouse", or the entity that actually paid the original broker for the mortgage loan transaction.

Where the actual original paperwork went to for each individual homeowner is now anyone's guess. However, a "solution" appeared to have been purposed to deal with recordation issues (from a lender's perspective) in October of 1995, with the creation of Mortgage Electronic Registration Systems, Inc. in Delaware (hereinafter: "MERS").

This will be discussed in great detail in the Introduction to this book, because after all, when you've got something to hide, it generally means there's fraud and chicanery involved. Mortgage loan record keeping by lenders was sloppy at best up until the creation of MERSCORP, Inc., MERS' parent company; and then MERS, Inc. itself out of two other corporately-organized MERS's, in 1998. Then mortgage loan record keeping became opaque, according to attorneys like former Florida attorney Neil Garfield. Garfield runs a foreclosure defense website (whose numerous references appear throughout this work).

In late summer of 2009, the author spent a half hour live on the radio talking to San Diego attorney Michael Pines about the mortgage foreclosure crisis and the solutions to solving the dilemmas that each homeowner faced. It was at that point the author decided that someone needed to write a book about the latest developments as an after-the-fact, lessons learned kind of work as well as options in dealing with the current crisis.

## **LACK OF TRANSPARENCY ON WALL STREET**

It was not until well into 2009 that the news media was fully involved in the "insider trading" that was going on inside the investment houses on Wall Street. *60 Minutes* and numerous other media outlets produced programming not only on failed banks, but attempted to dig inside another little-known investment house product: Credit Default Swaps (hereinafter CDS's).

On Main Street, the battle to make CDS's "transparent" is one largely of partisan politics. On Wall Street however, the battle is quite different; between the big banks and everyone else.

The key concern by insiders is that if all of the details of a CDS were fully disclosed, no one would have invested in them. Now fraud charges are starting to emerge.

According to Gary Gensler, Commodity Futures and Trade Commission Chairman, Wall Street dealers are the only "parties that benefit from the lack of transparency."

Gensler points out in articles posted on several Wall Street-related blog sites, that transparency would result in liquidity (meaning less profit-taking) because the real truths and real ratings surrounding the performances of these CDS's would result in less participation by investors. Satyajit Das (a consultant and leading Wall Street derivatives trader) posted on one key blog article that these so-called creative financial innovations (CDS's) were specifically and deliberately designed to "conceal risk, obfuscate investors and reduce transparency".

For this process to work in favor of the banks (in order to produce higher profit margins), could pose a potential problem for attorneys in discovery; because if you don't know where to search for the paperwork and you don't know what to ask for, you can't properly draft a defense efficiency and transparency are counterproductive to their goals. This is why there could (in the case of foreclosure) to what might be deemed "credit enhancements" in favor of your client. When the process is clouded in secrecy, proving that anything "sinister" occurred that would inure to the benefit of your client (much less the general public), would have to be confusing at best to any seated grand jury.

## **LACK OF CHALLENGE**

Keep in mind that any such notion of "foreclosing on the lender" would be considered absurd by many in the judiciary. While it may appear the author is "reaching" here, anyone taking a close look at the current fractionalized banking system has already surmised the need for a system-wide enema, starting with a reduction in lending ratios!

From roughly 2001 until about 2007, mortgage securitizations were at an all-time high. When the financial markets started to unravel, many investors found themselves holding worthless bonds (in light of ratings companies like Moody's giving them a triple-A rating). With AIG in trouble reports started surfacing of the default payouts it was making to numerous Wall Street brokerages like Goldman-Sachs, Bear Stearns and Lehman Brothers. The practice of slicing up loans and bundling them into "financial products" called "collateralized debt obligations" [hereinafter CDO's] came to light.

These debt obligations were insured against default [by AIG] by wrapping them in the derivatives previously described [CDS's]. These derivatives would then be sold to pension, municipal and foreign investment funds as bonds. The banks apparently knew which way to bet since it appears they designed the loans to fail; as the resulting payoffs and bonuses paid to executives of these failing companies drew the ire of the U.S. taxpayer as AIG called on Congress to bail it out. The \$185-billion bailout reimbursed AIG at taxpayer expense for the cash paid to these brokerages that were handling a majority of the subprime mortgage portfolios.

Each of these portfolios was sliced up into specific risk categories, known as a "tranche". To illustrate what a tranche is ... in your mind ... take a piece of pie and cut it into 8 slices. Each slice represents a portfolio of mortgage loans that was bundled together and placed into that slice. The greater the risk (meaning the greater chance for default) the "slice" had, the lower it was rated. If the portfolio was expected to perform well, it was given AAA, AA or A ratings. If it was deemed risky ... this is where "B" and "C" paper took on a whole new meaning. New evidence however is indicating that the higher the tranches were rated, the more likely only the top tiers were being paid off. The rest were allegedly sold or written off as losses, deviating from Generally Accepted Accounting Practices (hereinafter "GAAP"). It is these deviations that the SEC and disgruntled investors are looking for in suits being filed (and these suits are being quickly settled to avoid discovery) to recover at least a portion of their losses.

As of this writing, Moody's Investor Services (a bond rating firm on Wall Street) received what is known as a "Wells Letter" from the Securities and Exchange Commission (SEC) alleging it was being investigated for knowingly placing higher ratings on lower-grade bonds which eventually turned out to be worthless. The "Wells Letter" in of itself has a serious stigma attached in that it generally is construed to mean that the SEC would probably soon issue an order to the ratings firm to cease its activities and close its doors for good. Fitch's and other investor ratings services are also under SEC scrutiny at present and may face the same consequences.

## **LACK OF UNDERSTANDING OF MORTGAGE ISSUES**

Even with the advent of new defenses to mortgage foreclosure claims by lenders, there is still a lack of understanding by attorneys and judges on the securitization of mortgage loans. The overwhelming complexity of the process is to say the least, unnerving. Most attorneys will agree with the author that many sitting judges are "old school" in their thinking about "you borrowed it, now you pay it back!" It is hard to change that mindset without first objecting to everything you thought you knew in principle to be true. This has worked to the advantage of the foreclosing lender.

Unraveling the gobbledygook of mortgage securitization is not a simple process because of the multiple levels of documentation that were created in the development of a mortgage loan, followed by all the paperwork that was generated in creating the CDO's.

Through 2008, the banks in judicial states were at a clear advantage in court simply on the basis of default by the homeowner who simply failed to show up. Many in the judiciary, who were coming to grips with these issues for the first time, granted the foreclosure or forced the case into a settlement conference where the borrower-homeowner got "screwed" even further in loan modifications that didn't work. The author will discuss in some detail why mediation is at best futile when it comes to dealing with clouds on title. The sloppy execution of paperwork is attributed to much of this problem.

In one instance in Miami-Dade District Court in Florida, a judge educated BOTH the Plaintiff and Defendant on the "mess" before she sanctioned the lender \$207,000 by awarding the Defendant a free and clear home. The bank did not comply with the court's orders to post a \$414,000 bond and had no reasonable excuse as to why it did not do so. In non-judicial states, many homeowners didn't understand the foreclosure process well enough to know that they needed to hire attorneys to fight them.

Inside of this legal arsenal they could have inexpensively accessed was a suit to quiet title. Unfortunately, because of lack of knowledge the lenders simply filed documents in the local courthouses (that both homeowners and attorneys should have immediately recognized as "suspect") and moved forward with publication and sale.

**From the author's research and based upon attorneys' purviews, filing suits to quiet title is going to become more commonplace, especially in non-judicial states as a countermeasure to foreclosures.**

## **WHEN THE HOMEOWNER QUILTS, THE BANKS WIN**

There are a lot of reasons why homeowners just give up at the first sign of financial struggle. This society has been so brainwashed of the stigma attached to foreclosure and default on the "note" that rather than fight the lender in court, borrowers simply packed their belongings and vacated their "dreams". You will read about this stigma further in *Section 3: Strategic Default* and what it takes to "get your head around it".

This left the homes open to vagrants and vandals; even homeowners themselves destroyed their properties as they left them for tent cities or cheaper rentals. To the extreme, a Moscow, Ohio man bulldozed his \$350,000 home to the ground to get even with the banks and the IRS. Another homeowner in a Phoenix suburb ended up dead after being shot by police on the front lawn of his foreclosed home because of what many news reports say was a "misunderstanding".

Most of the general public was never educated to this level of finance and thus didn't know how to deal with it. Neighborhood values plummeted as foreclosures rose and homes were short sold for well less than what was owed on them. Couple that situation with rising unemployment, which in simple economics: If one has no job, one cannot pay for a high-priced mortgage, predatory or otherwise. Without a job, deficiency balances couldn't be paid either (if such deficiencies are really legally owed, post-foreclosure); thus, bankruptcy filings continued to increase and are still increasing.

Sadly, many like Storm Bradford, a mortgage fraud examiner in suburban DC, say bankruptcy may be just another tactic to delay the inevitable. "Even the Comptroller of the Currency's website calls it a foreclosure rescue scam", Bradford maintains. The author checked it out ... it's true. It also jacks your credit reports for up for 10 years.

The other law of simple economics the lenders seemingly forgot to consider while pocketing short sale money is: When you short sell a home for well less than what it's worth (whether you own it or not), you devalue the entire neighborhood. When one subdivision is devalued, it affects overall market assessments, which drive down the local tax base. When that happens, the local city and county governments get short-changed.

That means they have to cut back on public services because the money isn't there, or raise property taxes on the respective homeowners to make up for the budget shortfalls. The author didn't make this stuff up. There are "white papers" (university level research conducted by law professors and others) that have analyzed the foregoing scenario to death. Every county in America is affected by this scenario. The author has talked to county reporters firsthand about this.

There are still arguments surfacing today that many of these valuations were over-appraised; however, local governments are still being deprived of tax and recordation revenue because of the electronic wall of secrecy known as “MERS”.

Attorneys like April Charney of Jacksonville Area Legal Aid found themselves overwhelmed with burgeoning foreclosure caseloads. The existing legal consortiums facing this dilemma with any degree of understanding decided that if they were going to win their cases against unscrupulous foreclosure mills, they were going to have to get past a key mindset they had been programmed with since law school: Mediation. Mediation works when you have something to settle. It doesn't work when there's fraud. Up until the time that mass foreclosures hit the court system, all attorneys really understood was mediating on behalf of the homeowner, trying to get a settlement in lieu of a well-deserved, all-out victory. This is where the duty to the client has to change.

In the actual scenarios, what foreclosure defense attorneys discovered was the mortgage lenders' foreclosure mill lawyers were “out for bear”. Attorneys were not prepared for the onslaught of deceit. The lenders got past many of these legal issues by incentivizing the homeowner, making it easier to quit, through short sales and loan modifications, which turned to be nothing more than factored-in economic duress and again, eventual foreclosure. Short sales are frauds on their faces, not just because the homes were sold for less than what they were worth; but because they were sold without actual proof that the lenders actually and legally owned the homes in the first place.

This occurred more so in the 29 nonjudicial states, where lenders can simply foreclose by publication and notice of default. It is in these states that extra duty of care must be taken by homeowners to protect their equity (if any remains). In nonjudicial states, once the homeowner receives a Notice of Default, the foreclosure process begins despite his “Right to Cure” remedies. Many a wrongful foreclosure has occurred because of Due Process violations or unprosecuted frauds on the courts. The author has been continuously questioned about HOW non-judicial states are supposed to deal with foreclosure. The author's answer (in one word): **MARKETING**.

Law firms are going to have to start “boning up” on countersuit strategies (meaning they are going to have to invest in continuing legal education of everyone in their office, to familiarize themselves thoroughly in quiet title actions, mortgage loan securitization, lender liability, deceptive practices and recordation procedures. In order to fight the major lenders and their bands of foreclosure mills, information sharing is also going to be required to play a key factor in successes. Major lenders have money to burn and the only thing that will stretch their limits is several thousand lawsuits being filed simultaneously throughout the United States ... every single week ... several years in a row.

## **SUCCINCT PHRASEOLOGY**

The “pretender lenders” (as foreclosure defense attorney Neil Garfield likes to call them) would then put the short sale and foreclosure proceeds in their pockets (allegedly undeclared to the IRS as profit).

To make matters worse, the loan servicers who MERS claimed they had the legal right to foreclose on behalf of wrote down the losses on their books while the investors who actually held the securitized notes and mortgages in the form of asset-backed securities got nothing. **Did you get that?** “The pretender lenders made the money”, says Garfield, “The investors who actually owned the notes and mortgages did not.”

The bonds they bought were non-recourse and their 401k accounts and other investment vehicles secured by these underlying obligations plummeted in value. You’ve may have heard these referred to as “toxic assets”.

The homeowner in many cases was left with a deficiency judgment and lenders are coming after them for it. As you will see in this work, the deficiency judgment case is as reversible on grounds of fraud as defending a foreclosure in the first place. The borrowers found themselves facing deficiency judgment post-short sale because they did not first get a signed waiver of deficiency by the lender BEFORE the short sale was commenced. There are certain aspects of deficiency case law that are rooted in the Fair Debt Collection Practices Act, which the author knows full well, having written *The Credit Restoration Primer*, an in-depth workbook on credit repair. The lenders can then sell these deficiency judgments to third-party debt collection agencies. The third-party debt collectors then proceed against the ex-homeowner to court. These cases can follow the defaulted buyer who doesn’t get a waiver of deficiency granted to him as part of his agreed short sale process.

## **LENDING TO UNQUALIFIED BUYERS**

The mortgage lenders are not all to blame for this mess. People who had no business applying for a mortgage loan due to their lack of credible repayment history applied and received predatory loans for homes they could not afford. Lenders preyed upon the desperation of low-income Americans, setting these homeowners up in adjustable rate and interest-only, low doc or no doc, no money down loans that were doomed to fail from the start. In many instances, the borrower put nothing up for collateral other than the home itself.

In many instances, it has been discovered that the lenders appeared to have inflated the appraisal or dummied up the borrower’s financial history to make him look more creditworthy to the underwriters. Since late 2007, these predatory loans came into the public spotlight when the buyers couldn’t meet their obligations and their homes went into default. Many buyers intentionally obtained mortgages under false pretenses just so they could live for a year in a nice house rent free. The prosecutorial rate for mortgage and appraisal fraud remains at an all-time low. At this writing, a case in California ended with several appraisers, lenders and real estate agents being convicted of various counts of appraisal and mortgage loan fraud and receiving jail sentences. Operation Stolen Dream has only netted about 1,500 cases. As public outcry increases, you will see more prosecutions, where both the borrower and mortgage broker could face jail time for fraud.

## **MORTGAGE LOAN SERVICERS: FRONT-LINE PRETENDER LENDERS**

The author likes Garfield's term "pretender lender", because even though mortgage loan servicers may collect your monthly payments, they may not have advanced any loan proceeds. It is now well known (not even arguably) that non-performing loans generate more revenue for the servicing lenders. All the late fees and "other" fees tacked onto to delinquent homeowners' accounts push struggling homeowners deeper into despair.

As a result, the frustrated homeowner does the worst thing possible: He abandons the home and fails to show up in court [in a judicial state] and the bank wins by default judgment. When the borrower took out a note and mortgage, they generally were made to sign a document stating that they understood their note and mortgage would be sold to another entity and that at some point, another lender would contact them to finalize payment arrangements. What they didn't know, was that another entity was included in their mortgage or Deed of Trust; namely, MERS. The author will get into that later.

On the initial paperwork, the mortgage loan broker would set the loan up to be assigned to another lender as the servicer of the note, who would then be entrusted to collect the monthly payments from the borrower and distribute them according to the terms of the contract. However, legal arguments have surfaced that contradict the servicer's legitimate standing to foreclose. These arguments are becoming more legitimate due to the process of securitization. **Servicing lenders can change repeatedly over the life of a single mortgage loan.**

When the note was bundled into a portfolio and securitized, it became an "obligation", which was purchased by investment groups worldwide in the form of bonds. Paper records turned into electronic records and the paperwork was "shuffled off to Buffalo". With the latest contract with Genpact, which many attorneys feel isn't "accidental", the paperwork may be shuffled out of the country by MERS, thus making discovery more difficult. Filing protective orders as an option to prevent spoliation has been discussed.

No homeowner ever knew who actually owned his note, because it was never disclosed to him. No lender ever told the homeowner the course that his note and mortgage would take, flowing into the stream of securitized portfolios and collateralized debt obligations. In essence, neither the homeowner nor the investors who actually owned the securitized bonds were involved in the creation of these portfolios.

The way to find out ... go into default on your mortgage loan (the author is being facetious here). Then the "unproven party in interest" runs to the county courthouse to file paperwork to attempt to legitimize their claim; or runs to the court with paperwork attached as an exhibit. In either case, any attorney familiar with mortgage foreclosures knows that under Rules of Evidence, these documents may be impeached! There are various explanations for this later in this book. If you feel your home is at risk of foreclosure, it is important for you to strategize now, not wait until everything falls down around your ankles!



## A PEEK AT WALL STREET

Portfolios containing mortgage loans, good or bad, were proprietarily traded by originating lenders to Wall Street brokerage firms like Lehman Brothers, Bear Stearns and Goldman-Sachs, who set themselves up in new paperwork, absent of legal assignment and disclosure. The investment pools that now legally represent the “true Plaintiffs” in mortgage foreclosure cases have no idea what hit them. The action by mortgage lenders appears to be specific cases of non-disclosure, which is fraud anyway you look at it. Much of this thought process was generated from Neil Garfield’s foreclosure defense camp, among others.

When the borrowers began to default, the pretender lenders and their foreclosure mills of attorneys who were well-prepared with all the contractual tricks of the trade began seizing homes in record numbers and liquidating them in short sales and if that didn’t work, in foreclosure sales. Once the pretender lenders collected on the proceeds, it is assumed that they put the profits in their pockets. There is some argument going on that these proceeds represent taxable income as a capital gain. This is still in dispute. The investors were left holding worthless bonds, with absolutely no recourse whatsoever (at that time). Yet unknown to these investors, if the loans they funded actually made it into the “pools”-“tranches”, they became liable to the homeowner as the true holders in due course. The courts had no idea that the level of fraud reached so deep because the foreclosure paperwork in possession of the lender was so superficial.

The new “buyers” of these foreclosed homes, who purchased properties that had lis pendens liens filed against them by borrower’s attorneys, put themselves in a very compromising position because they didn’t bother to check for liens prior to sale. Thus, they became the new “lenders”.

Foreclosure proceedings in judicial states were chiefly based on the emotional rantings of the lenders’ attorneys in court coupled with flimsy paperwork which the attorneys for the homeowners were ill prepared to scrutinize. For years, the lenders in judicial states were allowed to just walk into a courtroom and easily dupe the court system into believing it was entitled to a summary judgment and interlocutory decree to foreclose based solely on homeowner default. Most consumers and their attorneys had no idea that the banks would stoop to fraud to prove their case. In the case of non-judicial foreclosures, the lenders still run roughshod all over the borrowers, merely getting the county sheriffs to do their bidding by publication, evicting the homeowners without a fight. The real frauds came to light as the press got involved in the goings-on in court in Jacksonville, Florida.

April Charney’s efforts to shut down mortgage foreclosures initiated by MERS in Florida drew attention to her tactics because she proved to the court that MERS was only a record keeping database and not given any actual power to stand in the lenders’ stead as a nominee. If the lender was the “duck”, MERS wasn’t walking and quacking like a “duck”. *Jacksonville Business Journal* reporter Kimberly Morrison was one of many area reporters who began covering Charney’s procedural exploits.

Attorneys in Florida started paying attention to what Ms. Charney was doing and she ended up holding seminars in various parts of the state. In short order, those seminars ended up going nationwide, as Charney extolled her methodologies in foreclosure defense. Lines of attorneys extended around the corners of the conference centers and hotels she held seminars in.

At the same time, Ohio Attorney General Marc Dann and attorneys like Neil Garfield and his partner Brad Keiser started researching and grasping the same defense techniques and many foreclosure cases in Ohio ended up stalled in the courts. As a result, many judges became educated. Attorneys across the country realized this new “education” they were lacking in needed to be addressed in some form of CLE courses.

Since then, Garfield and Keiser run a website called “Living Lies”. Their website sports a blog that has been barraged by mostly those that are affected by foreclosure. The two are among many entities (like Gardner, Pines, Charney and CFLA) that host a multitude of seminars for attorneys and other legal professionals. Whether the information gleaned from these seminars will actually be useful still has yet to be fully tested. There are also arguments for and against loan audits as well. If a homeowner’s loan is more than 3 years old and the note hasn’t changed hands since, it is highly unlikely the findings of a mortgage loan audit will do the homeowner any good. Yet, the author still feels you need to at least look at what loan audits entail to get a full understanding of the legal picture. The author interviewed five (5) forensic loan audit companies as part of his research.

## **ACTIONS TOO LATE IN COMING**

By the time only a handful of defense attorneys grasped the understanding of what these pretender lenders were up to, millions of homes were already seized and put back on the market (the author’s included in 2003), creating a massive glut that drove home prices even lower.

Virtually all of southwest Florida felt the sting of home foreclosures, followed by Las Vegas, Stockton, California and Phoenix, Arizona. It wasn’t until AIG started disclosing its financial distress to government regulators that the general public, the attorneys and the courts started to grasp the resulting legal challenges they were facing.

Tampa attorney Chris Hoyer spearheaded the Consumer Warning Network, telling homeowners in Florida about making the pretender lenders *produce the note* via production of documents, a method of ascertaining evidence afforded to both Plaintiffs and Defendants in civil and criminal cases. Sample paperwork was circulated all over the state and subsequently the entire U.S. In the hands of the uneducated pro se litigant however, this was not the cure-all that was hoped for. By the time these production forms were submitted, the homeowner was way past the point of getting the court to entertain discovery motions. It is for this reason the author is going to insist you focus heavily on discovery and Rules of Evidence and Rules of Procedure; because as every attorney knows: Good discovery wins cases.

It is hoped that understanding the local rules of evidence in the forum you are engaging the enemy lender in will prove your best asset. In the realm of home foreclosures, discovery is designed to do more than just “stall” the case, it is supposed to bring out evidence that is necessary to prove the merits of a case.

In this scenario it would be necessary to prove to the court just who exactly owns the note and mortgage if that is even possible. The biggest problem today is finding a judge that wants to “get it” because judges are homeowners too. The hardest part to explain to a judge is that the actual “investor cash” came FIRST in the entire chain of events. Aggregate fund managers and originating lenders worked in consort to find homeowners to loan this cash to, whether they could pay it back or not. This is why the quiet title action may be a simpler, more elegant scenario for homeowners who are in a quandary about their mortgage loan, even in the face of foreclosure, at less expense.

### **HENRY PAULSON IS NOT YOUR FRIEND**

In this author’s humble opinion, neither is the current Secretary of the Treasury Timothy Geithner! Putting former New York Federal Reserve Bank Chairman Geithner in charge of the mortgage lending crisis and subsequent bailout is like putting the inmates in charge of the asylum. As a taxpayer, the author is outraged! Henry Paulson made a very bad (if not deceitful) choice in telling Congress that if they didn’t vote for this bailout “that martial law may have to be imposed”. This statement was an all out lie to thwart a multitude of congressional attacks, lawsuits and government actions against the banks for fraud and predatory lending. Paulson committed fraud (by his own actions) against the American people and Congress as a part of “damage control.”

A couple of months later, an article appeared in *The San Francisco Chronicle* that speculated the real reason for the bailout being proposed by Paulson was not to keep mortgage-strapped borrowers in their homes, but actually to thwart a rash of lawsuits against the banks. He also knew that Congress wouldn’t give any bailout to a bunch of frauds; and the rest is history ... for now. At some point, maybe we will see a whistleblower with a conscience come out of the Wall Street woodwork and tell all. Many in Congress who had any sense of the real goings-on protested the bailout. To the affected taxpayer, any member of Congress who voted for the bailout needs to be voted out of office!

### **LACK OF FINITE PAPERWORK**

The banks who arranged all of these mortgage-backed securities typically served as trustees for the investors who backed them. In the event of foreclosure, when trustees couldn’t produce timely written proof of ownership entitling them to act as the Plaintiff, they would file with the court what would become known as “lost note affidavits” (many of them “blank”). As Storm Bradford so eloquently put it, “It’s like seeing who ends up with the unsigned lottery ticket.”

At that time, the judges would generally let these foreclosures proceed without objection because defense attorneys were either uneducated about these attack methods or flatly and blatantly just didn't show up to court.

In October of 2007, U.S. District Court Justice Christopher Boyko of Cleveland ruled that Deutschbank didn't file the proper paperwork to establish its right to foreclose on over a dozen homes it was attempting to repossess as trustee in the State of Ohio. Of course, later on, the banks came back in with more paperwork and tried foreclosing again.

In late 2009, the Florida Supreme Court came out with new rules that drastically slowed the rash of foreclosure filings by requiring lenders to have all their paperwork in order. As it turned out, lenders' attorneys chose to ignore it.

Attorneys are starting to wise up to mortgage lender strategies that allowed people like Joe Lenz, a 62-year-old retired software engineer in Boca Raton, Florida, to live in his home without making a single mortgage payment for several years now, while Washington Mutual tries to locate his "paperwork". Again, Lenz has been living in his \$1.5-million home for several years without making a single mortgage payment! According to published reports, it is doubtful that WAMU may ever find his paperwork. Let that be a "learning curve" to you WAMU borrowers reading this work. After a time, the author would assume a possible quiet title action being filed to clear the title to Lenz's home of the lien. In Florida, five years must lapse past acceleration of the note to do one.

The "conscience" to literally "take on" a mortgage in a legal action will soon no longer be a "stigma". In the 1940's and 50's, there was a stigma attached to having children out of wedlock as much as there was a stigma attached to filing bankruptcy. As time passed however, more and more women became single mothers and as the financial crisis progressed, more and more people filed bankruptcy for logistical reasons. Soon, the stigma of both scenarios became the norm. Despite the fact the Comptroller of the Currency claims that bankruptcy is not a catch-all to solve a mortgage foreclosure problem, many consumers are still using it as a "last ditch effort" to save their homes.

"If the homeowners just allowed a short sale or gave up their deeds in lieu of foreclosure, their credit bureaus would only take a 100 to 150-point hit", Bradford says. "It two years, they'd be eligible for an FHA loan." On the other hand, Bradford says bankruptcy will virtually tank a consumer credit report for up to 450 points.

One of the finer points that both the author and Bradford agree on is the fact that homeowners are not realistically looking at their financial situations. Whether their loans were securitized on Wall Street really doesn't play out well for someone who is paying an attorney the sum and substance of their mortgage payments every month to defend them in a foreclosure, when they could just as easily used a quiet title action, coupled with a *lis pendens* lien, and sorted through their finances while they attempted to work through a given time frame and find somewhere else to go. With predatory lending occupying a dominant majority of today's defaulted loans, it becomes hard to understand why borrowers would not choose to rent for thousands a month less.

“There are plenty of other options,” according to Bradford, who eluded to the fact that homeowners just need to figure out what their potential strategies are. Bradford runs a website called mortgagefraudexaminers.com, and claims that there is appraisal fraud in almost all of the loans he reviews in addition to lender liability issues. He downplays loan auditors because most of the time audits are conducted; the time limit for enforcement has passed. Still, fraud claims (as hard as they are to prove) make up the bulk of lawsuits against lenders.

In part, the United States government and its “federal banks” will have to answer to the American people as to why they allowed the frauds to occur, as they virtually sanctioned this behavior. There’s much more to be discussed on this behavior in *Section 3: Strategic Default*”. The author had to include that section because he is one that chose that path.

**There are four scenarios being explored in this work: (1) attacking the lender before the default actually occurs [foreclosure offense through quiet title actions and other strategies]; (2) attacking the lender after the default occurs [foreclosure defense by filing a countersuit]; (3) attacking the lender post-foreclosure in the filing of a wrongful foreclosure claim and a quiet title action; and (4) attacking the lender or the third-party debt collection agency in the phase of deficiency judgment.**

The author discusses the possible results of the propounding of theories relative to this cause, as it is every property owner’s right to due process and to address grievances in a court of law. There should be no issue with the fact that if you’re going to bring a claim against a homeowner, you legally should own what you’re claiming.

For now, get the family together, unpack your things and stop fighting with each other and start looking for solutions to your problem; being delinquent on a mortgage because you lost your job is no reason to get a divorce. If you have to have a garage sale to raise money for an attorney or to live on while you’re fighting the lender in court, then do it.

## **ANY ALLEGED CONSPIRACY THEORIES?**

There are many who believe that MERS was created for the sole purpose of securely disguising all transactions on behalf of its subscribers with the intent to defraud not only the borrowers of their rights to full disclosure but the investors as well.

The obvious, which is **not** a conspiracy, is that MERS’ actions deprive county treasuries of millions of dollars a year in recordation fees. This has been established as fact and is not just the author’s opinion, but is also the opinion issued from the American Law Institute. Conspiracy theorists also advocate that the entire Wall Street plan was to bleed AIG and subsequently the U.S. taxpayer (with the direct help of the New York Fed) in backing up securities that were claimed as being non-performing, but really performed well for certain entities who collected from AIG.

All of these theories should be quietly left at home because until such time as an independent committee (free from any government interference) performs a complete audit of the Federal Reserve and its member banks, many of these theories are just that.

**The author's research has not shown the courts are buying any type of conspiracy claims; yet everyone continues to search for the incontrovertible proof needed to nail all of the elements of conspiracy together in order to win a case. Again, maybe a whistleblower would be a big help. We cannot be sure of their safety at that point.**

## **FURTHER MARKET SCRUTINY**

Unfortunately, the fallout of the mortgage lending crisis on Wall Street has affected other portions of the stock and bond sectors as well. Shannon Julian, a securities dealer in San Antonio, Texas that handles sales of municipal bonds, expressed concern that the scandal involving all of the Collateralized Debt (Mortgage) Obligations brought undue scrutiny on his business, which dramatically reduced his commissions. These days, he advises that if you're going to invest in municipal bonds, find out what security interests they're actually tied to. You will read further into this work about how the states and counties are getting ripped off for income, but not necessarily all due to non-performing bonds.

## **THE CRACKDOWN BEGINS: GOLDMAN SACHS ET AL**

The Securities and Exchange Commission filed a civil suit for fraud against Goldman-Sachs and one of its Vice Presidents for what it terms, "defrauding investors by misstating and omitting key facts" in its prospectus. The crux of the suit centers around Paulson & Company, a hedge fund that helped create a CDO and at the same time bet against its performance. Paulson is alleged to have paid Goldman-Sachs to structure the deal in which it could speculate against securities derivatives created out of subprime mortgages. The losses to investors was estimated around a billion dollars. Paulsen wasn't named in the suit.

Goldman was sued for making misrepresentations to investors like German banking entity IKB, who bought the security at the recommendation of GS Vice President Fabrice Tourre, who is also named in the action. As the SEC continues its investigation of other alleged improprieties on Wall Street, Congress is expected to step in and start legislating against the very behaviors caused by legislation repealed over a decade earlier. Even though this suit will settle quickly (if it hasn't already at the time of publication), SEC Enforcement Director Robert Khuzami indicated that any of the firms selling mortgage-backed securities and then bet against their performance "may have a harder time sleeping", as the SEC may recommend cases to the Department of Justice for potential criminal investigation and prosecution. The outcomes of these cases will certainly reveal what the firms did in more detail and could potentially provide "prima facie" evidence which could be used by subsequent litigants in their suits against the lenders that provided those subprime mortgages for securitization, according to Neil Garfield.

## **THE CRACKDOWN BEGINS: U.S. V. FARKAS**

On June 15, 2010, federal prosecutors accused the former Chairman of the Board of Taylor, Bean & Whitaker (at one time TBW was of the nation's largest mortgage lenders and is now in bankruptcy) of masterminding a fraud scheme that cheated investors and the federal government out of billions of TARP dollars, which subsequently led to the sudden failure of Colonial Bank of Virginia in 2009. A grand jury in Alexandria, Virginia indicted Lee B. Farkas on 16 counts of conspiracy, bank fraud, wire fraud and securities fraud in the scam. Along with the indictment was a list of the homes and antique collectible cars that Mr. Farkas "indulged" in what the feds say was at least \$20-million of the proceeds from the scam. Farkas was arrested Ocala, Florida on the day the grand jury issued the true bill. Farkas's problems aren't over either. The Securities and Exchange Commission filed a separate civil action against him and other TBW executives for the same thing. Other players in TBW may also face similar charges.

## **THE CRACKDOWN BEGINS: HUNDREDS ARRESTED NATIONWIDE**

It's known as "Operation Stolen Dreams". It has resulted in a national sweep of various individuals within the lending structure, yet it doesn't come close to nailing the real perpetrators (the ones who created the derivatives and the SPV's that defrauded the U.S. government out of billions of dollars of what is known as "TARP" money).

What may appear to be a "smoke screen" to "appease the peasants", the sweep (which started March 1, 2010) has netted a total of 1,125 defendants; 485 arrests and 673 indictments; 336 convictions and since June of 2010, 206 defendants have pled guilty or were sentenced to prison terms and fines.

Even with the claimed recovery of \$207.4-million in total recovered funds that homeowners were defrauded of (in both criminal and civil enforcement actions) the idea that this is going to solve the real frauds is an understatement. The real frauds are going to be solved when judges order full inquiries into the frauds brought into their courtrooms.

The U.S. District Attorney's office for the Eastern District of North Carolina has set up its own Mortgage Fraud Task Force to deal with similar issues; resulting in 3 convictions and more on the way.

In California, Attorney General Edmund "Jerry" Brown is cracking down on scam artists who have been involved in short sale frauds. Brown's statement doesn't address the real issues of fraud however, like why his office isn't investigating false claim of lien and assignment filings in his state as well as "proper party" frauds by pretender lenders.

In summary, until the government starts cracking down in its own back yard, the frauds will continue.

## PURE INTELLECTUAL MASTURBATION?

The apparent arrogance of Wall Streeters who took huge bonuses much to the chagrin of the U.S. taxpayer can potentially be summed up through a quote in one of Goldman Sachs VP's (Fabrice Tourre) emails to his girlfriend:

"When I think that I had some input into the creation of this product (which by the way is a product of pure intellectual masturbation, the type of thing which you invent telling yourself: 'Well, what if we created a 'thing', which has no purpose, which is absolutely conceptual and highly theoretical and which nobody knows the price?").

The Securities and Exchange Commission released Tourre's emails as part of its investigation into Goldman Sachs' involvement in the creation of derivatives and credit default swaps.

## MOMMY! FREDDIE DOESN'T WANT TO SHARE!

In a 2010 action in the U.S. Bankruptcy Court for the Central District of Florida, the Federal Home Loan Mortgage Corporation (known herein as Freddie Mac, a quasi-government corporation now in conservatorship under the direction of the Federal Home Finance Agency) is trying to get information on the scam explained earlier in this work involving Taylor, Bean & Whitaker and the TARP fraud that landed its key player Lee Farkas in jail, charged with 16 counts of various frauds. Ocala, Florida-based TBW is in bankruptcy and Freddie Mac is trying to lay claim to as much of its "assets" as possible.

Unfortunately, Bank of America and others want a piece of that pie. **Insodoing, Bank of America's attorneys have admitted in pleadings that loan portfolios might have been double- and even triple-pledged as collateral AT THE SAME TIME!** Bank of America and others want a look at the documents now in possession of the bankruptcy court and Freddie Mac's attorneys filed an objection to their request to examine what it considers confidential material pertinent to resolution of its claims. This isn't over yet.

## MERS "ACTORS" UNDER SCRUTINY

And just when you thought things weren't getting interesting enough, multiple civil actions have been filed in Nevada and California against MERS for filing false and misleading statements and for circumventing taxes that were rightfully owed to the counties in Nevada. As time progresses, these will not be the last.

In Texas however, the author has been closely monitoring a case in which the Plaintiff (who claims he was wrongfully foreclosed on by a handful of lenders), has asserted a section from the Texas Penal Code [37.101]. The violation carries state jail time for felonious behavior wherein fraudulently-recorded documents were used to defraud someone of their property. The county the suit was filed in is directly involved.



In this instance, as the case progress in civil court, the Plaintiff's counsel is planning on handing a copy of the suit to the Van Zandt County District Attorney for investigation into the filing of charges for which multiple defendants could end up in front of a grand jury.

The author feels this suit not only has real teeth in it, it should put a scare into everyone who had anything to do with filing assignments in the local county recorder's office. Agents representing MERS are being targeted for prosecution because they executed an assignment on behalf of one or more of the defendants.

There are eleven defendants in this action to date. The real estate brokerage company also put the foreclosed home under contract, which prompted motion for a temporary restraining order to be filed, as they were trying to sell it over the top of a lis pendens lien that was filed at the time of suit.

In this case, a county Justice of the Peace is the Plaintiff's star witness. In the first unlawful detainer hearing, the Justice of the Peace ruled against the lender because she couldn't find proof of ownership, let alone service of process. A subsequent Justice of the Peace used the listing at the appraisal district to evict the Plaintiff three weeks later. The county is cooperating to get to the bottom of this mess because the second JP's actions were at best "questionable". The Errors & Omissions attorney for the county is now involved, called in by the county's risk manager.

## **PURE ADMISSION OF "GUILT"**

At the time this writing was released, GMAC Mortgage issued a moratorium on thousands of foreclosures in all the judicial states because of apparent "fraud" in the way affidavits and assignments by one of its "officers" (41-year-old Jeffrey Stephan, a graduate from Penn State who admitted to attorneys in two separate depositions that he only had three weeks of training in foreclosure processing when he joined the company in 2004) in thousands of cases. Even with 23 states affected, this could virtually "open the door" for litigation in all of the other states whereby homeowners could claim wrongful foreclosure, cite a specific document and exercise their rights to the fullest extent of the law. This has also prompted investigations of at least three states attorneys general.

While it's hard to estimate the outright ripple effect of GMAC's actions (as reported in the *Washington Post*); one thing that is for certain is that it will probably spawn several thousand lawsuits against GMAC; many of those requesting the quieting of their titles and potential declaratory judgments in an attempt to negate their loans.

# INTRODUCTION: The Big MERS Lie

**“The bank argues that MERS’s status as a “nominee” for the lender and the “mortgagee of record” within the document qualifies it as a “mortgagee” within 14 M.R.S. §6321. We disagree.”**

**MERS v. Saunders, Maine Supreme Judicial Court (2010)**

## A RECIPE FOR CONFUSION

The mortgage mess had to have a mechanism to cover its tracks. From all of the author’s research, the catalyst was the creation of MERSCORP, Inc. (incorporated in 1998) and its subsidiary Mortgage Electronic Registration Systems, Inc. (known hereinafter in this work as “MERS”).

MERSCORP, Inc. and “MERS are Delaware corporations. Most banks that operate in the United States were also created as Delaware corporations. Why banks set themselves up in Delaware (obviously because of the benefits they receive as corporations in that state) is not the subject of this book and thus it becomes unnecessary to dwell on it further. From depositions, it appears the MERS that everyone is dealing with now (#3) was created December 30, 1998 and this creation became effective on January 1, 1999.

The CEO of MERS is R. K. Arnold. He is the Registered Agent for MERS and his office is in Reston, Virginia. On September 25, 2009, he was deposed by attorney Nick Wooten for testimony regarding the behavior of his company; specifically, how MERS can foreclose on homeowners when it doesn’t fit the criteria of Restatement of Mortgages (Third), or any other legal standard of criteria fitting the description of a “beneficiary”. More recently, on April 7, 2010, another deposition of MERS Secretary-Treasurer William Hultman (who is actually employed by its parent, MERSCORP, Inc.) was taken by oral-sworn, video-telephone conference by attorney Mark Malone (in a New Jersey case), representing a client being foreclosed on by a Wall Street “trust” (being represented by their Trustee, Bank of New York), in a counterclaim against the bank.

As one could glean from excerpts of the April 2010 deposition of Hultman however, there were actually **THREE MERS** entities, not just one. Each MERS entity transitioned into the next subsequent entity. As confusing as all of that may seem, each MERS entity, as the corporation itself progressed, performed something that was finitely different to enhance the performance of the subsequent MERS entity. The first MERS entity was apparently created in October of 1995 and ended June 30, 1998; which transitioned into the second MERS entity, which incorporated on June 30, 1998 (taking over for the first MERS entity) and then after more “agendas” and “discussions” the third MERS evolved and went into operation on January 1, 1999. Also significant is the fact that this “evolution” of companies further complicates discovery because any attorney suing MERS would have to delineate which “MERS” did what and when.

What is known however from this deposition, by Hultman's own admission, is that the "MERS #3" entity had to be known as a "bankruptcy remote" entity (meaning an entity that could NOT go bankrupt because it held no assets, liabilities, income or expenses). This clearly fits when you compare this to the defined parameters of Restatement of Mortgages (Third). It also obfuscates MERS' abilities to do certain things, like foreclose on or convey assets from one party to another; assets it clearly does not own. Again, any attorney wishing to depose MERS for the purpose of gleaning any kind of evidence is going to have to sort through the "layering" of all the corporations.

Also significant to this deposition was the admission by Hultman that non-MERS members could have their employees "certified" as "MERS officers". This means that as a Plaintiff in a suit against MERS, you'd have another potential hurdle to climb over in establishing (1) whether the person signing your documents that are recorded in the courthouse were actually certified to sign those documents (by way of a "signing agreement"); and (2) whether or not the company this "officer" worked for was a MERS member or not. This clearly has much to do with just how significantly clouded your title to property would be (as the "agency relationship" with someone NOT holding an asset could claim that it had authority to foreclose on any given homeowner could be attacked as deficient); thus separating the lender and MERS into distinct parts: one that owns the asset and one that doesn't, for the purposes of control only.

This also further complicates the issues with MERS when you start researching into which set of applicable "governing documents" were in effect and being utilized by MERS and its affiliates and their assigns at the time your mortgage loan was closed. It appears that every time a major case ruling comes down against MERS, its governing documents are updated, particularly the membership application to be a MERS member, the rules of membership that MERS members have to abide by and especially the procedures manual (which could include instructions for how to foreclose on a borrower).

If you examine the timeline of events, you'll see that the first MERS was set up in early 1995. Its founding members included Fannie Mae, Freddie Mac, the American Land Title Association (ALTA) and about 20 other major players (the lenders). Its purpose was to act as an electronic database to track mortgages; however, it was only accessible by its members. Now, if you have a MIN (a number listed on your deed of trust), you are supposed to be able to track your own mortgage; however, the author has yet to see anything positive or truthful come out of this database that wasn't lender inputted. In 1999 (a year after MERS #3 was created), the Glass-Steagall Act was repealed. WHY?

Nobody knows. Is it possible to surmise that bank lobbying efforts had a hand in it? Maybe; because post-repeal is when all of the subprime loans and alleged chicanery started and every county in every state started losing revenue by the massive drop in fees collected at the recorder's office for the filing of security interests to perfect the lenders' positions. This happened because MERS recorded its initial filings for the lenders as their "nominee" and at that point, everything was secretly hidden behind an electronic wall. Unless you have a subscriber code, you don't get true access the way a subscriber does. Even today, if an investor doesn't want disclosure, you won't find out the truth.

Even though securitization has been around for centuries, there was more proprietary trading of mortgages onto Wall Street between 2001 and 2007 than at any other time in American history, even during that small time frame in the mid-1970's. By 2008, a massive chunk of these loans were in default because of their subprime character and in 2009, the bailout occurred and here we are, present day, discussing possible reasons for this mess.

The idea that there could be a relevant issue concerning clouded titles came into fruition with the concept and implementation of MERS, as this entity shall be referred to in this work via acronym, understood and accepted in the legal sense, will be construed to mean the "electronic registry database". The case law regarding MERS that is discussed in this work will reflect more than just the initial intent purported by its founders.

MERS has won suits in some jurisdictions, appearing largely to have ballyhooed the judges, while in other jurisdictions the door is slammed permanently shut. In those states, this could present an opportunity for homeowners to entertain quiet title actions with immense impunity. There may come a point in time where quiet title actions will be streamlined to make them more effective to where a court docket can actually function with a minimum number of players coming into court to prove their claims. It will be interesting to see how MERS stands up to these actions.

## **MERS PLAYS INTO THE "CONSPIRACY"**

Prior to MERS' creation in 1998 (there is discussion the concept began as early as 1993), a majority of the lenders not only sold their notes and mortgages to other lenders via the secondary mortgage warehousing markets, most of the instruments necessary to actually prove that the original lenders owned the notes they were selling, transferring or assigning to the new entities were lost. This is where the radical new movement of foreclosure defense's "Produce the Note" concept came into being. The courts quickly picked up on that. So did the lender's attorneys.

What might seem as an arguable conspiracy theory surrounding MERS is that its attorneys continue to argue that the "electronic clearinghouse" they set up has legal standing to foreclose on behalf of any lender as a "nominee", despite rulings to the contrary by many state courts that it has argued before.

In this work, you will find that being a "nominee" doesn't give you the actual authority of a lender by definition. The author supports this research with case law and state court rulings; most recently with the Maine Supreme Judicial Court's ruling in the *Saunders*'s case. *[So you do not think it was an outright victory for the Saunders's, the judgments were vacated and the case was remanded back to the District Court for rehearing.]* True, MERS has gotten latitude in some jurisdictions; however, the author asserts here that in time the U. S. Supreme Court will rule on its legitimacy. Its legitimacy will be tested through a quiet title action (author's prediction) ... and it will fail miserably.

## WHAT THEY SAY AND DO ARE TWO DIFFERENT THINGS

MERS officials say they keep track of all the transactions; yet when questioned about the legitimacy of their transactions and who the real creditors were, standing depositions of MERS President and CEO R.K. Arnold clearly failed the litmus test of Restatement of Mortgages (Third). It became obvious to many in the legal profession that once a mortgage loan was registered with MERS, the transparency of the transactions disappeared behind a corporate veil of secrecy. While the “nominee” (MERS) would skate off with the property in a foreclosure action, the people who invested in these derivatives “lost their shirts”. After MERS registered and recorded a mortgage loan in its name, it would bring foreclosure actions in the name of Mortgage Electronic Registration Systems, Inc. Florida was the first state to “put the hammer down” on this entity and April Charney, an attorney out of Jacksonville, Florida, was a key player in that regard.

The Kansas Supreme Court decision in *Landmark National Bank v. Kesler* is one of many legal rulings that changed MERS’ posturing as a standing litigant. Even though a later ruling declared that MERS could be an “assignee”, the probability that MERS could survive a quiet title action is debatable. But now, in Kansas, district court judges are now relying on what they call the “MERS statute”, referring to a July 1, 2010 law that now gives MERS some sort of legal impetus as an assignee. The author surmises that MERS lobbied the Kansas Legislature to get that passed. This will eventually be challenged in front of the same Supreme Court that issued the *Kesler* ruling.

Arnold admitted in a deposition to Alabama attorney Nick Wooten that there was a moratorium on MERS foreclosures in Florida. In one case heard in Reno, Nevada, U.S. District Court Judge Robert C. Jones (a former bankruptcy court justice), in *Lacy J. Dalton et al v. Citimortgage, Inc. et al* even stated during oral arguments, (in reference to MERS) “What we need is a class action suing the right lawyers who came up with the MERS system. That’s what we need.”

## THE LOST NOTES

Further, the crusades for justice are illustrated by the actions of attorneys like Wooten and April Charney of Jacksonville Area Legal Aid in Florida, who came to discover first-hand what much of today’s research has shown: That 4 out of 10 lenders are missing paperwork when they take a foreclosure claim to court. (Thus, they used “outside help” to manufacture what they needed to “prove a point” ... and got caught.)

The “lost note” problem was further evidenced by an action brought by Wells Fargo Bank against Wachovia Bank (196 Fed. Appx. 246 (5<sup>th</sup> Cir. 2006) in which the former sued the latter for failing to deliver all of the loan documents and origination paperwork to it as part of a transaction. In this particular case, it is evidenced that these documents were destroyed. Knowing this, Charney’s courtroom battles wound up being effectively centered on the Rules of Evidence.

Sloppy paperwork and record keeping by lenders was further confirmed by the findings of a study conducted by the University of Iowa. The research showed that 40% of the legal actions taken by homeowners against lenders in court wound up “on hold” while the lender tried to produce the required paperwork to prove ownership. Charney’s championed defenses still only scratched the tip of the iceberg in staving off mortgage foreclosures. She also had her run-ins with MERS in Florida and stopped them dead in their tracks, getting nearly 300 MERS state-filed cases dismissed inside of a year. This was just the start of what is now termed “foreclosure defense”. It is from that term that American homeowners are now starting to awaken to the frauds that have been perpetrated on them and the suspected clouds on their properties allegedly caused by MERS’ actions, hence the term and title of this work, “Clouded Titles”.

To explain the preceding comment, the author spoke with O. Max Gardner III (a well-spoken attorney who runs a foreclosure bankruptcy bootcamp for lawyers in Western North Carolina) who conceded that the original idea of an electronic database was well-intended but it ended up becoming more of a “problem”. The problem MERS has caused is reflected in many arguments before both state and federal judges; as MERS’ counsel likes to argue whatever happens to suit its cause at the time.

The comments of Judge Jones in Nevada preceded a heated argument with MERS’ attorney, Robert “Bobby” Brochin; the author having possession of the oral arguments as proof.

## **THE MOTION BY MERS THAT WENT NOWHERE**

August 28, 2009, the Kansas Supreme Court’s final ruling drove another wedge in the banking industry’s effort to foreclose on homeowners using MERS as a “nominee” to represent lenders who recorded no secured interest of record.

**If you’re a lender depending on MERS to help you establish “good case law” to your benefit, this isn’t it.**

In the case of *Landmark National Bank v. Kesler*, 2009 Kan. LEXIS 834, the Court held that Mortgage Electronic Registration Systems, Inc. was a nominee company that had no right or “capacity” to bring an action for foreclosure and thus did not need to be notified. MERS filed suit to be enjoined AFTER the Ford County, Kansas District Court ruled on the case, well after the time for filing of appeals had ended.

Because of the fact Boyd Kesler’s second mortgage loan had been sold to Sovereign Bank and that note and transfer was hidden behind MERS’ recordation, Sovereign Bank wasn’t notified of Kesler’s bankruptcy or foreclosure until AFTER the summary judgment was rendered by the district court. MERS and Sovereign Bank filed a motion to set aside the default judgment and the court denied it; so MERS and Sovereign Bank appealed the ruling and the Appeals Court upheld the lower court’s ruling.

MERS then appealed to the Kansas Supreme Court and got its electronic behind kicked. The significant point to recognize here is that Millennia Mortgage Corporation held Boyd Kesler's second mortgage loan and transferred it to Sovereign Bank AFTER recording it with MERS. (It seems the electronic database really hid the "foreclosure" well, huh?)

Since MERS' clients hide behind a wall of corporate secrecy in which only its membership can look at specific data that it is involved with, Landmark National Bank, who won the judgment at the district court level felt no need to inform MERS or Sovereign of its filing. Landmark obviously knew MERS did not have beneficial interest in Kesler's second mortgage and thus appeared to have felt no obligation to tell MERS anything. *As suspicious as this move might be ... make it part of your "learning curve".*

When MERS entered the fray, it was understood that in order to make a person a "contingently necessary party", it would have had to happen if (1) complete relief couldn't be accorded in MERS absence among the parties already present; and (2) MERS claimed an interest in the property, provided the entry wouldn't pose any financial risk to those already present in the action. Since MERS had no meritorious defense, since it's just an electronic recording database-type service, the court affirmed the lower courts' rulings.

**Again, one thing the author has noticed about MERS ... its counsel likes to throw interpretation to the wind to suit its arguments at any given point in time. If you're going to sue MERS, study the arguments of its attorneys if you want to beat them at their own game. The author will discuss another tactic you may wish to consider if you find MERS listed as a "nominee" or "beneficiary" on your Deed of Trust. It's called "gobbledygook" ... and you can read a paragraph below as a sample. (see \*\*)**

Nowhere in *Kesler* documents did MERS define what a "nominee" was; so in the absence of a contractual definition, the matter of definition was up to the court to decide. The high court also "stuck it to" MERS via another form of interpretation left open to them.

The Kansas Supreme Court determined that there was no functional relationship defined between MERS and Sovereign Bank. Since Sovereign Bank didn't record its security interest at the Ford County, Kansas Register of Deeds' office, it left itself hanging in the wind behind the flimsy MERS recordation.

What is even more significant to you attorneys out there is the doublespeak that Sovereign Bank's counsel proffered during the oral arguments in this case; claiming that (at the trial court level) \*\*"MERS holds the mortgage "in street name, if you will, and our client the bank and other banks transfer these mortgages and rely on MERS to provide them with notice of foreclosures and what not."

Would this mean that if you didn't want MERS to know what was going on, you might want to NOT list them as a Plaintiff or Defendant because they wouldn't be "noticed" of an action unless they were a real "party of interest"?

**\*\*Later, counsel for Sovereign Bank then stated that the nominee (MERS) “is the mortgagee and is holding that mortgage for somebody else.”**

**\*\*Yet again, at another time, this same counsel declared on the record that the nominee “is more like a trustee or more like a corporation, a trustee that has multiple beneficiaries. Now a nominee’s relationship is not a trust but if you have multiple beneficiaries you don’t serve one of the beneficiaries you serve the trustee of the trust. You serve the agent of the corporation.”**

Did you understand the foregoing paragraph of gobbledygook? *Didn’t think so.*

Again, the High Court decided that the relationship MERS had to Sovereign Bank was more akin to that of a “straw man” than to a party possessing all the rights given a buyer.

During deposition of MERS’s President and CEO by Alabama attorney Nick Wooten in late September of 2009, R.K. Arnold clearly tried to do the same “tap dance” around the relationship between MERS and its clients. The resulting testimony clearly affirmed MERS’ position in relation to Restatement of Mortgages (Third): The only relationship they have with the lender is that the lender “nominates” MERS as its source of electronic recordation, instead of in writing at the county courthouse! Thus, the County Recorders get ripped off of much needed operational fees and MERS saves its subscribers money!

Wooten’s deposition also brought into question the process used by MERS to “certify” its officers. The subsequent deposition of Hultman in 2010 also touched on that process. These depositions certainly merit further consideration if you are considering MERS as a defendant in any of your cases (if you’re an attorney).

The author has gleaned certain documents that are currently recorded in the Jackson County, Missouri Recorder’s office. In one foreclosure instance alone, it appears (from what Arnold stated in his deposition) that an “official” in St. Louis, MO (who may in fact be a secretary for a foreclosure mill), can go right ahead and transfer property to a “trust” post-default. In this instance, the foreclosure mill appears to have sent a vague and ambiguous Notice of Default to the homeowner, with no known amount required to cure the alleged default. Could this then construed as a potential element in a “wrongful foreclosure” suit?

If you as an attorney were looking at “full disclosure” in an effort to find out exactly what “chicanery” was going on behind the scenes, you’d have to do a lot more digging to find out anything different than what the Kansas Supreme Court found.

The next most significant thing the Kansas Supreme Court stated was: **“Indeed, in the event that a mortgage loan somehow separates interests of the note and the deed of trust, with the deed of trust lying with some independent entity, the mortgage may become unenforceable.”** (*Did you get that? ... “in the event”*)



***From that ruling, would you as an attorney have to then prove the loan DID IN FACT separate its interest from the Deed of Trust in order for your case to prevail on the merits of a quiet title action? [More to come on that strategy ...]***

Keep in mind (from the author's understanding) that a quiet title action puts the burden of proof on the creditors to prove to the court they have a legitimate claim. In some instances, the author has understood that MORE THAN ONE CREDITOR showed up in protest! In fact-pleading states, the allegations will have to carry some weight too, don't you think? Wouldn't that also put the burden of proof on you a little too?

It would appear that because MERS wasn't notified of the suit, Landmark National Bank knew what its exact relationship MERS was to its members (and Landmark was out to protect its own interests). It would appear that Landmark felt no obligation to inform MERS of its actions as a first lien holder. However, the Court did say "in the event"; this may NOT mean that the actual "act" occurred. If it did, your attorney would have to prove it. Thus, the quiet title action looks attractive in proving a break in the "chain of title". ***This is generally caused when lenders stop perfecting their security interests at the courthouse and record them electronically with MERS.***

Further, MERS' lack of transparency and subsequent "straw man-type" activities in the local county recorders' offices makes it impossible to really define exactly WHO owns the note. This is what put MERS in a state-specific quandary over its true role in the mortgage loan transaction.

With no security interest recorded at the local or state level; and MERS being the only party of record with its vague and ambiguous, lack-of-contract language, the connection between Millennia Mortgage Corporation and Sovereign Bank was lost. In a quiet title action, the chain of title could be claimed to have been broken; thus unenforceable. *(There are other challenges to take into consideration in quiet title actions as well.)*

Prior to this case, courts in Arkansas, Florida, Idaho, Nebraska, New York, Ohio and Vermont ruled that MERS had no beneficial interest in the note and therefore had no assignment powers vested with it ( ... and now Maine has joined in with its opinion, which the author felt should be eloquently placed up front). For Sovereigns' attorney to even insinuate that MERS even had any kind of relationship with the lenders as a "Trustee" is running contrary to the purpose for which MERS was created. The author would intimate here that Sovereign Bank got a pre-trial coaching from MERS' counsel.

MERS has repeatedly been described as being a for-profit corporation that electronically registers mortgages and tracks changes in ownership. This very information is listed on MERS' own website! There is even a templated presentation entitled, "The Building Blocks of MERS", which specifically directs lenders to record their interests in the local county courthouses, is seemingly ignored by the lenders because of another key promotional point MERS uses: Saving the lender in recordation costs by recording everything electronically.

The problem with MERS' system of information storage is that it removed all of the transparency of the note and mortgage. Therefore, the homeowner has no idea as to who the real creditors or "holders in due course" really are. We're talking 62,000,000+ mortgages affected by this ruling that MERS tracks electronically in all 50 states! (*This is restated because the author wants you to maintain focus on MERS' real purpose.*)

## **WARNING TO HOMEOWNERS!**

**The current filings at the county level are cause for alarm. Every homeowner may want to look at his mortgage paperwork and then pay a visit to the county courthouse where their mortgages or deeds of trusts are recorded. If MERS is listed as a beneficiary on their mortgage or deed of trust, the author surmises that the homeowner faces a serious problem in proving up chain of title if they ever decide to sell their home. As we proceed together through this book, you are going to see case after case where MERS' authority is being challenged.**

For extra credit (if you're going to court in a bench trial), you may wish to check the judge's Deed of Trust to see if MERS is listed on it! One of two things could happen ... the judge will be curious enough to let you proceed; or, the other side will be asking for his recusal because of "bias". It's going to be hard to find a judge that doesn't have some involvement with MERS somewhere. Most attorneys forget to background the judge before their initial confrontation in court. Even attorneys are now starting to realize this.

**If you are one of those homeowners that discover MERS' involvement, you may want to retain a competent real estate attorney to further investigate your situation because it is very likely possible that your property's title has been slandered (and thus you may find evidence of "clouds" on title).**

Using your good conscience, could you really legally sell your property with these potential clouds on your title? Think about it. Even if you disclose it, no title company will close your transaction and guarantee "good" marketable title without having proof a quiet title action was adjudicated. This scenario the author has proof of. Some title companies are starting to get nervous about insuring against defects in title where MERS is involved. This goes to show you what happens when you are made to believe the legitimacy of an argument is true; pretty soon, without concrete proof, you come to accept it as truth whether it is or not. (This makes you wonder about what happens post-foreclosure when the title companies just take a lender's word for it that they actually "owned" the property they just foreclosed on.) More in *Section 12* ... keep reading.

Over half of all new-millennium-issued U.S. residential mortgage loans are registered with MERS and recorded in its name ... but only as a nominee (they like to think they're a beneficiary as well ... sometimes you'll see that listed also, undefined); and while Kansas Supreme Court rulings are not binding on the rest of the country, they send a very clear message to other courts, backed by some very sound, conservative reasoning (as follows):

**“By statute, assignment of the mortgage carries with it the assignment of the debt ... Indeed, in the event that a mortgage loan somehow separates interests of the note and the deed of trust, with the deed of trust lying with some independent entity, the mortgage may become unenforceable.”**

***“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. Without the agency relationship, the person holding only the note lacks the power to foreclose in the event of default. The person holding only the deed of trust will never experience default because only the holder of the note is entitled to payment of the underlying obligation. The mortgage loan becomes ineffectual when the note holder did not also hold the deed of trust.” (From Landmark v. Kesler)***

Here’s two other points of interest on how MERS’ attorneys behave: (1) MERS counsel made no attempt to show any injury to MERS resulting from the lack of service; and (2) counsel insisted that it did NOT have to show a financial or property interest. The Court ruled that, “Parties are bound by the formal admissions of their counsel in an action.”

*(Remember that the next time you face MERS’ arguments in court!)* You also must assume (based on actual findings) that “pretender lenders” are going to start revising their tactics and fabricate evidence! The author points to an Order issued out of Pasco County, Florida confirming that ... bravo Judge Lynn Tepper! (It’s in *Section 10!*)

Forensic analysis and thorough auditing of every mortgage loan may become commonplace so that deficiencies can be spotted BEFORE the homeowner files an action against a lender. The homeowner will also have to determine where the “agency relationship” was terminated. In Kesler, the author alleges that it happened following Millennia’s sale of Kesler’s second mortgage loan to Sovereign Bank.

Again, it is undisputed by several attorneys the author has spoken with that in a quiet title action the burden of proof will shift to the claimant creditors to prove their standing, while it will be up to the homeowner’s attorney to impeach and discover potential frauds on the court brought by the attorneys representing the claimants. This is also listed in most rules of civil procedure (under Rules of Evidence).

## **MERS IS THE “BENEFICIARY”?**

After a loan was registered with MERS as the “beneficiary”, if a borrower defaulted, MERS would then foreclose on the note, claiming it held the deed to the property as the mortgagee. In nonjudicial states, this process used to be a cakewalk. Again, even on its own website, MERS boasts that it has the authority to foreclose because it is the “mortgagee”. The courts in many states are saying otherwise.

Within the short time frame that it has taken to author this work, events surrounding the unraveling of MERS have begun to unfold at a rapid pace, starting with the September 2009 depositions of two of the company's top officers, one being President R.K. Arnold III. As of mid-2010, qui tam actions against MERS and most of its subscriber base have been filed in California and Nevada. Fannie Mae and Freddie Mac are involved. Even though there are questions as to whether disclosure is legally required, the idea here is that MERS's part in the pattern of hiding information is quite clear.

This rather lengthy deposition has verified much of what the courts have been saying. In sworn testimony in front of Alabama attorney Nick Wooten, Arnold and his Vice President William Hultman, admitted that indeed, MERS was only a nominee and not a beneficiary; thus deriving no profit or loss from the transfer, sale or foreclosure of real property. In fact, prior to this deposition, numerous courts in Kansas, Nebraska, Ohio, Florida, Vermont and Arkansas (and now Montana, and installment contract state) came out with of their own set of rulings. Most of these rulings state that MERS was nothing more than an opaque shield for lenders to maintain their electronic dealings in the derivatives markets. This MERS lender-maintained system pairs similarly to the way creditor/subscribers report trade line item information to the credit bureaus. Equifax, Experian and Trans Union all claim that if you've got a beef with the trade line item, take it up with the creditor and not them.

Like the credit bureau system, the MERS system of lender-maintained files could also contain errors as well. In the case of the credit bureaus, if the reporting creditor is not the one that advanced the loan proceeds, why are they allowed to report as subscribers? According to MERS, any lender who has a relationship with a given file is allowed to enter that electronic file and make changes to it at random.

Even with the new TILA regulations requiring updated transactions being reported to the borrower, how would a homeowner know directly that any of MERS' subscribing lenders are accurately reporting appropriate ownership information, because there's no way to verify it without taking some sort of legal action to effectuate discovery to find out the real truths? If not as a proximate result of a foreclosure action, where the burden of proof is on the lender, what then could be verified as the result of a quiet title action?

Let's use the author's own personal example of Chase Bank. It reports to the credit bureau as a subscriber; yet it wasn't in fact really the "true holder" of his note. Because the originating lender registered the mortgage loans with MERS and then caused them to be sold off, the author is challenging the legal capacity of Chase Bank to be able to report any account information at all on his consumer credit report. Just because Chase acquired Washington Mutual Bank doesn't mean it loaned the author any money. What happens when a lender assigned its rights and duties off to another lender and now has no capacity to report updated information? Very often, you will see "Account Transferred or Sold" on a consumer's credit report. Does this make the old creditor who no longer owns the debt a "legitimate" creditor for the purposes of credit reporting?

If it was found to the contrary, each violation for misrepresentation of a debt, for inaccurate reporting, for knowingly reporting false information on a consumer's credit file, for not giving the consumer the opportunity to dispute the validity of the debt and for unfair trade practices in general, will cost the credit bureaus and reporting subscribers up to \$1,000 for each trade line item in statutory damages under the Fair Credit Reporting Act, plus attorney's fees and costs of suit.

**The solution to this problem: For all American homeowners to demand the courts enforce the statutes already on the books!**

**MOST EVERY STATE HAS A STATUTE THAT GIVES PROPERTY OWNERS THE RIGHT TO FILE AN ACTION TO QUIET TITLE! The rest is up to the courts. At present, there are no laws that make MERS responsible for the information its subscribers report to it with the same sum and substance as that of the Fair Credit Reporting Act. The author argues here that this gives MERS an unfair advantage over the homeowner as an agent of the lender because of the aspects of non-disclosure.**

The potential fines imposed by the states and counties as a result of the qui tam actions would reimburse the coffers that were depleted when MERS's operations impacted them initially and local and state revenues dropped. The local economies would get a capital infusion off of the imposed fines. Even if the qui tams were to fail, the idea has already been "put out there" for counties to examine to determine if their own action is required.

If it became necessary that MERS would cease to exist; any time a mortgage company makes a loan, "they will have to go back to the old fashioned way of doing things" (when they lend money), according to Mark Mausert, a Reno, Nevada attorney who has been litigating against MERS in the courts. Even with voluminous paperwork, by recording everything at the county each time that a mortgage loan changes hands, transparency would be restored to the system and the counties and states would generate revenue again. The potential here is that the banking system is going to get the enema it deserves. In the process, state judges that have been emotionally tossing out cases without rhyme or reason, based on the "note argument", will end up answering to the voters.

## **THE BACKLASH**

**What happened in the MERS case in Kesler is now being replayed like a broken record all over the country. With the ruling by the Kansas Supreme Court, any note and mortgage that has been securitized in effect, becomes nearly impossible to enforce in foreclosure without the proper paperwork to back up the lender's claims!**

Attorney O. Max Gardner III even quipped about how the bankruptcy court judges in Western North Carolina won't recognize MERS as any kind of standing litigant in their courts.

## **THE END RESULT: THE APPARENT CLOUDING OF TITLES**

It is estimated (by MERS' own admissions it has recorded some 62,000,000+ mortgages and deeds of trust in its name) that as many homes could have fatally flawed titles due to MERS' recordations! This event, coupled by missing paperwork and the securitization process, could actually compound the slanders on title. Neil Garfield is one of many attorneys who have identified the fact that defective paperwork, coupled with securitization and improper recordation are suspect. This means for the next two decades, it will be big business for attorneys to bone up on quiet title actions.

In addition to the quiet title actions, other underlying strategies may have to be initiated to prove the defects and then ask for damages as a form of relief. Otherwise, homeowners could be held liable by selling property that has defective title. If the real truths were to become known and case law upheld those truths, title companies would refuse to close real estate transactions because title to property would be slandered and would legally have to be "cleared" before it could be insured.

## **THE HOMEOWNER FOCUS: THE QUIET TITLE ACTION**

While you as a homeowner may be evaluating the legal condition your property is in, the author had good reason to write this book. The author has purchased "seized" property before and has successfully won quiet title actions in court. As the author discovered, he could not sell his "acquired" property with a Warranty Deed, covered by a title company policy until he removed the "clouds" from the titles, caused by the tax deed sales. This meant a lawsuit had to be filed. In the author's case, the same former owner was involved, so one suit covered both tracts that were "clouded".

To further affirm the position of the title company, the real estate agent handling the sale of these properties for the author also told him that there was no way a title company would close any of his tracts without there being "good, clear and marketable title". Not only did the title company affirm this position, but the buyer refused to purchase without clear title. This meant the author had no choice if he wanted to sell his property but to file a quiet title action.

With the advent of MERS, the author clearly points a finger at the relationship between MERS and its subscribing lenders as the real reason as to why titles are clouded. Because MERS apparently uses its "authority" (yet to be determined in your case specifically) to do whatever it wants to as a matter of convenience on behalf of its subscribing lenders, the transparency of the promissory note and all of its surrounding assignments and appointments that are attached in some way to the deed of trust or mortgage (filed in the courthouse) are now suspect. This is mostly due to non-disclosure. It is for this reason that this "electronic database" has to be legally pursued and made to conform to a standard wherein its alleged authority is clearly defined. It appears that the lack of transparency benefits MERS, so MERS has reason to keep things status quo. This is the author's opinion. If you want legal advice in this regard, consult with an attorney.

If such parameters cannot be designed, then the entire system needs to be shut down and we need to go back to the way things were prior to the creation of MERS. Most attorneys the author has spoken with clearly state that MERS is “a royal pain in the ass” and they wish it would go away.

In defense of MERS ... well ... the author understands why the need to be able to track mortgages; however, without transparency there is non-disclosure. With non-disclosure, there is nothing but trouble. So, no, I guess MERS has no defense. Of course MERS’s attorneys will and do argue otherwise. With MERS’s new 7-year contract with Genpact, you can bet the non-disclosure will take on a whole new meaning. Some attorneys the author spoke with have come to realize that protective orders are going to have to be sought all across the country to keep MERS and Genpact from moving documents and databases off shore, where they will be difficult to “get at”.

### **“WHO SUES ON BEHALF OF THE KING AS WELL AS FOR HIMSELF”**

What about these qui tam actions? Two of them were filed in state courts in Nevada and one in California. Two of the suits allege evasion of recordation fees and one suit alleges evasion of transfer taxes. More suits in other states are expected where qui tam proceedings are allowed (as soon as the suits are “tightened up” and provable). The damages include treble damages for the fraud. MERS and most of its “charter members” are named as defendants. The author was under a confidentiality agreement with the authors of the suits for a number of months while they were being developed. *The “fit has finally hit the shan”; and this fire will not be put out anytime soon!*

**According to Robert Hager, one of the attorneys who was involved in the filing of these actions, a week after Fannie Mae was served with the Nevada tax transfer fee suit, the Federal Housing Finance Agency (FHFA) ordered Fannie Mae and Freddie Mac to de-list themselves from the New York Stock Exchange!**

Even though the attorneys that are working on these suits are still researching the angles of attack, the fact they were filed is still worth the mention. In 1996, the 9<sup>th</sup> Circuit ruled that Fannie Mae and Freddie Mac are NOT exempt from transfer taxes and thus ... these could be the cases of which one will end up in the U.S. Supreme Court and that final ruling on MERS could once again restore “peace to the kingdom”. This tax suit could bring the State of Nevada anywhere from \$300-million to \$500-million (early estimates) of badly needed funding. The Plaintiff’s claims in the suits centered on Chapter 357 of the Nevada Revised Statutes. Of course, before it’s all over, the suits may go through several amended petitions before the right ingredients are propounded.

In these suits, every detail about MERS’ lack of standing and capacity is challenged. There are enough court cases and wised-up judges that know exactly what is going on; which could be enough to trigger a reversal of filing standards all across America. A similar suit has been filed in California on behalf of all the counties and their recorders.

The suits allege that MERS and its subscribers filed false and misleading statements when MERS claimed itself as a “beneficiary”, when it is truly anything but, according to the definition. The Kansas Supreme Court clearly defined MERS as a “straw man” and this suit goes one step further in reinforcing Peterson on MERS, a white paper that was issued by the law professor on MERS’s negative impact on the current system of recordation. Mr. Peterson is not even arguably off point in one single aspect of his brief, which a lot of courts and county recorders are now coming to accept. It is now just a matter of time before things begin to unravel. With the relatively new disclosure, the liability will shift to MERSCORP, Inc. because MERS is “bankruptcy remote” (apparently thanks to Moody’s Investor Service) in order to “play in the game” on Wall Street.

## **AN ESTABLISHED PATTERN OF ATTACK**

In wrapping up this introduction, the author wishes to point out that much of this research has established a defined pattern of how the “MERS system” attacks defaulting homeowners:

1. As soon as the homeowner goes into default on his payments (whether he legally and genuinely is or is not) the lender-MERS subscriber summons MERS and the “boogey man comes out of the closet”.
2. MERS and its “agents” then remove the trustee of record (in Deed of Trust states) and in both judicial and non-judicial states, an assignment is drafted and executed which is then filed in the local county courthouse, claiming the party being assigned the note and mortgage (or deed) is the real party in interest.
3. Most of the cases the author has seen involve MERS’ agents doing the dirty work. Most of the cases the author has been brought into to analyze have found (much to the amazement of attorneys looking at these cases), is that suit to foreclose was filed BEFORE the actual assignment was recorded. These untimely filings are certainly cause for not only legal challenge, they also generally lead to a problem for the “pretender lender” in court, where the judge orders the lender to produce other assignments, allonges, indorsements proving agency or the original note with the new lender’s name properly affixed to it. In many instances, the lenders attorneys do not have the note.
4. This brings a “stall” to the case. In many instances, if the case gets that far, the lender will do everything in its power to buy time. In many instances, this time factor has given several “parties” (in conjunction with MERS, LPS, DOCX) and/or agents the opportunity to produce what are known as “manufactured” documents. There is a 40-point checklist in *Section 7* to refer to as to how to spot whether these documents are properly prepared; and this list may only be somewhat futuristic and may need to be amended.



5. The lenders have done everything to fight discovery. They'll offer loan modifications to homeowners to step outside of a Chapter 13 bankruptcy in an effort to do an "end run" around the homeowner and foreclose on them before they know what hit them. Whatever "stall pattern" you see in a case involving lender challenge, you can be sure that whatever follows is going to be suspect.
6. More times than not, once the lender's standing is challenged and the lender has to produce paperwork to prove his claim, they will attempt to settle and pay off the borrower's attorneys never to sue them again; or many times, they will attempt to do a loan modification (again, a waste of time). Nine times out of ten, the lender lacks standing to do a loan modification because they don't own the note! They can't modify something they don't own! While some entities like Chicago Title on its Connecticut website claim that MERS can do loan modifications, this is also virtually impossible, as MERS did not advance any loan proceeds and collects no monthly payments. The author points to this as disinformation. The author believes that Chicago Title does NOT want to "expose" itself any more than it has to.
7. What has been evidenced in foreclosure actions or actions involving bankrupting debtors has been outrageous behavior on the part of lenders and their attorneys, especially where documents are backdated and then brought into court and proffered as genuine. See U.S. Bank v. Harpster.
8. Of late, MERS has been more aggressive in getting itself named as an "assignee", whether it has a real interest or not. MERS demands to be notified. A lot of attorneys the author has spoken with see no point in naming MERS as a Defendant in an action. The author disagrees and points to the qui tam suits. MERS' "certifying officers" are not covered under MERS's E&O.
9. The biggest fraud on the county recordation system is where MERS and its agents (who in the author's opinion all ought to be jailed for a minimum of 10 years for each signature they put on a phony document used to further their cause) attempt to transfer the deed AND NOTE, even though it legally does not own the note and couldn't pass a litmus test under Restatement of Mortgages (Third) if it tried.
10. The concurrent fraud generally surrounds HOW the assignments and appointments of successor trustees are executed. In most instances the author has seen, the appointment of a successor trustee will generally involve turning the duties of foreclosure over to a "foreclosure mill". These trustees (according to many attorneys now coming head-on against them with FDCPA threats) are in essence third-party debt collectors. There is a defined SCOTUS case in Jerman v. Carlisle et al (Decided April 21, 2010) that addresses the issues covering foreclosure mills under the Fair Debt Collection Practices Act.

One of the core stall tactics that you will ascertain in this work is that when challenged, the lenders will generally contact the borrowers in an attempt to “waste time” doing loan modifications or hit them with abusive amounts of discovery, as Greg Morrison, one foreclosure defendant in Johnson County, Kansas, found out in the latter part of his case. Many times these tactics are used by foreclosure mills in an apparent attempt to “buy time” so the lenders can figure out what their “next move” is. In another case in Johnson County, Kansas, U.S. Bank filed suit against a homeowner 39 days BEFORE it recorded its assignment of ownership and the case was reopened subsequent to a foreclosure and the issuance of a summary judgment in favor of the lender. At the time of this writing, the lender’s attorney (South & Associates) now wants a “nunc pro tunc” because it filed suit on behalf of the “wrong party” and now wants to use this procedure to substitute lenders. *(The author thought that these types of filings were used to correct typographical errors.)* The borrower that does their homework (albeit a lot of this work is informative) will be more prepared to work with their attorneys to achieve the desired results.

## **GENPACT ENTERS THE PICTURE**

In August of 2010, MERS awarded a service processing contract to an entity known as Genpact, believed to be headquartered in Bermuda. This further complicates discovery issues because a full analysis will have to be done as to determine Genpact’s direct involvement in the recordation process. With the disclosure of MERS #1, MERS #2, and the resulting MERSCORP, Inc.-MERS #3 progressions, this inevitably will create more layers of discovery (and headaches) for attorneys, based on the following rationales (the author’s simple assumptions ... not legal advice ... from a paralegal outlook):

- (1) MERS #1 was incorporated and dissolved ... you’ll need paperwork from both ends ... the incorporation, the dissolution, the by-laws (how many were applied and approved by resolution to transfer from one corporation to the other); what assets-liabilities conveyed from MERS #1 to MERS #2?
- (2) Then you have to apply this same scenario from MERS #2 to MERS #3.
- (3) Then you have to apply this same scenario from MERS #2 to MERSCORP, Inc.
- (4) Then you have to discover what errors and omissions policies existed for each.
- (5) You’ll need to know who all the players were, especially the attorneys that were involved in the set-up and transfer of each corporation (as the Hon. Charles Jones in Nevada would probably also be interested to know that).
- (6) You’ll have to determine the complete asset picture of each of the 4 corporations.
- (7) You’ll have to determine the complete liability picture of each of the 4 corporations. How deep are their pockets? (We know MERS-3 doesn’t have any.)
- (8) Were the attorneys that were involved in the set-up of these corporations possibly involved to the point where they could be brought into the game as a third-party beneficiary under a theory of negligence?
- (9) How much of a case is there for civil fraud? Can the same attorney represent each entity? How is MERS contract with Genpact going to play into this scenario? Further obfuscation of the chain of title?

Sustaining a quiet title action could be extremely involved, because unlike the author's quiet title actions, there was only one defendant-claimant and there was no note or mortgage involved. *Bellistri v. Ocwen* is a similar case to what might be examined in today's actions because it was a tax-case-turned-foreclosure-case. It would merit some study to apply the differences in a tax case versus a full-blown mortgage or deed of trust and promissory note claim involving potential multiple claimants and multiple claims.

The other problem is that until the "ball starts rolling" with Genpact, the full impact of this 7-year outsourcing contract won't be felt. What is certain though is that Genpact's public relations people refused to answer the author's questions when asked about its prospective activities and whether LPS would be replaced with this contract. LPS also refused comment. The biggest fear is that these processing services would be moved offshore, making them harder to deal with in litigation and thus making a nightmare out of discovery.

## Section 1: Understanding the “proper party”

Much of the following comment was ascertained from attorneys the author has spoken with, if not directly tied to a court case. With the true discovery of the effects of securitization and proprietary trading has revealed a new era of fraud and fabrication of documents upon the courts, especially the bankruptcy courts.

### WHO OWNS MY NOTE???

An amicus curiae submitted by American Land Title Association (one of MERS' founding members) in the *Kesler* case inferred that the statutory recording system used in all of today's county courthouses is antiquated and unsuitable to 20<sup>th</sup> century financial transactions. However, the problem with having a single “straw man” (MERS), or nominee, for various financial institutions makes it difficult for mortgagors (borrowers) and other institutions to determine the identity of the true current note holder:

“It is not uncommon for note and mortgages to be assigned, often more than once. When the role of a servicing agent acting on behalf of a mortgagee is thrown into the mix, it is no wonder that it is often difficult for unsophisticated borrowers to be certain of the identity of their lenders and mortgages.” *In re Schwartz*, 366 B.R. 265, 266 (Bankr. D. Mass. 2007).

Generally, many loans obtained by borrowers over the last decade were what are known as “table funded loans”. These loans (if you can imagine this scenario) work sort of like this: When you close on your mortgage loan, the documentation is usually signed at a title company who then records the note and mortgage (or deed) and sends it to where the lender directs it to be sent. The broker is receiving directions from a secondary funding source that is paying the broker a commission for handling the paper. Once the broker is finished securing the transaction, the funding source pays the broker and the party to whom the payment is due (the other homeowner or builder) for the home you just bought. What you don't understand though, is that the broker is working under a “wholesale lending agreement” he engaged in from the secondary funding source. The actual loan did not come from the broker; it came from the secondary funding source (who may have been Countrywide Lending, Washington Mutual or Long Beach Mortgage, etc.; especially in the subprime markets) which was not made known to you even after your loan was closed. If MERS is involved, all of this information is generally transferred by the secondary funding source into MERS' electronic systems, never to be seen again (unless you default on your mortgage loan).

The way mortgage notes were securitized, it is also possible that once you signed your note and deed of trust, your loan went directly through the secondary funding source into a “special purpose vehicle” or SPV, a trust, on Wall Street, where it became part of a rated portfolio that became a collateralized debt obligation (CDO) and then wrapped into a derivative called a credit default swap and from there, marketed as bonds to investors. From all indications those investors funded your loan BEFORE your note made the CDO.

## THE WAY THINGS USED TO BE

Prior to the creation of MERS, upon closing, the originating lender would then record the note and mortgage with the county recorder's office, paying all necessary fees for the recordation. After that, the originating lender would in turn sell the note to another lender by assignment; and another county recordation would occur and fees paid. Each time the note and mortgage would turn over, the assignor would be paid in full by the assignee and the rights to hold, sell or service that mortgage would remain in the hands of that lender; but not since 1998, when Mortgage Electronic Registration Systems (known in the system as "MERS") was created to record all documents electronically.

With the advent of the MERS system, documents were recorded at the County Courthouse in the name of MERS as a nominee and beneficiary, incurring a one-time recordation charge. These documents were submitted to MERS by the originating lender. It's anyone's guess what happens to the paperwork after it has been recorded with MERS. According to the way the laws were set up, all documents necessary to inform who the real owner of the note and mortgage were were recorded at the county and state levels. In order to create a wall of secrecy and reduce fees (denying the county and state levels recordation income) MERS would record the originating note and mortgage once in each locale and then hide the rest of the transfers and assignments electronically.

After that, the entire resale process would all be controlled by MERS (as a nominee ... or so it claims), thus eliminating the paper trail and the need to pay more fees. What the buyer isn't told however (a challenge for disclosure in the commercial realm), is exactly WHO is going to end up with the note and mortgage and whether or not it would potentially result in a cloud on the title to that homeowner's property.

Over 62-million mortgages are claimed to be recorded electronically by MERS (by its own admission). This has happened and continues to happen among the twenty-some-odd major banks that still make mortgage loans. However, the brick wall created by MERS is slowly crumbling each time a court rules against it. Aside from Kesler, MERS recordations also have statements contained within them that could be construed as "misrepresentative."

It doesn't take an Einstein to understand that when a debt is sold and/or assigned to another party, that the party that becomes responsible for servicing the debt may change also; but seriously, many people don't know that. The second party would then package the loan into a portfolio (or processes the note in-house, through a process called proprietary trading (which became more predominant after the Glass-Steagall Act was repealed), by existing lenders like JP Morgan Chase, Citigroup and Bank of America.

These entities would then trade securities for their own accounts; BUT, just because a party is entrusted to service a loan doesn't mean they hold the note. This has become repeatedly apparent in many foreclosure defense revelations of late and will become more predominant as the spate of quiet title actions start to dot the countryside. You can bet the servicers will come forward trying to prove interests they don't really own.

## **THERE'S STILL A BIG MESS TO CLEAN UP!**

Once all of these transactions were recorded with MERS, the banks and mortgage companies traded in risky mortgage-backed securities, which for the most part, created the mortgage crisis. (To add insult to injury, most of these banks received taxpayer bailout money and insurance payouts from companies like AMBAC or AIG!)

Investors then bought these discounted, mortgage-backed securities on a whim, without all of the necessary paperwork changing hands. More than likely, these investors actually thought they were investing in real housing portfolios that made money off of the interest. To date, no one knows for sure if that's what really happened.

It has become evident through this warehousing and securitization process, the paperwork necessary to facilitate proof of the actual mortgage loan and the accompanying agency relationship was lost, separated into bits and pieces, re-sold into a "network" of secondary investment sources, or even worse, destroyed in the shredder. With the admission of all of these supposed practices comes the evolution of the "Lost Note Affidavit".

When you see such documents in the foreclosure process, more so on a defensive counterattack than not, it generally is construed to mean (according to the lender's attorneys) that the note did in fact exist ... "it's just not readily available, your honor." Judges have wised up to this. In at least three cases in Kansas that the author is personally aware, the judge is requiring production of the original note. Some cases have dragged on for months because seemingly, "We just can't seem to find the note yet, Your Honor."

As long as your attorney doesn't object to this sidestepping behavior and make the lender and the lender's attorney cough up the material, the court allows it into evidence (and you wonder why so many homeowners get screwed in court). Another thing you'll hear foreclosure mill attorneys claim in court to a judge is, "Take my word for it, your Honor. The note and mortgage really do exist." You really need to object to comments like that. We'll cover more of that later in *Section 9: Your Day In Court*.

## **THE SPLITTING OF THE DEED AND PROMISSORY NOTE**

There is also the allegation by many attorneys (and now the courts) that when the note and mortgage are **bifurcated** (split up and portions of it are securitized and turned into an obligation), the title to the property becomes defective and the note becomes unenforceable.

The author poses a different theory on this subject: That at the time the note is sold to another lender and the deed of trust or mortgage is electronically registered with MERS, the title to property is clouded because the deed or mortgage is many times in fact, misrepresenting who the real party in interest is because the real holder of the note and all of its subscription data entries were hidden in an electronic file at MERS.

The note, as indicated by many of the case filings the author has reviewed, went to Wall Street to be pledged as “security” for investor loans; if in fact, that’s the way the scenario fully played itself out. In *Section 16*, you’ll see a different thought on that.

**Let’s explore another possible scenario:** When the borrower (the Grantor) actually signs the Deed of Trust and the note, the Deed of Trust becomes evidence of the note (operating in the nature of a lien). If the Deed of Trust is ruled a fraud, by virtue of a quiet title action, when the parties can’t prove authority (standing or capacity, via agency) to act, the chain of title becomes broken because MERS is acting in a capacity for which it is not legally entitled to act. Even though MERS claims in the Deed of Trust that it holds legal title to the property, it does not own the note and therefore cannot convey the evidence of the note away from the note. If the note is being held by one party as an obligation and the Trustee that is responsible for overseeing that the Deed of Trust is followed through to the letter; and MERS comes in and removes the Trustee as if the Trustee didn’t exist; and substitutes another trustee when the Deed of Trust specifically reserves that right to the Lender, then MERS has caused the Deed of Trust (as evidence of the security) to be voidable. The title is slandered because MERS exceeded its legal authority when it acted outside of its capacity as “nominee”. This poses potential arguments under merger doctrine, where the trustee was merely a “puppet” in name only for MERS.

**Also bear in mind (in reality) that the Deed of Trust and/or mortgage lacks specific definitions of the duties of the Trustee and the specific duties of MERS.** In Kesler, MERS couldn’t define what its specific obligations were as a “nominee”, so the Kansas Supreme Court did it for them. This is where the bifurcation argument came into play; that the deeds of trust issued today with MERS’ name on them *STILL* don’t identify the specific duties of the Trustee or MERS; thus, the language is vague, ambiguous and is left open to interpretation in an action to quiet title. Because MERS fails the litmus test under Restatement of Mortgages (Third), it’s going to have a hard time surviving a quiet title action. And what happens if the trustee really doesn’t exist?

There are so many bankruptcy court decisions, of late (*In Re Box*, *In Re Walker*) that lend credence to MERS’ lack of standing that the author feels it would be virtually impossible for MERS’ attorneys to argue they had every right to convey property they don’t legally own. It’s seemingly cut and dried as a matter of course. To compound the problem, the chain of title becomes broken once MERS takes the duties of the Trustee away from him (the Trustee) and subrogates his authority, acting outside of the non-uniform covenants that the Grantor agreed to (leaving substitution of trustee up to the lender and not MERS). If #24 (where it’s usually found) says the rights are reserved to the lender ... and it doesn’t say MERS ... you might assert what it says is what it means. Where (generally) in your Deed of Trust do you see the actual signature of the Trustee? Further, discovery might show that because MERS has no written contract with any lender outside the original lender wherein the lender doesn’t retain full beneficial interest, the agency relationship is thus defeated. This is why Judge Arthur Federman gave Bank of America the opportunity to come back in to a full evidentiary hearing in the Box case and prove their agency relationship. The door is still open as of the date of this publication.

A quiet title action pretty much affords the Plaintiff-property owner with an opportunity for an evidentiary hearing. Claimants are going to have to bring all of their proof forward or be forever barred from making any claims against the property in the future. This will end up resulting in homeowners having to file quiet title actions among other complaints. In theory, the first time the note is transferred to an intermediary party, called an “intervening assignee” (because MERS is NOT a lender or true creditor) and the note is securitized and then turned into a derivative, the paperwork is hidden or destroyed and the paper trail goes nowhere. Truly, at that time, the character and status of the debt also changed because the debt turned into an underlying obligation for a security investment.

One only has to examine the “official certification” of MERS’ officers to understand why a title could become clouded at the point of MERS’ official recordation of the Deed of Trust. If true ownership of the note can’t be proven or readily obtained, there would then remain a question as to “claim of interest” that would hang over a property like a storm cloud. The only way to fix that is by making the real parties come forward to prove their claims. Most attorneys well versed in this have stated that quiet title actions are the best way to do this. End of another possible scenario.

### **WILL THE REAL LENDER PLEASE STAND UP!**

Had the note and title to the property been completely vested with MERS as an assignee from the original lender (the author alleges); and MERS actually played the role of “lender”, the note and chain of title would have been preserved. However, with MERS retaining title in name only (and the deed and note being bifurcated) it affirms the Landmark National Bank v. Kesler ruling, by rendering the entire financial transaction unenforceable. A quiet title action would virtually (in part) do the same thing. With the deed of trust being knocked out because of fusing of the parties or some other defect (like no proof of standing) it would leave the note left without collateral to secure it. (*The author isn’t quite sure that this isn’t what the Wall Street players were dealing to investors anyway because all of the bonds they sold to them were non-recourse.*)

It could also be assumed that because the “agency relationship” was divested by the first intervening assignee (that got it from MERS who had no “party in interest” status); that at any point subsequent to that transaction, any defect in paperwork would also further cloud the title. It’s that simple. Now ... ask a title company to insure all of that and see what answer you get. This is a “hint” of the things to come in *Section 12*.

If the chain of title is slandered through broken and/or fraudulent assignments, it becomes clouded as there could be multiple claimants who have (or had) an unrecorded, hidden interest in the property. As a result of the separation of the note and mortgage via the actions of the intervening assignee (because the “nominee” MERS retained no rights as a lender), the note bypassed MERS (which in effect created a legal “wall” around itself as a “nominee” in name only and not as a lender with “intervening assignee” rights and obligations) and was pledged elsewhere, using the subject property as the collateral. Mind you, all of the subsequent transactions were NOT recorded in the county courthouse!



The new intervening assignee on the “other side of the wall” took the note and ran with it. This is why everyone is so confused (even the judges) as to the resulting after-effects (also at the time the proprietary trading into securitization occurred) of a securitized mortgage. This is why the Kansas Supreme Court rendered its decision that the mortgage may be unenforceable. Restatement of Mortgages (Third) also affirms that very same idea. The scenario would present itself as a divestiture of agency relationship. Loss of agency relationship means loss of the legal capacity to collect the debt in its intended form. (EXAMPLE: Original credit card company sells its charged off debt to a third-party debt collector for 10-cents-on-the-dollar; the new “creditor” must now prove up the entire debt; with only flimsy paperwork.)

As a credit repair specialist, the author has previously shut down 100% of all collection efforts by collection agencies using this reasoning. Just because the debt is \$500,000 on a home doesn’t make the principle of the claim any less consequential. If the debt was securitized, it only makes the situation worse because (1) agency relationship may have been dissolved; and (2) the monetary gains inuring to the benefit of the borrower and true beneficiary, are further “lost in the shuffle” amidst a sea of newly-created paperwork (at the securitization point where the notes were packaged into CDO’s.) Sadly, many attorneys don’t understand this concept, which limits the number of lawsuits being filed. Those attorneys who do “get it” are swamped with caseloads.

In accordance with the latitude the Second U.S. Circuit Court of Appeals gave the Plaintiff in *Clomon v. Jackson*, 988 Federal Reporter 2d Series (beginning at page 1314; for those of you lay people perusing the law library for the first time), all it takes is ONE SINGLE VIOLATION of the Fair Debt Collection Practices Act to establish civil liability! But don’t just take the author’s word for it. Look the case up yourself!

Because MERS is only a nominee and not the true creditor, the character of the “debt” could have been altered past the supposed understanding of the borrower. Had the entire deed, note and mortgage been sold to a final second party and then retained and serviced by that second party (as was signed off on by the borrower), foreclosure offense would be a moot issue. However, with the creation of MERS (established by case law as an electronic registry/database and NOT a true creditor), someone else may come forward with a claim. This has created numerous conflicts in the court systems all across America. There was one instance in the Tampa, Florida area where two lenders tried to foreclose on the same home in two different case filings. This of course caught the attention of local judges who were forced to investigate the matter and act accordingly.

Another argument arises that if the true creditor (the investor who bought the note as part of a portfolio that was securitized, turned into a derivative and sold to that investor in the form of a bond) comes looking to cash in ... and your “security interest” isn’t legally extinguished by MERS. The question arises as to whether you as the seller of the home are now involved in a fraud scheme when that true creditor comes calling on the new buyer of the foreclosed home that was sold to them. Would the end result put the former homeowner in the path of an action to quiet title, thus having to expend legal fees?

The flip-side to that argument is ... if MERS didn't have the legal capacity to pursue a claim of lien in the first place, MERS then acted illegally in filing fraudulent documents in the county courthouse! This places those same investors in an even more precarious position. These thousands of investors lie underneath the bond as certificate holders and your job would be to find out who they are. It may also be necessary to see whether your home was even included in the pooling and servicing agreement your "investors" relied on. Because of the fact some of these agreements have registration deadlines, your loan may not have made it (even into the prospectus) anywhere near securitization.

When those 401k fund managers find out the note was sold and the money was pocketed by the servicing lender, who do you think they're going to turn to in furtherance of their collection efforts? Neil Garfield and other attorneys investigating this mess are also pondering this same question.

If the states and municipalities that invested in these swaps all of a sudden were forced to have a "Come to Jesus" meeting with their "beneficiaries" (the bond holders) when their 401k accounts "tanked", where are they going to turn to for recourse? Wall Street? Are you beginning to see the author's point about the level of fraud created here?

Because the credit default swaps are worthless, AIG had to pay claims to those holding the CDO's! What hasn't come to light yet, is whether the trusts holding these CDO's actually had any "res" in them in the first place. As time passes, more and more of these divisive actions by Wall Street brokerage houses will come to light and the picture is not only ugly, it appears these actions could have been their undoing. And then ask yourself who really owns the portfolios if the bank's buy them back from the pools? The next question is what happens to title to property as a result of all of the "non-recordations"?

## **THE UCC VERSUS AGENCY RELATIONSHIP**

While the Uniform Commercial Code is "supposed" to be "uniform", "It appears to be anything but," says O. Max Gardner III. "Each state has changed their code around in such a way now that every single case is state-specific." Gardner teaches attorneys all of this necessary information in a 12-hour per day/5-day course, of which he boasts April Charney as one of his students.

The main reason for these state-specific concerns is that the original "lender" (who is really a table-funding broker for the most part), who legally transferred the loan with permission of the borrower, who assigned the loan over to another lender, has been paid in full (via commissions, fees and costs of transfer). This broker, along with the chain of title transfer into MERS, constitutes the REMIC (Real Estate Mortgage Investment Conduit). Table funded loans work this way. That lender is only the "originator" (they were just a brokerage conduit to the real lender). If the loan is originated by a broker, it mistakenly could be assumed that the lender the note was transferred to through the conduit [the REMIC] is the real "proper party in interest". But it doesn't stop there ... it may have been proprietarily traded into a trust on Wall Street; or sold elsewhere.

In the electronic recordation system, the originating lender records its deed with MERS, so MERS can start electronically tracking the movement of the paperwork surrounding the recordation. *It's no wonder MERS doesn't want to divulge what it has (or doesn't have) in its electronic files.* It may not have anything past the point of the original recordation by the lender who filed it. It depends on its subscribers for updated info.

Remember, MERS was created as a FOR-PROFIT CORPORATION by over two dozen of the biggest banks in the business in addition to Fannie Mae and Freddie Mac AND the American Land Title Association [ALTA]. Knowing the current financial crisis that America is in, could you expect anything else other than deliberate and inept recordation practices by MERS? This is where the UCC and the agency relationship between intervening assignees come into play.

***Every state has adopted its own form of the Uniform Commercial Code [hereinafter UCC].***

In theory, the conflict between the note and the agency relationship of the parties who claim ownership is the hinge pin to the entire scheme. This happens when the “security interest” hasn’t been perfected past the filing by the original lender (via MERS, the nominee). When foreclosure occurs, there is a rush to file documents at the county recordation office in an attempt to tie the agency relationship between lenders together in order to “create” the real party in interest by assignment. Unfortunately however, many of these documents are backdated, mechanically prepared or unlawfully notarized or completely fail to tie all of the agency relationships together. These security interests must be challenged, either offensively or defensively, and to thoroughly be examined for the judges’ benefit; otherwise, you’re not going to get a fair ruling!

The filing of a statement of “secured interest” was considered the standard fiduciary practice of the lender until MERS came into the picture. At that point, all filings were handled “in-house” by MERS, with complete disregard for state and local filing rules that were required to perfect security interests. The author alleges that this is where the first of many “dummied up” assignments and forms would be slipped in by the lender’s attorneys and support staff while fighting a foreclosure suit.

This was evidenced in the US Bank v. Harpster case in Pasco County, Florida. This also poses another question: Can the termination of an agency relationship somewhere in the chain of title between the servicing lender and the true creditors of the note and mortgage be cause enough for relief to be granted? Using a combination of flaws in the chain of title and deficient paperwork as proof? Theoretically, YES. This is one of the key hinge pins in foreclosure offense. Principally, a quiet title action could work this way.

The problem with the title, as the author will discuss further in ***Section 12: Quiet Title Actions***, is that the original lender closes on the note and passes the paperwork through to MERS; yet what is recorded at the County Recorder’s office only “touches” MERS as a nominee. Everything seems to hit that legal “brick wall” at this point. When this happens, the county begins to suffer loss of revenue because of the subsequent electronic filings.

It further appears to anyone looking at the recorded information on the local and state levels that MERS is the proper party in interest as a recorded beneficiary. As many court rulings now state, MERS is anything but a true beneficiary. When proper parties cannot be readily identified in the courthouse records, slander of title becomes suspect.

**THIS IS THE POINT WHERE THE AUTHOR ALLEGES THAT THE TITLE TO YOUR PROPERTY BECAME CLOUDED!**

Because MERS is so publicly secretive about what paperwork it has electronically recorded in its databases, it is almost impossible to tell without pursuing intensive, court-enforced discovery exactly where the pass-through occurred after MERS obtained the paperwork and stored it electronically. In many cases, it may be because the original lender has already settled the account and received payment when the note was sold or “passed through”? If MERS is only proven to date to be a “nominee”, then after the pass-through occurred into MERS’ system, did the proper mortgage recordings cease? After all, public filings are required to be recorded in order to represent a valid security interest, are they not? Sixty-two million mortgages and deeds of trust filings say otherwise.

A lot of attorneys are afraid to sue MERS because they don’t understand HOW to sue it. Due to the secrecy surrounding MERS’ recordings, unless a court specifically ordered the data preservation company to cough up the documents and prove up the entire chain of title to its logical conclusion, the title to the property could be construed as “fatally defective” if the note and mortgage weren’t properly updated and recorded. Besides, if MERS-3 doesn’t have any assets, why would they be worth suing?

The improper use of the “official recordation system” that is tried and true in each county courthouse is the apparent cause of the cloud on the title, because proof of actual ownership interest is unknown. That brings us to the next proposed scenario:

The truth would not come out until the party holding title (you, the homeowner) to the property brings suit to “quiet” that cloud. In order for you as a homeowner to come to grips with your potential clouded title scenario; you may wish to examine the part of the process in understanding the role of the servicing lender and what will happen when you default on your mortgage loan. If MERS is named on the suit ... conveniently ... all of the other parties involved in your quiet title action will be tipped off by MERS. This is where your attorney can have a field day challenging every single assignment!

The servicing lender (the lender that takes your monthly mortgage payments) would then hire what is known in the business as a “foreclosure mill” (a group of attorneys that specialize in beating up homeowners in court by whatever means necessary).

They will produce the minimal amount of documents they think are required to prove their case, including but not limited to, “lost note affidavits”, “lost instrument affidavits” and copies of recordings that are improperly notarized or affidavits that are blank or unsigned or improperly notarized; or affidavits and assignments that are dummed up to look like genuine articles or notes with allonges that are not properly affixed or indorsed.

Then they'll assert to the judge that "the mortgage loan does in fact exist, Your Honor, we just don't have it here."

As long as you the homeowner, or your attorney don't object to these slipshod comments and half-baked documents; allowing this evidence to be admitted as "fact", you will lose. For the attorney defending the borrower, your ability to recognize "legitimate" documents from those that aren't becomes a "key" to winning. What's worse is finding a judge that thinks the lenders are never at fault, especially when they start ranting from the bench that, "You're just a deadbeat who wants his house free and clear!" This is a big mistake of homeowners who take the system for granted (especially those that got 100%-no-money-down-type loans) as borrowers; but it also serves as a lesson to the egregious behavior committed against them by conduit mortgage brokers (REMICS).

The author reprises this situation by clarifying that the mentality of those getting 100%-no-money-down-type loans may have a "welfare state of mind" that think that if there's "free money", why shouldn't we have a piece of it? It is most of these individuals that think that foreclosure defense and quiet title actions are another way for them to get a free and clear home! This kind of nonsensical thinking catches most attorneys off guard. What also is of key importance here, which April Charney has pointed out in her actions against lenders, is that some lenders are not properly registered to do business in the state they are foreclosing in!

This has resulted in the dismissal of lawsuits by MERS, who attempted on so many occasions to portray itself as a debt collector! Much of this you will find in the state and federal versions of the Fair Debt Collection Practices Act and the local state debt collection registries.

A debt collector has to be duly licensed as a debt collection agency in the state in which it's collecting! April Charney and others have used that scenario to their advantage.

Following a string of several outrageous court victories, April Charney gave seminars all over Florida and subsequently the rest of the United States, on her successes and strategies in foreclosure defense. Subsequently, the author came to learn that she was castigated by many for her strategies when it all boiled down to attorneys who were so used to the "same as usual" behavior in court that they ignored the Rules of Evidence and Discovery procedures that Ms. Charney propounded in her seminars. Sadly, the author surmises that some reading this book will dismiss the author's ideas and "move on".

## **UCC: FORECLOSURE DEFENSE & QUIET TITLE ACTIONS**

In order to understand principles behind attacks on title to property, one has to come to grips with the relationship that is played between MERS and all of the subscribers involved in your loan. If a loan is suspected of being securitized, Charney says the only way you have of tracking true ownership is through the pooling and servicing agreement (PSA). The author considers her postings of these ideas to be of consequential value:

“You have to get the PSA and the mortgage loan purchase agreement and the hearsay bogus electronic list of loans before the court. You have to educate your judge about the lack of credibility or effect of the lifeless list of loans as the Uniform Electronic Transactions Act specifically exempts residential mortgage-backed securities from its application. Also, you have to get your judge to understand that the plaintiff has given up the power to accept the transfer of a note in default and under the conditions presented to the court (out of time, no delivery receipts, etc.). Without the PSA, you cannot do this.”

Using UCC §1-302(b) as an example ... it says that the obligations of good faith, diligence, reasonableness and care prescribed by the code may not be disclaimed by agreement, but may be enhanced or modified by an agreement which determines the standards by which the performance of the obligations of good faith, diligence, reasonableness and care are to be measured. These agreed-to standards are then enforceable under the UCC if they are not “manifestly unreasonable”. Subsection (c) of that same UCC provision also brings the PSA into fruition because it has an impact on when or what acts have to occur which then can allow the parties to vary the “effect of other provisions” of the UCC by agreement, according to Charney.

In comparison by the author to solving the chain of title puzzle for a note that has been securitized, Charney claims that “through the PSA, it is clear that the plaintiff (lender) cannot take an interest of any kind in the loan by way of an “A to D” assignment of a mortgage and certainly cannot take an interest in the note in this fashion. Without the PSA and the limitations set up in it by agreement of the parties, there is no avoiding the mortgage following the note and where the UCC gives over the power to enforce the note, so goes the power to foreclose on the mortgage.”

The PSA then becomes admissible evidence, even in your quiet title action. If you can't find it, then you have to ask for it in discovery. Holding true to Charney's argument, that the Trustee could only sue on the note and not foreclose is not correct analysis without the PSA. You will not defeat the equitable interest “effective as of” assignment arguments without the PSA and the layering of the laws that control these securities (true sales required; GAAP) and REMIC (no defaulted or nonconforming loans and must be timely bankruptcy remote transfers) and New York trust law (since you're dealing with a Wall Street-based trust) and UCC law (as to no ultra vires acts allowed by trustee and no unaffixed allonges, etc.).”

***The author felt this post by Charney on the national blogs was worth repeating in this work, as it will give homeowners and their attorneys something else to prepare for, because many of the claims they might face in quiet title actions might come from trustees for securitized trusts.***

Charney says you have to have that PSA as part of the admissible evidence the court must consider. The author concurs that there's no way you can wade through the summary judgment rule of the court if it is to accept the claim by way of affidavit or assignment by a lender, through what Charney maintains are “exacting provisions” of that rule. She challenges current litigation strategies that don't maintain the use of a PSA.

Charney says that “it is not just you that has the more considerable task of proving that New York law applies to this (securitized) trust and that the PSA does not allow the plaintiff (lender) to be a ‘nonholder in possession with the rights of a holder.’”

Thus, the author would have to conclude that the PSA defines the parameters for which a lender may maintain a claim of interest in the quiet title suit (or the portion of your case that petitions the court for your title to be quieted). Use the PSA to impeach their claim.

## **MEDIATION GAMES AND SETTLEMENT CONFERENCES**

Even judges would rather see the parties enter into mediation (via settlement conferences) because they want to avoid having to deal with the real truths behind the frauds (and also because court dockets are so full). Mediation is so damned much easier and attorneys are well-schooled in it. It becomes so “normal” to sit in a conference room and hash through negotiations rather than actually make use of a “referee” or a jury of “12 brain-deads”.

With mediation, there’s no real need to use Rules of Evidence and Discovery.

The lesson to be learned here: Know the Rules of the Game and your chances for winning increase, especially if the referee understands them as well. If you “smell a rat” in your mortgage lending transaction, there may be good reason. Maybe because you are upside down in your home (meaning it’s worth less than what you owe on the note) and there are underlying reasons, then perhaps a quiet title claim against the lender is worth pursuing. You may also wish to enlist the help of expert declarations by qualified witnesses to help you in impeaching the lender’s claims. Then again, if a spot check of your finances reveals you’d be better off renting, then perhaps you’ll want to visit *Section 3* on Strategic Default and have a “Come to Jesus” meeting with yourself and your spouse about all this.

True, when you’re involved in a protracted litigation, every day is a struggle. This is when the family unit becomes unsettled. Fights erupt at the dinner table. Divorce becomes the talk of the day rather than solutions. Suddenly, the father goes to his dresser drawer, pulls out a gun and randomly shoots every member of his household before turning the weapon on himself. This scenario has happened all over the United States ... all because of the financial stress caused by foreclosures. The author can document at least a dozen cases where this occurred.

Are the lenders and their attorneys ever made to “pay” for the stress they put on homeowners? Indirectly, yes they have in the form of punitive damages and sanctions.

Such a situation happened in a New York courtroom when a judge handed a Long Island couple a \$525,000 home for a Thanksgiving present, after OneWest Bank and its attorneys failed to consummate a loan modification in “mediation”. This case will continue to “eat at the mind” of OneWest Bank’s attorneys for a good long time.

## **PAYBACKS ARE HELL!**

Just before Thanksgiving of 2009, a Suffolk County, New York judge gave a Long Island couple their \$525,000 home free and clear, ruling it as a “sanction” against OneWest Bank for their inept behavior, to the degree of what he termed, “harsh, repugnant, shocking and repulsive.” OneWest Bank of course, intends to appeal the judge’s ruling, levied in part because OneWest refused to restructure a decent loan with the couple so they could remain in their home; but rather intended to toss them out on the street instead. The funny thing about what the Honorable Jeffrey Spinner did was he SANCTIONED the lender for damages totaling the value of the home to teach OneWest a lesson.

The judge was frustrated and outraged at the mortgage company’s insistence that no loan modification could be achieved and because of the fact the figures the mortgage company produced on paper for the judge were confusing at best.

All the owners (Diane Yano-Horoski and her husband, Greg Horoski) wanted to do was restructure the loan, so they wouldn’t just be paying interest payment after interest payment to OneWest Bank, a private equity group that bought this loan from the failed IndyMac Bank. They didn’t come into court asking for a “free and clear” home; but that’s what ended up happening.

IndyMac acquired the note from Deutsche Bank as part of a portfolio through the FDIC (another worthless entity in the author’s opinion). The sanction in effect, was a discretionary act by the judge to teach a party to the action a lesson.

OneWest Bank has apparently gained a poor reputation by ruthlessly foreclosing on anyone who owes it money. Good luck appealing that one! Appeals courts don’t take too kindly to appellants bringing a lower court’s sanctions to them for argument’s sake. As part of the ongoing saga, the author’s upcoming newsletters will keep you apprised of any rehearings or appeals on that matter. A quiet title action still may be necessary to extinguish OneWest’s lien on the property.

Had the Horoskis taken this matter one step further and made the “pretender lender” actually “prove” their note instead of going the restructured route, they might have been able to get OneWest to choke on their own mound of non-existent paperwork. This would have resulted in the same outcome of getting the house free and clear via another means other than court sanctions.

This act by Judge Spinner was the exception rather than the rule and probably won’t come up again unless someone that is using these foreclosure offense strategies asks for it. If there is a reversal in this case, the Horoskis may have to resort to raising the issue of true ownership to make their case stand. It was a brilliant move by Judge Jeffrey Spinner and is likely to be followed by other judges in the future, given the proper set of circumstances can be created! The judge’s sanctions came about after Diane Yano-Horoski successfully asked the judge to grant her a settlement conference and after the conference was underway. The bank refused to budge.



The author surmises the bank probably couldn't budge in this case because they didn't have the legal authority to; because they weren't the proper party in interest. It is also likely that the agency relationship was terminated when they acquired their notes from the FDIC! This is why they stonewalled the Horoskis in the settlement conferences.

***Many homeowners will discover that most of the servicing lenders have no power to modify their loans because they DO NOT HAVE THE LEGAL AUTHORITY TO DO THAT!***

This may also be true because of the termination of agency relationship between the servicing lender and the true creditors at the time when the portfolio of loans was securitized and then converted into derivatives. At that point in time (on Wall Street) when the mortgages were packaged up and used to collateralize the debts created by the newly-created derivatives, the author contends that the agency relationship simply ceased to exist. Because of the securitization process, the chain of title on the subject property became flawed and fatally defective!

***AUTHOR'S NOTE AND OPINION: Unfortunately, this is why the HAMP mortgage restructuring program isn't working. If only 400,000 homeowners benefitted and the rest failed, what does that tell you about your chances for a loan modification? Additionally, lenders have proven over time that they do not want to modify the loan ... they want your house! In fact, in most instances, they are incentivized by the predatory terms of your loan to go after your home instead of renegotiating a reduction in principal along with more amenable payment terms. By doing so, they face potential scrutiny of funds allocation through the bailout program or credit enhancements.***

The pretender lenders riding at the top of the heap of the mortgage mess know full well they can't legally restructure something that's been securitized and marketed as potentially non-performing. If they did that, they would change the entire structure of the securitized investment, which would render the prospectus promoting that investment a lie. The only thing that could replace an existing note is a new note, reduction in principle of the note or complete forgiveness of the loan, something which the pretender lenders are going to fight tooth and nail. To reduce the principle is to shrink the value of the bond that is secured by your home loan which is being used as an underlying obligation to that security, after promising specific yield premiums to the investors by the fund manager.

Besides, loan modifications always work in favor of the lender (not the borrower) because they create a whole new legal paper trail the lender can now use to foreclose the second the borrower defaults. Even though there is a chance this new note can be securitized, if the lender believes you'll default, he'll hold onto the note for awhile, looking for the opportunity to foreclose on you! Then he'll have all the "proof" he needs to do so!

***How would you like to have THAT scenario hanging over your head for 30 years?***

The instance with the Horoski case could have played out the same way if it could have been proven that an agency relationship failed to exist after OneWest Bank bought IndyMac's portfolio through an intermediary (the Federal Deposit Insurance Corporation). It could also be assumed that (at that point in time) the judge didn't understand the complexities of the case; instead, choosing to commit both parties to a settlement conference. Mind you, this case went on from July of 2005 up until the judge sanctioned OneWest Bank in November of 2009! That's over four years of haggling and over four years of family unrest in the Horoski household! In the end, was the reward worth it?

Sacramento attorney Peter Macaluso has filed nine lawsuits against OneWest Bank as of this writing, alleging that OneWest Bank is doing this because it can make more money selling foreclosures than it can keeping borrowers in their homes, for good reason. According to a YouTube video that went viral over the Internet, claims were made that OneWest Bank was incentivized by the FDIC when it acquired IndyMac Bank's portfolio [even though it is only 7% of its overall debt load]. Even though the FDIC didn't rebut the YouTube video's claims made by "Frank and Brian" point for point, it still left hanging the question of whether foreclosure by OneWest as an incentive works counterproductive to the intent of Congress in trying to come up with solutions to solve the mortgage lending crisis. To date, this question remains unanswered. Sadly, the taxpayer will end up picking up the slack if and when the FDIC pays off OneWest those "incentives" for taking over IndyMac's loans.

Another foreclosure attorney mill trick that Judge Spinner detested was the treatment by OneWest Bank's attorney against the Horoskis during the months of hearings they were subjected to.

This kind of behavior, as the judge so eloquently put it, was "inequitable, unconscionable, vexatious and opprobrious", so all of the ploys the foreclosure attorneys used to dissuade the court from siding with the Horoskis apparently backfired. The judge didn't even have to get into the complexities of the case and for him; all was well until the next time some attorney goes forum shopping on behalf of his clients and decides they want his court because of the treatment the Horoskis received. Besides, why would a lender do a loan modification? Probably because they've lost most of the paperwork of the original loan; but how could they if they legally didn't own the note?

For a judge to discover this would certainly embarrass them in court and probably work to their detriment. This is where an evidentiary hearing would have negated OneWest's case.

**This means that if you use the Rules of Evidence and the Rules of Procedure properly, as well as understand the tricks of the opposing counsel, you should be successful in shutting down the bank and getting the court to give you the remedy you want. If the bank won't budge, then a quiet title action will put the burden of proof on the bank to actually bring forward documentation that is impeachable. It may not revolve around what is recorded but what is NOT recorded at the county courthouse; because what is NOT recorded slanders title; thus, "agency" is lost.**

Understand that the judges have to be pretty convinced the lender committed serious infractions against you to just give you your house free and clear on a whim. Judges have a conscience and they are going to give the pretender lender as much latitude as they can to avoid accusations of bias and appeals based on error. Judges do not understand (unless your attorney points it out to them) that the yield premium or the insurance payouts may have retired the underlying obligation (the bond); thus paying your mortgage off in full!

***In a nutshell, the servicing lender generally is not the proper party in interest!***

They are not the real holder of the note; they are just the loan servicer. They get paid fees to act on behalf of the investors who really own the note because of the securitization process. When one uses discovery in a civil action against pretender lenders, the likely results will either be missing paperwork and a claim that can't be proven (along with a defective title) or half-baked or dummied-up documentation that contains errors in notarization or recordation, which is fraud upon the Court, which in all likelihood would result in sanctions. Such a case is illustrated and embedded in this work.

The sanction for fraud upon the court in U.S. Bank v. Harpster was simple; disallowed evidence due to fabrication of documents proving assignment. The lender's attorneys should have known better. They are entrusted to maintain the integrity of the justice system. When they don't, stuff like this happens and the bank ends up getting tossed out of court and thus criminal investigations are started up to see who's culpable.

## **STOP THE MADNESS!**

What if you were to turn this whole case around into an offensively-postured legal maneuver? What if you could drag your lender into court on a legitimate pretense, citing a claim for which relief could be granted? Relief could run anywhere from a renegotiated loan ... or in the absence of that ... complete rescission of contract plus treble damages for mortgage fraud or predatory lending? Or maybe even quieting the title to include complete abatement of all filings and recordations by the original lender? This amounts to a complete vacating of the lender's loan off of the home, which would render it free and clear from lien, subject to any tax liens due and owing of course. Some attorneys are considering declaratory judgments to negate the loan as having little or no value whatsoever. This is where the PSA and all supporting documents are more than likely going to come into play. You're probably asking yourself why you hadn't thought of this before. It's probably because the bank was using what's called a "power over" strategy on you, blaming YOU for what this situation has become. Collection agencies are really good at this "power over" strategy and pretender lenders with no agency relationship are just like third-party debt collection agencies! What worse, the author alleges that the pretender lenders are going after homeowners for homes that were paid off several times over when the notes were sold and resold! The borrower is fleeced for well more than just principal and interest when it comes to actually "paying off" his mortgage loan. Welcome to the sad state of affairs in America.

Theoretically, if the loan were fully transparent and free of TILA and other violations, the borrower would know ALL of the terms and conditions of his loan. If the borrowers were only sophisticated enough to discern whether the funds that were advanced to them by the originating lenders were really advanced from the real investors of the securitized notes and mortgages, then mortgages could be challenged at closing instead of in court. Despite all of the non-disclosure ... it needs to be reiterated that MERS hides all of the subsequent transactions from the borrower past the originating lender; at that juncture there is cause for litigation to vet out the truth. You can read Neil Garfield's (paraphrased by the author) story of "Aunt Alice", which is a simplified means of illustration to show a judge exactly WHO may have paid down on the borrower's note and mortgage WITHOUT the borrower's knowledge or consent on his website, Living Lies.

**To follow this chain of logic would consequentially mean that the borrowers would have to sue the "proper parties" and their securities pools to find out how much money was made and how much of the fees paid really belong to them! This would be cost-prohibitive to borrowers in most instances and NOT practical.**

However, it is virtually possible through discovery and evidentiary hearings, that not only the loss of assignment could be ascertained; but also WHO the true creditors are, **IF INDEED THERE ARE TRUE CREDITORS!** The costs of a suit of this magnitude however undermine the end result; but perhaps not in a quiet title action.

Equally, the true creditors, once they find out what the middlemen did to them (misleading them into believing that their investments were being used to fund mortgage loans), which is now being fabricated in fraud to the borrower, the lawsuits and criminal prosecutions will start flying from the other direction! If an agency relationship was terminated at some point PRIOR to securitization, was the "intervening assignee" who obtained the note portion of your transaction the last true holder in due course? In other words, who's got the unsigned "lottery ticket"? Once Wall Street created a portfolio and used the pledged collateral (your home) as a security in another transaction, could the intervening assignee and the person creating the security instrument that was marketed as a CDO have committed a felony?

**ISN'T IT WELL ESTABLISHED THAT YOU CANNOT PLEDGE SECURED COLLATERAL IN ANOTHER TRANSACTION WITHOUT CONSENT AND PERMISSION OF ALL PARTIES INVOLVED IN THE TRANSACTION? In the securitization process on Wall Street ... things are apparently "legal".**

#### **YOU AS THE PLAINTIFF AGAINST A "PRETENDER LENDER"**

The burden of proof in foreclosure offense is on the borrower (which would be you), the Plaintiff. There may be enough preliminary evidence which can be obtained in advance of an action to support a claim for relief. However, if there isn't, you'll have to utilize discovery to obtain the rest of the information to prove your case.

The author is NOT saying, “You can walk away from a lawsuit with a free and clear home!” To the contrary; if your suit is meritless look for a summary judgment to be issued post-filing. Your mission is to wade through the mounds of paperwork and look for the flaws in the documentation using the Rules of Evidence of your local court. Your mission should be not to force the pretender lender into a loan modification conference! You need to hone in on what makes your title unmarketable! If there is a break in the chain of title, it will first be demonstrated by your knowledge of agency and assignment.

The ultimate goal is to get the court to quiet the title of all false or improperly recorded liens. The author realizes that this may be a long shot, but if you don’t try, then how will you know? A simple study of the laws of “agency” and the Uniform Commercial Code [hereinafter UCC], will be something that foreclosure attorneys will have to be well versed on in order to fight defective title suits because of improper security filings and mortgage fraud. A court decision can also be rendered based on what evidence there “isn’t”, instead of what there “is”; that would be proving a negative with the help of the defendant who “isn’t” the proper party and has no right to be standing in the stead of the real party in interest: The portfolio investor OR the party who actually loaned the proceeds and directly benefitted from the monthly payments made by the borrower.

As attorney Neil Garfield claims, “The only way for the true investors (of your note) to be brought forward is to (get the other side to) produce the bond!”

This requires production of the minute books, the trustee’s records, the actual copies of the certificates that were issued and the actual names and addresses of the certificate holders, so you can ascertain whether they even still own the note. Garfield has also stated that you as a Plaintiff have to “discover” ... “whether the loan was ever really accepted into the pool, whether it is still in the pool or whether it is paid in whole or in part by third parties through various credit enhancement (insurance) contracts or federal bailout.”

To further paraphrase Garfield’s argument here: Every filed document relative to your loan is suspect, even the SEC filings! Pooling and servicing agreements may reveal that your loan was actually never in the pool and thus your note was never actually securitized! This could also mean that any party “coming to the table” in a quiet title action, maintaining that your promissory note was part of a PSA merits further examination to determine the authenticity of the agreement or assignment, to see whether it was constructed legally or whether it was dissolved or your loan was placed into a new pool and resecured.

Garfield’s claim (and the author concurs with that claim) is that in court, the lender or party claiming to be the lender is going to focus their efforts on either your default (in the event of foreclosure) or your “wanting a free and clear house” (in the event of a quiet title action). They are going to do everything possible to evoke emotion from the judge to their benefit. Once the judge’s “patience” is tried, it makes your legal game an uphill battle. It also generally means the attorney has failed to control the narrative. In that regard, the attorneys handling foreclosure defense are faced with certain frustrating tasks.

The true party in interest may or may not be in the courtroom or named in your suit. The real party in interest may not have all the necessary paperwork to prove its claim either. If any of the proceeds of Wall Street (in the form of credit enhancements) benefitted your loan in any way, you'll have to get a full accounting through discovery. The lender however just doesn't want to share this information (perhaps because a lot of it is missing). Doing so would mean full disclosure and someone getting "egg on their face".

In foreclosure actions, you may wish to consider avoiding the securitization arguments and focus on: (1) Rules of Evidence (impeaching the other side's documents); and (2) Rules of Civil Procedure (showing the other side is NOT the proper party to the action). If the party is determined to be "proper", then discovery should go one step further in demanding a full accounting of all payments (insurance or credit default swap proceeds) applied to your note. It seems logical; but in practice to date, it seems to only happen in bankruptcy courts. Due to the fact that Lender Processing Services, Inc. [hereinafter "LPS" a/k/a "DOCX"] and several foreclosure mill law firms are now being investigated for criminal wrongdoing by the Florida Attorney General's office (following a rash of faulty paperwork submitted by lenders being tossed by judges in courts in Florida and all across the U.S.), every lender's paperwork (submitted in any case) is suspect and has to be fully scrutinized! The GMAC (Ally Financial) debacle is another Pandora's Box.

This new information and the levels of discovery required mean that you as a homeowner are going to have to hire an attorney that "gets it". The author will state this to you more than once as you are afforded a "sneak-peek" at the "paperwork behind the scenes".

## **THE SIGNIFICANCE OF QUIET TITLE ACTIONS**

As will be significantly discussed in more detail in *Section 12: Quiet title actions*, these actions are state-sanctioned. In fact, according to statute, they are every property owner's right. However, improper filing of these actions could get your quiet title action tossed out of state court, or even worse, removed to federal court, where that court has no jurisdiction to "quiet" anything on state lands (logically). Again, the lenders find it convenient to stall cases in which they are the Defendants, by removing them to federal court, under claims of diversity jurisdiction. This is because the cases were not properly pleaded.

As you'll read in *Section 12: Quiet Title Actions* every state covers certain case law and even certain statutes may apply in the enforcement of particular provisions of a Deed of Trust or mortgage. All of these can be effectively addressed in a quiet title action IF you are prepared and all of your pleadings are in order and kept "state-specific". It's also best to keep "federal questions" out of your state-specific pleadings as well. This is another "trap" that could get your case removed to federal court. Quiet title actions belong in state court. If you don't have all the information, you could try to get that information through discovery and simply amend your complaint later, right? There is also the possibility of a separate action against the Trustee and get a declaratory judgment which could be used to effect collateral estoppel against the lender. Many attorneys are exploring these options.

Quiet title actions can be used to define agency relationships between lenders and parties in interest. You may discover in the process of investigation that your former homeowner you purchased your property from had one of MERS agents file a “Release of Lien” at the courthouse. Again, the actual interest in the “reconveyance” of something MERS does not own is illegal. Since MERS cannot convey something it doesn’t own, it’s recordings of Release of Lien may generally be fatally flawed. The breaking of agency in this regard also clouds title because conveyance was improper.

Another thing to keep in mind when rummaging through existing courthouse documents is what is NOT there! Sure, you may find the recorded mortgage or deed of trust ... but if you became aware at some point that your note was immediately “sold” to another lender, it is possible that the original “lender” you dealt with (what is known as a “REMIC” ... Real Estate Mortgage Investment Conduit, a broker, a loan dealer) and was funding the loan all along ... you just didn’t know that. Again, “table funded loans” are notorious for not revealing all true information to the borrowers.

In all instances involving a quasi in rem quiet title action, the list of Defendants will grow as you uncover all of the possible claims of lien that might move forward in your case.

You will also find out from the author’s research (as well as your own), that quiet title actions operate in the same nature as regular lawsuits. You file the complaint, all the known defendants file an answer. You motion for discovery and hearings; the rest is pretty much your typical lawsuit. However, some quiet title actions allow for cross-claims. Research your state for all applicable statutes and pleadings before proceeding.

More of these possible scenarios will be discussed in *Section 12*.

**AUTHOR’S NOTE:** The quiet title action and suits against the trustees may be one of several options (but as seen here, potentially the most practical) to stop foreclosures in deed of trust states. There are also issues of trustees being responsible to the borrowers’ insofar as fiduciary relationships as well as good faith and fair dealing, depending on your state’s statutes. One important point to remember in deeds of trust ... the trustee’s duties (as well as the true definitions of MERS) are vague, ambiguous or non-existent.

## Section 2: Understanding applicable statutes

The author pays particular attention to two distinct items in these statutes ... one is the jurisdiction and claim mechanisms for which a court can rule a legitimate claim for which relief can be granted (in order to prevent the opposing party from slam dunking your case with a summary judgment or directed verdict) ... the other is what penalties or relief you can ask for if you pursue this offense. Remember ... all statutes have time limitations attached to them! Make sure you have your attorney review each “cause of action” to make sure those statutes haven’t expired in your particular case!

### THE FAIR CREDIT REPORTING ACT

The pretender lender (the servicing lender) reports all of your late payments, whether accurate or not, on your credit reports. The Fair Credit Reporting Act statute that applies to the true creditor and not the pretender lender is 15 U.S.C. §1681s-2; or **§623. Responsibilities of furnishers of information to consumer reporting agencies**. This section is constantly violated under Paragraph (7) Negative information; Subparagraph (A)(i); to wit:

(i) In general. If any financial institution that extends credit and regularly and in the ordinary course of business furnishes information to a consumer reporting agency described in section 603(p) furnishes negative information to such an agency regarding credit extended to a customer, the financial institution shall provide a notice of such furnishing of negative information, in writing, to the customer.

Rarely, if ever, does the “intervening assignee” provide notice to a homeowner (within the statutory 30-day time frame they are required by law to provide) that they are furnishing default or foreclosure information to the credit bureaus. Damages of up to \$1,000 per violation can be assessed against the pretender lender for failing to adhere to this statute. Actions on this statute can be brought in federal district court for the district in which you reside; or a parallel state action can be brought in the district, superior or circuit court in which the case you are filing against the lender might be added as another “count”.

Another element of the Fair Credit Reporting Act is §607, which requires that the credit bureaus maintain accurate credit files. The resulting question then becomes: What happens if the creditor who reports derogatory information on your credit files isn’t really the true creditor? Because the credit repositories took these alleged “creditors” at their word when they subscribed as “true creditors”, if the existing creditors were required to prove that they actually had “capacity” to act in the nature of a true creditor and were later found to lack capacity to report anything to the credit bureaus, then the credit bureaus standing as a reliable source of true creditors would be diminished. This is the last thing that Equifax, Experian, Trans Union and Innovis want to hear.



The foregoing section of law is the resulting violation of the credit bureaus' total disregard for the consumer. In the 1990's there was an 85% chance of an error on your credit report.

Today, even with identity theft precursors in place, the margin of error has only dipped to 70%. Also remember the semantics of credit reporting ... the account numbers on your credit reports represent files identifying you as the consumer. These are tracking numbers that belong to the creditors that were assigned by the creditors. ***THESE ARE NOT YOUR ACCOUNT NUMBERS!*** These numbers were assigned by the creditors to keep track of your account (you did not create them nor assign them to yourself). The same is true with your Social Security Number, your phone number, your driver's license number, etc. (Many will argue that this is a "tit for tat" bit of trivial nonsense. In credit reporting however, you will find that your account numbers are anything but "trivial".)

## **THE FAIR DEBT COLLECTION PRACTICES ACT**

This is an extremely viable section of law to utilize in most instances, as 15 U.S.C. 1692 et seq has parallel state statutes that correspond with it. Damages can run up to \$1,000 per violation. In particular:

**§807. False or misleading representations [15 U.S.C. 1692e] (2)(A)** The false representation of the character, amount or legal status of any debt; and

**§808. Unfair Practices [15 U.S.C. 1692f] (6)(A)** Taking or threatening to take any nonjudicial action to effect dispossession or disablement of property if there is no present right to possession of the property claimed as collateral through an enforceable security interest.

The first statute [Section 807] is used (coupled with discovery) when proving the pretender lender is not the "true creditor". The second statute [Section 808] of this Act is useful when used to counterclaim deficiency judgments in nonjudicial foreclosure states (where action is done by publication and not in court); or in the event the homeowner can initiate suit or file Chapter 13 bankruptcy to expose the pretender lender's fraud in front of the bankruptcy court at the time they are noticed with default and suspect foreclosure publication has commenced. On both of the FCRA and the FDCPA, statutory damages, attorney's fees and court costs are not the only awards you can ask for. Many attorneys won't take these cases because they think there's no money in them. Do they know they can also go after exemplary damages against the lender for coming into court with unclean hands and punitive damages for the willful behavior of the lender in committing fraud against the homeowner?

In the Section 808 case, if you can prove that the lender does not have a perfected security interest in the property, not only can you ask for damages, you can also motion for quiet title and have the judge expunge all existing lender liens against the property (however, IRS and other tax liens and child support may not be able to be expunged).

According to the author's research, bankruptcy is the only action you can take to stop the county and federal tax collectors from foreclosing on your property and selling it to pay off your taxes, while you dispute their validity) or set up a payment plan to pay them off.

According to Section 813 of the act, you have **one year** from the actual date of violation to bring an action; otherwise, you are barred from such. Nowhere in the law can the author find where it says that you are entitled to bring an action "from the date of discovery of the violation", as in some frauds where the statute starts to toll from the point of discovery. This is why the author "leans" towards use of this law at the first claim of deficiency judgment or foreclosure to stop a trustee's sale.

## **STATE CONSUMER PROTECTION LAWS**

Every "state" has consumer protection laws within the framework of its statutes. For example, in Kansas you can find applicable statutes to base claims for which relief can be granted under K.S.A. 50-626 (a)(b)(1)(G)(3), which states, as written in full detail, to wit:

"No supplier shall engage in any deceptive act or practice in connection with a consumer transaction. Deceptive acts and practices include, but are not limited to, the following, each of which is hereby declared to be a violation of this act, whether or not any consumer has in fact been misled: Representations made knowingly or with reason to know that: The use, benefit or characteristic of property or services has been proven or otherwise substantiated unless the supplier relied upon and possesses the type and amount of proof or substantiation represented to exist; the willful failure to state a material fact, or the willful concealment, suppression or omission of a material fact."

What do you think happens when a lender misleads the consumer as well as the Court in leading the consumer to believe that it (the lender) has the legal authority to foreclose on the homeowner? The potential exists for the lender's foreclosure mill to come before the court with unclean hands (... and that happens all the time; the courts are just recently starting to notice!)

Many consumer protection statutes talk about acts of deceit; however, you must examine the definitions under each section to see if the statutes under "consumer transactions" apply to banks.

Generally, there are sections under "Finance" or "Banks and Banking" that apply to the actions of banks. With these statutes also is a statute of limitations that ends after a certain period of time.

When researching the statutes, **FIRST** check the "Definitions" section and identify whether a financial institution or mortgage lender is listed there. If it isn't, chances are you're in the wrong section of statutes.

## DECEPTIVE OR UNFAIR TRADE PRACTICE STATUTES

Certain states phrase their statutes as “Deceptive Trade Practices Act” (like Texas) instead of “[State] Consumer Protection Act” (like Kansas). They all carry the same weight. However, Texas courts have ruled that a loan of money is still not a “good” or “service”:

“Where the allegation is that there was a loan of money, without any further purchase of service, there is still no standing as a consumer for purposes of bringing a claim under the DTPA.” *Maginn v. Norwest Mortgage, Inc.*, 919 S.W.2d 164, 166-167 (Tex. App.-Austin 1996, no writ); *Waite v. BancTexas-Houston, N.A.*, 792 S.W.2d 538 (Tex. App.-Houston [1st Dist.] 1990, no writ).

You will spend a lot of time in the law library “spinning your wheels” without a keen sense of legal acumen. The author advises you to seek counsel if you don’t understand specific statutes. The legislatures created them with specific intent and sometimes, ALL elements have to be proven in order for the statute to be truly “violated”.

## TRUTH-IN-LENDING ACT [TILA]

**Codified in 1968 under the Consumer Credit Protection Act (as law), administratively enforced by the Federal Deposit Insurance Corporation [FDIC] chiefly but not solely; in simplest terms, the Truth-In-Lending Act concerns specific areas of information that the lender must disclose to the borrower PRIOR to extending credit. Key aspects include but are not limited to the annual percentage rate (APR), the actual term of the loan and the total costs to the borrower. One sample of such state laws regulating such disclosures can be found in the Florida Statutes at 494.0038 (Mortgage broker disclosures); as individual state statutes can also be utilized. You can find them in the Resource Section of this work. This information must be placed in conspicuous form on all documents that are handed to the consumer to sign, BEFORE SIGNING! This conspicuous information must also be posted on periodic billing statements that become part of the credit transaction.**

In one instance the author was made aware of, one homeowner closed on his mortgage loan, signed his paperwork, moved into his home and was unpacking when he got a phone call from the mortgage lender’s representative asking if she could come over to his home (it was on a Sunday). After showing up at the door within minutes of the phone call, the woman proceeded to explain to the homeowner that they forgot to get their signature on the Truth-In-Lending Act Disclosure Notice form. She persuaded the homeowner to sign it, not in the presence of an attorney or witnesses. Only after the homeowner signed the form did the lender’s representative disclose to the homeowner that if he hadn’t signed the form, he could have “gotten the house free and clear”. Lesson to be learned: If this happens, get a lawyer!

Even though most consumers would recognize this oversight as a simple mistake, the lender's representative may have also committed fraud against the homeowner by not allowing him to take it to his attorney for review.

An action can be brought under this Act if the lender failed to disclose some provision of the loan to you. You can prove this through evidence gleaned in a TILA Audit. Attorneys that have a background in securities and finance may be familiar with this procedure. Remember also that there are time limitations on these statutes. Have your attorney review your specific case particulars to make sure they are applicable and not expired. There's nothing worse than filing a complaint only to have the other side shoot down half of your "counts" because the statute of limitations expired well before your complaint was filed.

There are also provisions that you may be able to use against the lender if the lender promised that, for example, that you could refinance at no charge at any time prior to the ARM readjusting itself; and after the loan closed, months later, you wanted to refinance your note and then was told that it had been sold to another lender and that the new lender refused to refinance your note as promised.

This is commercial non-disclosure known as "fraud in the inducement"; in other words, the lender's representative tricked you into signing the paperwork because you relied on their claims that they would refinance you at a lower fixed rate when in fact, it never happened.

Insofar as the federal statute is concerned [check also for parallel state statutes], the penalty for violations of this Act is stated herein:

#### **§112. Criminal liability for willful and knowing violation [15 U.S.C. 1611]**

Whoever willfully and knowingly

(1) gives false or inaccurate information or fails to provide information which he is required to disclose under the provisions of this title or any regulation issued thereunder,

(2) uses any chart or table authorized by the Board under section 107 in such a manner as to consistently understate the annual percentage rate determined under section 107(a)(1)(A), or

(3) otherwise fails to comply with any requirement imposed under this title, shall be fined not more than \$5,000 or imprisoned not more than one year, or both.

As of this writing, there are also new requirements under the *Truth In Lending Act*, which carry up to a \$4,000 penalty if not adhered to (as they are in force now). These new rules apply to all mortgage loans, whether open-ended or closed-ended, that collateralizes the homeowner's principal residence.

Any person that acquires more than one mortgage loan in a 12-month period will have to provide a notice of transfer whether or not they could be deemed a creditor under TILA definitions. If the mortgage loan is part of an SPV (Special Purpose Vehicle; trust), it too has to give notice because the underlying loan is part of the SPV, regardless of whether an assignment is recorded or even if the underlying banks are MERS members. *Also note that these requirements do not affect the notification rules under RESPA for servicing transfers on mortgage loans.*

New owners who acquire BOTH legal title and servicing rights to a mortgage loan will have to satisfy the rules for TILA and RESPA, which in essence, state that notice must be given on or before the 30th calendar date after the date the new owner acquires the loan. In the case of short-term repurchase agreements, the acquirer is not required to give the notice if the transferor has not treated the transfer as a loan sale on its own books and records.

However, if a repurchase does not occur, the acquirer must give the notice within 30 days after it recognizes the transfer as an acquisition on its books and records. The notice must be given even where the new and former owners are affiliates, but a combined notice may be sent where one company acquires a loan and subsequently transfers it to another company so long as the content and timing requirements are satisfied as to both entities. The notice must contain the information specified by the new rule, including contact information for any agents used by an owner to receive legal notices and resolve payment issues. The required information also includes a disclosure of the location where ownership of the debt is recorded. If a transfer has not been recorded in the public records at the time the notice is provided, a new owner may satisfy this requirement by stating that fact.

## **REAL ESTATE SETTLEMENT PROCEDURES ACT [RESPA]**

The Real Estate Settlement Procedures Act, first passed in 1974, is a statute designed and purposed to help consumers become shoppers for settlement services and to eliminate kickbacks and referral fees that unnecessarily increase the costs of those settlement services.

RESPA covers mortgage loans placed on 1-to-4 family residential property. These include purchase loans, assumptions, refinances (which loan modifications are), property improvement loans and equity lines of credit. Even though the Department of Housing and Urban Development's RESPA office is chiefly responsible for enforcing this statute, citation as a "count" involving a legal action with a pretender lender may be used to further disparage the lender's behavior for failing to provide certain documents PRIOR to closing, such as a Special Information Booklet, which explains various real estate settlement services; Good Faith Estimates (GFE); and Mortgage Servicing Disclosure Statements (the document you signed that discloses the lender's intent to sell your note and mortgage or service the mortgage themselves).

You can and should utilize all the angles in your research regarding what you were told (or not told) to determine whether there were disclosure violations that might give rise to lender liability issues. This should be a part of your forensic analysis used to determine whether you have cause to sue your lender. The lender has to give you these documents at the time of loan application or no later than three days AFTER you submit and they receive the loan application.

Did you get these documents as part of your loan modification or refinance? If you didn't, you may have a cause of action. If you have any questions about RESPA disclosure rules, they are readily available as a link in the resource section of this work.

## **TILA RESCISSION**

If any Truth-In-Lending-Act disclosure violations occurred on a refinanced loan for your primary residence and your loan was closed within the last three years from the date you file an offensively-postured action, you can claim the rights to rescind your contract with the lender. With a rescission, you are putting your loan “back the way it was” before you transacted it (in other words, completely cancelling it).

This is backed by reference as found at 12 C.F.R. §226:

(a) *Consumer's right to rescind.* (1) In a credit transaction in which a security interest is or will be retained or acquired in a consumer's principal dwelling, each consumer whose ownership interest is or will be subject to the security interest shall have the right to rescind the transaction, except for transactions described in paragraph (f) of this section.

(2) To exercise the right to rescind, the consumer shall notify the creditor of the rescission by mail, telegram or other means of written communication. Notice is considered given when mailed, when filed for telegraphic transmission or, if sent by other means, when delivered to the creditor's designated place of business.

(3) The consumer may exercise the right to rescind until midnight of the third business day following consummation, delivery of the notice required by paragraph (b) of this section, or delivery of all material disclosures, whichever occurs last.

If the required notice or material disclosures are not delivered, the right to rescind shall expire 3 years after consummation, upon transfer of all of the consumer's interest in the property, or upon sale of the property, whichever occurs first. In the case of certain administrative proceedings, the rescission period shall be extended in accordance with section 125(f) of the Act. The term “material disclosures” means the required disclosures of the annual percentage rate, the finance charge, the amount financed, the total payments, the payment schedule, and the disclosures and limitations referred to in §226.32 (c) and (d).

This is one of the reasons why the author recommends getting a full and thorough TILA audit conducted by an experienced professional. As the author previously stated, rescission virtually puts everything back the way it was BEFORE the transaction, as evidenced as follows in 12 C.F.R. §226.23(d):

(d) *Effects of rescission.* (1) When a consumer rescinds a transaction, the **security interest giving rise to the right of rescission becomes void** and the consumer shall not be liable for any amount, including any finance charge.

(2) Within 20 calendar days after receipt of a notice of rescission, the creditor shall return any money or property that has been given to anyone in connection with the transaction and shall take any action necessary to reflect the termination of the security interest.

(3) If the creditor has delivered any money or property, the consumer may retain possession until the creditor has met its obligation under paragraph (d)(2) of this section.

When the creditor has complied with that paragraph, the consumer shall tender the money or property to the creditor or, where the latter would be impracticable or inequitable, tender its reasonable value. At the consumer's option, tender of property may be made at the location of the property or at the consumer's residence. Tender of money must be made at the creditor's designated place of business. If the creditor does not take possession of the money or property within 20 calendar days after the consumer's tender, the consumer may keep it without further obligation.

(4) The procedures outlined in paragraphs (d) (2) and (3) of this section may be modified by court order.

Rescission of contract needs to be fully examined by your attorney because there are certain aspects of this action that you may not be aware of that your attorney will explain to you. One of them is that you need to have all the money you borrowed readily available to "tender" back to the lender!

### **FALSE LIEN CLAIMS ... IF IT DOESN'T "QUACK LIKE A DUCK" ...**

This analysis has surfaced through Reno, Nevada attorney Mark Mausert, who filed suit against MERS in state court in Churchill County, Nevada under Nevada Revised Statutes Chapter 357. Using this false lien claim procedure, the suit attacked MERS' claim of capacity as a "mortgagee", when the President and CEO, R.K. Arnold in fact (in previous depositions), declared that MERS had no beneficial interest whatsoever in the mortgage despite what its liens claimed. At the time of this writing, a summary judgment in Mausert's case is pending. As the author has discovered through intensive research, not every state has an identical statute to N.R.S. Chapter 357. Arizona's false claim of lien statute also provides for damages to the homeowner (even treble damages in some instances) as well as fines inuring to the benefit of the State. Have your attorney check into the possibility that you may have this statute as an option; especially in a quiet title action (this statute may actually lend impetus to your case).

Mausert estimates that some 890,000 such liens exist in Nevada alone. This could also predicate fraud on the court at the time the documents are produced in oral arguments. Again, MERS executives were deposed in September of 2009 and have admitted that they are NOT a beneficiary in interest; they have admitted they do NOT suffer financial harm when a consumer defaults; they have admitted they are NOT really a mortgagee as they claim on their website; and the courts in Kansas, Nebraska, Florida, Ohio, Vermont and Arkansas have already ruled that MERS lacks capacity to pursue a claim to foreclose.

Here's the rub ... the false claim of lien statute has not really been used to date to "beat up" MERS in fines for its alleged, blatant misuse of the county recordation system.

MERS takes your paper mortgage and records it at the county courthouse in which your property is located and lists itself as a "mortgagee" when its own president has admitted in sworn deposition that MERS is NOT a real "mortgagee", but just an agent of one. Is MERS also filing a false lien claim at the courthouse? As a backgrounder on these "false lien" statutes: As early as the mid-1980's, the so-called "Patriot Movement" Common Law Courts and certain individuals connected with those groups filed nuisance liens against anyone with whom the "patriot" had an axe to grind. The filing of the liens caused undue financial burdens on those who fell victim to these acts.

**AUTHOR'S NOTE: Have your attorney examine your applicable state statute to see whether it would specifically apply to your quiet title action.**

## **CRIMINAL INTENT**

Here is Texas' penal code statute covering filing false liens [emphasis in bold]:

Sec. 37.101. FRAUDULENT FILING OF FINANCING STATEMENT.

**(a) A person commits an offense if the person knowingly presents for filing or causes to be presented for filing a financing statement that the person knows:**

**(1) is forged; (2) contains a material false statement; or (3) is groundless.**

**(b) An offense under Subsection (a)(1) is a felony of the third degree, unless it is shown on the trial of the offense that the person had previously been convicted under this section on two or more occasions, in which event the offense is a felony of the second degree. An offense under Subsection (a)(2) or (a)(3) is a Class A misdemeanor, unless the person commits the offense with the intent to defraud or harm another, in which event the offense is a state jail felony.**

From the above statute, criminal prosecution might be warranted and section (a)(2) would apply because of the material false statement (MERS is not the mortgagee as it claims in the recorded document). This statute violation was cited in a Texas wrongful foreclosure suit against seven different lenders who all "touched" it, along with at least 7 individuals who could face jail terms. All of them represented themselves to be acting on behalf of MERS or one of the lenders in the wrongful foreclosure.

If a financing statement was filed subsequent to an action against a lender in order to perfect its security interest and it can be proven to have been falsified (see US Bank v. Harpster) by some paralegal or office clerk that had no authority to sign it, the above statute might be very handy to use to get the local District Attorney to pursue criminal charges against the party (or parties) signing and/or recording it. Jail a few of these people and this kind of nonsense might be reduced.



With the claims by the thousands of lenders that they are MERS “officers”, acting behind the face of the “nominee”, with all of their purported assignments, the rulings against the MERS liens could “pass through” the wall of secrecy (because at some point MERS will have to thoroughly explain its “lien situation” in courts all across the nation. Could it also be alleged that the investors who own the bonds for which these loans secured the underlying obligations are equally liable for the actions of MERS?

In the event this statute was to be enforced on its face in all states having such, the end result would be that the states’ general funds would be enriched due to all of the civil penalties assessed against all of the defendants and millions of borrowers could end up with their homes free and clear by filing a quiet title action against the MERS liens.

Also, it could be assumed that MERS would be put out of business and its recordation system would be replaced by the old tried and true standard of “pay as you go” recordation by the true creditors each time an assignment was created.

To realize the gravity of this situation, all one has to do is the math on 62,000,000 mortgage loans times the amount of a single filing fee at the County Recorder or the Secretary of State’s office to see exactly how much revenue the lenders are defrauding the states for in failing to properly record their security interests!

Now let’s pair those losses up against the title insurance companies that would have to defend the lenders in these suits just because of MERS’s actions. How could a title company insure a lender against slander of title when MERS and its agents run amok in the filing of assignments and transfers; a majority of them questionable? Let’s also remember that MERS hides all of the data electronically until it needs it in order to foreclose. That data should have been recorded all along in the county courthouses across America. Now, with MERS as a party to the mortgage or deed of trust, title is slandered because once the information disappears behind the electronic wall, it’s not in the courthouses ... and title companies are insuring against “blind faith”. This will come in very handy during the quiet title aspects of your journey through this work. You will see how the title company could become your best friend in order to avoid exposure.

Even without enforcing the foregoing statutes, the current rulings against MERS in the state courts could spell doom for those “lenders” who don’t perfect their security interests prior to foreclosure (or prior to a consumer filing a quiet title action). Again, it takes an attorney with specific knowledge in this area to raise the proper issues of material fact and impeach all of MERS and its subscribing lenders’ evidence.

## **UNREGISTERED DEBT COLLECTION AGENCIES**

Every state has debt collection laws regulating the behavior of bill collectors. One of the allegations made by attorney April Charney against MERS when it first started filing foreclosure actions is that MERS was not registered in the State of Florida as a debt collector. The courts recognized this. Check your local statutes for potential violations.

## UCC SECTION 3-309

For argument's sake, UCC §3-309 would provide a simple solution if it was just a case of a "missing note". Any person entitled to enforce an instrument which has been lost, destroyed or stolen may enforce the instrument using this Section.

The courts however, are starting to recognize that third parties are showing up and attempting to enforce the instrument against the borrower. In bankruptcy court, it may have been cause for denial of a Motion for Relief of Automatic Stay; thus reinforcing the idea behind §3-309(a)(1) and (b) that a person seeking to enforce a missing instrument must be a person entitled to enforce the instrument, and that person must prove the instrument's terms and that person's right to enforce the instrument. Here again, proper party defenses in a foreclosure offense case would force the so-called "pretender lender" in this instance to "reach" in order to maintain its position in an action where you are the Plaintiff.

Article 3 of the Uniform Commercial Code governs negotiable instruments, defining what a negotiable instrument is and defining how ownership of those pieces of paper are transferred. For the precise definition, see § 3-104(a) ("an unconditional promise or order to pay a fixed amount of money, with or without interest . . . .") The instrument may be either payable to order (or bearer) and payable on demand or at a definite time, with or without interest. § 3-104(e) defines ordinary negotiable instruments as including notes and drafts (a check is a draft drawn on a bank). Negotiable paper is transferred from the original payor by negotiation. §3-301. "Order paper" must be endorsed; bearer paper need only be delivered. §3-305. However, in either case, per UCC § 1-201(20), for the note to be enforced, the person who asserts the status of the holder must be in possession of the instrument. This is where judges are starting to crack down.

The original and subsequent transferees are referred to as holders. As related in §§3-305(b), holders who take with no notice of defect or default are called "holders in due course," and take free of many defenses.

"The UCC has been adopted into every State's statutes", says attorney Max Gardner; "just not that uniformly". Still each state's UCC does claim that a payment to a party "entitled to enforce the instrument" is sufficient to extinguish the obligation of the person obligated on the instrument. Clearly, then, only a holder (a person in possession of a note endorsed to it or a holder of bearer paper) may seek satisfaction or enforce rights in collateral such as real property.

In 2008, Judge Bufford addressed the rules issue [*In re Hwang*, 396 B.R. 757] as judge of the Bankruptcy Court for the Central District of California); with pleading problems that arose wherein the holder of the note is unknown; typically found in a motion for relief from stay in a bankruptcy proceeding.

Federal Rules of Civil Procedure 17 clearly states: "[a]n action must be prosecuted in the name of the real party in interest."

This rule is incorporated into the rules governing bankruptcy procedure in several ways. As Judge Bufford pointed out in a motion for relief from stay (filed under F.R.Bankr.Pro. 4001 is a contested matter, governed by F. R. Bankr. P. 9014, which makes F.R. Bankr. Pro. 7017 applicable to such motions. F.R. Bankr. P. 7017 is, of course, a restatement of F.R. Civ. P. 17. *In re Hwang*, 396 B.R. at 766) The real party in interest in a federal action to enforce a note, whether in bankruptcy court or federal district court, is the owner of a note. (In securitization transactions, this would be the trustee for the “certificate holders.”) When the actual holder of the note is unknown, it is impossible – not difficult but impossible – to plead a cause of action in a federal court (unless the Movant simply lies about the ownership of the note). Unless the name of the actual note holder can be stated, the very pleadings are defective.

Chasing these securitized investments through the Real Estate Mortgage Investment Conduit [REMIC] that funneled them into securitiesville can be a nightmare and almost impossible to prove if MERS and the FDIC don’t cooperate.

### **THE ERROR OF THE SERVICING LENDER**

More often than not, the servicing agent for the loan will appear to enforce the note. For example, let’s assume that the “servicing agent” states that it is the authorized agent of the note holder, which is “Trust Number 99” (obviously evidence of a securitization). The servicing agent is certainly a party in interest, since a party in interest in a bankruptcy court is a very broad term or concept, as stated in *Greer v. O’Dell*, 305 F.3d 1297, 1302-03 (11<sup>th</sup> Cir. 2002). However, the servicing agent may not have standing: “Federal Courts have only the power authorized by Article III of the Constitutions and the statutes enacted by Congress pursuant thereto. ... [A] plaintiff must have Constitutional standing in order for a federal court to have jurisdiction.” *In re Foreclosure Cases*, 521 F.Supp. 3d 650, 653 (S.D. Ohio, 2007). But, the servicing agent does not have standing, for only a person who is the holder of the note has standing to enforce the note. *See, e.g., In re Hwang*, 2008 WL 4899273 at 8. The servicing agent may have standing if acting as an agent for the holder, assuming that the agent can both show agency status and that the principle is the holder. *See, e.g., In re Vargas*, 396 B.R. 511 (Bankr. C.D. Cal. 2008) at 520.

### **THE SHORTCOMINGS OF FORENSIC LOAN AUDITS**

In cases where the author has relied on loan audits to uncover certain statutory violations, many of the cases involved home mortgages that were older than three (3) years; thus, the statute of limitations was up for that statute. One would wonder whether that was money well spent. Therefore, the idea here is to research your mortgage loan BEFORE the statute expires, so you can take the appropriate action. For \$100, the Loan Compliance Advisory Group in Delaware will do a preliminary “audit” check for you to determine whether you’ve got issues worth pursuing.

On many an occasion, the author has heard competing loan audit representatives discuss the “other company”, when a competitor’s name was brought into question. The most common response given is, “They use boilerplate software to do their analysis.”

The author would suggest that you go on that company’s website and look at samples of their work. If you happen to run across a lot of “superfluous” insertions, like pretty flow charts and graphs that are meaningless, it could be that the auditing firm has placed this material here for two reasons: (1) it is trying to make a point in eluding to a specific fact in the audit; or (2) it is simply just taking up space in an attempt to make the report look “phat”; to appear more voluminous, so the auditors can “justify” their fees.

Don’t be afraid to ask for references when shopping loan auditing firms. The one thing you can be sure of though is that if there are statutory violations, a loan audit will reveal them. In doing so, the loan audit may give rise to other issues (like lender liability issues) that may have been missed in the audit because the auditors did not possess the “client intake” that is privy to most attorneys and their paralegals.

Additionally, under certain circumstances, TILA violations can exceed three years in the event the loan audit uncovers securitization in the loan. Your attorney should advise the loan auditor to investigate further if you believe your loan may have been traded into a portfolio and used as an underlying obligation for an asset-backed security.

## **OTHER APPLICABLE STATE STATUTES**

The author constantly stumbles upon relatively little-used statutes like RSMo 443.350, which says by statute that a Deed of Trust may NOT contain an out-of-state trustee unless there is a nexus created with an in-state co-trustee. You may wish to check your state statutes to see whether you can find a statute that parallels the foregoing. This could come in quite handy in a quiet title action when challenging the legitimacy of a Deed of Trust!

Then there are the perjury statutes and other applicable penal codes which cover the filing of erroneous or misleading documents or false financing statements that are used to defraud a homeowner. The level of punishment on these penal codes depends a lot on how far the fraud got. If the homeowner was wrongfully foreclosed on and the lender (who really didn’t own the loan) actually got his house and sold it, then the damages and jail time would be severe and the fines and sanctions would be astronomical.

In the Texas case, a Justice of the Peace is alleged to have done his own research in determining that a homeowner did not have title to his property and thus he evicted the homeowner. Some three weeks’ earlier, another Justice of the Peace hearing the same case denied eviction because she could not find evidence of ownership, let alone the fact the homeowner had been served, as is required in a home equity line of credit (HELOC) foreclosure. In this instance, not only are there multiple defendants, but a judge’s bond and a real estate broker’s license and errors and omissions insurance is weighing in the balance and may be “attacked”.

## **THE LAST HURRAH!**

Now let's cover one final aspect of HUD regulations that could spell treble-damage trouble for lenders who fail to engage in loss mitigation. On September 26, 2008, HUD issued a mortgagee letter (2008-27), identifying the potential for civil money penalties for failing to work with borrowers that possess HUD-approved mortgages. In order to avoid these damages, lenders must (1) ensure that the loss mitigation evaluations are completed for all delinquent mortgages before four full monthly installments are due and unpaid; (2) mortgagees must ensure that the appropriate action is taken based on those evaluations; and (3) they must maintain documentation of all initial and subsequent loss mitigation evaluations and actions taken.

Check out 24 CFR §203.605 to see what the code has to say about compliance regulations. This is all basically an administrative-type hearing against lenders that don't comply with these loss mitigation requirements. Treble damages however cannot be assessed on defaults that occurred before May 26, 2005, the rule's effective date.

**PARALELGAL'S NOTE:** If you are uncertain which one of the foregoing statutes, codes or situations apply to you, it's best to seek out counsel that has appropriate expertise in these areas.

**CAVEAT EMPTOR:** An attorney should order any forensic audits or appraisal fraud audits from a qualified source. Paralegals and "your next door neighbor" are NOT sources for legal advice (unless your next door neighbor is an attorney that is well versed in real estate and securities law).

## Section 3: Strategic Default

**Remember when the author told you “to let your conscience be your guide”? This is the section where that statement holds especially true. This is the part where you as the homeowner (or the attorney that wants to render advice on defending the home in court) get to decide at what stage of the “game” you want to jump in and play.**

What’s happening in today’s mortgage market is being considered by many in the finance industry as a “key paradigm shift”. According to recent studies by Trans Union (one of the Big 3 national credit repositories), people would rather pay their credit cards rather than their mortgages. That means the stigma of foreclosure is waning.

Long ago there were stigmas attached to bankruptcies; at about the same level of humiliation and embarrassment as having children out of wedlock. Bankruptcies are about as commonplace as foreclosures, the major result of the paradigm shift in financial behaviors. Now, strategic defaults are coming into play as a “business decision”.

Despite the major transformations to the Fair Credit Reporting Act since 2004, many Americans now view their credit scores as blasé. Survival is more important on a day-to-day basis and having credit cards to fuel impulse spending habits to elevate comfort zone levels has become the norm. What has become less cognizant to most Americans is that the credit card companies also securitized accounts as well. As a result, they are adding fees where fees weren’t previously added (like annual fees), escalating penalties and late fees and cutting credit limits based on activities not associated with credit card purchases. This is almost identical to the behaviors of mortgage loan servicers who add fees onto homeowners’ indebtedness at every opportunity to put them further under duress.

The author will “reach” here and declare that if the high credit limits of consumer credit card spending are cut, people will be more reluctant to pay on their credit card balances as well (and these are unsecured, despite the fact they’ve been securitized). Nobody likes their all-day sucker being taken away. Many (like the author did in 2003) are defaulting solely on the basis of protest of “home being worth less than what is owed”; while others are defaulting because of the demoralization of the American Dream of home ownership in the media resulting from a job loss, medical crisis or some other “financial hit”.

Strategic defaults are starting to become the norm, especially in corporate America. Major investment firms that bought high-priced developments and office buildings on the West Coast have purposefully walked away from their financial obligations. Surprisingly, you aren’t hearing about any legal actions against any of these firms. Yet, let a homeowner default and the foreclosure mill starts cranking out paperwork. Because foreclosures are now so commonplace, the stigma associated with them is waning.

With the advent of new information about the flaws and frauds in the securitization process, more people are purposefully and strategically “walking away” to get the banks into court to try to get their homes free and clear through the use of education in the court system. Unfortunately, walking away from your home doesn’t relieve your responsibility.

Had Ohio Attorney General Marc Dann and others like attorneys Michael Pines, Neil Garfield and April Charney not gotten involved in foreclosure defense, foreclosure offense would not have come about. Due to new information and strategies afforded to homeowners, strategic defaults are now becoming more palatable as a means of “getting even” with predatory lenders, if you want to call it that.

As of this writing an offensively-postured suit was filed by one determined Phoenix homeowner against Wells Fargo Bank and US Bank. As a back-up, that same homeowner has suggested bankruptcy in an effort to get the real owners of his note to come forward. The U.S. Comptroller of the Currency refers to this as a “foreclosure rescue scam”. Yet at least the client bothered to retain counsel and is paying his attorney rather than his mortgage. As for the homeowner in Ohio that bulldozed his \$350,000 home, it would have been much better to fight it out in bankruptcy court with an attorney that knew the real truths. If you’re going to strategically default, consult with an experienced attorney before doing so. There are certain liabilities you might face by simply walking away.

## **STRATEGIC DEFAULTS WILL INCREASE**

From the research in current trends, mortgage loans will continue to go into default based on rising unemployment and underemployment, continuously-sagging home prices versus what is owed and moral dilemmas surrounding obligations on option-arm, negatively-amortized and interest-only loans (which in effect are even more predatory in nature than most 80/20 subprime loans). Foreclosure actions are not going to go away any time soon despite what the media says. In fact, the author believes they will increase better than twice the rate of what they are at now. The more the media plays up on the scenario, the more likely a negative, moral influence they will have on those struggling homeowners who are on the verge of financial ruin. Better than half of that number will file for bankruptcy protection as soon as the foreclosure process commences on their homes largely influenced by the prospects of deficiency judgments. The other half (hopefully those who are reading this work) will choose to stand up and fight; undoubtedly the court systems around the country will be left to sort this out.

## **LENDER MISBEHAVIOR FUELS THE FIRE**

Pretender lenders have also committed acts of burglary, theft, criminal trespass and criminal mischief; not to mention due process violations, by seizing homes that weren’t theirs to take.

One 46-year-old homeowner in Allegheny County, Pennsylvania came home from work to find herself locked out of her home. The woman wasn’t in default on her mortgage. She’s now filed a civil action against Bank of America for sending a contractor over to her home, believing the house was vacant. The contractor stopped the utility services, cut water lines and electrical wiring, damaged flooring and finishings, winterized the toilets and sinks by pouring anti-freeze into them and “stole” the woman’s pet parrot.

Angela Iannelli was forced to drive well over two hours away to retrieve her parrot, Luke. When she contacted the bank, they were unresponsive. The outcome of the case is still pending.

A suburban Kansas City couple got into a default situation with OneWest Bank and the bank filed foreclosure against them in Johnson County District Court. After some struggle, the couple managed to cure the default but not before the bank's attorneys sent their henchman out to the couple's home to lock them out. The bank's attorneys are of course claiming ignorance despite the fact the bank accepted the money and still locked the couple out of their house, leaving a window open which could have drawn thieves in.

A Suffolk County, New York family was locked out of their home by Wells Fargo Bank contractors, despite calls from the father, Steve Tyson, that the home had NOT been abandoned. The contractors drilled out and replaced his door locks. Tyson managed to gain entry, only to discover nearly \$5,000 of his belongings missing from his garage.

Subsequently, Wells Fargo Bank sent one of its representatives out to check on the home, which the family was not immediately residing in but was fully furnished ... and again, trespassed on the property. This time, Tyson was there to confront them. In court, Judge Jeffrey Spinner (the same judge that gave another Long Island couple their home free and clear because of atrocities committed against them by OneWest Bank) not only whacked Wells Fargo with actual damages of over \$5,000 for the missing belongings and drilled out locks, but then hit the bank with exemplary damages of \$150,000 for criminal trespass on two occasions, to teach them a lesson.

## **BANKRUPTCY AS AN OFFENSIVE STRATEGY?**

While many of the homeowners affected by the foreclosure crisis are seeking federal court protections; as an offensive strategy, you may think the author mad at this point for even suggesting simple Chapter 7 or 13 bankruptcy proceedings as a way to confront your lender in an adversarial proceeding and make that lender prove to the Court that it legitimately owns the debt. As a last resort perhaps; but if you have no credit card or any installment loan debt, why would you want to go bankrupt?

This is one of the reasons that quiet title was thought of as an option. It's an option to bankruptcy. If you have minimal debt, why let the lender force you into bankruptcy court to get your loan out there and exposed? Sure, the stigma of bankruptcy is waning about as much as short sales and strategic default is, but bankruptcy? When you could do a quiet title action instead? Wouldn't it be so much easier of a move to quiet title and you still get to have your "meeting of the creditors" (your day in court) without screwing up your credit file for 10 years?

Consider for the moment that money is tight. You are juggling to make your adjustable rate mortgage payment which has just reset itself and virtually doubled in size. You've got major credit card debt on top of all of that.



If you're that upside down in debt, bankruptcy may be your only option. Lord knows you paid for years on this mortgage and it gets tiring because property values have made it upside down versus your loan balance. You are still making the payments but you wish there was a way to restructure without having everyone think you're a deadbeat. If you knew that you could foresee your options, would you risk wrecking your life and your credit report for 10 years?

**Part of your problem is that you are worried about what everyone else thinks and not what you think. If you were really concerned about what "you" think, you might consider finding a way to delay your mortgage foreclosure as much as possible and pay off all of your credit card and installment debt (which probably carry higher interest rates); find a cheap rental to hunker down in for two years; and take the 100-150 point hit on your credit bureau with a short sale or deed in lieu of foreclosure, a comment that MortgageFraudExaminers.com's Bradford even agrees with.**

**"In 2 years", he says, "you could qualify for a no-money-down FHA loan; and you'd have plenty of time to readjust your financial position."**

Forget what your neighbors think and start thinking "positive strategy". Using bankruptcy court [and they've really tightened up the rules using the "means test"], especially if you apply for a Chapter 7, you'd be asking for total liquidation and that is NOT what you want, so you'd end up in a Chapter 13. If you have too much debt, you may find yourself in an expensive Chapter 11, which starts at \$12,500 for most attorneys' fees. This turns into a giant roulette wheel for most homeowners, who are taking a serious gamble with whatever remaining funds they have in making poor legal choices.

If you don't hit the maximum amount allowed (which homeowners in Florida, California and Hawaii are probably going to have a problem with), then you would stay in Chapter 13 and fight the lender in bankruptcy court (this according to several bankruptcy attorneys the author has spoken with).

As of this writing, those homeowners who do exceed the eligibility requirements of a Chapter 13, as you cannot have more than \$336,900 in unsecured debts or \$1,010,650 in secured debts; you will end up having to file a very expensive Chapter 11. (*A totally underwater second or third mortgage is deemed to be unsecured, and if it, added to the other unsecured debt is over \$336,900, the debtor could be found to be ineligible for a Chapter 13.*) In states like California and Florida, where real estate prices are deflating and many homeowners are upside down in their notes; this could have an impact on their eligibility to file a Chapter 13. (Since everyone's situation is different, you need to contact a bankruptcy attorney and go over your specific case with them.)

In a foreclosure defense posture, your attorney would immediately notify your lender that a "stay" has been effectuated as a result of the bankruptcy petition filing. This of course, will cause the lender's attorneys to attempt a Motion for Relief from Automatic Stay, in an effort to get the court to release your home. This is where the real battle commences.

For you, the debtor, “your day in court” where the stakes are higher despite the outcome, is still going to take a 450+ point credit rating hit for 10 years.

At some point, the Bankruptcy Court will assign a trustee to your case. You want to make sure your attorney lets him know that there are issues of material fact in dispute; hence, the filing. As long as you are disputing your mortgage, you might as well dispute your credit cards too and see whether or not your student loans were securitized as well. Any lender can turn out to be a “pretender lender” and thus, not have the legal standing to collect on the debt, thus their debt claim would be dismissed by the Court. Your attorney should see to it that all of your schedules are properly filed.

To the author’s knowledge, the concept of “silver bullet strategies” being used in the justice system is still in its infancy (unless you live in an area plagued by high foreclosure rates) and judges are having a hard time coming to grips (in all good conscience) with the fact that the lender (through the securitization process) may have watered down or virtually eliminated his chances for negotiating a settlement.

**AUTHOR’S NOTE: This is NOT the time to stand there and tell the judge you are there to get a “free and clear” home. This is not legal advice, nor was this the author’s intent when he suggested this route as an option. If through the end result of these proceedings, you happen to be on the back end of an asset case, consider yourself lucky. You’ll still have the bankruptcy filing on your credit record for 10 years, according to well-established law, despite what the U.S. Comptroller of the Currency thinks about it. Ask yourself whose side is the Comptroller on here? He’s not the one in trouble. The idea behind bankruptcy is to be able to stay in your home and continue paying the proper party in interest. It’s just sad that you may end up having to go this route when you know the lender is wrong.**

It is hard to conceptualize that things with the mortgage and credit industry have run afoul. A judge looking at a “prove the note” or “proper party” issue may throw up as much resistance as if you raised the issue that the U.S. government had advance knowledge of and participated in the events of September 11, 2001. Because that thought process is so overwhelming to consider, a lot of attorneys are still skeptical about even using any type of offensive strategy. This is why April Charney has had more luck just using the tried and true Rules of Evidence, Procedure and statutes and standing case law.

If you did find a judge that was “reasonable”, the lender’s attorneys could be taken to task to come up with the paperwork necessary to prove (or disprove) their standing. In another case in Johnson County, Kansas, one homeowner, Greg Morrison (who was gainfully employed in the insurance business), found himself unemployed when a foreclosure showed up on his credit report. In light of the fact he’s been living in the home without paying on his mortgage for over ten months (the author knows this personally), District Court Judge Charles Droege is holding the lender’s attorney’s feet to the fire in demanding they provide documentation that evidently still “doesn’t exist”. The lender has asked for two continuances and still hasn’t coughed up the “proof” and the Court will not accept electronically-recorded documents; it wants the originals.

A Motion for Summary Judgment and Motion to Dismiss is forthcoming; following which, the homeowner's attorney intends to ask the Court to quiet the title to the property. Expect to see the pleadings surface at some point.

Whether you get very far in your case depends on the skills of your attorney in alleging that documents were trumped up or unverifiable and challenging every comment made by the lender's attorneys as hearsay. As was recently evidenced in a bankruptcy court in Tucson, Arizona, the Hon. Eileen Hollowell slam-dunked Deutsche Bank's motion for relief from automatic stay (*In Re Tarantola*). For those of you reading this case, understand that Judge Hollowell understands securitization and at the time of this writing, many other bankruptcy judges are also coming to grips with this scenario, but only because they have a vested interest in protecting the debtor's estate. Securitization payouts affect the debtor's estate as evidenced by CPA Michael Nwogugu's research.

You have to honestly tell the Bankruptcy Court (or the District Court judge if you're not taking bankruptcy) that you genuinely want to pay the true creditor in this matter; however, the "suggested" notification to the creditor you sent out (to the pretender lender) also includes, "John Does 1-1000", as holders of an asset-backed security portfolio that contains your note. This compounds the problems for the lenders because they have more to do to tie the ends of agency relationships together.

*In Re Box* in the Western District of Missouri was another classic example by Hon. Arthur Federman in making Bank of America produce the necessary documents to prove it owned the note and could legally be entitled to come forward into a meeting of the creditors. The biggest stumbling block is getting past the Motion for Relief from Automatic Stay. Again, you can bet that once you file your bankruptcy petition, the lender's attorneys will attempt that Motion. Once that is blocked, due to issues of material fact being raised that the lender is not the true creditor, it is now up to the pretender lender to prove he IS the legitimate creditor, not you. An interesting thing about bankruptcy (similar to quiet titles actions) is that the Court places the burden of proof of actual claim on the creditor. It is also undisputed that bankruptcy courts and their respective trustees are charged with the duty to weed out any fraud being brought before it. Of late, law firms are being sanctioned for "bad behavior".

## **OFFENSIVE STRATEGY AS A WEAPON; NOT A NEGOTIATING TOOL**

Considering any methodology against a lender merits a lot of heartfelt thought. Any strategy is going to cost money. You will have to find that money somehow, whether it's in an extended series of garage sales; odd jobs; sending the kids packing mowing lawns or babysitting to raise the extra cash (this will be a great learning lesson for them as well as it keeps your family unit together) to help pay legal fees and to help pay down other debt or save up for a move to a cheaper set of digs; possibly in an area that is more plentiful in the type of work you do. With the economy the way it is today, employment choices should factor in as much as living choices do.

If you are considering or have sought bankruptcy protection, it probably becomes obvious to your pretender lender that you are using this strategy as a means to impede the foreclosure process. In an offensive posture (here comes the “if it were me” scenario), the author would evaluate his unsecured debts, see how much actual revenue he could produce in 60 months time, and go into bankruptcy court on a Chapter 13 filing, attempting to discharge all old taxes that statutorily can’t be collected, all old credit card debts and any other notes and issues arising from past business transactions where one could personally be held liable; and take the mortgage as secured debt and throw it into the mix. Other borrowers have divulged this strategy to the author throughout his research.

Texas and Florida are true homestead states and are considered debtor’s havens. This is why there has been so much in-fighting in DC trying to get bankruptcy laws changed so that Texas and Florida (there are a few other states that have similar exemptions) will come into uniformity with the other states that don’t recognize homesteading. This means if you want protection, you’ll have to file bankruptcy or lose your home if you can’t cure a default. Even with that move there are no guarantees. As far as the author can see, homesteading gives redemption rights to the homeowners and lenders don’t like this.

The mere fact that the lender’s attorneys have to prove that their client is the proper party should be one measure of consolation, especially if your attorney has “boned up” on securitization procedures. You have to assume that the lender’s representative will lie at every turn, even to the bankruptcy court. The lender’s attorney is there to protect his client’s interests, at all costs. Your subsequent research should bear this out.

It becomes necessary then, to make sure that you point out to the court that your schedule of creditors lists the pretender lender twice because you have no other way to contact the unknown parties other than in care of the pretender lender. This is why on the creditor’s list you would consider listing the pretender lender who is trying to foreclose on you as well as “JOHN DOES 1-1000 (or to the asset-backed security holders of account #insert account here) in c/o the pretender lender”. In order to attempt the second entry, it would appear that the borrower would have to have reason to assume their mortgage has been securitized. A forensic mortgage loan analysis done upfront could reveal it.

While it seems that this is more of a defensive posture, if you are current with your mortgage but are carrying a heavy debt load of unsecured credit and can still qualify for a Chapter 13, you may wish to consider dumping much of that unsecured debt as long as you’re in the forum. From all indications, you can utilize Chapter 13 bankruptcy for up to 60 months on most debts. Most creditors, once they receive notice of your filing, will not pursue claims against you; and the harassing phone calls and letters will stop. However, this does not preclude the much-anticipated Motion for Relief of Automatic Stay on the lender’s part. Because of continuous frauds on the courts by some foreclosure mill attorneys; judges and bankruptcy court trustees are now the wiser and are handing out defeat to the lenders who can’t prove they really own the homes they foreclose on. If you have questions on any of this, consult with an experienced bankruptcy attorney.

Your bankruptcy attorney will have to be well prepared to object to that motion, raising issues of material fact and objecting to any hearsay on the part of lender's counsel. The strategy here is to go fishing in advance of the filing and find out what possible causes might be available to you for getting the motion denied or at least taken under advisement; or in lieu of that, to have enough issues of material fact raised that an evidentiary hearing and discovery is called for.

The caveat here (from everything the author has studied) is that the attorney has to be well-schooled in Rules of Evidence and have a clear understanding of the local court's Rules of Procedure. Because of the nature of the issues, most attorneys get flustered because it means that they think there will be hundreds of hours needed to bone up on securitization. From the author's research, this may not be necessary. The bankruptcy trustee may jump into the fray on your behalf.

This was the case in *In Re Box*. The Court Trustee was very much aware of these frauds and warnings by the bankruptcy court supervisors in other districts to be on the lookout for fraud and flimsy paperwork, that he overrode the local attorney (who hadn't a clue of any of this stuff) and lodged a complaint with the Court. As a result, Bank of America and its counsel were banned from even speaking in open court! In its decision, Judge Federman invited the bank back into court as soon as it could prove standing and agency nexus by production of the required documents. This was in June of 2010. The case is still dormant. You be the judge. Is Bank of America coming back? Many other Bank of America cases in the Western District of Missouri are also hanging in the balance.

You could use U.S. District Court to attack the specific fraud issues; or take them into state court, depending on whether the issue involves a federally-chartered lender or a state-chartered lender. One suggestion has been made to take an SPV case into Chancery Court in Delaware, where the defendant only has five days to answer a complaint, let alone make application to be relieved of default. It is ironic in this instance because virtually all banks and financial institutions and MERS, are incorporated in Delaware.

Simply stated however, if the lender is not the proper party to be taking an action against you, then what defensive weight do they carry? What's less likely in a bankruptcy filing is that you'll have a team of attorneys assigned by the lender to take you on, when you've got a trustee and a judge looking down their noses at them. It's a tag-team situation because the Trustee in Bankruptcy is an officer of the Court as well and that means you get to educate two parties (the judge and the trustee) as to the issues you will be raising to the legitimacy of the lender and the John Does that are hiding somewhere, yet to be brought forward. That could be a good thing ... to get a trustee suspicious of a creditor that may have no legal capacity to be there. The key idea here would be to object to that lender's appearance before the court at the meeting of the creditors and to continue to object to their appearance every single time they show up! Again, bankruptcy should by all right and reason be considered as a last ditch effort. If you were screwed over in a wrongful foreclosure, discharging any remaining balance in bankruptcy court when the case is still appealable could be considered a big waste of time. All of this requires advance planning and precise financial execution in managing debt during that time.

## **A HARD PILL TO SWALLOW**

The idea that bankruptcy could be used as an offensive tool may still be a hard pill for you to swallow. If you have any other bright ideas, such as a definitive lender liability action, then you will not only need to find an attorney that “gets it”, but one that is used to dealing with issues of contract and real estate law that understands lender liability issues and not just singular ideas such as Fair Debt Collection Practice Act violations. In filing for bankruptcy, all your creditors (and through publication in the legal notices) and your friends and business acquaintances will find out. What kind of stigma is being attached to your life? What will the neighbors think?

Your neighbors are probably living from paycheck to paycheck and hand-to-mouth just like you are right now; they’re just too embarrassed to admit it. With all that is negative about the economy in the forefront, you will just look like another poor casualty about to bite the dust. What your neighbors don’t know however is that this is a strategic ploy to restructure not only your asset pool, but to expose fraud, truth-in-lending and a host of other viable deceptions by the pretender lender. Forget the stigma! It doesn’t matter now. Filing bankruptcy at least gives you a little breathing room and a way to dump a chunk of debt. Whatever the case, filing bankruptcy is not the total solution to this problem. Getting the proper evidence and pursuing the lender from an offensive posture puts you in the driver’s seat with the help of a good attorney.

## **THE FISHING EXPEDITION**

Before undertaking this methodology, you’ve got to bring yourself up to speed. You’ve got to get yourself knowledgeable about the most intimate details of your mortgage transaction. In order to do that, you have to find out what the lender knows. If the lender hasn’t done his due diligence, you will discover a proverbial mess left behind in the wake of his filings; or not. The author is “suggesting” here that this is what he’d do:

**STEP 1:** Start with the county office where your deed might be recorded. These offices might be known as County Clerk, County Recorder, Register of Deeds and the like. You will want to bring your checkbook or cash with you, because what you uncover regarding your Deed of Trust and note and mortgage and any other assignments that are officially recorded will have to be copied by the clerk and then certified, to make them admissible in court.

Don’t be surprised if you don’t find anything else but ONE filing of the initial security interest or Deed of Trust on your home. Make sure you take your legal description with you when you visit, because the security interest may only state your legal description and not the actual situs address. If you took out your mortgage loan between 1999 and 2008, chances are very good that your loan has been securitized through proprietary trading. If that is the case, more than one document representing security interest needs to be there. If it isn’t, this could represent a “kink” in the armor of your future opponent. This is the very thing that title companies will NOT insure against!

If you only find one filing and it was an assigned deed of trust done by the original lender to MERS; you can safely assume that you may have a clouded title because securitization has caused the deed and note (mortgage) to be split up, sold and resold many times, thus, fitting within the parameters of the *Kesler* case. Each time a transfer in ownership interest occurred, a new filing should have been done to “perfect” of the security interest already on file. As the author has discovered, having only one filing means you will have to utilize discovery to find out who else has had a security interest in your home. Up to this point, all of the claimants have allegedly been hidden in MERS’ electronic databases.

This evidence (or lack thereof) will serve you well in a quiet title suit coupled with a host of other options (predatory lending action, false lien or other statutory claim, etc.).

At the time of this writing, a handful of accountants who have reviewed the securitization process claimed to have found several illegalities with it. The biggest fraud in the shell game that was created on Wall Street was that when assignments were tendered via contract, no money or anything of consideration was tendered. Any attorney who knows anything about the standard elements of a contract knows that consideration must change hands in order for the contract to be enforceable.

The only reason the author can deduce why the existing securitization contracts haven’t been declared void by a court is because they’ve yet to be discovered. Many of these contracts have been declared proprietary by the Wall Street firms that created them. The New York Fed appears to have been running interference.

Now what you do think happens to your debt when the original lender “sells” your loan to another lender? That new lender becomes just like a collection agency?

If the new “intervening assignee” in the chain of ownership hasn’t perfected his security interest by filing new paperwork and assignments at the courthouse, claim of interest in your property is unproven; and thus, title to your property may be clouded.

STEP 2: Once you’ve obtained this documentation, gather up all of your mortgage loan documents that you received at closing and make an appointment to see a representative of your title company where you did the closing of your loan. When you visit, ask them if they will take a few minutes to review all of the documentation to make sure it is there. Make sure you take your title policy with you, as your title was guaranteed through their insurance company to be marketable and free of encumbrances, other than the ones you caused to be placed on the record. Insist on complete confidentiality here. Instruct the title company NOT to contact the lender!

There is a caveat here: Most title companies look for standard flaws. They may not regard MERS or anything it does as a “flaw”. They also don’t look for breaks in the agency relationship. If all they see is the original Deed of Trust or mortgage, they will issue a title policy or title report and tell you everything is fine. That is not what you want to hear. You need to sit down and discuss with your title company as to whom their errors and omissions carrier is and that you’d like to discuss further issues regarding title.

When you sit down with the new title company executive, you need to point out to them that there are glaring errors or statutory violations of your Deed of Trust or mortgage. You may have found serious notarial errors or fraudulent recordation executions that may warrant further investigation. If the title company was asked if they would insure your title then, and they declined because you pointed out potential errors for which they may be held liable, you need to get a declination letter from them to serve as evidence in your quiet title action. This will be illustrated further in *Section 12*. This is what the author would do in his own case. In lieu of that, you should also get certified copies of any missing paperwork that the title company might keep in its archives. Again, bring the checkbook or cash to pay for their time and expense. At some point in all this, you'll wonder if your title company is liable.

STEP 3: Do a Freedom of Information Act request from the FDIC if you know your loan was part of a debt transfer via a takeover (like OneWest Bank taking over IndyMac Bank). A sample letter, which you can customize to your own purposes, is found in the appendices. Send this letter certified mail, return receipt requested. The time frame for an answer from the FOIA Officer is twenty (20) days. The FDIC, armed with your lender's name and loan number, can uncover quite a bit of information (many times through the lender itself) without costing you tons of money.

A foreclosure sale case in the nonjudicial State of Colorado was set aside after a litigant sent a FOIA Request to the FDIC. When he got his response back (in about 6 days) he discovered that his mortgage loan had been sold several times over and securitized and that the lender that was foreclosing didn't have an interest in his property. The judge, who was initially adverse to his pleadings, is now rehearing the matter. It has also been discovered in some instances that the FDIC does NOT have the applicable paperwork; however, at least you asked and at least you have a written response from them.

STEP 4: Once you are armed with your "puttload of paperwork", make an appointment to see an attorney. Use the resource list contained in this book to find one nearest you. If there isn't one close, go to your local lawyer referral network or county bar association to see if there is an attorney that is well-versed on real estate and contract law. See how many quiet title actions he has actually argued that was successful. See *Section 8* for more details. Due diligence in your search is more proof to the court that your action is NOT frivolous. Also of importance is to ascertain whether your attorney has represented banks in any kind of lender liability or quiet title action. Any attorney who regularly represents banks in actions like foreclosure or in a defensive posture is likely: (1) adverse to the idea of fighting the very people that give him his paycheck; and (2) will likely steer you into mediation to "protect" his interests because of his loyalty to financial institutions.

STEP 5: Make three copies of everything you now have on file. Give your attorney all three sets ... one for the attorney, one for the forensic loan auditor and one for the TILA auditor (if they're not one in the same person). Pay the attorney to order a forensic mortgage loan audit and TILA audit. Within a week or two, you should have all of your results.



By the end of one month, you should have all the documentation necessary to take action! It is necessary to “fish” first to see what kind of bait you’ll be using to reel in the catch. You’ll also need to see what documentation you might be lacking to prove your case and a forensic loan audit and TILA audit can help you determine what other paperwork you may wish to have your attorney try to obtain through discovery and evidentiary hearings.

## **YOU’VE DISCOVERED POTENTIAL ERRORS!**

Let’s say you discover some sort of fraud or inequity through a forensic mortgage loan audit (preferably BEFORE the lender has a chance to realize his problem and attempts to correct it by filing phony documents) or some other obvious “assignment flaws”; you have a much better chance of offensively beating that lender in court, largely because you bothered to familiarize yourself with what to expect when you get to court.

From an offensive posture you are probably aware that if the security interest was not perfected past the initial lender’s filing with MERS, any subsequent lender (including the pretender lender now appearing at the meeting of the creditors or in your initial court action), is probably not the TRUE CREDITOR! Your proof of certified copies showing the LACK of perfection of the pretender lender’s security interest [this is the last thing the sloppy loan servicer will ever realize] was never filed in the first place! Don’t you think this will look a little weird in court ... your showing up with certified copies that are completely admissible into evidence, showing that this creditor who stands before the judge and/or trustee doesn’t have their act together?

CAVEAT: If you are going to file suit against a lender involving your mortgage loan, the “ticket” is large enough to have reason NOT to contact your lender and tip them off as to what your intentions are! You will need to do a certain amount of research to locate the lender’s registered agent with whom to serve process. Have your attorney research these contacts thoroughly. Again, your attorney will know best how to proceed with service.

## **QWR’s, DVL’s and IDK’s**

A lot of preparatory work has been called for by many “experts” these days. You may have heard the term “QWR” (an acronym for Qualified Written Request) or DVL (Debt Verification Letter) bandied about. There is a cost for this too.

These letters are supposedly sent to whatever lender you assume is handling your loan. Even after the expense of preparation according to the guidelines you THINK you may hit on the lender for answers on, doesn’t mean you’re NOT going to get hit with one big “IDK” (I DON’T KNOW if that will work anyway because the lenders seldom answer it). Usually, the lenders are tipped off to this kind of letter-writing and they understand that this campaign is generally a prelude to some sort of legal action. With the expense of such a campaign running anywhere from \$250 to \$1000, think twice about what this is going to accomplish when it gets sent out. Loan auditors are really keen on the idea.

**After much research, the author feels it's basically a "crap shoot".**

Sure, these letters are provided for under the Real Estate Settlement Procedures Act [RESPA]. This would be more applicable if your mortgage loan were less than three years old and within the statute of limitations for statutory claims under TILA and one year on RESPA. In most cases however, the lender will balk at the letter and many times will not respond. By telling your lender you intend to pursue court actions, you give them the opportunity to go to the courthouse and perfect their security interests BEFORE you establish they weren't perfected in the first place. They may end up making more of a mess that you'll have to challenge. At least with an attorney in the mix, all of this correspondence is "on the record" and the lender won't be able to backdate any documents on you. Is that what you want to have happen?

One might think it unnecessary to go to all of this trouble and expense once the statute of limitations has expired on the federal statutes if you know the loan hasn't been sold to another party since May of 2009, when the new regulations went into effect. With a quiet title action being filed, do you really think TILA is going to matter? TILA is federal and thus your attorney would be reluctant to use it in state-type actions. From a paralegal's perspective, by the time you've initiated suit and filed a lis pendens, it will be a little too late for the pretender lender to "dummy up" or file new paperwork at the County Recorder's office; your filing and prima facie evidence was already created with your initial exhibits! This will also lend greater impetus to your motion to quiet title and ask the court to expunge the existing lien on any number of meritorious claims. If the Court balks at your request, then you would probably have to "educate" the judge into understanding the "scheme of things". The idea here, as will be noted in upcoming sections, is to strike FAST and HARD and TAKEDOWN quickly! If it were the author, a quiet title action would be commenced along with the filing of a lis pendens lien at the county recorder's office. One cannot work without the other, because without a lis pendens, you leave the door open to foreclosure right smack dab in the middle of your quiet title suit. Your attorney obviously, would have to have the last "say" as to this strategy. With all of the recent developments unfolding at a fairly rapid pace, filing bankruptcy may not be the only answer to solving fraud issues involving your mortgage loan. Besides lender liability actions, the following section applies to virtually 62,000,000 mortgages registered with MERS since its inception.

## **QUIET TITLE ACTIONS AND MERS**

Another method of strategic default is to attack the lender's security interest in your property by challenging his filings with the County Recorder's office (depending on where you find the most current security interests perfected). Pay particular attention to whether "Mortgage Electronic Registration Systems, Inc." shows up in your filings; as this will be a plus to you in getting a court to quiet your title. MERS is only a nominee and has no beneficiary interest or "capacity" in this case (and of course they will take issue with this). The recordation of MERS alone may be enough of an issue to cause the court to allow your case to proceed (provided you have the proper documentation).

Then again, you may have to put together other “merits” in a multi-count action for which you can prevail.

The title companies do not fully realize this yet, but many of them are beginning to suspect that MERS is going to cause problems for them in the way of “exposure”. They don’t want that; because it generally means that their errors and omissions insurance carriers are going to have to pay out damages to someone for MERS’s flawed behaviors. As far as the author can ascertain, the title company may have some exposure; from the point that MERS becomes the nominee of all successors and assigns, forward. The author would like to see in the not-too-distant future for title companies to withdraw their policies unless the lenders they insure start filing ALL of their documentation in the courthouse instead of hiding it in MERS’ electronic databases. The author surmises that MERS should not be taken for granted. If MERS doesn’t own the note and only holds legal title to property ... and the note goes one way while MERS goes the other way ... who loses?

Even though the title company cannot be held liable for incomplete research if you used that research for business purposes, there may be issues if it is discovered that they “didn’t catch” an encumbrance or security interest that was known during the initial title search, they might have to pay off someone for a damage or a loss. The payoff on that will be limited, so you’ll want to consult with your attorney further about going directly after a title company. In any case, a title search, accompanied by all of the certified copies, should arm you with enough ammunition to get into court for your initial hearing.

## **WHAT THE COURT CASES SAY**

Theoretically, if your note and mortgage were split up and the note was sold and resold several times over, the lender’s actions against you may be unenforceable, especially if the note was securitized.

This could be construed as a title defect, which is what the title company was paid by the seller to insure against.

Since the title defect was created AFTER you bought the property, the title company’s liability would be virtually non-existent according to what the author has learned.

However, try to sell a property with MERS potential for clouding title, with all of the standing court cases being published, and the issue of liability may be different.

Again, the author (“if it were me”) would not sell his property if he knew of existing clouds on his title. This is every homeowner’s responsibility; therefore, make sure there aren’t any clouds by doing some research on your own. Besides, it’s a great civics lesson visiting the courthouse anyway, because then you’ll be able to appreciate the procedure!

## FORECLOSURE OFFENSE VERSUS DEFENSE

In any case, you must adhere to the Rules of Civil Procedure, state law and federal law for the Court in which the action is being taken. There's nothing worse than going to all of the trouble and expense to prepare an air-tight case, only to have it tossed because the "other side" squeezed through a loophole that you created by not timely filing motions and answers. This creates a real mess of an uphill fight to stay "in the game". In foreclosure defense, the action by the pretender lender has been commenced against you because of default and breach of contract.

You can object to every statement the attorney makes as hearsay because the attorney has no first-hand knowledge of your mortgage loan. They're just working off their crib notes. Unless they can produce first-hand witnesses (the mortgage loan officer that handled your loan, the escrow officer that closed your loan, etc.), they have at best a weak case, especially when you challenge their "proper party" status. Attack their lack of "proof" in discovery and you'll find the lender "stalling for time" while they look for documents that they claim exist (but in all likelihood do not).

In foreclosure offense, the action taken by you seeks to get to the heart of who your true creditors really are, based on a claim of "clouded title"; because it's obvious the pretender lender isn't the proper party and thus the question remains as to who is claiming an equitable interest in your property, despite who you're actually making monthly payments to. The prepared Plaintiff will have already ascertained where all the breaks in the chain of title are. In a quiet title action, forensic loan audits are meaningless unless they pinpoint violations of state statutes. With the boilerplate methods being used by auditors, specific recognition is highly unlikely. Having allies in the county recorder's office as well as at a competing title company is surmised by some to be your best bet.

Additionally, the Plaintiff's attorney will have examined every single piece of paperwork generated in the mortgage loan, from the application all the way through the closing and recordation process and will have analyzed it for errors and omissions. More of this will be discussed in further detail in *Section 5: Preparing Your Case*. **Again, this book was authored for the purpose of giving the reader a preliminary education from the author's investigative journalism standpoint as a paralegal. The intent is NOT to render legal advice but instead to present options for the reader to consider in filing an action against the lender in the wake of the bailout of the mortgage industry.**

As an afterthought, you have to remember that Timothy Geithner and Henry Paulson are deeply involved with the Federal Reserve Bank and this country's finances and they know too well first hand that America is in serious financial trouble. It's government, which is supposed to be "By the People and For the People", is being run by the well-educated oligarchs who could care less about you and whether you stay in your home or not. They just look at foreclosure statistics as a gauge of the political climate. What will change America is a slew of offensive foreclosure proceedings filed in the wake of these unconscionable acts.

And further ... if you are going to fight, then come up with a strategic game plan and quit fighting with your spouse and other family members. Let's face it, your credit score is going to take a hit for awhile while you get through this. Pay on your credit cards and keep food on the table, your utilities paid and the taxes and insurance paid. Your property taxes are what keeps your county running and you don't want to get crossways with it. Dump unwanted inventory through garage sales and take the more valuable items and sell them on eBay or Craigslist. Sock that cash away for legal expenses. The way things are going right now with the foreclosure mess there are a variety of stall tactics that can keep you in your home without making a single payment for at least a year, maybe longer. Affirm this plan with an attorney in your free consultation BEFORE you start doing anything, especially stopping making your mortgage payments!

### **“JINGLE MAIL” ROCK**

As Florida foreclosure defense attorney Mike Wasylik has touted in his circulars to besieged homeowners: “You have to decide whether your home is worth fighting for”.

If you are that upside down in your mortgage and if you must default because you lack the funds and the necessary skills to fight, and don't have enough debt to strategically file bankruptcy, then the option of mailing the keys back to the lender sends at least a small message. The author was forced to do this in 2003. Had he known then what he knows now, he would have fought it.

This procedure will also allow you time to have garage sales and at least get the cash you need to regroup. Wait until the last possible minute to leave and DON'T move out until you become aware that the Sheriff is going to “kick you to the curb”. There is nothing worse than having Johnny Law throw your stuff (and you) out of the house in front of everyone (or put it in storage and charging you a fee).

This extra time will at least help you find a new place to live while you lick your wounds. Be prepared to “get small” very fast; taking what little savings you have in cash, closing all of your bank accounts, moving in with relatives or renting a shack “out in the woods”; because these jokers aren't going to leave you alone until they've bled every last dime out of you and your estate to pay off a deficiency judgment. By you NOT fighting the banks ... another senseless casualty is lost to fraud.

### **DO NOT DEAL WITH MORTGAGE MODIFICATION FIRMS!**

Florida foreclosure defense attorney Mike Wasylik warns against this. These people make fees off of your stupidity. Remember why you bought this book? The author will again discuss the real loan modifications under HAMP and why Obama's ideas don't work. There are investors who will take over your deed and file the suits for you, in exchange for a piece of the proceeds “once the smoke clears”. Fully analyze your scenario prior to signing away your home. You may still be on the hook for the balance.

Your best bet is to try and locate an attorney and see what they can do to help you. Because attorney's fees and retainers vary, you may have to negotiate for an up-front retainer and then to make monthly payments until the attorney's fees are paid in full. All of this of course, depends on your circumstances. The last thing you want to do ... because these scammers read the notices at the courthouse and then send you documentation in the mail in an attempt to lure you into their schemes is to further check with the Attorney General's office or the Better Business Bureau in your state to see if they are reputable before engaging their services. Don't be afraid to ask for credible references that you can contact to find out if the services they offer are legitimate.

## **THE SHORT SALE AS AN "OUT"**

If you're just going to throw in the towel and walk away, remember that the short sale of your home may be illegal because the lender that foreclosed was NOT the true creditor ... and you may be shortchanging yourself by not even trying to find out who the true creditor is BEFORE handing over the keys (which is what the pretender lender wants you to do). Citibank is now conducting a test pilot program of 1,000 homeowners in default to see who is willing to walk away from their homes in exchange for moving expenses.

There's nothing wrong with asking the lender whether they really own the note before you engage in any agreement to short sell your home. Make them give you a copy of the note if they have it, showing all the indorsements. If you suspect fraud, you can have the document analyzed for accuracy. There is a 40+ point checklist in Section 7 that will help you spot frauds in such assignments and transfers that you might be presented with.

What if Citibank doesn't really own the home? You should know that if you allow this to happen, Citibank just pocketed all of your "equity" (if there is any) as well as what funds they recovered at sale, even if they may not have the legal authority to accept it (and they'll pocket your proceeds as profit, while calling it a "loss" to the investors that actually own your note that think they advanced the money towards it). *"Oh, what a web we weave ..."*

Some investors are buying properties as trustees and then taking the property and negotiating for the sale to outside parties, whether the home goes into foreclosure or not. As a party of interest that is recorded on the deed, the honest trustee will sue on your behalf and give you a portion of the proceeds from sale if it gets that far. If you have any doubts about following that kind of procedure, don't. Some of these people are scam artists.

In any case, keep in mind you as the borrower will still be facing deficiency judgment after the sale if the trustee can't beat the lender in court. Are you going to cope then when the bill collectors start trying to garnish your wages and stain your credit reports even further ad infinitum, ad nauseum?

## THE LOAN MODIFICATION

The author asks the simple question, “Why on earth would you want to sign a loan modification agreement when you don’t know the status of your current mortgage loan?”

The Obama administration was considering banning foreclosures altogether; however, with the change in political climate over the economy, all this has taken a back seat. Obama obviously does not understand that servicing lenders do NOT have the legal capacity to make new loans out of existing defaulted loans.

As a result of the lackluster performance of HAMP, a major class action lawsuit has been filed in Seattle, Washington and this in turn has caused numerous issues out of that suit to be used to spin off other lawsuits like multiple tornados out of a single storm. One litigant argues that certain issues of the HAMP program would be useful to at least get the judge’s attention and get the judge on your side because you at least tried to work things out before they got ugly and you were forced to file suit. Everything involving HAMP challenges are still gummed up in the procedural works at the time of this writing.

The Executive and Legislative branches of government are acting just like the Judicial branch: mediate and settle, no matter who continues to get hurt (as long as we all get reelected in November) by encouraging them to modify their current delinquent loans if possible rather than foreclose on them, which would drive real estate prices down as the glut of newly-foreclosed homes on the market explodes.

In effect, the “out” that Obama gave to lenders, which was another screw job on the homeowners, was to allow the lenders (whether they had the legal authority to modify the loans or not) to re-do a homeowner’s mortgage loan to make it more “palatable” and affordable. Rarely does this work. If it did work in reality, why did only some 400,000 homeowners actually benefit from this program out of all of those homeowners out there that are in trouble?

***The loan modification benefits the lender not the borrower.***

In effect, the lender has now (more than likely illegally) replaced his old securitized mortgage note (which he probably cannot find anywhere) with a brand new note that he will NOT securitize or trade proprietarily because he knows you’ll default at some point and then he will have a fresh set of filings to come after you with. This is why the author, even as a paralegal, would never do a loan mod himself. Why would he suggest that you do it if he knew you’d have any kind of a chance of beating the lender in court? Could the entire loan modification process put the homeowner in a condition of economic duress? Would a quiet title action be better served? Would it be better just to move in with the “parentals” and help them get on with their lives until you can sort yours out? Wouldn’t your chances be better if you just hired an attorney to fight the fight up front and take the lender to task using a host of lender liability or appraisal fraud issues and other options you may have available? And stop worrying about what your neighbors and friends think about what you’re doing? These are things to consider in effectuating a strategic default.

## **Section 4: Identifying lender liability**

In the early days of these types of actions (which started out in the commercial realm) it was commonly thought that if you were in business and you borrowed start-up or development money from a lender and the lender and its representatives became involved in your business to the point where it influenced direct, day-to-day decisions, the lender in essence became liable to the borrower for those decisions. Non-performance and performance to the extent of tortious interference brought claims from borrowers (generally in state court) that the local lender caused harm to the business in some way, thus resulting in massive damage awards. What started out as business-related actions has now evolved into homeowner-borrower claims of very similar types of torts by their residential mortgage loan lenders.

### **ASSERTING YOUR CLAIM**

In order to effectively give the pretender lender the “benefit of the doubt” for the purposes of litigation, you have to notify the lender of your complaint. It could be anything from a failed promise made to you by the original lender, to lack of disclosure of some part of the loan or for some other outrageous violation like taking action on a foreclosure by locking you out of your house BEFORE a judgment was actually rendered (don’t laugh, it’s happened to people the author knows!) which is a due process violation. In any case, you have to notice the lender of your alleged claim and see what the lender has to say before proceeding against them in court. You can have your attorney write it.

The reason for the letter writing campaign is to notify the lender to give them a chance to rectify or settle your claim. If you just file a suit without first giving the lender a chance to respond, you set yourself up for failure in front of the judge for not asserting your claim and attempting settlement prior to filing the action. In the world of being licensed to practice law and being admitted to the “bar”, which includes sitting on the bench, attorneys and judges received an education that included mediation and settlement as part of your duty to the court as an officer of that court. The reason that the author encourages you to get an attorney, is to put an officer of the court in “your driver’s seat” so to speak, someone that knows how to craft a letter pertaining to the issues at hand to first notify your lender of your allegations wherein they would be taken seriously. Again, if you’re in default, waiting until that point to work out new payment arrangements with your lender will probably be exacerbated to a degree when a “legal” letter-writing campaign starts.

Further, every local court (or whatever venue you select for the filing of your action, if it fact you see no other way to resolve your dispute) also has rules, which are published. If you have any type of paralegal (or any legal skill whatsoever) skill, you’ll want to research those rules. Generally, all federal rules for each district are published on line. State Court Rules are also generally published on line but you’ll have to be more specific as to county and venue. Many times, you’ll have to get an updated hard copy directly from that court’s clerk if you can’t find anything of significant on line. Court rules do change from time to time and you need to be aware of those changes.



There are civil rules and there are criminal rules. In this case, you want civil rules ... of evidence and procedure. Your attorney probably will have copies of these rules, as well as their updates, thus saving you time and expense. You can look online, but the resources may be limited as to what you can find. Because attorneys appear in court more often than you do, they probably are very familiar with both already.

If you are going to venue shop, your attorney should be the one to select the venue, based on what type of violation occurred, state or federal. You are only going to file your suit in one of two jurisdictions ... state or federal. Call it forum shopping if you want to, but the attorney will go where he feels most comfortable in winning your case, preferably in a venue where he knows the judge! NOTE: This is for offensive cases only! In a defensive case, wherein the lender is foreclosing, most responses get filed in state court.

If you need an attorney to help you write the letters to your lender, that attorney needs to understand exactly WHAT you are asking for. For example, let's say you want to view your actual loan documents to see if there were any other "side agreements" attached that you feel weren't exercised in your loan, your attorney would make that request to the loan servicer (who in most instances would refuse and generally would send you a copy of your mortgage loan documents, which you probably already have a copy of).

In one instance, after four letters written by the homeowner, Chase Bank responded by saying that its files were "proprietary" and thus they were not going to release them for viewing by anyone. While that may sound "odd", the bank did send along a "note allonge", something the borrowers had never seen before. Upon examination, the allonge was not affixed to anything and it was simply "rubber stamped" under a "pay to the order of" Citibank NA.; which more than likely means that the note was probably placed into a securitized portfolio somewhere on Wall Street; because Citibank is famous for securitizing loans.

By refusing to provide documentation or claiming that the documents are "not in their possession" the lender may be telling you the documents might be lost, hoping the borrower will "go away". Throw up a wall and make it hard to climb over ... and you discourage the other party from their quest to know the truth. Credit bureaus do this all the time with people filing repeated disputes in an attempt to clean up their credit reports.

What the Plaintiffs were trying to ascertain is: (1) Does Chase Bank NA legally own the note that they've been paying on? (2) Were there any intervening assignees involved prior to Chase Bank NA acquiring the note? (3) Does the original note and mortgage documentation contain any information that would be beneficial to the Plaintiff's claim that they were entitled to fee-free financing prior to the maturation of their adjustable rate mortgage? ... and (4) Where can the Plaintiff's come and view the paperwork?

The way the Plaintiff's original contact lawyer drafted the request to Chase Bank NA asked for "copies". The author took issue with the lawyer's letter, because it became apparent to the author that this lawyer didn't "get it". The Plaintiff's are now drafting a quiet title action, where the lender gets to "put up or shut up".

The Plaintiffs wanted to see the originals at a location convenient to the lender, even if they had to fly themselves and their attorney out of state, to view the originals in the presence of the bank's attorneys. What ended up happening, was the Plaintiff's ended up sending their own set of letters to Chase Bank NA, which after three letters (including one to their U.S. Congressman, Dennis Moore) resulted in getting a letter bank from Chase Bank NA that was so off-point, a local judge would even take issue with the bank's response in court. It's the "what have you got to hide" scenario.

This is not exactly the precedent that must be created in order for an action to be commenced; but it does lend some credence to one reason why people file quiet title actions.

In light of Chase Bank's response, the Plaintiffs can now use Production of Documents in discovery to demand Chase Bank to produce the original documentation, which proves they actually own the note and mortgage. This is only the beginning of where the fishing expedition starts! Your mission is to find out exactly what documentation the pretender lender actually has in its possession. Discovery is the method in which you will find out exactly what the pretender lender actually does have. In order to be granted a motion for discovery, you need to follow all procedural rules and rules of evidence, which means you have to enter the venue with a valid claim for which relief can be granted. In a quiet title action, you would have to come into court showing that chain of title was breached because of certain defects created by the lender (like failing to record assignments proving ownership when you know in fact there are owners). This may be difficult to prove, unless you've been denied coverage because of it. A "denial letter" certainly would raise "red flags". You may also have discovered a flaw in your mortgage or deed of trust that would cause it to be voidable. Using statutes to prove your claim is even better. *(Still think you can do this pro se?)*

## **THE FORENSIC MORTGAGE-SECURITIZATION LOAN AUDITS**

If you suspect that your loan may have been securitized, then probably the most effective way to get the information you need is through a securitization audit.

There are groups that do offer such audits (like Neil Garfield's continuum website, at [livinglies.wordpress.com](http://livinglies.wordpress.com) or [uslenderaudit.com](http://uslenderaudit.com) or through a securities analyst that specializes in doing these types of audits. Your attorney may already have a contact for this. The problem with using a securitization audit it first to have to determine what course of action you are going to take and what research is going to be necessary to achieve that end.

If you are even able to penetrate the securitization chain and get inside of the asset-backed security pool (SPV) you will be one of only a handful that has done this outside of a bankruptcy court. Even in the foregoing decisions where securitization was argued, it still came down to the lender producing bogus assignments and other paperwork.

It had nothing to do with how much you impressed the judge with your knowledge of pooling and servicing agreements.

This is not to downplay the need to know these things. Even April Charney will tell all the attorneys reading this book that they should get a snoot full of securitization and be well-versed to at least know WHERE to outsource for information to help their case with expert witnesses and documentation. She realizes the value of a PSA.

For the purposes of quiet title actions, most of this proof is going to be up to the lender to provide. If the title company you're working with has provided you with a conceptualized listing of missing documents in the order of their "lack of appearance", then you pretty much know what you're going to have to tell the judge is going to be required to plug in the variables to make the whole equation work. The lender cannot do that unless you stand there and DO NOT OBJECT!

**PARALEGAL'S NOTE: Even in a quiet title action, bogus documents can be brought in, requiring forensic analysis.**

If you find that federal questions warrant answering and if your loan is fairly new, loan audits can help frame your case. Have your attorney order an audit if he (or she) expects there to be issues present which can be claimed as statutorily viable (meaning the statute of limitations is still in effect and the proximate cause fits with your claim). Then examine any materials you obtain from these sources to make sure they are valid and applicable to your claim. Again, your attorney needs to be the one ordering these reports.

These audit firms may also draft a QWR and DVL for you as well. In response, the lender may tell you that the QWR is defective or improper, but it doesn't matter as long as you followed statutory procedure and they didn't. But again, consult your attorney.

In case preparation and lender follow-up ... remember these simple rules of thumb:

- (1) Assume that everything your pretender lender says to you is a lie. Even if they have their attorney contact you, everything the pretender lender's attorney says to you is a lie. You will have to challenge everything they say (in court and out of court); and
- (2) Don't accept any document put forward by the pretender lender as these could be fabricated or forged. This could also include affidavits. According to Neil Garfield, this is why you use the QWR and the DVL. This provides more information for your forensic analyst to chew on and scrutinize those statements that are questionable.

This will also help shape your discovery questions. Many times however, the lender will not answer either one. In many instances, these actions have preceded litigation.

## **CERTIFIED FORENSIC LOAN AUDITORS [CFLA]**

This is a company based in Los Angeles, California, who services attorneys representing clients in all 50 states performing audits of their clients' mortgage loans, sifting through their loan paperwork to make sure that there are no violations.

Generally however, according to CFLA's Managing Member Andrew Lehman (MBA, JD), these audits result in at least 16-20 causes of actions for which a borrower can file suit against a lender. For fees ranging on average of \$500-\$1,000, a borrower's attorney can get a complete report of everything that's wrong with the loan, including whether it's been securitized. Mr. Lehman proffered a relatively well-known fact that MERS is very careful about guarding the true beneficiaries of the note; and it's CFLA's job to get past the smoke screen and find out just who all of these investor-beneficiaries are.

Lehman's biggest concern, which is shared by many attorneys, is that it's difficult educating judges. It has been suggested that as time progresses and the cases against banks are more widespread, more "qualified" judges will be willing to go out on a limb for homeowners instead of allowing their cases to be thrown out on a simple demurrer.

"What scares the hell out of lenders is evidentiary hearings and discovery", says Garfield. The author couldn't agree more. That is why your attorney may have to insist on both. A lot of the research conducted by the author has shown the method points to the madness. The further into securitization you get, the more maddening the legal scenario becomes.

**A FULL ACCOUNTING OF A SECURITIZED MORTGAGE LOAN HAS NEVER OCCURRED IN A COURT IN THE UNITED STATES OF AMERICA TO THE AUTHOR'S KNOWLEDGE!!**

## **THE TILA AUDIT**

This type of audit is necessary despite the "age" of the loan; but is more effective if you are within three years of taking out a mortgage loan. The potential for discovery of issues ranging from unsigned statements to misrepresentations abound. The costs of these audits vary. With the new May, 2009 rules, if your loan was sold, you needed to be notified who bought it within 30 days of the date of the transaction.

If you are keen on pursuing lender liability actions, you need to know the full scope of what you're dealing with; hence, the reason the author suggests the use of BOTH the TILA audit and the forensic mortgage loan audit. Both of the firms doing these audits can advise your attorney as to potential deficiencies in your paperwork and help them with additional research and case law. The TILA Audit should also demonstrate any Second Tier-type transactions that could have resulted in money advanced by the investors of the securitized note and mortgage that could have inured to the benefit of the borrower. This portion of the audit could be considered effective in dealing with evidentiary hearing issues regarding the number of investors that actually may own your note and mortgage.

## **BASIC COMMON LAW LENDER LIABILITY ISSUES**

The list of possibilities for common law-type actions dates back into the 1950's and 1960's, when lender liability theories moved to the forefront. The only time you ever heard of a lender liability action being filed was between a bank and a business it served. What started as lawsuits by businesses against banks for causing damage through cutting off lines of credit has further evolved into the mortgage foreclosure market. Here are some examples for you to consider:

### **FRAUD or DURESS**

This could be termed as “blatant cheating” to establish what the lender's true intentions were when they made the mortgage loan in the first place. For example, did the lender make full disclosure about the interest charges on the loan?

### **BREACH OF FIDUCIARY DUTY**

In this instance, the standard of care owed to the borrower come first, not the lender's. For example, were the interests of your predatory mortgage broker placed above yours as the borrower? (i.e., placing you in a home loan the lender knew you could not qualify for and thus be expected to default on).

### **BREACH OF CONTRACT**

An example of this type of behavior may arise when the lender promises something to the borrower, such as a promise to release loan proceeds for construction of a property it has agreed to finance and then reneging on its promise.

### **BREACH OF GOOD FAITH or FAIR DEALING**

With these terms being fairly interchangeable, this opens limitless possibilities for you as the borrower, from false Good Faith Estimates that didn't show the real true numbers to any other number of conduct violations involving lenders and trustees.

### **BREACH OF JOINT VENTURE AGREEMENTS**

In the event a lender partners with you to help you with a business project (or becomes involved with you in your business in some way) and the loan goes bad, the bank's position it created in the joint venture makes it a part of the borrower's company, which makes the bank's interests supersede the interests of its partner/borrower.

### **INDEMNITY**

When the lender exercises control over the borrower's business, it creates a relationship of making the bank the “principal” and the borrower the “agent”.

If the borrower is damaged in some way, shape or form while acting on the principal's behalf, they are entitled to indemnity from their lender.

This in essence demonstrates that if the lender doesn't act to save the borrower, it's liable; if it does act and something goes wrong, it's liable for not exercising proper control or commits malpractice.

### **MALADMINISTRATION or MALPRACTICE**

This cause of action arises when the lender commits some sort of behavior such as interference with a contractual relationship or interference with a business relationship, even against third parties involved in the business relationship with the agent prior to the principal's involvement.

The massive jury awards in issues like these date back to August 1984, when Farah Manufacturing Company (an apparel firm out of El Paso, Texas) sued the State National Bank of El Paso for fraud and duress when the bank demanded that Farah as a company replace its Board of Directors. The original damage award was \$19,000,000.

The Eighth Circuit Court of Appeals affirmed the jury's findings, that the lender's participation in the company's business excluded the Board of Directors from active management of the company.

### **A LOOK AT "THE OTHER SIDE"**

One cannot fully appreciate the warnings that were issued in a checklist to the banks in an article issued by U.S. Banker in May of 1986; one of which jumped right out at the author during his review of the article:

Keep the files clean!

To paraphrase, while the borrower expects the banks to keep everything in writing, MERS has now made transparency opaque. The warning of the past was that a homeowner's attorney could use discovery to open up the borrower's file to find any kind of memo that would shed a negative light on the homeowner and WHAMMO ... you have libel and slander to deal with. This is why discovery and evidentiary hearings are so important in gleaning information that otherwise might be destroyed.

### **R.I.C.O. VIOLATIONS [18 U.S.C. § 1961–1968]**

The Racketeer Influenced & Corrupt Organizations Act basically states that any person or organization that has committed any two of 35 alleged crimes (27 federal and 8 state crimes) within a 10-year period can be charged with racketeering, which is punishable by up to a \$250,000 and a 20-year prison term, per violation.

Criminal RICO Act violations can only be pursued in federal court, not state court. It permits treble damages in the event of a conviction. Civil RICO actions however, can be pursued in state court as well as federal court.

Homeowners can sue under this Act if they can prove that a criminal enterprise existed; in other words, multiple defendants acted in consort to defraud the borrower in the loan transaction or clouding the title to the homeowner's property. Your attorney can research and better define the parameters surrounding these types of violations and whether they apply to your specific case. While the civil actions refer to conspiracy, all elements **MUST** be proven in order to make your claim stick; otherwise, the lender will do everything in its power to make you look like a nutjob!

### **CLASS-ACTION LENDER LIABILITY CLAIMS**

While generally not unheard of, the author doesn't suggest this to anyone. These types of claims are very case specific (from all the research the author has conducted) and your attorney can tell you if any of these claims might apply based on the evidence you've provided to them.

### **“SPECIAL RELATIONSHIP” DUTIES**

Let's say for example, you strike up a business relationship with a person who is your financial advisor and that person has been managing your stock portfolio for years. Then that advisor goes to work for a major bank and you move your entire portfolio with him where he moves because of an element of trust you established between the two of you.

Then the portfolio is used in some way as collateral for a mortgage loan. In so doing, the financial advisor ignores your portfolio and its value drops below the minimum required investment necessary to maintain your “down payment” or reserve investment as part of your loan, thus putting you in default, wherein the lender can foreclose. Because of the “special relationship” that existed between you and the financial advisor prior to the loan, you may be able to assert that the financial advisor and the lender are responsible for the default because they had direct control over the portfolio and failed to exercise a reasonable duty of care to maintain its value, thus breaching their fiduciary relationship with you. (This is an example of an actual Texas home loan case.)

### **SPECIFIC RESEARCH NEEDED**

Lender liability arguments are more tenuous; therefore, they take a lot more time and energy to develop. Many attorneys are not well versed in lender liability so if you're looking for one to explore those possibilities.

## Section 5: Preparing Your Case

It is noted here that in order to present your best case scenarios before the court, you must first seek out and locate ALL the mortgage documents you have in your possession. It is hoped that you have a file that contains all of the correspondence that you sent to and received from your pretender lender. If it does not, you will have to use up one of your requests for production of documents to attempt to get the lender's copy of the item you don't have. This will eat up one of your "fishing opportunities" and take more time.

### START PREPARING YOUR CASE FILE

Here is a list of all of the preliminary tasks you should do to help save time and money preparing your case:

Put together a set of manila file folders and label each according to the type of documents they contain. For example, one folder might contain your actual promissory note and recorded mortgage. Label it **MY COPY OF THE NOTE AND MORTGAGE**.

Then go to the county courthouse that your property is located in and get certified copies of all of the recordations there are in the county records. These are going to cost about \$1.00 a page to print, plus extra to certify them as genuine. You'll need to have them certified if you want to introduce them as evidence at trial. You may have to do more than just search out the county record that is located on your copy of the file-stamped mortgage deed and note. There may be other entries at later dates recorded that pertain to your property. If you need help locating any of these documents, ask the clerks for help. They don't mind and that's what your tax dollars pay them to do. Save all receipts as these costs factor into your costs of action. Put all of these certified copies into a separate manila folder for **ADDITIONAL RECORDATIONS**.

Get another manila file together for all Truth-In-Lending (Regulation Z); RESPA; and all of your other applicable disclosure forms. You might label that file: **DISCLOSURE FORMS**. This will only be necessary if the statutes haven't expired because of time limitations. In other words, if your loan is five years old, unless it's been sold since May of 2009 and you haven't been notified in writing, then TILA would be an option.

Get a spiral bound notebook and start a journal of all the things you did when you started to build your case, from the time you dug up and compiled your mortgage paperwork, to the time you visited the courthouse (record your mileage too); staple in all receipts to each page each time you incurred an expense (like paying for parking when you visited the courthouse or the capitol); record the dates and times you visited each person and describe what you did and list the names and addresses of each person you talked to and what you talked about. These people may have first-hand knowledge and you may have to call as witnesses in your case. You also need to make notes of every person that was at closing (including what companies they represented ... your Realtor ... the closer ... the mortgage loan officer?)



Then put together another manila folder for **LENDER CORRESPONDENCE**. Any communication you have had with your lender needs to be in writing because “you can’t take phone calls into court”.

Then get a manila folder and label it: **MISCELLANEOUS MORTGAGE PAPERWORK**. In this file, you are going to put anything that is NOT a disclosure form or anything relative to the main file containing your note and mortgage. If it relates directly to your note, then put the document in that file.

Finally, get a manila folder and label it **PAYMENTS AND RECEIPTS**. Keep this folder to track all payments to the lenders; printed computer copies of receipts showing payments of mortgages or late fees, etc. You may get hit up for this in discovery as some cases the author has seen have as a stall tactic by the “lender”. *In short, accumulate as much information as you can ahead of time so it will cost you less in attorney preparation time.*

## **VISIT THE TITLE COMPANY THAT CLOSED YOUR LOAN**

More often than not, the title company that closed your loan will keep copies of all the main documents, including but not limited to your note and mortgage that they recorded; all major disclosure forms; HUD-1 Settlement statements; and copies of receipts, fees and escrows; not to mention a copy of the title insurance policy they have on your property. If you misplaced any documents, the title company can get you certified copies of the stuff you are missing. The trip may also refresh your memory and if it does, you need to write down in your journal anything other details you feel were important to your visit at closing.

It may help to make an appointment with a title company closer (as they are extremely busy) and pay them a few bucks to review what’s in your manila folders. They can generally tell you if you’re missing anything important.

If you are missing important documents that they don’t have, you may not have received them or might have been sent to the lender. In any case, you’ll want to note this in your journal as a reminder that this item might be important enough to ask for in discovery. According to title company closing personnel the author has spoken with, the title company you closed the loan with carries a majority of the stuff you’re looking for on either microfiche or hard copy. It is best however NOT to tell the originating title company about your intentions to sue the lender. The title company may be named as a Defendant. Now, why would you want to go tip your hand and make these nice people all upset with you when you visit them?

In *Section 12*, the author is going to discuss obtaining what is termed, a “declination letter”. At this juncture, he will put this thought in your head, because at this particular visit to your title company that closed your loan, you will not be asking for that letter. In fact, it would be better if you got that letter from an up-and-coming competitor.

You might also even ask your attorney to inquire of the supervisor or one of the executives of the local competitive title company office as to who the errors & omissions insurance carrier for that title company would be. *(This could help your case immensely ... more explained on that later. Just keep that in the back of your mind for now.)*

## **THE FORENSIC LOAN-APPRAISAL FRAUD OR SECURITIES ANALYSIS**

To reprise this section ... and to not be redundant ... a forensic mortgage loan analysis or an appraisal or mortgage fraud analysis ([mortgagefraudexaminers.com](http://mortgagefraudexaminers.com)) might be helpful especially if you were looking at high-stakes payouts from lenders for outright appraisal or mortgage fraud.

However, ask yourself whether the age of your loan or the current economic conditions would apply and go with your instincts. Then get legal advice to back that up. Don't throw unnecessary money away on research that won't help you because the statute of limitations expired on all those causes of action you just paid for research to utilize in court. This is a mistake a lot of homeowners make because mortgage loan analysis is fairly new and having one of these loan audits can sometimes represent a shiny new toy. It looks nice on paper but it may be just another "model" that sits on the shelf and collects dust.

You also have to ask yourself whether you even want to spend the money proceeding with the case in an offensive manner. You should speak with an attorney first before making a decision. If there are insurance companies to collect from, an attorney with a trained eye will review all of the material you brought forward, listen to your concerns, examine your situation internally and then attempt to ascertain issues which may arise from the fact your note and mortgage were securitized; and determine the best course of action to get your case into court and properly adjudicated without spending gobs of money you don't have.

They will also look for evidence of inflated appraisal (which may be indicative of fraud) as well as the possibility of flaws and frauds in the chain of title. Forensic audits can also be used to ascertain TILA, RESPA and other statutory violations. Auditing Truth-In-Lending issues is not a catch all for any other ethical and statutory violations however.

The realm of lender liability is huge and the causes of action are numerous. It is possible that a loan audit can reveal some of these issues for your attorney's consideration. Some of the issues will blatantly "jump right off the page" at you and your counsel. If additional guidance is needed beyond the scope of the attorney's understanding, then he (or she) can be called for a loan audit. An average audit can take as little as 3 days to complete.

The forensic audit is equally important in the nature of bankruptcy because the trustee's so-called "take-down" report needs to be obtained and any objections to that report need to be drafted and filed with the trustee by your attorney if your home is in foreclosure.

The forensic audit can be utilized to spot questionable assertions by the pretender lender's foreclosure attorneys. When a claim for which relief can be granted is filed, the forensic audit provides enough evidentiary questions to raise enough issues to force discovery; yet evidentiary support will only be derived through discovery.

Once the forensic analysis is complete, your attorney will get it in outline form so he (or she) can study and build a case around the relevant points. As a homeowner, the more you know as a Plaintiff, the better equipped you are to keep your attorney informed so he can act procedurally in your best interest. Again, the cost of one of these audits starts at \$500 and must be ordered by an attorney! In most instances, you cannot order these reports yourself (as a homeowner). Again, you have to look at the age of your loan and your repayment history before considering ordering one of these audits. Get the attorney's take on this procedure as to whether it would suit the legal and economic needs of your case.

### **THERE IS NO "SILVER BULLET"**

As far as the author is concerned, filing paperwork to stop an unlawful detainer hearing or a late introduction of a request for production after the interlocutory decree has been issued, is NOT the right time to use that material. In fact, once you get to the unlawful detainer hearing, there are very few options you have left, besides bankruptcy.

The "produce the note" arguments have already been played out in most of the courts around the country. There are some things one can try to stop a trustee's sale; but timing is everything. Only a court order or attorney-strategized maneuver can stop a foreclosure and very few judges will just hand the house over to you free and clear (as much as we'd like to see that happen).

However, if a note and mortgage have been securitized and the pretender lender's paperwork is deficient or "out of order", this scenario may give rise to a complete stall in the legal process until all of the requested documentation can be procured, provided your attorney objects to the form and substance of what the lender's attorney presents to the court. As a result, homeowners have been kept in their houses, rent free, for years.

At that point, your attorney will have to weed through it to make sure it's not "dummied up" (fraudulently drafted to look like something it really isn't). Again, US Bank v. Harpster illustrates this. This also will more than likely buy you time, so you can get finances in order. You've probably seen a lot of television advertising from outfits that tell you they can stop your foreclosure. These are scams. They do not possess any silver bullets either. Again, loan modifications aren't silver bullets. Frankly, from what the author has seen, they're a "pain in the ass" and a complete waste of time. They are designed to lead you further into default whereby the lender, with a brand-spanking new set of mortgage loan documents, can more easily foreclose because the original documentation is still in his hot little hand. As of late, new reports from whistleblowers are indicating more of a lender propensity to foreclose than to negotiate a new note.

Remember that the pretender lender is the servicing lender and they are out to make as much in fees as possible, especially when you default. While this may seem a bit overwhelming, understand something else (again) ... the pretender lender can't do a loan modification as they don't own the note.

If you've tried to do a loan modification, your attorney needs to have all of the details, because at least you the homeowner, tried to work things out and make good faith payments, even though you didn't know who you were giving the money to. Because your attorney's time is so valuable, don't waste it on frivolous commentary and chit-chat (which means more expense to both of you) when you're meeting with him. By doing your research ahead of time and looking up the documentation, you will move things along in your case more expeditiously.

If you are a great record keeper and all of your files are in order and properly documented (the author is also willing to wager that you didn't read all of the documents BEFORE you signed them at closing) then you've saved loads of time in preparing your case.

Granted, this is not a cheap fix to your financial problems ... but the last thing you want to do if you're going to stay and fight is to spend your time making contingency plans for packing up and moving out! If you think that bankruptcy is a last resort for you, then financially plan for that. Find an attorney that will take your case on a partial contingency basis if you're that cash-strapped. It's better than doing nothing.

## **EXPERT WITNESSES AND DECLARATIONS**

Affidavits and testimony by experts in the field of forensic analysis and that of specific experts like appraisers, securities analysts or title company executives will go a long way in your offensive strategy. These expert opinions can be extremely helpful in identifying flaws in the chain of title, irregularities in the securitization process and identification of "manufactured documents".

As was posted on Neil Garfield's blog site, you may discover two yield spread premiums that you never knew existed; totaling as much or more than the loan itself. Garfield's website posts a lot of useful information for attorneys, paralegals and lay people to view regarding obtaining expert opinions on such things as probable damages, return of undisclosed fees and interest, as well as aiding you in formulating your best offensive strategy to be used at trial, including what you should be demanding in the form of relief (rescission, treble damages, punitive damages, exemplary damages, etc.). This may or may not be relevant in a quiet title action, because your key emphasis is not so much proof as to what happened on Wall Street moreso than what happened (or didn't happen) at the county courthouse. If you are paying an expert witness to testify at trial, make sure that the expert sticks to the parameters of his/her opinions. It would be the lender's attorney's pleasure to attempt to impeach your expert's testimony based on lack of knowledge of subject matter outside the realm of opinion. This could happen because the expert witness was "dragged" or "led" outside of his "comfort zone" while on the stand.

## **COUNTERATTACK STRATEGIES**

In the process of researching your case, the forensic mortgage loan audit can reveal a number of strategies to your counsel as to how to combat the lender's attorneys in court should you decide to take on a federal lawsuit. Quiet title actions are state actions ... in this instance, a quasi in rem action.

It may surprise you to know that according to a report in the *New York Post* there were over 12,500 foreclosure actions filed in 2009 in the New York area (New York City proper and all of the surrounding suburbs) by ONE SINGLE LAW FIRM (foreclosure mill)!

According to a report issued by the U.S. Trustee from the Justice Department (who oversees ethics violations committed by attorneys) in Manhattan, Chase Bank appears to be targeted for monetary sanctions for bringing false and deficient paperwork into court, failing to prove they even own the home they're seizing.

Chase's foreclosure mill, Steven J. Baum PC of Amherst, New York has been chastised in judicial decisions on everything from not divulging mortgage payments paid by the homeowners and accepted by the lenders prior to foreclosure; to creating questionable assignments (that last-minute attempt to make it look like the "pretender lender" is legally entitled to foreclose); to improper notarization (where in one case, attorneys working in Baum's firm tried to prove that its client owned the mortgage backing one homeowner's house by filing an assignment of that mortgage from a Florida company signed by an executive of that company but it was notarized in Buffalo, New York). Even though Baum's firm hasn't been charged with fraud, one of his cases, the famous Horoski case on Long Island resulted in sanctions; the judge gave the couple the house!

But for every case that was questionably handled by Baum's firm, there were hundreds more that resulted in default judgment because of the lack of knowledge of the borrower! All of these foreclosures are tying up the court systems and from all indications, it's nothing but a numbers game; to see which homeowners were poor and ignorant versus those who could at least afford some representation. Scores of these purported foreclosures resulted in NO DEFENSE AT ALL! It is the author's hope that once you read through this work, you will decide to stay and fight (and not vacate your most prized possession). A class action suit was filed against Baum and others in New York on behalf of one homeowner by attorney Susan Lask claiming wrongful foreclosure.

## **DISSECTING THE NOTARY'S PARTICIPATION IN THE DOCUMENT**

PARALEGAL'S NOTE: The last known listing of action by the Florida legislature regarded notaries public amended the statutes covering notaries public to allow for certain notaries to obtain and use electronic, digital signatures; however, it did leave intact the basic statutes covering the behaviors of a notary public.

You should understand that all states have enacted statutes in this regard and you should make sure your state statutes are similar before analyzing any legal documents presented by the “lender”.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsection (3) of section 117.05, Florida Statutes, is amended to read:

117.05 Use of notary commission; unlawful use; seal; duties; photocopies; penalties.—

(3)(a) A notary public seal shall be affixed to all notarized paper documents and shall be of the rubber stamp type and shall include the words “Notary Public-State of Florida.”

The seal shall also include the name of the notary public, the date of expiration of the commission of the notary public, and the commission number. The rubber stamp seal must be affixed to the notarized paper document in photographically reproducible black ink. Every notary public shall print, type, or stamp below his or her signature on a paper document his or her name exactly as commissioned. An impression-type seal may be used in addition to the rubber stamp seal, but the rubber stamp seal shall be the official seal for use on a paper document, and the impression-type seal may not be substituted therefor.

Section 4. Section 471.025, Florida Statutes, is amended to read:

471.025 Seals.—

(2) It is unlawful for any person to stamp, seal, or digitally sign any document with a seal or digital signature after his or her certificate of registration has expired or been revoked or suspended, unless such certificate of registration has been reinstated or reissued. When the certificate of registration of a registrant has been revoked or suspended by the board, it shall be mandatory that the registrant, surrender his seal to the secretary of the board within a period of 30 days after the revocation or suspension.

Revisiting the key points:

Examine the notary’s signature. It has to be exactly as commissioned. Using initials in the signature, if NOT exactly as commissioned, can be challenged as invalid.

If the notary’s commissioned has expired or has been revoked or suspended (you need to check with your Secretary of State to verify their commission is still in force) the notary’s seal is invalid.

If the document was signed in another state and notarized in a state different from the state the notary public resides in, challenge and discovery must be utilized to uncover frauds committed by the signor and the notary.

If the intentional act was committed on more than one occasion (and fraud was the result as proven) by more than one party involved in the transaction, then cause for a RICO violation may be asserted. The commission of the notary may be revoked by the Office of the Governor upon complaint of the aggrieved party.

In the *Harpster* case, which you can examine for yourself in the resource section, you will notice where the notary's signature stamp indicated his commission expired May 19, 2012. A check with the office in Tallahassee handling Terry Rice's notary commission revealed that his notary commission stamp was not even valid four years previous to the fraudulent submission of a fabricated assignment by US Bank's attorney on the document attached, submitted and as evidence by the court.

Since the notary (Terry Rice) had to be bonded, the attorney for Defendant Harpster went to the bonding company's representative and obtained a sworn affidavit from Erika Espinoza, stating that the Notary Stamp used by Terry Rice did not exist on the purported date it was notarized. Her affidavit specifically stated that the notary stamp didn't come into existence until sometime in April of 2008, five months after the date on the Assignment that was fraudulently submitted as proof.

The court, upon a motion in limine and motion to strike by the Defendant's counsel, granted the motions and dismissed the foreclosure action WITH PREJUDICE (which means US Bank will never be able to refile the foreclosure again). The author would suggest here that at this juncture, this case would be offered into evidence in a quiet title action, to immediately follow this ruling.

## **OTHER MERS CONTESTS**

On more than one occasion, the "official capacity" of a "trustee" or "certifying officer" of MERS has been called into question. In one document filed with the Jackson County, Missouri Recorder's office, a certifying official with MERS (supposedly in Flint, Michigan) signed a document which was notarized in St. Louis County, Missouri (the same location where the law firm handling the nonjudicial foreclosure was located).

MERS' supposed "official" assigned the note over to a new "trustee". The problem is ... is that person legally authorized to "assign" anything? Further, when a MERS "certifying officer" caused something to require an official "stamp", what did the stamp show? [The author has documents in his possession that were made "official" in 2009 with a 1995 MERS stamp on it. The 1995 MERS corporation was dissolved in 1998, so the stamp is invalid.] This is not the last time you will see evidence of not only sloppy record keeping, but also false notarizations, fraudulently backdated documents and unauthorized signors.

In the case of *U.S. Bank v. Harpster*, the bank found itself sanctioned because of the behavior of its foreclosure mill attorney, whose "secretary" signed off on an "assignment" that was supposed to perfect the lender's security interest.

Harpster's lawyer however, spotted the notary defect, not only challenging it, but getting a sworn affidavit from the notary's bonding company showing the commission was invalid at the time of signature! According to numerous attorneys, Cheryl Samons is what is known as a "robo-signor" (someone who ...like a robot ... signs anything put in front of her). Her qualifications as a "qualified" signor have been challenged in deposition.

As evidenced with the GMAC (Ally Financial) mess, Jeffrey Stephan was an admitted robo-signor as well. The disclosure of his “first-hand knowledge” of what he was signing led Ally Financial to stop foreclosures in 23 states and this situation is starting to unravel.

## **QUIET TITLE ACTIONS, REVISITED**

Quiet title actions are the right of every property owner and are covered under state law; thus, should be filed in state court according to state statute. Again, it is **best** if the attorney you hire has some experience, understanding or a track record of victories in this area. If the attorney knows that by filing an action in a certain court he’ll get a judge that he knows will listen to reason it would definitely serve to his advantage. If the attorney doesn’t know the judges all that well, you might consider doing a background check on the bank’s attorneys from previous foreclosure actions and see which courts worked in their favor and which courts worked against them. If you don’t have a choice in court selection, as some counties in the United States use “odd” methods of selecting judges. In Jackson County, Missouri for example, a “wheel method” is used. (Imagine the “*Wheel of Fortune*” and Pat Sajac telling you which judge you got after you spun the wheel.)

**In quiet title actions, you will use the county court that your property is located in!**

Some litigants like to ask for a temporary restraining order to keep the lender from foreclosing upon the initiation of suit. Others like to hit up the lenders with discovery right from the get-go, as the judge will understand that time is of the essence and that the litigants are trying to achieve a quick settlement. The author has seen the lis pendens used on numerous occasions where a quasi in rem action has been filed. He likes what he sees in this regard and the attorney he works under just recently filed a lis pendens lien in a case where a real estate agent kept trying to sell a home that was already in litigation.

In setting up a jury trial, the quicker you can paint the lender as the “bad guy”, the better. The lender does NOT want any cases against it to go to trial, especially where the Plaintiff’s attorney knows the judge and knows what kind of treatment the attorney’s client stands to get. This could also result in bad case law; thus, it drives the lenders to settle your claim before it gets that far. For a lender to stall proceedings at a quiet title hearing would certainly raise the ire of the judge, considering there could be hundreds of cases on a court docket in a single month!

Knowing the judge as a reasonable person also keeps the potential for a summary judgment against you to a minimum. Painting the narrative to the judge, especially when asking for a jury trial, and doing it quickly (trying to force the bank into court sooner than it is ready to defend itself) keeps the game in your court.

By using discovery right out of the gate, you let the other side know YOU KNOW what they’re up to. The idea here is to research the other side’s previous cases so you know what to expect when it’s your turn.



## **STRUCTURE YOUR CASE TO WIN**

It is never a good idea to overload your case with frivolous claims as it destroys your chance to keep your narrative concise during oral arguments. The worst thing an attorney can do is put forth claims they can't prove; thus, the greater chance for a summary judgment against you, the client. In a quiet title action, stick to the facts (especially if you're in a "fact-pleading" state). The best thing to do is to keep your pleadings simple. You can always amend them later if the situation calls for it.

Look at the weaknesses of your opponent. Analyze the potential for the other side to dummy up an assignment form and have your defenses ready for it. Look at past foreclosure actions and see where their assignments came from and who executed them.

You may be able to find previous "assignments" that you can use in your case to prove "fraud on the court" by "backgrounding" their claims of assignment to see whether their recordation was backdated and thus fraudulent. Maybe the notary was fraudulent (as in Harpster). In one case in Missouri, it was found in courthouse records that the same person who "notarized" one assignment was the "assistant secretary" in another! This could be very useful information for the purposes of impeaching that person's participation in the signing of a document; thus, causing it to become subject. In a quiet title action, the more of these documents get impeached (and technically, it only takes one document) the better the chance that the entire house of cards will come tumbling down! Have forensic document analysts "at the ready" just in case.

There's nothing like impeaching the credibility of the lender and its attorneys by illustrating previous frauds they committed upon the court your case is going to be tried in, even though they may object and attempt to strike the documents as irrelevant (the jury and/or the judge heard it). The key idea here is to make the other side look totally bad to the judge and/or jury BEFORE the lender's attorneys can even open their mouths if you're attacking on anything other than quiet title issues. In a quiet title action, most if not all of these actions are trials to the bench. Rarely is there ever a jury involved.

## **BACKGROUNDING THE JUDGE**

It may become necessary to do some investigative work once you know what court your case has been assigned to. The author put this portion in this section because he wants to make you aware of the potential problems you might face BEFORE you get to the court to file your case. Understand that every Supreme Court for every State in the United States has a Canon of the Judiciary or Code of Ethics that judges must abide by. In the example the author is providing here, a Motion for Disqualification was filed in Circuit Court in Palm Beach County, Florida by the Ice Law Group to ask that Judge Meenu Sasser disqualify herself from hearing a case involving their clients, Paul and Lynn Lawless, on the grounds that she owns substantial shares of stock in Bank of America.

Bank of America had filed suit to foreclose against the Lawless's (among other parties) and the Defendant's attorneys did their homework, discovering that the very judge that was a "trier of fact" in their client's case might be prejudicial against their clients because her stock might be affected by the outcome of the case.

The form you're generally looking for is the "Full and Public Disclosure of Financial Interest". It can usually be requested from the Clerk of the Supreme Court; or at the Secretary of State's office for the State in question, so long as there is a legitimate business need to know this information.

The Motion for Disqualification in this instance concerns itself with the judge's economic relationship with Bank of America and that of the 55,000 foreclosure cases being heard in Palm Beach County, Florida, Judge Sasser has most of them. This would mean that Bank of America's filings "might" be treated with favor; objections against the bank could be overruled in open court; the judge might have even made up her mind that she would grant summary judgment in favor of Bank of America because of her financial interest.

This is significant because all of the foreclosure cases are grouped together into Judge Sasser's court, where she would virtually be sitting on the bench for all of these cases involving a limited number of banking entities. As of this writing, the outcome of this motion has not been decided.

## **KNOW THINE ADVERSARY**

Part of the problem with attorney resources, which will be discussed in the next section on hiring your attorney, is that a lot of these attorneys are not well versed in this particular subject matter. If they are, they are worth their weight in gold.

You should also know (according to NACA.net\* instructor and attorney James Kowalski, Jr. of Jacksonville, Florida) that most practicing attorneys are so busy that the only time they have for themselves is for family time and CLE (Continuing Legal Education). The author states this because at some point in time long ago, the lenders knew they'd be facing a foreclosure crisis so they set up a pre-determined network of attorneys and foreclosure mills to handle the caseloads.

## **THE LENDERS HAVE ATTORNEY NETWORKS**

These networks are: USFN, AFN, ALFN and Wingspan Portfolio Advisors, LLC. There may be others, but these are the formidable ones. It would do you well to run searches for your area to see if your lender uses these attorneys or firms. Some of these attorneys are retained as trustees in foreclosure actions.

USFN is a national not-for-profit association of select attorneys; trustee companies and associates providing comprehensive default services to the mortgage banking industry. They can be found at <http://www.usfn.org>.

AFN stands for Attorney Forwarding Network, Inc. and is another organization put into motion to bring attorneys into the debt collection fold. They can be found at <http://www.afninc.com>.

There is also another entity that educates a lot of the banking professionals (not to be confused with AFN ... it's called ALFN ... American Legal and Financial Network, which can be found at <http://www.alfn.org>.

Wingspan Portfolio Advisors, LLC is another attorney network which boasts the membership of 65 law firms throughout the country, is based in Dallas, Texas. They can be found on the internet at <http://www.wingspanportfolioadvisors.com>.

**It is best to find out (if you're going to hire an attorney in the preparation of your case, that you DON'T call the lender's attorney first by mistake. If they are found within this network, they work for the lender, not you!**

*\*NACA (National Association for Consumer Advocates) is a group that represents consumers in foreclosure litigation. They can be found at <http://www.naca.net>. They may be a good referral source for you for litigators that have made foreclosure defense part of their curriculum in their CLE coursework. This network specializes in a host of consumer-oriented issues including foreclosure defense and predatory lending.*

## Section 6: Hiring your attorney

The author's experiences with retaining counsel are far reaching. This section, even though it is brief, is worth the read. The author has talked to dozens of attorneys while researching this material (as well as distressed homeowners) who have given him a bird's eye view of what is happening on the "firing lines" (in court). As simple as this may seem, not every attorney (A) has the desire to practice in this line of specialty; and (B) not every attorney is a litigator (a lot of them would rather NOT appear in court but feel more comfortable in mediation). Then there's (C) there are attorneys out there who just got out of law school and are hungry. This is where your research is most beneficial. Asking questions is the next most important thing. Exactly how much experience does an attorney have in this area of litigation (because it is litigation)? A few attorneys have told me that property law was "boring" in law school; yet now they need it! As Neil Garfield also stated, just because those attorneys are on the list on his website doesn't mean they "get it" all the way. Attorney Jon Lindeman, Jr. of Advocate Law Groups of Florida concurs that if the attorney is not getting continuing legal education in this area, they are "out of date and out of practice" in an area that requires stringent expertise.

The attorney you're looking for is one whose expertise lies in real estate, mortgage and contract law. Some attorneys in this realm work on contingency, which means if they win your case, they get a percentage of whatever damages you are awarded. If there are no damages awarded, they can assess fees and costs of suit to the lender, who has to pay your attorney if he or she prevails. Lindeman says you have to determine "how they are going to charge you; an hourly fee will wipe somebody out. If they charge by the hour, they are not likely doing much of this type of case work."

Depending on the district you live in you will have to investigate the proper forum in which to resolve your issues. Many times the "deaf ears" are in district courts and the bankruptcy courts are the only "champions of the debtor".

If you are serious about taking on an attack against a lender, you can bet that the lender has a foreclosure mill that will come against you, with all the money and forces the lender can muster. They will be out after your house! Lindeman says that is not "overstated". Do not let this intimidate you, because you have key strategies in your back pocket that these foreclosure mill attorneys are not going to be prepared for by way of discovery. Since each scenario is different, your attorney is going to have to organize a solid game plan that you both can agree to and you need an education in this as well. The author would digress here to say that most juries probably despise banks, credit card companies and collection agencies and that most lenders would rather face a bench ruling than want a jury to see the "ways of the wicked".

Your attorney should be a good litigator; prepared to object at every turn and duke it out vigorously with opposing counsel in open court. By not being able to build a strong case and clearly state a claim for which relief can be granted, while outlining the underlying causes that forced the claim to be put forward in the first place, you've already wasted time and money.

If your claims are serious enough for a jury to decide, then go for a jury trial. Keep in mind however, that you will now have to educate 12 people instead of just the judge. If the judge's conscience is "seared", that judge could virtually make your jury trial a nightmare for your attorney. Your objective is to find an attorney with a clear conscience that has no problem attacking the lender from an offensive posture, rather than wait until your home is in foreclosure to attack the bank from a defensive posture.

When your attorney can go in and rattle the opposing side from Day One, you will certainly freak out the lender's attorney. In the case of a Fair Debt Collection Practices Act violations, remember that every state in the union has adopted the federal statutes into their own state statutes so there is a corresponding cause for which relief can be granted as well as reliable statutes to back up your claim. Again, your attorney should be wise enough to check into whether the statutes are time-barred. These statutes generally are only good for one year from the actual date of the offense. That means once you ascertain any type of time-barred limitations, you have that amount of time to file suit.

## **LOOK FOR TRUE LITIGATORS**

Many attorneys are not litigators (they do a lot of paper shuffling and prefer NOT to try cases in court if they can possibly avoid it) but would rather meet in informal sessions and closed-door hearings where they can come completely prepared on paper, rather than to actually argue a case in open court. The attorney you are looking for is not afraid to strategize with you and your case in advance of trial. Your attorney needs to know what your desired final outcome is and BOTH of you need to agree on what you will settle for (or NOT settle for).

If you are using any kind of an offensive strategy, you will need a seasoned professional that thoroughly knows the Rules of Evidence and Rules of Procedure so he can come out swinging verbally with all of the tactics necessary to shut down the lender's legal team while getting the judge's attention. These attorneys are not going to come cheap. Some may entertain splitting the damage award with you if there is any to be gained from any lawsuits filed, plus attorney's fees and costs if you prevail, to offset the applicable, billable rates; plus taking a share of any damage awards.

Your attorney needs to feel totally comfortable raising issues of material fact, arguing the facts of the case and objecting to every single comment or interjection made by the opposing side. If the attorney you are interviewing doesn't appear passionate about your cause, find another one who will be. Most attorneys who are confident and really know what they're doing will spell everything out for you in a free, upfront consultation about your case. Do not be afraid to ask when you make your appointment if the attorney will at least "hear you out" before charging you anything. Keep in mind that any attorney that is "green" in this area is probably going to spend the better part of a month researching and getting up to speed on the subject matter. Your budget for legal representation certainly has to come into play here. Exactly how much can you afford to spend? Again, you have to decide whether to stay and fight or re-strategize and move on.

## THOUGHTS ON GOING IT ALONE

The author has talked to a lot of people who know attorneys and frankly don't trust them. The author has actually had to "find" an attorney for friends who needed foreclosure representation; it is not a pleasant task bringing both sides together. If you are one of these people that fit the profile of the first sentence of this paragraph, then the following paragraph is especially written for your benefit:

If you have a lot of time on your hands (and we're talking a few hundred hours) then you can probably research all of the applicable blog sites, buy a good law dictionary, purchase a subscription to LexisNexis®, make a lot of phone calls, ask a lot of questions, take a lot of notes ... and then maybe you'll have as much knowledge as a first-year law student. That doesn't make you a litigator. Of course there are sample forms available for you to use to posture a case and draft your pleadings but you're forgetting one important thing: At some point in time you are going to have to enter a jurisdiction (a courtroom) and argue with an attorney from a lending institution (who knows more procedural tricks than you do) or collection agency that is trying to foreclose or collect on a deficiency judgment. If you do not have legal acumen (like most homeowners who think they'd make great attorneys), your chances for success in court are at best futile.

The author has spent 21 years researching and studying law. He still would only go into court pro per on only very minor JP court issues. State court judges at least are somewhat understanding and patient with "pro se" litigants; however, federal judges, who have a lot on their plate, are less tolerant. You'll find that out the first time you're at a loss for words and the other attorney is hammering the judge with procedural objections. The author has a "legal team" of his own (both civil and criminal representation); a cross section of some of the best this country has to offer.

If you have any doubt in your capability to stand up to a federal judge in court and argue a case before him, then you would best be served getting an attorney that is admitted to practice in federal court. In fact, a lot of mortgage foreclosure cases end up being "removed" to federal court, because the lenders' attorneys are more comfortable arguing in that forum because that's where their "comfort zone" really is. State court has its own set of "comfort zones" and even though a lot of state court judges understand foreclosure proceedings (especially those in Florida), they are now less tolerant of the "proper party" not being in court during a foreclosure proceeding.

Most attorneys the author has spoken with have stressed beyond concern the need to stop precedent-setting bad case law. The mortgage mess is certainly not an area that you want to go ignorantly into. If all else fails, the only other tolerable place a pro se litigant might find solace is in bankruptcy court; however, if you're facing a lender's attorney in the meeting of the creditors or in a motion for relief from automatic stay, you'll wish you had retained counsel that knew a thing or two about mortgages, assignments and procedure. Not to say that a brilliant pro se could not handle it, but those cases are extremely few.

## **Section 7: Use of discovery to win your case**

### **DISCOVERY WINS CASES**

The author stresses the strategy towards the use of discovery to win your case. With the right cause of action to get your claim in front of a judge or jury, comes the use of discovery to compel the “pretender lender” and its “chain of title” to produce the original note and mortgage as well as to demonstrate to the court who actually owns the note and mortgage. Every bit of discovery is supported by a rule of evidence somewhere in a state or federal court (no matter what the venue). If your case has merit, you are entitled to discovery. Understandably, quiet title actions carry sort of an evidentiary hearing with them at some point in the proceeding.

What has become obvious in this “scheme of things” is that lenders (like Washington Mutual Bank’s subprime mortgage affiliate Long Beach Mortgage Company [which was dumped by WAMU in 2007 after investigations by the FBI and the SEC revealed fraudulent loan practices] “fudged” on paperwork (fabricating loan documents, cutting and pasting phony information on borrower’s bank statements, etc.) in order to get loans approved. As of this writing, the Florida AG’s office is investigating Lender Processing Services and “DOCX” for its behaviors in dummying up loan assignment documentation.

This type of behavior, in addition to predatory lending activities like the high rate of “option-ARM” and “interest-only” mortgage loans, means that every “assignment” involved in a mortgage loan needs to be fully investigated and verified. These types of loans offer better yield spread premiums to the brokers and originators involved; not necessarily the investors though. The investors (where your loan money actually came from) have non-recourse bonds (kind of like buying stock that tanks and you get nothing) and thus have no way to recover their investment if it takes a nosedive.

This means that your attorney is going to have to get your case to the place where heavy use of discovery and an evidentiary hearing is warranted. The lenders do not want this because in so doing they are afraid the real “dirt” will come out. This is where cases are won or settled prior to going to trial. In quiet title actions, this may take a different twist.

With Chase-assumed WAMU loans, you will be looking up assignment trails into the securities markets, especially in 2006, when WAMU’s subprime portfolios rose from \$2.5-billion to \$29-billion. Even AIG (which received \$180-billion in taxpayer bailout money) called much of WAMU’s portfolios “suspect”, according to a U.S. Senate Panel investigation report.

No attorney can overlook any detail. If there was fraud (and there is evidence of up to 83% alone just in WAMU loans in California), then all documents being tendered into your court case by the “lender” are suspect. Every single document has to be examined thoroughly on its face by auditors and thus, the business of forensic mortgage loan audits will flourish.

The beauty of these unraveling cases is that each time a decision is rendered in favor of the borrower-homeowner; case citations which prove fraud become more abundant and available for reference in your case, thus eliminating the need for huge amounts of billable legal hours. A forensic mortgage loan audit can steer your experienced attorney in the direction of the applicable cases necessary to prove the issues you are raising. It can also weed out issues that are time barred.

## **THE FIVE SEPARATE ELEMENTS OF DISCOVERY**

Through the use of **ADMISSIONS** (a series of questions in which the defendant admits or denies certain allegations you make), you can ascertain whether a chain of title was actually created; whether your mortgage loan was indeed securitized; whether there were intervening assignees; and whether the Pretender Lender is actually a loan servicer. If you make it available for the Defendant bank to Admit in part or Deny in part, then you open up another door to a different aspect of discovery, called Interrogatories, where you can ask more questions about why certain aspects of the Defendant's Admissions were admitted and why some were denied. That leads to more questions and more reason to ask for substantive documentation to back up their statements ... more on that shortly.

Your attorney will then construct what are known as **INTERROGATORIES** (follow-up questions which require a written explanation of the admission statements you tendered). In most courts, admissions statements and interrogatory questions are generally limited to 25 in number (each), unless you can show the court compelling reasons why more admissions and interrogatories must be posed. The "other side: can argue that the overuse of admissions and interrogatories is abusive and thus refuse to answer any of them.

With the use of admissions in discovery comes another angle: When the defendant "admits in part and denies in part". This basically means that your interrogatory questions must be prefaced with "if you admitted in part and denied in part, you must fully explain what portions of the admissions statements you admitted to and what portions of those same statements you denied" and WHY. This causes the defendant lender to have to fully explain in detail their involvement in your loan process or chain of title or whether they indeed have personal knowledge of what happened to your loan once it was securitized.

The use of "Interrogatories" compels the Defendant Pretender Lender to answer more specific questions about how the chain of title was created; what parties were a part of that chain of title; who the intervening assignees were and when they were assigned your loan; and to virtually uncover the behaviors of the Defendant Pretender Lender as a loan servicer. In most discovery applications, the use of interrogatories is tied to the admissions questions posed to the other side; therefore, as in admissions, the interrogatories are also limited in most courts to 25 in number. Check your jurisdictional rules to see how many of each the court will allow and structure your questions carefully. Some attorneys ask preliminary questions and like to save the juicy stuff for later. The use of admissions and interrogatories can also facilitate depositions of the Defendant Pretender Lender and its agents and assigns.



Deposing the agents of the Pretender Lender can also be used to “fish” for errors made in the loan process. It can also be used to find out which parties have what knowledge or first-hand information about your loan. It can also be used to discover fraud. This is what the lender doesn’t want because it could lead to you amending your complaint.

The next element of discovery is the **PRODUCTION OF DOCUMENTS**. This is helpful especially in cases where you might be missing certain documents and need to “fish” for them. Many of the great litigators of our time used production of documents to virtually build the missing elements of their cases. This has not changed through the ages. Although the number “25” sticks out in the author’s mind as to the number of “documents” that can be requested before abuse of process can be alleged, if your requests for production are carefully worded, the 25 sets of documents can open more doors to require further evidentiary hearings, especially once the judge is convinced there is enough evidence of fraud or liability which would allow further hearings (required to substantiate your claims). In some jurisdictions, production of documents can allowably exceed that number.

You can subsequently use expert testimony to impeach false lender claims! All of the production of documents requests is usually tied to what you expect the outcome of your admissions and interrogatories to reveal. To that effort, the author will focus on the kinds of documents you’ll be looking for and why. This will be focused on in greater detail in *Section 12*. The use of “Production” can also be custom-tailored to provide you with more in-depth documentation, such as interdepartmental memos, certified copies of trust documents and other financial data that could be relevant to your case. The author cannot stress enough here that since the mortgage game is a paper trail, production is going to be one (if not the most) of the most important elements of discovery.

The next element of discovery is the **DEPOSITION**. This is where you and your attorney get to meet with witnesses from the “other side” and their attorneys, to give sworn testimony regarding their participation in your case. The taking of the testimony can last as little as five minutes; or as in the case of MERS CEO and President R.K. Arnold, can take all day. Depositions are used to weed out details without using up the court’s time. The most relevant aspects of the deposition can then be entered into evidence and ruled on by the court. Judges like it when you have all your ducks in a row and don’t waste a lot of the court’s time.

The resulting transcribed testimony (taken in the attorney’s office or in some other mutually agreed upon location) can then be used to frame your arguments in court before the judge in an actual **EVIDENTIARY HEARING**, which is the last element of discovery. This is the element of discovery that the defendant lenders fear the most.

This is because the evidence derived from hearings before the judge (who can pick and choose what is relevant and hear and rule on objections) is usually the most damning to their defenses. In foreclosure defense, this also works in reverse for the Plaintiff Lender because the judge (as in the case where you’re the Plaintiff) gets an education at the same time he is ruling on the admissibility of certain evidence as fact.

If you are lucky enough to get an evidentiary hearing, it could mean (A) you have a great attorney that “gets it” and (B) you have a great case and the judge wants to know more.

## **THE MOTION TO COMPEL**

When the Defendant Pretender Lender balks at your requests for Admissions, Interrogatories and Production of Documents and fails to answer your discovery within a reasonable period of time, say thirty (30) days, the next step would be to file what is known as a Motion to Compel Discovery with the Court. In this instance, the skilled attorney outlines to the court that he followed all rules and procedures in presenting the discovery and that none of it was abusive (meaning all questions, etc. were extremely relevant) and that the Defendant Pretender Lender has failed to answer.

Further, your attorney may argue that the Defendant Pretender Lender had a reasonable period of time to answer but failed to do so. In many jurisdictions, failing to answer is often construed as an admission by the other party that what you are claiming is all true; to which the court can also agree and allow all of this to be admitted as fact.

Often, it may be necessary to facilitate a Show Cause Order, in which the Pretender Lender’s attorneys (or even MERS) will have to show up to answer to the judge as to why they shouldn’t be held in contempt of court or be made to answer questions that are relevant to your case. While this is generally a “last resort” type of item, it has happened in cases the author has researched (a lot of them in Florida).

More recently in Arizona, Deutschbank showed up with multiple assignments showing the most recent one to be “new and improved” over the rest. When a former IndyMac executive who signed these assignments was called to the stand to testify, the exec looked at the documents and swore that those weren’t his signatures; that he wasn’t employed by IndyMac in 2009 and that he doesn’t use a rubber stamp nor does he sign his assignments using that signature. What turned out to be a witness for the lender played right into the judge’s hands. She took the document into her possession and refused to give it back to Deutschbank’s attorneys. One would wonder if that wouldn’t constitute a DOJ referral.

The judge may also grant your request to compel the other side to produce discovery just based on the filing of a paper motion alone and issue an Order directly to the Defendant Pretender Lender’s counsel as to why they haven’t answered it. If a hearing on the matter is necessary, the judge may pummel them with questions, especially wanting to know WHY they didn’t answer YOUR questions and produce the requested documentation.

If not properly answered, it might be possible to ask for sanctions the longer they stall. Most judges however will give the Defendant Pretender Lender the benefit of the doubt, until they are fully educated and made aware that your claim for relief is not only valid, it’s necessary to force the Defendant Pretender Lender to “come clean”: They are either not the proper party and have no business being there or they don’t have the documents to prove they actually own your loan. Either way, it’s a waste of the court’s time.

As was seen in the Horoski case in New York, some judges are becoming intolerant of the insolent behavior of mortgage lenders. This case ended up in a settlement conference, where the Pretender Lender OneWest Bank and its attorneys became abusive, much to the chagrin of the judge. Remember, judges (many of whom were or are still attorneys) would prefer to settle a case, as this unclogs their dockets for hearing other actions.

The idea of settlement also reduces the chances that the judge might make an error in the case, which could be appealed and reversed by the Pretender Lender. District court judges do not like to have their cases reversed as it looks bad on them and could reduce their chances of any kind of political or judicial future. By having their cases reversed also creates “bad case law”. To the judge involved in that case ... that’s really bad, as the error and reversal could work to the detriment of future cases whose outcomes were actually well-intentioned for the moral good.

Again, careful use of discovery and rules of evidence and procedure are the most important elements necessary in winning your case against the pretender lender. The author cannot stress that enough.

As a foreclosure offense strategy, asking for the house “free and clear” at the onset of the claim (opening arguments) is not a good idea. In fact, it never is. By thinking that way up front, you are more than likely going to be disappointed in the outcome.

The judge is already conditioned to the fact that you did in fact obtain a mortgage loan ... otherwise you wouldn’t be in his courtroom in the first place. The idea here is to assert your claim through the use of all legal means, especially discovery, to draw the pretender lender out into the open to get at the truth. In a quiet title action, all potential claimants (including your lender, MERS, etc.) has to be notified and be given an opportunity to file an answer to the suit within a specified time frame.

Your proper use of production of documents will force the pretender lender to have to “produce the note” (at some point) ... the common catch phrase of foreclosure defense attorneys. In virtually all cases, the judge is going to give the lender the benefit of the doubt (since there is “money” involved) and if what ends up happening is the court gives you your house free and clear of that mortgage loan, so be it. The court has to safeguard against error and abuse of discretion. Ejectment from a quiet title proceeding can occur for a multitude of reasons; from failure to prove claim to fraud on the court.

In many courtrooms, the only documentation the judges will accept is original documentation. In many instances (especially in mortgage lending) the paperwork is either deficient or absent because the note and deed of trust have been bifurcated. If you took out a mortgage loan between 2001 and 2007, chances are your loan was securitized on Wall Street. Assume this automatically; and also assume that your originating lender allowed MERS into the picture. If you find this is NOT the case, then your claims may be altered somewhat to reflect more direct allegations of fraud and improper party. In any case, you will also have to publish against all unknown claimants (anyone tied to the property in question, which may also include the property itself).

In the quiet title actions, when it is determined that a party has no claim, they are “ejected” (dismissed) from the suit and are forever barred from bringing further claims.

## **DUMMIED UP DOCS**

With the amount of fraud being exposed in the mortgage loan industry (and it appears that some of the cases are being considered for prosecution by the Justice Department), you can safely assume that a lot of the paperwork the lender is going to produce is “inadequate” (not complete, as in a trust document that lacks the actual paperwork to prove its existence); “defective” (devoid of some necessary element, as in a trust that does not have a trustee or has a trustee or a beneficiary [MERS] acting outside of its legal capacity); or “fraudulent” (bogus, meaning that some flunky in the attorney’s office [or some other place] drafted it up to look like an official document, but it bears serious scrutiny because information is either missing or was placed within the document with the intent to bring fraud upon the court).

The fraudulent aspects of document production are very real, as evidenced in the US Bank v. Harpster case in Pasco County, Florida. For every one case we hear about, there are ten cases we don’t hear about. That means, for every ten cases in which a homeowner gets his house free and clear (so to speak), we only hear about one of them. The system is very careful NOT to publish all of these cases. The author surmises that if all this information became “exposed”, it would encourage more people to file suit.

In Greg Morrison’s case, Mellon Bank and an associated trust series brought foreclosure against the insurance executive, yet when asked to produce original loan paperwork, South & Associates (a foreclosure mill within the Wingspan network of law firms that handle mostly foreclosure business) could not. As of this writing, the case is on hold, waiting for a defense motion to dismiss with prejudice; followed by a motion to quiet title. You can bet there is a chance that if Mellon comes back into court with an “assignment” after over 9 months of continuances, that it will be suspect and will come under severe scrutiny by the court. When paperwork is not readily available upon request, you can bet the lender will be tempted to “manufacture” documents. In a last-minute stall, Mellon peppered the Defendant with discovery (of which Mellon already had most of).

### **RULE #1: Thoroughly examine every assignment or document that is either in the recorded documents at the courthouse and introduced into evidence by the lender!**

It is at this point we focus on St. John’s County, Florida, where a hearing has been set to determine whether lender M&T Bank is going to be charged with fraud in its handling of a case through its foreclosure mill attorneys at Marshall C. Watson. The case is M&T Bank v. Lisa D. Smith, Case #CA09-0418. On June 10, 2010, Circuit Judge J. Michael Traynor granted the Defendant’s Motion to Dismiss Second Amended Complaint with Prejudice [which for those lay people means M&T can’t refile a case against Lisa Smith ever again. According to the Order however, Wells Fargo Bank can file a new action, but only if it can prove it legally owns the note.

At this juncture however, with the fraud on the court being investigated by the judge, it is doubtful that Wells Fargo is going to come in and stir up a hornet's nest any time soon.]

In short, M&T Bank attempted (through a set of amended complaints) to assert its ownership in Smith's property. According to Judge Traynor, "The court has been misled by the plaintiff from the beginning." Judge Traynor is considering whether to charge the bank with fraud on the court. At issue are the three different assignments that M&T's attorneys tried to get the court to accept, which all evolved from its initial complaint which asserted a "lost note affidavit". Then, as if a miracle occurred, the bank all of a sudden filed an amended complaint saying they "found" an assignment. When examined, it was discovered that the assignment may have been dummied up. Details on the case were presented in an overview drafted by Lynn Szymoniak, Esq. as part of her Fraud Digest, a publication she regularly puts out describing the foregoing behaviors.

In the above case, on two other occasions, M&T and its attorneys recorded and brought forward two more assignments, claiming these assignments were the true and correct assignments, asking the Court to disregard the other previously-filed assignments. At last check, the hearings were cancelled for some reason. The author is keeping tabs on this case.

Most of what the lenders are hanging their hat on is the allonge. In this instance, the allonge is important because of what it means as evidence when submitted to the court for consideration. From all that can be gleaned from the allonge in this instance, the following items are suspect and must be "discovered" in some form of evidentiary hearing:

1. Who processed the paperwork? What are their qualifications? Were they an employee of the lender or did they work for:
  - a. Lender Processing Services, Inc.
  - b. Fidelity National
  - c. MERS
  - d. Marshall C. Watson
  - e. Wells Fargo as Trustee
  - f. A law firm out of state
  - g. Another unknown entity yet to be discovered?
2. Where did the stamps on the allonge in question come from? Who issued them? When were they printed? Were they photocopied onto the allonge or were they physically attached to the allonge? Were they attached to something other than an allonge? Who attached them to the allonge or other assignment? What were their qualifications? Who were they employed by?
3. Who had first-hand knowledge of the drafting of these assignments or allonges? Who did they work for? What were their qualifications? How did they come into possession of the paperwork?

4. Who touched the paperwork since its inception? How did they come to be involved? To what extent was their involvement in the preparation or execution of the documents? Who recorded the documents at the courthouse? Is there any possibility the document could have been deliberately backdated?
5. Who notarized the documents? Why were they in New York when the person signing them resided somewhere else? Did the notary physically witness the signature? Was the notary bonded by a bonding company at the time the notary seal was applied to the document? Was the notary aware that their seal was actually applied to the document ... or was it photocopied onto the document? Was the notary's commission in force and valid at the time the document was notarized? How does the notary "know" the person signing the documents? Where was the notary at the time the document was signed? [In another room? In another state? This information has been recovered in Robo-Signor depositions!]
6. Who are all the "actors" at issue in this case? They are considered "actors" because of the fraud perpetrated upon the Court. The judge wants someone's head on a charger as a result of this fraud.
7. Every single person involved is going to have to be questioned, from the actual drafters of the allonge/assignment right down to the notaries who signed it. This includes all of the trustees (or those claiming to be the trustees) in this case.
8. Are there trust documents available? These would be:
  - a. Affidavit of Trust
  - b. Trust Indenture
  - c. Master Sales & Servicing Agreements
  - d. Pooling & Servicing Agreements
  - e. Evidence of Asset Trust Account
  - f. Full accounting of the Asset Trust Account, including:
    - (1) master payment account(s)
    - (2) sub-trust account(s)
    - (3) deposit record(s)
  - g. Evidence and documentation of:
    - (1) Loan loss insurance providers
    - (2) Credit Default Swap providers
    - (3) Evidence of Indenture Trustee
    - (4) Full documentation (contract) between Trustee and trust
    - (5) Evidence of named beneficiaries
    - (6) Evidence and location of all trust accounts
    - (7) Evidence of note insurer
    - (8) Documentation of all credit enhancements
    - (9) Evidence and documentation proving tranche allocation
9. Regarding the set-up of the trusts themselves ... who are all of the actors?
  - (1) Grantor
  - (2) Trustee

- (3) Protector, if known
  - (4) Beneficiaries [trustees can't be beneficiaries]
  - (5) Certificate Holders [the true creditors]
  - (6) Are any of them related? [by blood]
  - (7) Dates of trust creation and dissolution (if applicable)
10. Regarding the securitization of the note ... where is the proof?
- (1) All pertinent SEC filings, including items relating to:
    - a. FR 2046 balance sheets
    - b. FASB Statement 95: Statement of Cash Flows
    - c. FASB Statement 133: Accounting for Transfers & Servicing of Financial Assets & Extinguishment of Liabilities
    - d. FASB Statement 140: Accounting for Derivative Instruments & Hedging (this Statement replaces Statement No. 125)
    - e. FASB Statement 166: Accounting for Transfers of Financial Assets
    - f. 424(b)(5) statements (regarding prospectus disclosures)
    - g. All applicable prospectuses [to check for misrepresentations made in their prospectuses as compared to their audits]
11. Regarding the set-up of the SPV [Special Purpose Vehicles] ...
- (1) All documentation proving existence
  - (2) See #7 & #8 for further evidentiary details
12. Who is the brokerage house that handled the securitization of the loan?
- (1) Name, Address, Registered Agent
  - (2) Date of Transfer
  - (3) Name of Trust [SPV] and Date of Transfer
  - (4) Tranche identifiers
  - (5) Pooling & Servicing Agreement
    - a. Check all aspects of the agreement, including deadlines
    - b. Check all makers of the agreement and their qualifications
    - c. Check all dates and locations of the makers at the time of creation of the SPV [check for conflict or contradictions]
    - d. Location of all accounts to allocate payments to investors
    - e. Names and account numbers and ledger sheets showing payments to investors
    - f. Potential payments made to the borrower's loan from any credit enhancement [possibly eliminating chance for default; credit against principal]
    - g. Identify names and relationship of all actors [potential for serving in multiple roles, which is illegal]
    - h. Names and locations of all parties who had access to paperwork
    - i. Who had first-hand knowledge of transactions and ledger entries?
    - j. Potential failure of the pool in which your loan was an asset; when was the last 10-K filed? Was there a 15-D filed? Is the trust still in existence? Was it "wound down"?

The securitization aspect all comes back to the case the federal government is about to prove in U.S. v. Farkas, wherein Defendant and former TBW Chairman Lee Farkas is charged with 16 counts of multiple frauds (wire, bank, mail, securities). This also lends itself to other questions, like:

1. Where were these documents processed?
2. Who caused the documents to be transferred from one party to another?
3. Who transferred each document?
4. How were they transferred? [By courier, mail, fax?]
5. Was anything of value or consideration tendered? [transfer of assignment with no value attached]
6. How was the consideration tendered? {By courier, mail, wired into account?}
7. Were the investors paid with allocations from first payments due and outstanding?
8. Expired accounts? Non-existent accounts? Dummy or shell corporations?
9. All corporate records, minutes and related filings of any suspect shell corporations

If things look shady on the ledger sheets, then who prepared them and did they use Generally Accepted Accounting Principles [hereinafter “GAAP”]?

From all estimations, a full accounting of the lender’s balance sheets and income statements should show what money was taken in and where it went and where your loan fits in. These documents can be used to build a great prima facie case against the lender because there is presumption that upon refusal to provide these documents or ledger entries that were not acting in the capacity of the holder in due course.

This is a great way to separate the loan originator from the REMIC and demonstrate they have no standing or capacity to pursue (or defend) an action! Since the lender will in all likelihood play out the “note” argument, you can then take his claim one step further and ask whether “this lender” actually meets the criteria of a lender under Restatement of Mortgages (Third):

1. Did you advance any loan proceeds?
2. Did you accept any monthly loan payments from the borrower?
3. Would you suffer financial harm in the event of default?
4. Would you stand to benefit from the proceeds of a foreclosure?

Other ancillary questions would arise, such as:

1. Did you actually originate the loan or were you just a conduit?
2. Are you currently under contract with the real lender to service the note?
3. If the answer to #2 is YES, then who is that contract with?
4. Is MERS involved? How many times has that entity executed documents on behalf of the original lender? Did it ever act outside of its capacity?
5. Was MERS ever involved with the actual allonge?
6. Does the allonge contain all of the specific and timely indorsements?
7. Were the indorsements proper? Were the stamps legitimate?



Check it for completion. If it's an allonge to a note, does it have all of the indorsements properly attached and in place? Are the assignments properly constructed? Are the notarial seals genuine and valid? Was the notary actually commissioned at the time the stamp was placed on the document? Were the documents backdated? Was the document issued in one state, signed in a different state, and then notarized in a different state? Was the person signing the document just some "robo-signor" (a robot secretary in a law firm whose assigned duties are to "certify" documents, with absolutely no authority given by the lender or the trustee to do so)? If you have any questions, refer to the "assignment" tendered by Cheryl Sammons in the Harpster case and practice analyzing that. If any of these questions are met with suspicion, it usually means you're going to have to produce previous case law that illustrates that same individual brought fraud on the court, or you're going to have to drag that person into a deposition or into an evidentiary hearing and drag the fraud out of them in that scenario.

**RULE #2: Build a thorough checklist of all documents required for a mortgage loan.**

Even though the original documentation is recorded at the courthouse and can be certified, on many occasions, it has been discovered that not all documents required to secure the interest of the lender are recorded. YOU as the Plaintiff do NOT want to contact the lender and tell them you are going to sue them.

This gives them a chance to go in at the last minute (prior to suit) and either dummy up documents at the courthouse or record some sort of security instrument to back up the MERS lien on record.

This is why many people who could posture themselves as Plaintiffs allow their property to be foreclosed on, so they can see what the lender does and attack the lender's lack of paperwork. Chiefly, it's because as a Defendant, the burden of proof is on the "other side" and then the lender has to actually prove ownership. Foreclosure however, does muddy up ones credit bureau reports. Have the title company representative go through all of the documentation you have to make sure all of the required documents are there. Maybe you weren't given a copy of some document that you should have been given. In lieu of that, your mortgage loan audit or a competing title company can also reveal deficiencies and errors that would be useful to your case.

**EN GARDE**

The idea behind your offensive strategy is to formulate a cause of action for which relief can be granted. As the Plaintiff in an offensively-litigated case, the burden of proof is on you; but that does not mean that you can't use discovery to further prove your claims. In a quiet title action, establishing prima facie evidence up front means the claimant has to work harder to prove their claim. With your advance preparation, information gleaned in initial discovery and during the evidentiary hearing will be like "icing on the cake". When the real truths come out, damages can be truly assessed and accountability can be ascertained. Ejectment occurs when the claimants cannot solidly prove their claims.

By paying for the production of a forensic analysis and an expert declaration, you will not need to necessarily learn the inner workings of securitized loans. All you have to do is raise the issue of fact, showing the court that you have experts who say the pretender lender/trustees, etc. are not the true creditors; nor are they working for the true creditors. Your attorney should know (as soon as the lender files its answer) how opening arguments are going to be framed, starting with upfront objections to the lender's attorney being there! Sure, the pretender lenders attorneys may say their clients are in fact the creditors; however rather than take one side's viewpoint over the other, the judge "buys" your argument that the servicing lender really doesn't "own the note" and allows for discovery or calls for an evidentiary hearing (which could be facilitated by your motion) on the issue of standing ... in other words, "not the proper party." April Charney used this strategy quite frequently.

The final part of your case in determining the agency relationship has been terminated will also mean gleaning the SPV (Specific Performance Vehicle, the trust that represents the pool of investors) to see whether those investors were misled into believing they were purchasing your collateralized mortgage loan, in addition to the basic documents.

In a quiet title action, you may also need to get expert title analysis/experts to testify in court as to when agency assignment vanished, thus clouding title. Removal of the "imperfect security" further closes the door on the pretender lender's chances of winning.

The latest cases involving Washington Mutual Bank's investigations by a Senate Panel revealed that the investors who bought the mortgage securities were not informed of the fraudulent lending practices. This can be construed to mean that WAMU executives not only knew of the frauds being committed by their loan officers, they condoned their behavior because they saw all of the profits that could be made, betting against securities that they knew would fail by insuring them against failure. Keep this aspect of securitization in mind when framing your discovery. Leave no stone unturned! If it becomes necessary to subpoena all those with first-hand knowledge to testify, so be it. If it becomes necessary to depose the trust (bring the trustee forward), so be it.

## **THE PERSON WHO IS "NOT WHO THEY SAY THEY ARE"**

In many an instance, it has been discovered that the person who signed a document being purported as evidence did not have the authority to sign the document in the first place. In this regard, check every single signature and compare it for: (1) originality [is that actually the signature of the person who signed the document or is it an indicia?]; (2) authority [does the person actually have the legal authority as an employee of the lender or is the actual trustee of an SPV that has legal documentation to back up his claim of authority to sign the document?]; (3) presence [did the person in authority actually sign it in the presence of a notary or did they sign it and ship it off somewhere else to be notarized or use a rubber-stamped form already signed by a notary somewhere else]; (4) form [did the person sign the correct type of document?]; and (5) did others sign that "authorized person's" name on his behalf (look for multiple variations of signature).

Another suggested method of impeaching this type of witness (as demonstrated by false filings in previous cases) is to bring them forward in discovery and get all the names, addresses and telephone numbers out of them as to who their employer really is (or whether they are working for some law firm doing nothing but boilerplating documents). At trial, put them under oath; ask them to re-verify under oath that they work for that specific entity. They will either “come clean” and tell the truth, which will kill the lender’s case because of increased scrutiny for fraud upon the court; or they will continue to perjure themselves, in which case you can remind them they are under oath and if they continue, pull out your investigative materials that contradict their testimony, impeach the evidence and immediately motion for summary judgment and ask for damages!

If you are able to impeach the assignment **YOU WILL HAVE DISMANTLED THE CHAIN OF TITLE!** Recognize that chain of title was already flawed by the securitization of the note and mortgage through the registration of the lien with MERS.

You’re just demonstrating to the court as prima facie evidence that this defective assignment just “broke the chain” **AGAIN** and separated the lender from the borrower! There is plenty of case law, expert testimony and “white paper”-type studies to substantiate the “rules” of agency relationship and assignment in your favor. The lender’s counsel will be hard pressed to backpedal to see that his source of authority on an assignment was just ruled fraudulent by the court. The judge will certainly have his “say”. The aid of the declination letter will also go a long way in establishing evidence.

## **GO ONE STEP FURTHER INTO DOCUMENT ANALYSIS**

As time passes, you are going to see a lot more attempted fraud on the part of lenders who will come into the fray at the last minute through their attorneys and attempt to produce evidence in an attempt to perfect their security interest. Any document that comes into evidence after months of **NOT** coming into evidence needs to be forensically examined. By this, it is meant that the following theories must be tested against each document:

1. A document that is notarized without the signature of an authorized officer.
2. A document that is notarized without any signature at all.
3. A document that is notarized in one state and the person signing it may be in another state.
4. A document was notarized in blank (meaning no indorsements); open to transfer.
5. A document had a rubber stamp on it showing “paid to the order of”, with no signature and no notary attestation.
6. A document had a signature on it with no notary attestation (or a signature claiming to be signed “under oath” with no witness).
7. The document was notarized by a notary whose commission had expired.
8. The document was notarized by a notary who did not have a commission at the time it was notarized.

9. The document was notarized by a robosignor who then becomes a notary on other documents (thus giving way to the argument the person was just a “desk jockey”).
10. The document appears to have a false swearing (personally known to the notary when in fact, the other party works in a different office in a different state; thus, the notary would not possess this first-hand knowledge).
11. Under magnification, the document was shown to have been printed from a template (dot matrix printing cannot be detected by the naked eye).
12. An examination of the signature shows that there is no indentation on the reverse, meaning no pressure was applied to the document when it was signed (which could mean the signature was copied onto the page).
13. An examination of the signature indicates that it may have been forged by a mechanical signature machine (they do exist and you will need a handwriting analyst, preferably from the FBI, to analyze the authenticity of the signature, especially if it’s YOUR signature that may have been forged).
14. The dates on the document do not compare adequately with other dates shown on the document that were signed by the same signor (signed simultaneously by the same person who is reported to be in one state where the second document you use to compare it to was signed by the same person as a representative of a firm in another state on the same day).
15. The signature of the signor and the signature of the notary look very similar (again, you will need a handwriting analyst to examine the document).
16. The notarial execution was listed in one state when the commission stamp of the notary was from another state.
17. The notarial execution was attached on a separate sheet of paper from the assignment or allonge; thus giving rise to the fact it was added later from a different location (examine the type of paper used; check for watermarks; run chemical analysis on it if possible, especially if one of the sheets is a different weight or gloss from the others).
18. Impression seals that claim to be “official stamps” but do not cause an indentation in the paper. These could have been added by copying them onto the document.
19. A check of the notary’s commission or bond (with the State they are in) shows deficient information, outdated or predated commission, no bond at the time the notary executed the document, or complaints filed against the notary for malfeasance in other cases.
20. Comparing the document they introduce as “original” with a signature on it; when the copy that is identical to it at the courthouse has been signed or altered.
21. A check of the recorded instrument number does not match or does not exist with the instrument number that is recorded with the County Recorder (clerk).
22. A check of the recorded instrument shows that the Recorder’s stamp is uneven or not properly aligned with the stamp placed onto the document (could have been copied onto the front page of what they are claiming was a recorded document); or if the County Recorder customarily places a stamp over a label and affixes it to the recorded document by label, the label is improperly placed as to location or the label itself appears to be “new” looking, or of a different type of label that the County Recorder uses.

23. Original inks tend to smear or run when a yellow magic marker is applied over them. Copied documents will not do this; it's like highlighting sentences in a book.
24. The longer a document is stored the more brittle it becomes. If it is an original document, it may have lost some of its weight or yellowed due to exposure to elements. If possible, determine the weight of the paper and who manufactured it and find out whether that stock was carried in inventory at the time.
25. The ink used on the rubber stamp may have been recently fabricated or applied by photocopy. The yellow magic marker works to test those too.
26. The signatures by the same person on the same date were signed with two different colors of ink; likewise, a husband signing with black ink, while his wife's signature shows up in blue ink, may indicate that someone else forged a signature.
27. The document was improperly notarized (missing dates, flaws in the "subscribed and sworn" section showing the wrong gender, i.e., the person signing the document was obviously a female and the document refers to her as "he"; no date and location of signor).
28. Items on the recorded document at the courthouse do not appear on the evidence introduced by the lender. Conversely, items that do not appear on the recorded document now appear on the evidence introduced by the lender (i.e., initials added or scratched out; appearance that "white out" was used and then photocopied over).
29. Items that were notarized by official representatives of MERS generally aren't the people they say they are (see the section above for clarification).
30. The dates that the documents were recorded do not match up with the proper timelines in which they were supposed to have been recorded (appointment of successor trustee was done 13 months before the actual assignment of the Deed of Trust; meaning the trustee was protecting "nothing" because "nothing" was assigned to him to protect). It's a "cart before the horse" scenario.
31. Documents being filed in improper order, as a result of #30. As a result, what else was going on with the note at the time the alleged recordation took place (had it already been transferred to another lender?)
32. When a note is presented, there are no indorsements or allonges attached to it.
33. Assignments absent of any recording information. (This demonstrates possible recent manufacture.)
34. Improper or copied indorsements on the allonge.
35. Appearance of high gloss or "shiny" lighter weight paper, indicating the paper may be newer.
36. Dates of stamps on allonges that do not correspond with the appropriate time lines on other documents; this also includes out-of-date official MERS seals.
37. Missing assignments and transfers that leave open timelines of chain of title.
38. Misspelled names or indentifying information; deliberately created position.
39. Missing endorsement stamps that do not correspond with endorsement stamps on other documents presented.
40. Misaligned copies; when held over a recorded original, it shows signatures not firmly over the top of each other in an attempt to cover another document defect.

## **ARE YOUR PLEADINGS IN ORDER?**

Make sure you have covered all of the bases in your motions (expert witness and back-up affidavits completed, properly marked and filed as exhibits; all courthouse-generated documents copies certified); full documentation and case law to back up the merits of your claims so you will prevail in court (too many attorneys lose because they don't have all their "ducks in a row" or are claiming things that either "don't fit in the grand scheme of things" or cannot be substantiated); fully examine the jurisdictional questions (so the judge or the opposing party doesn't have to); all pleadings are "to form" (meaning they comply as far as spacing, font size, etc. with the jurisdiction's rules); and rebuttals (a back-up set of arguments to counter the claims made by the opposing party).

For those of you lay persons reading this ... understand that before your case even goes to court, the judge will have already read the pleadings from both sides [in most instances] and will have made up his mind as to what direction your case is going to take, if it does at all. Analysis of the right set of causes of action coupled with documented evidence and supporting case law, is sure to further the case instead of ending up in a directed verdict or summary/declaratory judgment.

## **DO NOT "SHOTGUN" YOUR CASE!**

Many attorneys lose because they look at the tree but they don't see the forest. Looking at two or three initial counts and then being able to frame those specific causes of action into something workable that can be expanded on is what the author has been told by some of the best legal minds. The mistake many attorneys make is coming up with twenty "counts" against the lender, hoping one or two will hit the target (prevail on their merits). You may have heard it played out as the "cooked spaghetti noodle theory" wherein you throw spaghetti at a wall and see if one or two of them stick; these concepts generally don't work. Judges see them as meritless, stall tactics.

The best trial lawyers know that picking two or three key claims and then sticking to them will keep their cases "on point" and keep the lender's attorneys from stonewalling or drawing them into a blind spot where they can get them off point and further confuse the court as to the merits of the case. They know they can always amend their complaints later if something else is exposed that opens up a whole other line of allegations. If there is enough credible evidence to believe that you were a victim of predatory lending and you have enough supporting investigative documentation to back that up, then go after the lender on that count.

If you are within the time limitations of RESPA or TILA, then use those statutes in addition to predatory lending allegations to keep your case "on point". Do not "reach" for arguments (like conspiracy theories that are harder to prove) like RICO violations, unless you can prove all the elements. All of the successful cases to date were "individualized"; thus also meaning AVOID CLASS ACTION LAWSUITS! These are too expensive, time consuming and can too easily be argued "off point".

Even with the prospect of a major money damage award, you as a Plaintiff can expect little in the form of relief after attorney's fees are paid. Better to be a "hero" to your client than to the country. Quiet title actions are NOT class action-type suits.

## **ATTACKING MERS THROUGH ITS SUBSCRIBERS**

The author has studied enough on MERS to make an arm-chair assessment of attack theorem of how to dismantle the database BEFORE MERS attorneys start arguing away your case: query all of the participating lenders in your suit as to their membership in MERS and what role they expected MERS to play as a "beneficiary". Use admissions statements to get the participating lenders to ADMIT and DENY those things in Restatement of Mortgages (Third) that are relevant to your action. In quiet title actions, you will have all of the lenders' statements before you. Use the admissions to MERS disadvantage and get them admitted as fact, thus, taking the wind out of their sails before they can start arguing their position. Here are some sample statements (with interrogatory follow-up in light-face type):

(Lender name) is a subscriber to Mortgage Electronic Registration Systems, Inc. (hereinafter MERS) [Thus you can ask them for specifics as to when they joined and get them to further discuss in detail their participation in MERS.]

(Lender name) was one of the founders of MERSCORP, Inc. [Thus you can establish whether or not the lender was in on the actual set-up and get them to further identify the true purpose of MERS from its perspective ... not MERS'.]

(Lender name) uses the MERS database (as described on its website) to directly input data about its transactions. [This establishes further need to examine its procedures as a subscriber as to how they input data and whether or not they inputted every change.]

(Lender name) used the MERS database to directly input data about (your name)'s loan transactions. [This establishes that someone other than your true lender has your identity floating around in the securities world, unbeknownst to you; possible ID theft.]

(Lender name) hereby verifies that MERS as a "nominee" is legally recognized as an "agent" for (Lender). [This establishes the need for further scrutiny as to what the Lender intended MERS to do and how much actual participation MERS has in day-to-day affairs. Because the Kesler case in Kansas showed MERS as a "strawman" because it left the term, "nominee" up to the court to define, you get to ask the lender to define it and create parameters for which you can "box out" MERS.]

(Lender name) hereby verifies that MERS disbursed loan proceeds to (your name)'s when they took out a purchase money mortgage. [This goes back to Restatement of Mortgages (Third) as to definition that MERS lacks capacity to bring an action.]

(Lender name) hereby verifies that MERS received monthly payments from (your name)'s as part of its duties as (Lender name)'s agent. [This goes back to Restatement of Mortgages (Third) as to definition that MERS lacks capacity to bring an action.]

(Lender name) hereby recognizes that MERS assumes liability as a beneficiary in this transaction. [This goes back to Restatement of Mortgages (Third) as to definition that MERS lacks capacity to bring an action.]

(Lender name) hereby verifies that MERS suffers a loss in the event of Plaintiff's default. [This goes back to Restatement of Mortgages (Third) as to definition that MERS lacks capacity to bring an action.]

(Lender name) hereby verifies that MERS receives proceeds as a beneficiary would receive in the event of a short sale or foreclosure of Plaintiff's home. [This goes back to Restatement of Mortgages (Third) as to definition that MERS lacks capacity to bring an action.]

(Lender name) hereby verifies that MERS "releases liens" on mortgages, even though it did not loan proceeds to mortgagors. [This goes back to Restatement of Mortgages (Third) as to definition that MERS lacks capacity to bring an action.]

(Lender name) hereby verifies that MERS circumvents recording fees at the county courthouses by shielding all of (Lender's) transactions inside of its database. [This points to lack of transparency to further scrutinize lender's participation in the MERS recordation process and to specifically identify how many failures to publicly record its interests there were. Remember, if the "security interest" isn't perfected properly, the lender lacks standing ... and so does MERS ... as its agent/nominee.]

(Lender name) hereby verifies that MERS' recordation system is transparent enough so that borrowers can keep track of all of the transactions involving their loan. [Gets them to deny that borrowers have access to MERS' system; thus creating follow-up to determine what transactions may or may not be recorded.]

(Lender name) hereby verifies that MERS' electronically retained all documents pertaining to Plaintiff's loan, even throughout the securitization process. [This opens the door for the lender to peculiarize your specific case for follow-up questions.]

(Lender name) hereby verifies that in Plaintiff's case, the person signing the documents purported to be "Assignments" were not simply secretaries in some law office retained by the (Lender) to execute documents. [This goes one step further in specifically identifying that the person signing on behalf of MERS was some legal secretary in a foreclosure mill attorney's office. These people are not "authorized agents" of MERS!]

(Lender name) hereby verifies that in all cases MERS' "certified officials" that assigned any portion of Plaintiff's loan were legally qualified by designation to do so. [Establishes from the lender's point of view their "take" on who signed your specific documents.]



If the lender believes they were certified and you can get them to submit affidavits of certification or qualification of those individuals who signed assignments, saying they were MERS officials, this makes for interesting impeachment arguments should they fail to produce all of the “certification” documents you need to prove their assignment was legitimate.]

(Lender name) hereby verifies that it caused an Assignment to be filed AFTER the foreclosure proceedings started, giving MERS the power to substitute a trustee, even though the Deed of Trust did not give MERS the power to do so. [This lets the lender know you know what kind of angle you intend on pursuing.]

## **THE AUTHOR’S ANGLES ON DISCOVERY**

From whatever source you are getting your information, the author discloses here that this section took him the longest to ascertain from a paralegal’s perspective.

From an attorney’s perspective, you will need to get the advice of one, even if you help that attorney prepare any discovery to be used in your case. Your attorney will have final say as to relevance. The author compiled the foregoing based on his knowledge of discovery and available research. This is not legal advice, but legal research. If an attorney feels that any portion of this section needs to be “tightened up” to fit a given case or circumstance, then that is their prerogative.

**CAVEAT: The foregoing items listed are all derived from applicable case studies. They do not guarantee any legal outcome. They are research tools, not legal advice.**

## Section 8: Filing your lawsuit

**AUTHOR'S NOTE:** There is a Florida court case styled *Countrywide v. Mines*, 2007-CA-6852, Fourth Judicial Circuit Court of Florida (Jacksonville), where the Circuit Judge Hugh Carithers had to recuse himself from the case because he received a favorable discount loan from a lender affiliated with the Plaintiff previous to hearing the case. This discount loan was not available to the general public and was probably given to the judge *because he was a judge!* Influence peddlers beware!

Now the advice being recommended by key players in foreclosure defense is to research your judge! In the practice of foreclosure offense, this could be deemed “forum shopping”. The author has now come to understand that the banks have given preferential mortgage treatment or some other favor to many judges, so it will also be necessary to run background and financial checks on the judge hearing your case, to make sure there is no conflict of interest that could be called into question. Generally, the Supreme Court clerks of each state may have certain financial disclosures on the judges; however (and the author hasn't seen this done yet but certainly anticipates it) it may warrant filing a Freedom of Information Act Request if the upfront results don't produce what you're looking for.

For example, if you were looking to get a judge that had full regard for the law and the facts and you were anywhere in Suffolk County, New York; Judge Jeffrey Spinner's court would probably be a good bet, as he has demonstrated great concern for the homeowners in at least two different cases of record. By examining previous rulings before any given judge (along with a forensic analysis of any of his bench trials being reversed on appeal), one should be able to determine whether his case stands a chance of prevailing in a bench trial, whether it be a full-blown lender liability action or suit to quiet cloud on title.

The other problem with court justices (which this author warns could come back on them in the worst way), whether elected or appointed, is that their perception of what Wall Street has done may be distorted or biased enough to cause them to rule against the law and the facts of the case or on any issues at hand that are raised by your attorney. The public relations effort by the banks and Wall Street may lead a judge to believe that all you are out for is a “mortgage free” home. While we know the outcome certainly may not reflect that, a judge that will constantly swing his gavel in favor of the lenders should be thoroughly investigated and exposed in the media.

There are sources for investigating the judges; not just hiring a private investigator. Your attorney will have a better take on which forum will work better for your case, until the Supreme Courts of each state take a stand against securitized mortgages and predatory lenders. Your attorney may already know a judge who would listen to reason.

Expect to pay the filing fees and costs of suit (which will be a minimum of \$300 for the filing fee and a minimum of \$60 per person or entity served with process).

In the realm of FORECLOSURE OFFENSE, understand that you may wish to couple a tort action or a fraud lien filing claim with a suit to quiet title, especially in MERS cases. Economic duress claims are not new but they may be effective, especially with loan modifications gone awry. Entering into a loan modification with unfavorable terms or being socked with fees or “other expenses” by unscrupulous lenders, which is purposefully designed to put a “squeeze play” on the borrower, can be construed as economic duress if it’s the homeowner’s only option of recovery from the damage of losing his equity.

The quiet title action, which will include a sample pleading that was actually used by the author in an Arkansas case, will give you an idea of what the basis for quieting a title is all about. This will also be explained further in *Section 12*.

## **THE PROBLEM WITH PRO SE LITIGANTS**

The author asserts here that going *pro se*, or “as one’s self”, may result in the setting of case law, especially if you do NOT have legal acumen and do not understand all of the legalese and the application of the rules of evidence and procedure.

In the practice of law this is exemplified by the statement, “He who represents himself has a fool for a client.”

If your particular case is that of a simple Fair Debt Collection Practices Act violation and you know the law inside and out and feel comfortable that a federal judge is going to give you “your day in court”, so be it. Understand that the FDCPA does NOT apply to the original creditor in any case, only to third-party debt collectors!

Yes, the author has researched all of the NOLO books on “Representing Yourself In Court” and other related materials. In fact, the author has an extensive library for someone who is just a paralegal, not just a law dictionary or desk reference.

You may think you have a better understanding of your case than an attorney would; but remember, if you lose, you have set bad case law, which the lender’s can use as proof of your stupidity in defeating others’ claims. Thus, if you feel you’re in over your head, perhaps you need to be talking to counsel about representing you.

Again, what’s your home worth to you?

## Section 9: Your day in court

**PARALEGAL'S NOTE:** In this section, it is important to recognize that from the moment the case is called, the attorney has to be on his toes regarding the statements made by opposing counsel, whether it be a defensive or offensive posture.

If you have properly filed objections and motions to dismiss using the argument that the Plaintiff (defensive posture) is not the proper party, you then can insist on an evidentiary hearing and deposition, where you get to bring all of the witnesses, notaries and other “players” into the proceedings under the Rules of Evidence. By NOT objecting to every single statement, document and legal claim made by the Plaintiff [in the foreclosure defense case; it would work the opposite in your offensive maneuvers] and Plaintiff's counsel, you allow those documents and statements into evidence as admitted, thus furthering the pretender lender's right to be there.

In the event the pretender lender is the Defendant in the action, they almost certainly will attempt to file a motion to dismiss for failing to state a claim for which relief can be granted. The idea here is to make sure that all of your evidence and exhibits you have to date are firmly stated in your complaint. All complaints are rooted in statutes, torts or case law and rulings; so there is really no legitimate reason why the lender could get such a motion through. There is no real affirmative defense to fraud.

Objecting to the following items right up front will put the pretender lender on notice that you are not going “quietly into that gentle night”:

1. **AFFIDAVITS.** Affidavits signed by any person used as evidence by the appearing party without being able to actually see and question the person who executed the affidavit, as is your right under the 6<sup>th</sup> Amendment to the U.S. Constitution, thus conforming to the Rules of Evidence.
2. **COMPUTER-GENERATED REPORTS.** Any reports that are either signed or unsigned have to be certified and validated. Any attorney that lets these documents into evidence without objection isn't worth the law license he was granted to practice. Allowing copies of these documents into evidence without being allowed to compare them to the originals is also another reason many cases are lost from the start.
3. **COMPETENT WITNESSES.** If the pretender lender doesn't have qualified or competent witnesses ... and this includes the attorneys from the foreclosure mill who are filing this action ... their testimony can be stricken from the case, moving you one step closer to dismissal.
4. **ATTORNEY REPRESENTATIONS.** This is probably the single most factor in winning a case for the pretender lender. None of the statements or representations made by the pretender lender's attorney is evidence and should be objected to.

If the lender's attorney seems to act like he's "got all the answers", perhaps your attorney would like to make him "a material witness" and put him on the stand and question him under oath? Did he have first-hand knowledge?

Whether inside the courtroom at trial, or outside the courtroom in deposition, it should be pointed out that such representations raise issues of fact that you or your attorney should be denying, in part to ascertain their validity in discovery. This will give rise to discovery: the use of admissions, interrogatories, production of documents and depositions to expose the pretender lender's frauds and thus diminishing the claim for which no relief can be granted. Every objection is relevant under the Rules of Evidence. Objections which have no merit under these rules can be overruled by the judge. *This is why unlearned pro se litigants lose in court.*

5. EXPERT WITNESSES THAT "STICK". When you present your expert witnesses (who are going to testify as to the errors and frauds discovered and what they mean to you the Plaintiff) come forward, there is a chance the other side is going to attempt to impeach their credibility by (1) digging up crap out of their past; or (2) get them off point to discuss things outside of their realm of expertise. Object to any of the possible ploys and keep your expert witness on track and within the scope and framework of your evidence.

6. THE ENTIRE PROCEEDING NEEDS TO BE TRANSCRIBED. In your case, you will need to make sure you have a court reporter taking notes for all proceedings. This is especially helpful if you think you're up against a brick wall with the judge and you believe that you're facing an appeal. The author doesn't know of a judge that WON'T allow a court reporter in if they are requested. There has to be some way to protect your due process rights. A transcription of your hearing and the judge's ruling document whether there was a judicial error or whether motions or issues raised were denied.

After reading the arguments by attorneys who attended April Charney's seminar, the author can understand that it is going to take some extreme boning up on Rules of Evidence and Procedure BEFORE going into court. "It ain't April's fault ... she knows her stuff."

In summation, the "passion" has to come out of the equation BEFORE the "evidence" can soundly be brought into the case. Refrain from jumping up and cursing the opposing counsel if he uses the word, "deadbeat" to describe you.

### **BE FOREWARNED! THIS IS GOING TO GET EMOTIONAL!**

Opposing counsel will use every trick in the book to pervert the judge's mind into believing that his client is: (A) the true holder in due course; (B) that if his paperwork is missing that the judge will just have to "take his word for it that it really does exist"; and (C) that you the homeowner are here in court just to try to get your home free and clear.

If you had a forensic mortgage loan analysis done as part of your investigation and it was used as a basis of reference to formulate discovery and the discovery makes actual reference to it in order to answer statements or questions, you will have to submit as part of your claim, so the pretender lender and his foreclosure mill attorneys are going to have advance access to it.

If you had an appraisal fraud analysis done, the expert witness will probably need to be brought in to attest to that declaration.

Be prepared for dummed up copies to be introduced as evidence of anything they think will make their case look better. Your attorney will have to be very skilled at having any subsequent filings that the pretender lender might try to get past you at the County Recorder/Clerk's office or at the office of the Secretary of State (in an attempt to perfect their security interest at the last minute). Use your title company witnesses to impeach any of these filings; or use the 40-point checklist in this book.

Do not be afraid to call on the clerks at either the county or state level to affirm any of these last-minute filings as fact, so that after they are impeached by your expert testimony, you can call for sanctions against the lender and lender's counsel for perpetrating what appears to be a fraud on the court!

The lender will stop at nothing to "perfect his interest" in this case. Confer with your title experts ahead of time and have them examine all the evidence you have in your possession. They may be able to identify what items might be lacking in your evidence, which you can either request in discovery or go on your own fishing expedition to find (or not) the documentation you are looking for that proves (or disproves their claim of agency) your claim. And finally, do not be afraid to ask for the judge to recuse himself if he starts ramrodding his bias down your throat. This has happened already in Florida in a *pro se* case in Countrywide v. Mines.

## **THE EMOTIONAL CHARGE BY YOU (THE PLAINTIFF)**

Most attorneys will be happy with the author on this point ... when in court, let the attorney carry on the argument and put forth the emotion and passion.

Day One in court generally involves opening arguments. Take to heart the judge has already read the case motions and has formulated an opinion as to the direction he sees it going. The greatest debaters and orators in court history will tell you that eye contact coupled with a firm and convincing tone, driving two (maybe three) strong points home to the judge will win more cases than not. That being said ... do not blurt out comments in open court. It's disrespectful and will more than likely draw the ire of the judge. What you are trying to do is get the judge to follow your line of reasoning and understand the facts and issues you are presenting, not fuming inside because you called the lender's attorney a "crooked shyster" at 90 decibels at the first objectionable comment. The author cites this paragraph because it's happened before in court (and not on TV either)!

If you have something to say that needs objecting to, whisper it to your attorney and let him do what you are paying him for (or her). Sometimes female attorneys have better luck with His Honors, especially if it appears from forensic pre-trial analysis that the judge likes looking at “eye candy”. This isn’t meant to be sexist. It just unfortunately happens that way in certain forums. More than likely, all of the objections to any potential comments are already going to be well thought out and well rehearsed PRIOR to going to trial.

## **THE SOLID GAME PLAN**

The petition you file and have served to all of the proper (and improper) parties will be received and reviewed by the Court ahead of your hearing. Your attorney should already have consulted with you to make sure that any items of concern for which issues could be raised or an objection could be made are fully discussed. Once the attorney gets into open court and the opening remarks have been made, based on the issues raised in the petition, you will get a clear idea of whether or not your case is going to get slam-dunked based on the motions made. If discovery is needed, which more than likely, there will be some use of it to fill in missing blanks, like assignment forms, original documentation, etc.; a judge will generally grant discovery if the issues that have been raised warrant it. You can bet the pretender lender’s counsel will look to motion for summary judgment for failure to state a claim for which relief can be granted.

This should only happen if your attorney hasn’t done all of his/her homework and the door was left open to allow for that motion. Any solid case merits the court’s time. Getting past Day One should at least give you hope.

In some instances, a full-blown trial could last several days, maybe weeks. More than likely in your case, if there is considerable question as to the validity of your claim, the judge will afford whatever time is necessary into ruling on the law and the facts at hand. Remember that all issues, if not raised at trial, cannot be raised on appeal.

## **GET YOUR FACTS STRAIGHT FROM THE START**

It is best if you “call a spade a spade” ... not a heart. In other words, the party who is sitting across from you is not a “pretender lender”. By using that term right up front, you confuse the court. The judge better understands “not the proper party” because he knows the Rules of Procedure. If you are going to raise any issues of merit (such as missing documents, MERS claims or counterclaims, etc.) you need to stick to two or three basic issues of fact that you and your attorney know **CAN BE PROVEN BEYOND A PREPONDERANCE OF THE EVIDENCE!** The author understands that as a Plaintiff you can’t “prove a negative”; however, there is nothing that says you can’t make the other side “prove a positive”. “Positive” in this case is actual, documented proof that they actually own your note and mortgage using the Restatement of Mortgages (Third) theorem:

Did the party claiming to be the “holder in due course” advance any loan proceeds?  
Did the party claiming to be the “holder in due course” collect monthly payments?  
Is the party claiming to be a “holder in due course” a Trustee or “nominee”?  
Was the mortgage loan securitized and placed into a portfolio without your knowledge or consent?  
Does the party claiming to be the “holder in due course” derive any pecuniary (monetary) benefit from a foreclosure?

## **CONTROL THE NARRATIVE!**

As Neil Garfield succinctly points out ... when your attorney gets into court, the worst thing that could happen is in oral arguments, the judge or the other side “gets control of the narrative”. This is where you are trying to tell your story and instead of you making your case slowly and succinctly so the judge can understand where you’re going with your argument, the other side or even the judge jumps in on your argument and “asks where you’re going with this”, or attempts to “sideswipe” you in court, interrupting your attorney for clarification on points that were not well represented. You also only have a limited amount of time to get all of this “out there” and after ten minutes, if you see the judge looking at their watch ...

If your attorney is on point and presents his/her arguments in a clear and concise manner, there should be no reason for a judge to simply “grant the other side a summary judgment and motion to dismiss”, simply based on an open-ended objection. Also, the easiest way to lose control of the narrative is to let the other side grab features inside your narrative that are not “solid” and have their way with your argument. Remember, it’s not so much the law; it’s who makes the best argument in court. The best defense is a good offense!

## **WHEN JUDGES WON’T RULE OR USE RULE #2 ... USE THIS TOOL!**

Any judge that constantly refuses to hear certain cases, like mortgage foreclosures or refuses to accept or is constantly slamming his gavel down before your attorney gets a word in edgewise, may represent a conflict of interest or may be abusing discretion. If you find this to be a constant behavior of judges in your district (short of electing new ones that are more reasonable), you may be forced to file a grievance and ethics complaint against the judge.

You’re heard the “Rule #2” saying, “In any case, See Rule #1.”

Then again, if you really believe the judge’s ruling to be in error, you must appeal. This is what Jon Saunders recently did ... all the way to the Maine Supreme Judicial Court. There may be some due process issues involved. You may also have to elevate the level of the action and go federal. A lot of the complaints the author has been hearing about surround the behavior of judges in nonjudicial states. There is also the consideration that a judge is abusing his power by becoming a finder of fact instead of a trier of fact.



If the judge won't let you get a word in edgewise before he tosses your case out of court, you can't really appeal it to an appeals court because the judge didn't rule on any issues of material fact to begin with. This could be construed as denial of Due Process under the 5<sup>th</sup> and 14<sup>th</sup> Amendments to the Constitution. Your attorney should be able to explain what if any other options you might have in that instance. In any instance, flagrant and blatant abuse (like the Judge Judy in Seattle) shouldn't be tolerated.

## **EXAMINING A SPECIAL PURPOSE VEHICLE**

When it comes to defining the terms used in the preparation of a trust as an SPV, you need to make sure that you and your attorney understand principally what each party to the trust does (see *Section 10* on Securitization). Even a simple diagram (such as the ones provided in *Nelson & Whitman*) can be utilized by you and your attorney to "chase the paper trail".

When the trail stops, that's when discovery can be used to find out if the other side really did their homework when they set up the trusts. Trust documents can be requested under Production of Documents the further into discovery you get. Complete understanding of the inside elements of securitization are not as essential as first using all available case law and rules to expose "proper party capacity", deficient paperwork, identification of a securitized portfolio and flaws in the chain of title.

For you attorneys out there that aren't "polished up" on trusts ... there are several sources of information. The American Law Institute has published several editions of Restatements that are widely held as "standards" by lawyers and judges. There is also a book by Edward C. Halbach, Jr., entitled *Gilbert Summaries on Trusts 13<sup>th</sup>* (which cost about \$30.00 for softcover). There is a two-volume set on the treatise of Austin Wakeman Scott out by Mark L. Ascher entitled *Scott and Ascher on Trusts* [more on family trusts than business trusts] and or if you want to impress your clients with a full law library (which run about \$1,800) by George Gleason Bogert. The author will touch briefly on his own experiences with trusts in the next section. Many states also have "trust" definitions that the courts may rely on moreso than textbook definitions. Whether you actually need to examine an SPV in a quiet title action is going to be determined by the type of answer filed by the claimants in your particular situation. Bank of America's attorneys have referred to Wall Street trusts as "common law" trusts.

Remember, you are a victim here, not a predator. Act like a victim, despite the vehement and emotional claims from the lender's attorney that you just want your house "free and clear". This is an emotional ploy on the court because judges are homeowners too. Object to these statements and assure the court that if there is any way that you can "work through this situation" to locate the real parties in interest, you would be happy to negotiate a settlement with them. This looks better to the court than, "Yeah, Your Honor, I'm just here to rape these guys!"

## **“GOOD MORNING, YOUR HONOR!”**

Any good trial lawyer will tell you that litigation is an exercise in intimidation and in withstanding intimidation. As Phoenix trial lawyer Beth Findsen (Magna Cum Laude, 4<sup>th</sup> in her class from the University of Houston) will tell you, “You can be right on the law; but if the judge refuses to apply it, you are still going to lose.”

A key problem with a lot of the “opening arguments” in these cases is that the attorneys who defend the borrowers think they have to get everything out in the open in “the first sentence”. [Take a breath, will ya?]

This will only lead to confusion and more than likely will cause potential objections from the “other side”. Once your opponent (or opponents in a quiet title action) smell fear in your voice or sense any insecurity on your part, the courtroom will turn into a feeding frenzy of sharks.

Your arguments should be deliberate and factual, supported by documentation that is incontrovertible. Once you have convinced the judge that you have factual evidence to support your claims and that you have the right to have your case heard on the merits (and manage to get the judge to agree at least to let you present your case ... this will be your biggest obstacle of DAY 1 IN COURT ... once discovery and evidentiary hearings have started, it is likely that the judge will come to understand what you’ve been saying all along was worth considering.

Your objective is to get all of the issues of material fact out there, even if it takes you a full day or longer (if it takes you weeks, you have way too many arguments and you end up making more problems for yourself). Give your opponent LESS to object to and get the case moving towards discovery and you stand a very good chance of winning.

Again (and it can’t be stressed enough) ... CONTROL THE NARRATIVE! Just because it appears to you that the judge is shaking his head up and down like a bobblehead on the back window of a car tooling down the road doesn’t necessary mean he “gets it”. KISS principles work well in keeping the narrative focused and on point. Let anyone come in and “affect what’s between your ears” and you’ve got an uphill battle trying to regain control because the other side may tear at the judge’s purse strings and it’s “game over”.

Because the burden of proof is “higher” (because of whom you’re dealing with ... banks), you have to make the lender’s attorneys jump through hoops and literally scare the hell out of them in court, starting from DAY 1. These lawyers are “out for bear” and you can bet if the attorney is a rookie he’s more likely to be intimidated. Get seasoned professionals and your chances to intimidate are reduced.

Your key ambition here is to object to anything that is irrelevant or hearsay out of the other side’s mouths. Lawyer representations that are NOT objected to are admitted as fact. You have to ask yourself just exactly how much this lawyer knows, first-hand.

Again, don't be afraid to object at the first sign of hearsay and demand the court put the other side's attorney on the stand, as there is no way he knows all about your loan or what the lender did with it. The other side is going to focus on the NOTE! You have to object to that as well. The NOTE isn't the only part of this case that's in question here! This isn't a scoring contest either. You make points with the judge over a cocktail; in court it's a different story.

## **BE PREPARED TO BACK UP ALL OF YOUR ACTIONS**

If you're going the quiet title route, make sure you have all of your service of process documents well organized into files (in the case of multiple defendants) so you can easily locate and dispute any defects in service should they come back on you. Since your property is involved, make sure that all notices of publication meet the court's requirements for service and that they are duly file-stamped and recorded.

When moving forward in a suit to quiet title, make sure all Defendants know there is a lis pendens lien filed, by attaching a notice of lis pendens to any paperwork you are sending out to them with their service. Make sure it is noted in the service that a lis pendens was also delivered and served at the same time a copy of the suit was delivered and served.

You should not have to justify to anyone why you filed a lis pendens in conjunction with your suit. If MERS is one of your key targets, especially if its agents screwed up your documentation, you need the lis pendens in place to prevent retaliation. It is better that a lis pendens is filed with the court and recorded in the courthouse to "tie up" the property so a foreclosure can't be commenced while you are trying to effectuate suit. Lis pendens liens have also been known to have been filed the day before a Sheriff's or Trustee's Sale. Thus, the new owner, not checking the courthouse records for clear title the day before (and the day of) sale, makes the new owner also liable for trespassing on your lien.

## **WHAT YOU PLEAD MAKES A DIFFERENCE LATER ON**

As a closing footnote, also note that if you don't raise a specific issue during the original trial, you can't raise that issue on appeal later on.

## Section 10: Securitization & Assignment

**AUTHOR’S NOTE:** This section examines agency relationships and paperwork (or the lack thereof) as it pertains to the *Landmark National Bank v. Kesler* and other related matters in your right to challenge the standing of the “lender” in court.

As long as you the homeowner, or your attorney don’t object to the misleading comments and half-baked documents; allowing phony evidence to be admitted as “fact”, you will lose. The author will discuss the term “assignment” first, as without assignment there can be no securitization. The author also notes here that allegations have been put forward that securitization in of itself may be illegal. According to Black’s Law Dictionary the term “assign” means: To transfer, make over, or set over to another. To appoint, allot, select, or designate for a particular purpose, or duty. To point at, or point out; to set forth, or specify; to mark out or designate; to particularize, as to assign errors on a writ of error; to assign breaches of a covenant.

Thus, the term “assignment” is the act of transferring to another all or part of one’s property, interest or rights. A transfer or making over to another of the whole of any property, real or personal, in possession or in action, or of any estate or right therein. It includes transfers of all property, including negotiable instruments [citation omitted]. The transfer by a party of all of its rights to some kind of property; usually intangible property such as rights in a lease, mortgage, agreement of sale or a partnership. Tangible property is more often transferred by possession and by instruments conveying title such as a deed or a bill of sale. “Assignees” are those to whom property is, will, or may be assigned. The “assignor” is the person who assigns or transfers property to another. The author knows you can go look this stuff up for yourself; however, to save time and expense in research, the author uses the foregoing to clarify his theory on what constitutes a valid assignment and the rights and duties of the assignor (which extinguish with the assignment) because in instances involving the mortgage loan, consideration was paid to the assignor by the assignee in exchange for the act itself (assignment). Are you confused yet?

Once the “right” to do anything (be it the transfer of secured interest or the right to collect a debt) has been transferred to another party, the party assigning that right loses interest in that assignment because payment was received (in the event of mortgage loan transfers) in some form, whether in full or in part (based on the amount of fees and future interest that could be collected). For example, when MERS conveys its agency position out of its corporation to another entity, MERS loses its “official capacity” as agent or nominee. According to the above definition of an assignment, it also has to be in writing, fully outlining the purposes for which the parties will serve. If no such document exists, or one does exist but doesn’t contain the appropriate language, it was either dummied up at the last minute or is representative of the fact that a trust may exist in name only and that some inter-office memo has been circulated between entities that the parties behind the scenes may not want you to see. The assignment below was deemed “fraud upon the court” by Hon. Lynn Tepper of Pasco County, Florida Circuit Court of the Sixth Judicial Circuit. Can you see the fraud?

<b>RECEIVED</b> <b>APR 06 2010</b> BY: <i>Re</i> <i>900 Pine Island Rd</i> <i>Sic 400</i>		2008132831 Rcpt: 1282347 Rec: 10.00 DS: 0.00 IT: 0.00 09/10/08 11:18am JED PITTMAN, PASCO COUNTY CLERK OR BK 7922 PG 1108 09/10/08 11:18am Deputy Clerk
Prepared by David J. Stearn, Esq. 601 S. University Drive Suite 300 Plantation, FL 33314 01-1609(ASCT)	This space is for recording purposes only	

# ASSIGNMENT OF MORTGAGE

## KNOW ALL MEN BY THESE PRESENTS:

THAT MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.

Residing or located at c/o WELLS FARGO BANK, N.A., 3476 STATEVIEW BLVD., FT. MILL, SC 29715 herein designated as the assignor, for and in consideration of the sum of \$1.00 Dollar and other good and valuable consideration, the receipt of which is hereby acknowledged, does hereby grant, bargain, sell, assign, transfer and set over unto U.S. BANK, NATIONAL ASSOCIATION, AS TRUSTEE FOR THE BANC OF AMERICA FUNDING 2007-4 TRUST residing or located at: C/O AMERICAS SERVICING COMPANY 3476 STATEVIEW BLVD FT. MILLS, SC 29715 herein designated as the assignee, the mortgage executed by ERNEST E. HARPSTER AND JANETH L. HARPSTER, HUSBAND AND WIFE recorded in PASCO County, Florida at book 7358 and page 1120 encumbering the property more particularly described as follows:

LOT 77, BLOCK 21A, LEXINGTON OAKS VILLAGES 18, 19 & 20, ACCORDING TO THE MAP OR PLAT THEREOF, AS RECORDED IN PLAT BOOK 45, PAGES 80 THROUGH 86, OF THE PUBLIC RECORDS OF PASCO COUNTY, FLORIDA.

together with the note and each and every other obligation described in said mortgage and the money due and to become due thereon

TO HAVE AND TO HOLD the same unto the said assignee, its successors and assigns forever, but without recourse on the undersigned.

In Witness Whereof, the said Assignor has hereunto set his hand and seal or caused these presents to be signed by its proper corporate officers and its corporate seal to be hereto affixed.

Signed in the presence of:

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.

ATTEST:

BY:

WITNESS:

PRINT NAME: CHERYL SAMONS  
TITLE: ASSISTANT SECRETARY

Print Name: *Terry Rice*

WITNESS:

Print Name: *Harry Innocent*

STATE OF FLORIDA  
COUNTY OF BROWARD

PERSONALLY APPEARED BEFORE ME, the undersigned authority in and for the aforesaid county and state, on this the day of *DEC*, 2007 within my jurisdiction, the within named CHERYL SAMONS who acknowledged to me that (s)he is ASSISTANT SECRETARY and that for and on behalf of MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. and as its act and deed (s)he executed the above and foregoing instrument, after first having been duly authorized by MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. to do so.

WITNESS my hand and official seal in the County and State last aforesaid this

5 day of *dec*, 2007  
*Terry Rice*  
NOTARY PUBLIC

NOTARY PUBLIC STATE OF FLORIDA  
Terry Rice  
Commission # DD782247  
Expires: MAY 19, 2012  
BROWARD FILM & LANTIC BONDING CO., INC.

According to a sworn affidavit from Terry Rice's bonding company, the notary's commission wasn't even in force until April of 2008; thus, the document was fraudulently backdated by the law firm and signed by Cheryl Samons. Terry Rice and Cheryl Samons by all rights should be put in jail along with all of their friends at DOCX that conjure up these documents that are defrauding county recorders and courts across Florida. This behavior, in any case, should be watched for and addressed when it occurs.

## **THE FUNDAMENTAL RIGHT TO TRANSPARENCY**

The fundamental right to know whether or not a land owner did in fact own his property free and clear of any liens or encumbrances became established in recording laws adopted by every state in the union as it attained statehood. From the 1630's forward, America has enjoyed the ability to be able to trace property records back to its "root of title"; in other words, where the original settlers of this country staked their claims to land. Mortgagees used recordation to prove their interest and rights in support of claims against their holdings. (*Okay, so here comes your history lesson!*)

If the mortgagee failed to record their mortgage or assignment, they risked losing their right to enforce their contract as against a subsequent purchaser for value. Having a sound public recordation system was elemental to American Jurisprudence and the moral good. America's basic system of property rights involves a solidly-maintained system of recordation. Deviating from this already proven system controverts the entire contractual obligation between the parties for which our forefathers deemed to be the most valued possession: ownership of land.

The idea of recordation was to prevent title disputes. Recording procedures have come to adhere to strict principles as formulated by Article 9 of the Uniform Commercial Code; adopted into all 50 U.S. States as well as the District of Columbia.

More importantly, fees were charged to record all documents (ranging up to \$50 per recordation) so that the public document archives could be maintained. Additionally, county services and other public works projects on the local level could receive funding without undue taxation of the body politic.

To record a mortgage or an assignment of a mortgage, the mortgagee delivers a copy of a notarized document, subscribed and sworn to be true, correct and complete to the best of their knowledge and belief, to the office of the County Recorder or Register of Deeds.

The clerk working in that office would then record the document under two indexes: (1) an alphabetical list of every grantor that has recorded a document within a specific time frame; and (2) another alphabetical list of every grantee that has recorded a document within a specific time frame. So when you are searching for a lien on property, you'd search under the "grantor's name" (that person who allowed the granting of the lien). (*This section was added for your understanding the next time you visit the clerk's office.*)

This system endeavored to make the tracking of documents easier to bring forward in case a dispute ever arose by looking up the grantor's or grantee's names in reverse chronological order. Prospective purchasers of land could then look up the debtor's name in the Grantee Index using that same tracking method. Likewise, the prospective lender would search under the borrower's name until it finds a record of the individual or business that sold or gave the property to the borrower. This process is repeated for the debtor's grantor, thus creating a "chain of title" all the way back to the "root".

This system grew to become voluminous as time passed and title companies were created to help prospective buyers and lenders weed through all of the recordations to the satisfaction of all parties concerned; because as time progressed, so did the recordation of other instruments, such as tax liens, mechanic's liens and other encumbrances such as easements. Title insurance was then issued to guarantee the marketable title from the grantor to the grantee every time a transfer in ownership was made.

Title companies however can only keep so much on file and can't be expected to keep up with the paper system of recordation ... it is the best system we've got. Because electronic files are not the most secure, they can be subject to accidental erasure or computer malfunction, bankruptcy, theft or fire. Because title searches are so complex and due to the fact that county recordation facilities are burgeoning with paper files, the title companies began maintaining what are known as "plant" files of all transactions they insured at some point in the 1960's. Still, these plant files are to speed up research to locate where the actual recorded titles to property are held in the county records.

Even though these records are maintained mostly on computer, without the actual paper system to back those records up, the system of recordation would be flawed. It becomes necessary for the author to explain the foregoing because the impact of this education and the comprehension of the services that recordation provides to the community is at best understated. At a point in time in the 1990's, the system of recordation became tainted with false lien claims from so-called "patriot groups". Individuals within these groups would file what would become known in the justice system as a "nuisance lien" against anyone with whom they had an "axe to grind". Judges, attorneys and public officials suddenly found themselves inundated with credit issues as a result of these filings; thus, laws were enacted that made it illegal to knowingly record a document at the recorder's office, known to be misrepresentative or false. Severe fines and penalties were assessed to those who dared challenge the new statutes. These laws are in all 50 states. It is important to understand WHY they also apply to entities who would later ply another type of "fraud" upon the recordation system.

## **ENTER THE "MERS" MORTGAGE**

More than likely, after thorough forensic mortgage loan analysis, it will probably be discovered that your loan was registered at the County Recorder's office by someone with Mortgage Electronic Registration Systems (hereinafter MERS). Since the original was recorded by MERS, it received the original back from the County Recorder's office.

At first glance, one would assume that the paper trail stopped there because MERS declared itself to be the beneficiary in interest, as well as a “nominee”. This is a “brick wall” of secrecy by most definitions; and a lie by others.

**Behind the wall is almost assuredly a deficient amount of paperwork necessary to defend an action in court. Anything filed subsequent to an action is “suspect”.**

This “brick wall” was conceived back in October of 1993 by a select group of mortgage bankers for the purpose of keeping their assignments and holdings “in-house”. There was nothing Congressional about the formation of MERS; it’s a corporation. Through a steering committee set up by the Mortgage Bankers Association (hereinafter MBA), the accounting firm of Ernst & Young was retained to study the entire plan, which in a nutshell, cut out the formal recording of mortgages in the traditional county recordation system, thus saving MERS’ subscribers millions of dollars a year in fees.

On the downside, the county correspondingly received substantially less money from mortgage recordations; thus denying all of the “extras” that supported the “old faithful” system of paper recording. The losses through MERS’ actions cost the counties billions of dollars since its inception.

Even though it took until mid-1996 to work the bugs out of the plan, MERS ended up being incorporated in Delaware, as a non-stock corporation owned by mortgage banking companies that made up-front contributions of anywhere from \$10,000 to \$1,000,000!

The primary goal of MERS was to cut the lender’s costs by \$22 per loan, despite what effects it had on the traditional system of mortgage recordations; it advertised such.

Subprime mortgage lenders began using the MERS system in 1999 and despite the rash of contradictory court rulings, lenders still use the MERS system to (1) record MERS name as an assignee; or (2) to record MERS name as the original mortgagee (this could not be farther from the truth). In essence, once it was discovered that MERS did not act in the “capacity” of a lender; several states ruled that any loan that was written through the MERS system and securitized was virtually unenforceable without proof of who the real owners were.

The question surfaces how MERS thought that it could be a nominee (in an agency relationship with the real owner of the note) as well as a mortgagee (the owner of the note). According to Landmark National Bank v. Kesler, the Kansas Supreme Court ruled that MERS cannot act in both capacities. [Bear in mind that the Kansas Supreme Court is a very conservative court that for the most part, rules on the side of caution.]

When MERS was the Plaintiff, it claimed it had the fiduciary right to foreclose as mortgagee; however, when MERS was the Defendant in suits alleging fraud or deceptive trade practices, MERS counsel argued that the company was simply an agent with no liability whatsoever (“you can’t have your cake and eat it too”).



The entire MERS concept runs contrary to the very first section of the Restatement of Agency Law, which clearly delineates that an agent and a principal are different persons. Restatement (Third) of Agency Law §1.01 (“Agency is the fiduciary relationship that arises when one person (a “principal”) manifests assent to another person (an “agent”) that the agent shall act on the principal’s behalf and subject to the principal’s control.”).

Moreover, neither the popularity of MERS’ self-characterization, nor its contractual recitation, are controlling. *Id.* §1.02 (“An agency relationship arises only when the elements stated in §1.01 are present. Whether a relationship is characterized as agency in an agreement between the parties or in the context of industry or popular usage is not controlling.”)

Even the company’s own *Recommended Foreclosure Procedures* report clearly states that MERS is acting merely as an agent. If this is the case, then by MERS naming itself as a mortgagee is the recordings of some 60,000,000 mortgages recorded at county courthouses all over the United States, the question of fraud by filing a false lien claim could certainly be entertained. There are penalties for this behavior as previously discussed.

Again, from all of the cases the author has researched, it appears MERS counsel uses whatever title and position seems to fit the occasion where a court decision is rendered in its favor. Unfortunately, what it recorded in the county courthouses all across America distinctly claimed it was a mortgagee when in fact, MERS officials knew that it was not. In essence, by allowing this entity to usurp state recordation laws with complete disregard for transparency in demonstrating a clear chain of title, MERS has completely muddled up the waters with its dual-agency, misrepresentative claims. Judges are starting to recognize the fact that MERS’ claim of any legal authority as a recordation database may constitute the filing of a fraudulent document, which in of itself carries some very stiff penalties. Not to be confused, MERSCORP, Inc. is the parent company of MERS, Inc.

Since MERS is a Delaware statutory creature that claims to assume no liability by isolating itself from its true holders in due course, then the only logical action towards the treatment of a corporation that commits fraud is to pierce its corporate veil, go after all of the self-proclaimed “officers” and “directors”; and then to clean out all of its assets and holdings to pay for all of the fraudulent lien filings it made (which thus returns money back to the states); and then clean out all applicable Errors & Omissions policies it holds (unless those policies exclude fraudulent acts by its directors); but then to simply order the State of Delaware to cancel its charter so it can no longer operate, thus effectively ending MERS as an entity. Essentially, by admission, MERS is “bankruptcy remote”.

Since the Directors of MERS have clearly stated that anyone representing themselves to be an “officer” of MERS outside of the direct corporation itself would not be covered under MERS’s errors and omissions insurance. There is additional documentation the “certifying officers” sign holding MERS harmless from anything the officer does. This also means the E&O carrier of each separate defendant could “come into play”.

In an offensive posture, there are actually three reasons why MERS cannot be a mortgagee, this according to the fundamental economic definitions contained in *Black's Law Dictionary*. The reasons are: (1) MERS does not fund any loans [no money comes from a deposit account paid in favor of MERS]; (2) no borrowers promise to pay MERS any money, thus MERS is never identified as a payee in any promissory agreement; and (3) MERS does not receive the proceeds from the sale of a foreclosure. There is plenty of case law to back this up.

A “white paper” by Christopher L. Peterson (then Associate Dean of Academic Affairs and Professor of Law, University of Utah, S.J. Quinney College of Law), which more succinctly summarizes the author’s views here, illustrates that.

## **ASSIGNMENT INTO SECURITIESVILLE**

From the point that MERS ceases to operate as an entity, the securitized portfolios will be left to stand on their own; however, there is still a level of culpability wherein the assignments from the seller of the notes into the Special Purpose Vehicle (SPV) could bind the agency relationship to the trust that is paying out yields to the investors (the true holders in due course). There are existing allegations that these portfolios were pledged multiple times to “guarantee” returns to investors.

All 62,000,000+ loans that were registered in MERS’ name are suspect for title flaws. Liens would have to be extinguished based on lack of assignment paperwork (other than what legitimate proof can be produced from Wall Street investors to back up their asset-back securities claims) that in hard copy form, firmly identifies who the holders in due course really are. Because the investors agreed to accept a bond created out of a CDO, they would technically become defendants to the fraud perpetrated by MERS.

What’s even more possible ... any foreclosure that MERS effectuated could potentially be reversed. It took from 1998 until 2010 to open this Pandora’s Box into the justice system; it will take another 12-15 years to remove clouds from and quiet all affected titles to property. Some have surmised that special “housing courts” may have to be set up to handle the overflow of cases that the justice system is expected to get “nailed” with. The author can’t assess at this time what if any effect the qui tam actions that started in Nevada and California will have on the recordation system. It is perhaps a better solution to have each county pass an ordinance banning MERS from recording any documentation bearing its name in their respective courthouses. This would be one step closer to restoring order in the county recorders’ offices.

From the time the trust (the SPV) assigned the portfolios over to Wall Street, the real truth about where the money went is yet to be determined because (1) the wheels of justice grind slowly; and (2) the criminal investigations have only just begun and each one will take at least another three years to prosecute from the time the investigation starts.

It is also possible that the true holders in due course will simply write off their losses instead of showing themselves to be true creditors and risk facing a battery of lawsuits from angry homeowners. After all, these investors actually thought they were buying up mortgage portfolios, when in fact, they were buying diluted securities.

What's even more unconscionable is that these supposed "defendant owners" of the obligation that was sold to them as bonds now end up being potentially held liable for a non-recourse-type transaction.

## **MERS RELATIONSHIP TO SECURITIZATION**

Due to the rulings already rendered by numerous courts throughout America, one thing stands out: Very few cases ever really got into what conduits the portfolios cycled through once they were turned into asset-backed securities. Because of MERS' recordation secrecy, securitization became impossible to track because its subscribers were responsible for updating MERS' databases. This of course, didn't always happen.

The options for the homeowner then became: (1) by mediation or loan modification; (2) by short sale or foreclosure; or by (3) complete dismissal of the foreclosure because the lender couldn't find the necessary paperwork to prove its claim. Relatively few cases went so far as to explain the theories behind "pass-through" and securitization. The author will try to keep it as simple as possible; however, you may not fully appreciate the results (your attorney will however). Opinions of CPA's and other experienced professionals would argue that what happened on Wall Street with the entire process of securitization was entirely illegal. To date, some of these processes are being investigated by authorities.

**As Einstein again would argue, "the last ones who should be entrusted to clean up the mess that was created are the ones who created it."**

**To understand the foregoing statement, one only needs to look at what the United States Congress is doing to try to stop the frauds on Wall Street. The author prefaces the discussion of the securitization of these mortgages with the reasoning held by the United States Supreme Court over 120 years ago in Carpenter v. Longan, 83 U.S. 271, 274 (1872); that a "mortgage can have no separate existence" from its promissory note. Cases like Vance v. Fields (in Florida) also claim that the note must follow the mortgage.**

MERS claims to own legal title to mortgages, despite the promissory notes those mortgages secure (having been negotiated elsewhere), flies in the face of the legal maxim endorsed by the Supreme Court. The parties to mortgage securitizations do not generally negotiate promissory notes to MERS as MERS does not pay anything of value for the note and MERS does not receive payments from borrowers for the note on behalf of the intervening assignees.

Thus, because the note and deed are split [technically], according to *Kesler*, supra, the note is unenforceable as a secured instrument (only as an unsecured note). Don't look to the author on this ... the banking industry did this to themselves ... and these merchants of the earth have yet to be dealt with. To further isolate MERS, Moody's (the ratings company) has suggested the entity referred to as MERS-3, become bankruptcy remote. To do this, MERS-3 has to have no assets, no liabilities, no income and no expenses. They do have limited errors and omissions liability coverage, but they have no employees and their "certifying officers" are not covered under the company's errors and omissions insurance. MERS-3 had to be structured as such to be involved with mortgage securitizations.

The foregoing needed explanation prior to delving into the simplicities of Wall Street (which will take all of three paragraphs to explain in the simplest terms possible). Allegations are now surfacing that there are better than five criminal elements coming into play involving Wall Street dealings, not to mention income tax evasion by the major banks and Wall Street firms.

## **THE ELEMENTS OF A LEGAL TRUST**

While every "astute" campaigner of truth is out delivering rather expensive seminars talking about securitization, the author simply asks you to sit for a minute and ponder the following definitions. Then he is going to tell you WHAT his research shows that makes a trust "penetrable".

This you need to know because the Internal Revenue Service "busts trusts" all the time in tax court primarily because they were illegally constructed in order to hide assets, avoid taxation and seizure for sale to pay off back taxes. The IRS will come into tax court and inform the judge that the taxpayer violated the Uniform Fraudulent Transfer or Conveyance Act in transferring assets or property into a trust, while the IRS had a lien in force (or one year within the time of filing bankruptcy also applies in bankruptcy court).

**CREATOR (TRUSTOR, SETTLOR):** For the purposes of Wall Street discussion, the bank or brokerage house was the entity that created the Trust (the individual or entity that actually created it is unknown until you locate the actual trust indenture or trust agreement) forms the trust on paper. Once the Trustor signs off on the Trust Document and Affidavit of Trust (the Trust Document has a name, i.e. "The HSBC Fiduciary Trust 2005-3"), they have fulfilled their obligation in creating it. The Settlor does not own an interest in the trust nor retains any control over it. Once the Creator-Settlor-Trustor (or his duly authorized representative) signs off on the trust document (via notarized signature), his participation in the trust is complete. He can no longer participate in any trust activities, nor can he assume or accept any other position with that trust! However, he may elect to be the Creator-Trustor-Settlor for a multitude of Trusts (for the purposes of having multiple choices to pick from in the investor securitization scheme). Each trust created is required to have a prospectus. The SEC refers to it as a 424(b)(5).

The prospectus describes in detail what the entity selling the Trust wants prospective investors to know about it (the “res”; value, the return on investment [ROI], the terms, etc.) so they can make an informed investment decision. What has happened as a result however, is when the contents of the trust itself were turned into a CDO and then wrapped into a derivative and sold as bonds, the investor who bought these bonds (this potentially could be your 401k fund) they bought them as “non-recourse”, which in effect, gives the investor no rights to sue to get his money back if the investment “fails”.

Now, for the purposes of discussion of your Deed of Trust (hereinafter “DOT), YOU, the borrower, are the Creator-Trustor-Settlor ... known in the DOT as the “Grantor”. Look at your Deed of Trust (yes, get it out and put your glasses on and look for it on Page 1). You will see where your name (or names if you’re married or you may only see one, depending on who the borrowers are or how you want the property conveyed, it could be a trust from the get-go) appears on the document. Now look for the name of the Lender. You will generally find that under “Grantee”. You and the lender are two distinct parties! There’s another distinct party in the picture too ... you’ll find out who that person is when you look at the next paragraph.

**TRUSTEE:** This individual is given the assigned duty to represent the trust itself as executor. **The trustee does not own beneficial interest in the trust**, for to do so would make him personally liable for the debts of the trust and violate merger doctrine. The Trustee can enter into side agreements on behalf of the beneficiaries of the trust, so long as the contracts are legal and binding, so the trust can generate an income to inure to the benefit of the beneficiaries. **The Trustee cannot be a beneficiary (*Reinecke v. Smith*), nor can the Trustee be the person creating the trust. If the trustee acts outside of the capacity of his position or the beneficiary acts for him, the merger doctrine kicks in and the basic tenets of the Trust document have been violated.**

For the purposes of your Deed of Trust (look at it again), find the Trustee. If the trustee is the title company that closed your loan, you can bet that in the event of a default the following will happen:

- (1) **The lender will exercise the option of appointing a substitute trustee.** That option is usually found in #24 of the “non-uniform covenants”. The argument here is that MERS is not listed as being that “option” as a nominee; the right is exclusively reserved to the lender. It does NOT say MERS. If MERS was entitled to do this, MERS would have been listed. MERS did not lend any money; therefore, it does not fit the definition of a lender. For the title company to foreclose would obviously be bad for business.
- (2) You may also discover that the successor trustee is a foreclosure mill or a company that is a subsidiary of the lender that customarily conducts trustee’s sales. They are still third-party debt collectors. Debt collection agencies **MUST** be registered with the Secretary of State for the state they collect debts in! If they are not registered or the “lender” that appoints them legally doesn’t own the note, the substitute trustee is acting outside their “capacity” and is thus liable.

- (3) **Because the “right hand” doesn’t know what the “left hand” is doing, generally, the appointment of substitute trustee in deed of trust states will come first.** This means that if the actual NOTE wasn’t in the name of the “lender” that’s listed in your deed of trust, then any other lender would have to have an assignment recorded (in proper order) at the courthouse. If that assignment is not recorded, then that “lender” (the party holding the unsigned lottery ticket) can’t appoint the trustee. When there are sequential recordation frauds recorded, over half of these apply to the foregoing scenario. To recap, the lender that actually owns the note (the holder in due course) must have recorded an assignment to that effect BEFORE it appoints a trustee to succeed the one listed on the original deed of trust; otherwise, the appointment is invalid. MERS cannot convey the note!
- (4) **Sometime after the appointment of a successor trustee, the borrower (Grantor) will receive a Notice of Default.** If at the time the Notice of Default doesn’t have perfected recorded documents to back it up (recorded in proper order in the courthouse), the successor trustee has a problem as a third-party debt collector under state and federal collection statutes.
- (5) **The clock starts ticking.** You have from the time the Notice of Trustee’s Sale is recorded until the sale date to act.

Further, the author has seen MERS’ arrogance in making the Grantor buy a Title Policy with MERS as the beneficiary. In the minds of MERS’ executives, the author thinks they think they’re entitled to reap rewards for their bad behavior through the insertion of their recordation entity into your paperwork. **The problem is: MERS has actually received a benefit at the moment the Deed of Trust was signed by you because the Title Policy inures to its (MERS’) benefit. Thus MERS, by contract, could be legally liable to you if the Deed of Trust is declared void.**

**The author will restate this argument: You need to understand that MERS is trying to give itself as much legal impetus on the Deed of Trust as it can get without having to invest a dime. MERS itself is a “bankruptcy remote entity” meaning it cannot have assets, liabilities, income or expenses. By YOU, the Grantor, purchasing a Title Policy in MERS’ name, YOU, the Grantor, just guaranteed marketable title inuring to MERS’s benefit in the event of challenge, further making it look as if it has some real beneficial interest in your Deed; fitting the term it uses: beneficiary. MERS cannot be a beneficiary because it didn’t loan you a dime!**

**Unfortunately, what title companies are now coming to understand (and getting nervous about) is that when MERS hides all of the transfers (and there may be several involving your mortgage loan); each time a transfer occurs and isn’t recorded, unknown to you, your title is slandered. If the recordations of perfected security interests are NOT recorded in the proper order of transfer, each one of those transfers that is NOT recorded in proper order disrupts the chain of title and slanders it, creating a cloud on title. Nevada attorney Mark Mausert even says that the foreclosure itself creates a slander on title. Can you see why?**

**IT ONLY TAKES ONE EXHIBIT TO PROVE THE CHAIN OF TITLE IS  
BROKEN; THUS, GIVING REASON FOR A COURT TO REMOVE THE  
CLOUD BY QUIETING THE TITLE!**

Here's another argument: If you read further into your Deed of Trust (Page 1 and 2, it's right up front there) you will see that MERS claims only to hold legal title. Then again, MERS also claims to be the beneficiary. This is also a problem because by definition, the Trustee is the one who is supposed to be holding legal title; again, this challenges violation of merger doctrine. Merger doctrine in Trust Law is when one party who is distinctly separated at "birth" (the creation of the Trust) acts in the stead of another distinct party (the Trustee), in conveying, assigning, or transferring your Deed of Trust to another Trustee or entity. The problem becomes even more convoluted by lack of definition of what the duties of the "nominee", "beneficiary" and "trustee" actually do.

It has been repeatedly stated in many courts throughout America that MERS cannot convey something it doesn't own; despite the fact you bought MERS a title policy. The question will then become: WHY did you do that? WHO advised you to do that? Was that part of the requirements of your mortgage loan? Did they tell you to get an attorney to review and understand what MERS was doing as a component of your Deed of Trust? Of course not. All of this working in tandem is what makes your Deed of Trust voidable in a quiet title action. Whether a judge voids the Deed of Trust (elementally making the note unsecured because the Deed of Trust is "unwound" from around the promissory note) is another story, depending on how much of the chain of title you can prove to be "irretrievably broken" or in the event the Deed of Trust is found to be a fraud ab initio.

**EVERY POTENTIAL BORROWER IN A DEED OF TRUST STATE SHOULD  
BE ADVISED OF THIS "FRAUD" AND ITS POTENTIAL CONSEQUENCES!  
THE NUMBER OF MORTGAGE LOANS WOULD DROP BECAUSE  
BORROWERS WOULD BE AWARE OF THE SCAM AND WALK AWAY  
FROM THE CLOSING TABLE! EITHER MERS GOES OR YOU GO! RUN!  
RUN AS FAR AWAY AS POSSIBLE!**

**SUCCESSOR TRUSTEE:** This person is called in by the Trustee (if the Trustee is capable), or by the beneficiaries (in the event the Trustee dies or resigns, refer to #24, Substitute Trustee in your DOT) to replace him as Trustee. Trustees can also be replaced by a Trust Protector (another assigned duty to a completely different person, unrelated to any other party in the trust, including the beneficiaries) in the event the Trustee dies, commits fraud or it is demonstrated that a conflict of interest would occur if the Trustee remained in that position. This is WHY you see MERS substituting Trustees in the event of default.

**ALTERNATE TRUSTEE:** This is a completely unrelated person to the rest of the parties in the trust that takes over in the event the Successor Trustee is not available to assume responsibility. Generally, unless the Trust has specific provisions for this, the substitution of trustees in your Deed of Trust will generally go to a law firm ... the one that's foreclosing on you if you default.

**TRUST PROTECTOR:** In most inter-vivos (irrevocable) trusts, the Protector can remove a trustee if the Beneficiaries allege fraud, conflict of interest, or other action counterproductive to the legal duties of the Trustee (i.e., the Trustee is convicted of a felony and gets sent to prison) or if the Trustee dies. The Protector is designated to “protect” the interests of the beneficiary. Most living trusts do not provide for this option.

**BENEFICIARY (IES):** These persons receive the full rights, privileges and benefits of the “res” in the trust itself (the “res” is anything of value that the trust is set up to protect, i.e. an interest in real property). [On Wall Street, the beneficiaries would be the investors who funded your loans. They would be the true beneficiaries. However, because of the way the Wall Street Trust-CDO-CDS parameters are set up, the beneficiaries have no understanding of the role they played in “funding the loans”.] This is where you’ll hear many people say that “China probably owns my loan”.

This is also where the argument of MERS’ standing or capacity comes into play time after time. MERS has fooled the system into believing that it really is a beneficiary to the point where as a “nominee” MERS demands it be notified in the event of suit by the borrower. This is the arrogance that is going to get MERS in trouble in a quiet title action. The author sees no way that MERS can survive, especially when it has no real “beneficial” interest in the note. IF the quiet title action is properly argued by an attorney that is familiar with MERS and its misapplication of duties and violations of merger doctrine, THEN your quiet title action could result in the Deed of Trust being voided because of its fraudulent creation by the actors involved. The author will go into more detail and explain the “bottom line” to the quiet title in *Section 12: Quiet Title Actions*.

## **WHAT MAKES A TRUST ILLEGAL, VOID OR VOIDABLE**

A trust cannot stand if any of the following elements exist:

- (1) **The Trustee wears two hats!** (i.e., the creator is also named as the beneficiary or trustee.) Here is a sample from the Kansas Statutes regarding “wearing two hats”:

### **Chapter 33.--STATUTE OF FRAUDS; FRAUDULENT CONVEYANCES** **Article 1.--STATUTE OF FRAUDS**

**33-101. Trusts.** All gifts and conveyances of goods and chattels, made in trust to the use of the person or persons making the same shall, to the full extent of both the corpus and income made in trust to such use, be void and of no effect, regardless of motive, as to all past, present or future creditors; but otherwise shall be valid and effective. History: G.S. 1868, ch. 43, § 1; R.S. 1923, 33-101; L. 1949, ch. 274, § 1; June 30.

**AUTHOR’S NOTE:** Many of the so-called “Patriot Movement” types attempted to set up trusts so they could hide their assets from government seizure.



Unfortunately, when called into question in tax court, they produced documents that showed they created the trust and then controlled the trust in the capacity of a Trustee AND was also listed as beneficiary! They were invaded by the IRS as a result. The court voided the trusts and ordered them liquidated.

- (2) **Any of the parties to the trust are related by blood!** Again, the author refers to another section of the K.S.A.'s "Statute of Frauds" as proof:

**Chapter 33.--STATUTE OF FRAUDS; FRAUDULENT CONVEYANCES**  
**Article 2.--UNIFORM FRAUDULENT TRANSFER ACT**

**33-201. Definitions.** As used in this act:

(k) "Relative" means an individual related by consanguinity within the third degree as determined by the common law, a spouse or an individual related to a spouse within the third degree as so determined, and includes an individual in an adoptive relationship within the third degree. History: L. 1998, ch. 13, § 1; Jan. 1, 1999.

- (3) **The Trustee commits an act of fraud in his official capacity;** thus bringing the trust under scrutiny of any jurisdictional authority!
- (4) **The actual Trust Document is not properly drafted** or signed by all the parties!
- (5) **The actual Trust Document and/or accompanying Affidavit were never executed; or if they were executed, were not properly notarized.**
- (6) **The Trust Document gave anyone outside of the parties named in the Trust express authority to transfer assets out of the trust without consent of the beneficiaries which would diminish the value (the "res") of the trust.**
- (7) **The trust contains nothing of value.** (This is why there are resecuritizations now!)

**A trust is one type of Special Purpose Vehicle (SPV).** Admittedly, these trusts are common law trusts. It maintains that type of status because the parties acting in consort to create and execute it are unrelated and are doing so purely out of a binding contract or for the purposes of asset protection.

In the case of your single-family residential mortgage loan, when the note and mortgage were bifurcated (split up into two distinct parts); and the note was packaged up into a portfolio and placed into an SPV (a trust), the character and status of the debt changed (as defined under the Fair Debt Collection Practices Act). Third parties now control the alleged "secured interest" in your property.

See *Section 15: Following the Money Trail* for a more detailed explanation of this.

Because of the fact your note was sold and re-sold; and then transferred, packaged and re-packaged, and sold as bonds to investors who thought they were getting a "piece of the pie", all of the beneficiaries in any preceding trusts CHANGED with the conveyance.

What a true forensic securitization analysis should demonstrate is that the chain of title has been broken and the note is unenforceable as a security instrument because the true parties in interest (the borrower and the beneficiaries of the trust in which your note is held in portfolio) were never a party to the transactions involving the Credit Default Swaps for which the banks bet would default. This is where the allegations of “insider trading” came into play, because the banks supposedly set up borrowers in bad loans KNOWING they would fail. Then they would securitize them and place “bets” against them with the insurance companies (like AIG and AMBAC). These allegations are harder to prove in the civil realm because they are criminal in nature and require thorough investigation by an entity that has the power to imprison the culprits. It is intimated here that a criminal “squeezeplay” will produce whistleblowers.

### **“IN CONSIDERATION OF ...”**

Simply put, one of the elements of a contract is payment or consideration. Without consideration, you don’t have a contract. Therefore, you have to ascertain exactly what if any value (in actual dollars paid) by the aggregate fund managers of the trust to the assignor in exchange for the security instrument. If no value or consideration can be determined, then there is no “res” in the trust. Without “res” (value), the trust cannot exist. It is reported that the bankruptcy court in the Western District of Missouri is now starting to challenge the “value” of the notes that the lenders are asking for relief on.

### **THE ALLONGE**

Here is another problem the legal eagle you’ve hired will have to deal with. According to *Black’s Law Dictionary*, 6<sup>th</sup> Edition, the allonge is a piece of paper annexed to a negotiable instrument or promissory note, on which to write indorsements for which there is no room on the instrument itself (to write those indorsements).

According to the Uniform Commercial Code §3-202(2), **the allonge must be so firmly affixed to the negotiable instrument or promissory note so as to become a part thereof.**

In many cases, these documents are non-existent or if they do exist, are **not** made a direct part of the negotiable instrument, but instead are proffered by the lender’s attorneys [which can be objected to just on “form” alone] as part of the instrument or note.

Many of them are NOT properly executed or are NOT notarized or even worse, are “rubber stamped” with some other name of a “trustee”, who is not identified on the indorsement.

**There can be no question as to what allonge goes with what instrument!** Many attorneys miss this in discovery! Your legal eagle has to examine every single document for specific errors ... remember, leave no stone unturned!

## **INSURANCE COMPANIES GOT SCREWED TOO!**

Because of the fact the banks and holding companies like Goldman-Sachs, Lehman Brothers and other major players on Wall Street “bet against” the performance of these subprime loans (they knew they would fail), they also knew that these “insured” loans would pay off in the event of a default by the homeowner to pay the note as promised.

Since AIG was the major insurance carrier (re-insurer of the SPV’s) on Wall Street, all the major players put a “squeeze play” on AIG, demanding cash payouts of their insurance policies when the notes went into default. This is what many term “structured gambling”. The banks knew that the loans they created would never be repaid and so they bet on their failures!

Now the insurance companies are getting wise to this and the lawsuits are flying (*Countrywide Financial Corp. v. Old Republic International Corp.* and *Bank of America NA v. United General Title Insurance Company and First American Title Insurance Company*) as they are refusing to pay default claims by the banks, telling the courts they’ve discovered improper lending practices that wreaked of deliberate predatory activity and fraud upon the insurers.

## **FUNDAMENTAL LACK OF PAPERWORK**

If one would allege anything in a court of competent jurisdiction, the assumption would be that much of the paperwork that was drafted for the purpose of “securitizing” your mortgage loan is either fraudulent or non-existent.

If you want to confuse a judge and further dig yourself a hole in court where the “lender” can wriggle through, jump right into the middle of what happened on Wall Street and start trying to explain in Greek to someone who only speaks Hebrew how securitization works.

In a quiet title action, avoid going right into securitization puts the “cart before the horse”. Start impeaching documents first! Many foreclosure cases have been won that way! The author predicts that quiet title actions will be won that way too!

**In every case to date that this author has examined, it only took superficial exposure to prove that the paperwork the supposed “holders in due course” were producing was either improperly created, doesn’t even exist (Trust Document or related Affidavit that was or wasn’t properly recorded), bears evidence whatsoever that the mortgage loan was securitized, was drafted “after the fact” (submitted after the original complaint to foreclose was filed in order to “bat clean-up” (fraud on the court) ... i.e., attempt AFTER THE FACT to perfect a security interest) or was not properly recorded if it was indeed filed prior to commencement of the foreclosure!**

***AUTHOR'S NOTE: This should tell you that you do NOT need a securities education (nor does the judge) if you just stick to the basics! Therefore, the forensic loan analysis obtained through counsel and your expert witnesses should get you past oral arguments and into discovery IF any of the elements of an analysis are not time-barred and are applicable. Many borrowers run out and hire an auditor when it's too late to enforce statutory requirements. This is a prime waste of money!***

## **THE PATH TO SECURITIZATION**

The author has found it feasible to examine and paraphrase certain “white papers”, which are researched reports by people with credible backgrounds (judges, law professors, forensic analysts and expert witnesses) that provide understanding into areas of law and accounting need more than just a modicum of understanding.

According to papers published by a well known central California bankruptcy judge (Hon. Samuel L. Bufford) who has a fairly firm handle on securitization ... its simplicity can be spelled out in one short paragraph:

**A borrower wants to buy a home and goes to a mortgage lender who finances the purchase of the property. The borrower then signs a note and mortgage or deed of trust. The original lender then sells the note and assigns the mortgage to an entity that securitizes the note by combining the note with hundreds or thousands of similar obligations to create a portfolio of mortgage-backed securities. These securities are then sold to investors as bonds; but not without consequence.**

## **THE DOWNSIDE TO THE SECURITIZATION PROCESS**

With the magnanimous flow of notes into the system, numerous mistakes have evolved. Unfortunately for the lender (generally the servicing lender, who files the foreclosure action) who is seeking to enforce the obligation by foreclosing on the underlying collateral, very often cannot find the note. Thus, the lender bringing the action cannot prove standing to sue.

If the trust has been dissolved, it does NOT contain the borrower's note. It may have been paid off and/or placed into a different portfolio to “hide it”. This reasoning would be easy to assume; so the current servicing lender can continue to collect on the original promissory note (double-dipping) or in the event of a massive credit event (a majority of the loans inside the trust defaulted) the balance of any remaining “good loans” were transferred through side deals into another trust series and the rest of the existing portfolio was written off as a loss. This process has been referred to as “resecuritization”.

The transference itself constitutes a violation of FASB 140-3 accounting standards if the pool was broken up and sold off in pieces to other trusts without disclosing the actual transfer of legitimate assets as “gains on sale”.

This is why the brokerage houses are settling massive lawsuits. If this illegitimate transfer information were to be exposed, hundreds of Wall Street analysts, traders and securities dealers would be sharing prison cells ... and they know it!

The downside for the homeowner-borrower is that he has to “prove” through discovery where his note went; that is, in a normal “suit” under some regulatory provision. However, in quiet title actions, the homeowner-borrower lays the cards on the table, gets the court to understand where he thinks the note went and how the batch of assignments and non-disclosures caused a break in the chain of title; and the lender claiming an interest has to come forward and show their cards. No cards = ejectment.

If the lender’s “cards” don’t look right, you impeach them through analysis of each document. The beauty of quiet title is that it virtually gets you an evidentiary hearing from the outset if you can demonstrate potential title defects leading up to the actual securitization of your note in your original pleadings.

Quiet title actions are indeed a form of “foreclosure” on the lender, especially if the statute of limitations has tolled on what at the time would be statutory violations. Many judges will not allow these regulations to be enforced from the time the “violation” was discovered. They will apply the regulations from the time the mortgage or Deed of Trust was entered into. The biggest fraud of all of this in fact, is that much of this was being covered up by the secrecy of MERS’ electronic databases!

As a result of the securitization process (with mortgage obligations having been securitized by assignment to a trust indenture, with the resulting pool of assets being then sold as mortgage backed securities, through Pooling and Servicing Agreements, hereinafter PSA’s) the servicing lender (as demonstrated already in numerous court cases) finds itself tempted to fabricate evidence to support its claims. This temptation has manifested itself moreso in the bankruptcy courts; thus, Judge Bufford’s reasoning behind issuing such a “white paper”.

The author gives major credit to *Whitman’s* diagramming of how a mortgage loan gets recorded and ends up becoming part of a special purpose vehicle and being marketed on Wall Street.

While the attorneys need to familiarize themselves with the terms and more specific functions of each player or entity on Wall Street, it is really up to Main Street just to familiarize itself with the generalities of securitization in basic understanding of what happened that caused the bailouts to come into play. The further up the trail you go however, the more it becomes necessary to utilize discovery and evidentiary hearings; again, this is something the Wall Street players don’t want exposed.

Your attorney should be looking for assignments that lead to a “dead end”; in other words, one trustee’s duty ends when it assigns that duty to another entity [like an SPV, whose trustee creates separate trusts as a creator, with all new trustees!

REMEMBER the trustee can only wear one hat! If the trustee was the creator, he cannot be the trustee, or you have a breach of merger doctrine!]; or trust paperwork that cannot be produced because it existed in name only or as an inter-office memo. Faxing a name-only trust to another person for use in a “shell game” against investors could constitute wire fraud. This has been alleged in a “white paper” by CPA Michael Nwogugu.

## CAUSE AND EFFECT

As Neil Garfield will tell you, there are examples of MERS’ “interference” causing more than just confusing opinions about case law and its applications to your particular instance. What is clear is that Restatement of Mortgages (Third) again states that if you put one name on the promissory note and another on the Deed of Trust, you have established intent to separate the two ... but why?

It could simply be assumed that when the mortgage loan broker used Fannie Mae and Freddie Mac-type documents in the preparation of the Deed of Trust that indicated MERS was the nominee for the lender; and as long as MERS stays where it is, the lender can take the note and go anywhere it wants to; like Wall Street, for example. The entire cause and effect is predicated on “intent”. If the intent was to use a group of bundled mortgage notes to set up a special purpose vehicle for the creation of a collateralized debt obligation, then we have to attempt to ascertain “intent” on the part of the creditor.

However, when MERS takes over the duties of the Trustee on the Deed of Trust, substituting another trustee (ask yourself why that is so?), could the deed of trust be void? A quiet title action is useful for this very reason ... to put the burden of proof on the creditor as a Defendant (to prove its claim) and not on the homeowner as a Plaintiff (to attempt to prove something it has no material knowledge of). This allegation has to be asserted in the initial pleadings in order for the judge to understand what it is you are trying to prove in the chain of title to property being “broken”.

In answering the “why”, one only has to ascertain the “when”, the “where” and the “how” to show that the “collateral” [the subject property] for the promissory note shifted into a different commercial realm known as a “collateralized debt obligation” (CDO).

**NOTE: The mere fact that a “trustee” for a Trust Series took over as “trustee” for your mortgage note does not mean it was actually entered into the Trust itself. For example, let’s say that if the “MLMI 2006 HE-5 Trust Series” was dissolved prior to your mortgage loan being assigned to the Trustee (in this case, Citibank) of that Trust Series (primarily through lack of “res” and purpose) your note may have been flushed through this Trustee (since he can convey, etc.; all the duties you as Grantor conveyed to him to do) as a conduit to another third party for “safe keeping”. This could have been done as part of a write-down of losses for that particular Trust Series (through insurance payouts and other credit enhancements and deviations of GAAP) and placed into another trust package elsewhere.**

It's not the actual CDO that changed the character and status of the debt. It's when the notes were bundled together and used to back certificates [bonds] that were purchased by investors through the mortgage brokerage houses that the note itself and the interest and yield spreads that were guaranteed with it became the "collateral" ... not the Deed of Trust. This is what is known as "multiple pledging". Sadly, if the homeowner-borrower re-pledged his property as security for another loan, he'd be in prison on felony charges; but it is okay for the banks to do it on Wall Street?

The title to the property became slandered (and thus clouded) when the homeowner was not readily able to identify (through county records) who had perfected and was currently the "holder in due course" of the security instrument that was being used to enforce his Deed of Trust. Generally, because MERS placed itself into the "center of things" by electronically recording all future events, the title was slandered and further clouded when the first asset-backed SPV was created and the note was placed into it. Even though the entire scheme more than likely ended up in the laps of the investors who funded the borrower's loan, they wouldn't have a clue because their bonds were non-recourse. This is why you see so many retirement plans now suing Wall Street in some way, shape or form in the State Courts (fundamentally important to recognize) under state fraud laws, because the investors were misled through the prospectus offerings.

The problem here is that the borrower did not consent to the securitization. With MERS hiding all the "goods" behind an electronic wall, the borrower has absolutely no idea that his loan was even securitized, much less possibly paid down (or paid off) by the bailout. If the borrower's note was securitized into a "pool" and the pool failed BEFORE TARP paid AIG's and AMBAC's losses, it is possible that credit events paid off the mortgage loan through the reinsurers BEFORE TARP KICKED IN. Only a thorough SEC or investigation by a securities analyst as ordered by a court through discovery will reveal that (if the related documents haven't already been shredded).

Restatement of Mortgages (Third) also validates that when the promissory note and deed of trust are separated, "they can never be put back together again", says Garfield.

The note then becomes unsecured and the title to property becomes clouded, until a court of competent jurisdiction (always a State court) adjudicates a release of all liens from the property (excepting those imposed by taxing jurisdictions or child support orders).

Don't cry ... the lenders did this to themselves. Once the split occurs, "you can't have your cake and eat it too." Repeal of the Glass-Steagall Act allowed them to do this.

The lender simply can't just show up, claim it's his investment in the property and then proceed to foreclose on it. Even an assignment from the party claiming to be the payee on the note is not enough to satisfy the claim if it can be proven that: (1) the assignment was not on official record in the county courthouse at the time the quiet title action was filed; and (2) the assignment can be dissected to reveal fraud (as it could have been manufactured to achieve the desired results).

In the case of U.S. Bank v. Harpster, Judge Lynn Tepper handed the home over to Ernest Harpster by ruling in his favor, with prejudice, because of fraud brought on the court by the “alleged lender’s” attorneys. This does not mean that title was quieted however. He will have to wait the statutory five years from the “point of acceleration of the note” to file for quiet title.

The other element to consider in the commercial realm is the “nexus” that was created between the time the Deed of Trust and Promissory Note was originally executed and the time the nexus ceased to exist because the elements of the contract failed in some respect.

**The only way the nexus could “officially” fail is if one of the elements that was used to create the original contract was altered; illegally transferred or assigned by parties that were not officially qualified to do so; through securitization into an obligation for an asset-backed security outside the agreed terms and conditions of the original mortgage loan; or through fraudulent conveyance to dupe investors.**

According to Garfield, once you establish that the note and Deed of Trust were split, “your prima facie case is met and the burden of proof is now heaped upon the creditor, who has to prove HOW it happened. Even if the creditor could prove this, the nexus is still broken, as is the chain of title, hence the reason you would file a quiet title action as part of your offensive game plan. The dissolution of the nexus between the note and mortgage is due chiefly to non-disclosure of other parties that were made a part of the original agreement. The borrower would not knowingly make such a commitment, unless they have an IQ of 40. The author still wants to know, “Why didn’t you ask who MERS was BEFORE you signed your closing documents?”

## **THEORIES OF UNMARKETABLE TITLE**

At that point, one would wonder whether the person making the loan couldn’t have figured that out in the first place. This is why closing personnel advise you that if you have questions, get an attorney to review the documents. They are covering their own ass.

According to Garfield, a borrower who signs papers without having a known party who is required by law to execute a satisfaction (release and reconveyance) has in effect executed documentation without a counterparty. The document is therefore voidable.

Since the document (note, DOT, etc.) is only evidence of the obligation that arose because the borrower did in fact receive a benefit from the funding of the loan, the obligation survives while the note and/or DOT do not.

However, in order to achieve certainty in the marketplace, the obligation is not secured unless and until some party identifies itself as the creditor and establishes a subsequent encumbrance through judgment lien, equitable or constructive trust or some other means. *The quiet title action works on behalf of the property owner to attempt to make that happen.*



Such a creditor action would be subject to rigorous requirements of pleading and proof. In the context of a securitized residential mortgage, the creditor can only be the party (or parties) who advanced actual money, from which money the borrower's loan was funded. In the context of mortgage-backed securities, a creditor who pleads that he expected a secured loan, must also plead all the documents and transactions that gave rise to advancing the money.

This would mean that the creditor would be required to disclose and account for credit enhancements, insurance, credit default swaps, over-collateralization, cross-collateralization and payments received from all sources pursuant to the terms under which the creditor advanced said funds.

Those terms are included in the prospectus and bond indenture which incorporate the pooling and service agreement, Depositor Agreement, Assignment and Assumption Agreements etc. In other words, the actual terms upon which the creditor advanced money were different from the actual terms accepted by the borrower.

A court in equity would thus be required to allocate equity and liability for the various unpaid and paid obligations of multiple parties whose existence was unknown to borrower at the time of the loan closing, and whose existence even now would be at best dimly understood by the borrower or any other person who was not extremely well-versed in the securitization of credit.”

**AUTHOR’S NOTE: As “deep” as this may seem, once you’ve grasped the full understanding (draw a flow chart if you have to) and reality of this procedure, you can then build a case around your situation.**

## **ASSIGNMENTS AND FRAUD UPON THE COURT**

**AUTHOR’S NOTE: More and more chicanery and misconduct (malfeasance) is being discovered and questioned by judges. At the time of this writing, several cases in Florida (in Florida, foreclosures have to be brought in Equity) have come under specific scrutiny, for which hearings to determine fraud and the imposition of sanctions against the lenders (Plaintiffs) and their respective counsel are up for review via an evidentiary hearing.**

As to the specifics in question, a lot of the cases involve issuing assignments to a “new and improved” [sic] holder in due course AFTER the action has commenced! Sadly, the judges do not have all the time in the world to review all of the documentation tendered by the lender and its representatives in a court action. Therefore, you and your attorney have to keep a close eye on the County Recorder’s (Clerk, Register of Deeds) Office when you find yourself in a conflict with a lender. You have to make sure the lender doesn’t “pull a fast one” in advance of your case. Frauds on the court seem to be more prevalent in Florida, as that’s where a lot of these evidentiary hearings are being slated as judges there investigate the suspect frauds.

Tampa attorney Matt Weidner explained in one of his blog posts (directed at judges) the reasons why judges need to pay more attention to these assignments because of the potential for fraud on their courts. Weidner is careful to point out that a lot of these “assignments” are hard to track. The one in the case cited below was put forward without the consent of the Defendants in an ex parte hearing. Weidner poses great questions to the judges in this instance:

1. EXACTLY WHO ARE YOU GRANTING FORECLOSURE TO?
2. WHO DOES THE AFFIANT WORK FOR?
3. WHO SIGNED THE ASSIGNMENT OF MORTGAGE?
4. WHOSE INCOMPLETE, ILLEGIBLE MARK IS ON THAT NOTE?
5. WHO PROFITS FROM YOUR JUDGMENT OF FORECLOSURE?

The Florida Bar Rules specifically “get down” on attorneys who commit fraud and malfeasance (not “playing fair”), as was just recently cited in an order by Judge J. Michael Traynor in U.S. Bank v. McLeod; another foreclosure gone wrong, in St. Augustine, Florida, quoting Florida Bar Rule 4-3.3(a)(1):

“A lawyer shall not knowingly make false representations  
or fail to correct a false statement of fact made to the court.”

## IN SUMMATION

Here are important points to consider regarding the investigation of your mortgage loan:

- If the Deed of Trust shows MERS to be a “nominee” or “beneficiary”, you can assume that title to property has been slandered because the real party in interest has been concealed from you.
- Unless you can readily identify from documents recorded in your county records that show specific “assignments” to outside third parties, you can safely assume that the security interest in your property has not been perfected and thus is in question; further bringing scrutiny as to clear and marketable title.
- Due to the fact MERS’ subscribers actually manage their own transactions, MERS itself as an electronic database must be held culpable for the actions of its subscribers. If MERS claims itself as a “beneficiary” then it must be willing to accept the consequences of its members’ actions.
- Since MERS is bankruptcy remote and doesn’t insure the actions of its “certifying officers”, you then have to look to its parent company, MERSCORP, Inc.
- MERS (through its operations) has defeated part of your county’s income stream. On one hand it tells its membership that it expects them to perfect all of their security interests at the time of sale or transfer; yet on the other hand, MERS tells the members that it saves them substantial amounts in recordation fees, while it not-so-innocently clouds title to the point where it can’t be legitimately reconstructed.

## Section 11: Lender liability tort actions

**AUTHOR'S NOTE:** Lender liability issues appear to have had their start in Texas with the case of *State Bank of El Paso v. Farah Manufacturing Co., Inc.* (1984). Over the years, they have evolved into much more than that. According to an article published by Davis Oretsky, P.C., entitled “Lender Liability Update: Recent Cases & Trends”, <http://library.findlaw.com/1999/Oct/1/127012.html>, claimants are now fashioning these issues, which the author will discuss in some detail in this section, to go after damage awards through claims and counterclaims against lenders, in addition to what Oretsky calls “first strike” actions to thwart collection or foreclosure. There are two links in the resource section that you can view “white papers” and other such topical information to expand your research on the subject matter herein.

**PARALEGAL'S NOTE:** Much of the initial research the author conducted for this eBook was formulated in Prosser & Keeton on Torts, 5<sup>th</sup> edition; more specifically, on “Misrepresentation and Nondisclosure”:

“The typical case of deceit is one in which the plaintiff has parted with money, or property of value, in reliance upon the defendant's representations.” (§105, p. 727)

According to the law of misrepresentation (which is much broader in scope than on an action for deceit), to become liable for damages may be based upon the intent to deceive, upon negligence, or upon a strict policy which holds the statements made by the lender or its representatives without either deceit or negligence. Strict policies can be established through the standards established by the government (i.e. RESPA, TILA, etc.). While there are penalties imposed by the established statutes, those penalties usually inure to the benefit of the government and not the aggrieved party.

### CLAIMS FOR DAMAGES

Something else to consider is the fact that even if you can establish the lender is liable, if you can't prove you were damaged in some way, you are not entitled to recover any damages and more than likely, your suit will be dismissed. *Condrey v. SunTrust Bank of Georgia*, 431 F.3d 191 (2005). Remember that when you're putting together your case.

### STATUTE OF FRAUDS

The definition of “fraud” is wide, varied and indiscriminate. It is so vague and ambiguous that it has to be specifically defined IN EVERY CASE! As a result, the nation's courts have rendered opposing decisions in what determining factors are used to qualify fraud. This can be used as an affirmative defense in a lender liability action; however, borrowers walk a tightrope when it comes to oral agreements.

Even if you made an oral agreement with a lender (or vice versa) doesn't mean it's going to be accepted in a court or law or equity.

**According to Prosser & Keeton, to determine relief, one has to recognize which situation related to the manner in which the mistake was induced: (1) unilateral impalpable mistake (where the mistake did not warrant rescission or reformation as a relief); (2) mutual mistake (where the mistake is common to both parties in the transaction); (3) unilateral palpable mistake (is whether the person making the representation upon which another person relied in order to make a contractual decision relates to the extent of the duty of that person to disclose material facts which he knows that the other party [that would be you] was uninformed); (4) mistake induced by a misrepresentation of the other party to the transaction or his agent (more common in lender liability issues); and (5) mistake induced by the misrepresentation of a third person (a person not directly related to the outcome of the transaction (why title company closers choose not to render legal advice at closing, no matter how many questions you ask them)).**

Just filing suits to be filing suits (without understanding HOW the mistake occurred is like playing Russian roulette with what few dollars you have to spend in legal fees) merits having an attorney and a forensic mortgage loan auditor/TILA auditor completely review your material to give the attorney specific ideas for which a cause of action for which relief may be granted. There is a case pending in Collin County, Texas [Dallas area] involving tortious lender liability-type behavior exercised by and through a major lender's representative. In this instance, the aggrieved party suffered actual pecuniary losses of over \$100,000 and has a running flow chart to prove it.

The author here alleges the lender's representative, who was in control of the Plaintiff's stock portfolio as part of the collateral she pledged for her mortgage loan, committed breach of fiduciary duty, breach of duty and care; and breach of good faith/fair dealing (all terms which you will come to understand in this section) in the mishandling of her portfolio that the lender had immediate control of by failing to monitor its progress and then allowing it to fall instead of putting in a stop-loss as ordered by the Plaintiff. The foregoing scenario is the kind of case that gives rise to actions in tort for lender liability.

This is why the author has presented you with some semblance of understanding as to the level of fraud or tortious behavior that may or may not have occurred in your loan transaction or during the performance of your loan at some point. Just because the statute of limitations may have expired in certain instances (TILA, RESPA) doesn't mean that there aren't lender liability issues that could present themselves. The damage awards alone could potentially "pay off" most mortgages.

Actions in tort are an effective way to bring into court a cause of action for which relief can be granted. Tort actions also have some element contained in them for which punitive damages can be awarded because in many instances, the intent to cause harm is all that is necessary to prove.

## **DISCUSSION ON ECONOMIC DURESS**

**By definition, this situation arises when acting upon another's fear of impending financial injury, unlawfully coerces the latter to perform an act in circumstances which prevent his exercise of free will. Mancino v. Friedman, 69 Ohio App.2d 30, 20 O.O.3d 27, 429 N.E.2<sup>nd</sup> 1181, 1186. (As quoted from Black's Law Dictionary, 6<sup>th</sup> Edition)**

**AUTHOR'S OPINION: After some careful research, this "condition" would warrant consideration to bring a tort action for a loan modification that did not actually work out; or a loan modification that ended up in foreclosure. You really didn't have any other choice, did you? Where is your exercise in free will then?**

For a minute, let's examine this legal definition when used in an application of a mortgage loan modification. Why would anyone sign a load modification? If that is the only choice given to you out of fear you will lose your house through foreclosure because there are no other remedies other than forced sale to recover any equity if any (financial injury due to loss of equity and investment), the pretender lender (who did not have the legal authority as servicing lender or intervening assignee in a securitized note and mortgage) coerced you (the homeowner and borrower) to either sign the loan modification or face foreclosure (where is the free will in that choice). Granted, the Obama administration is telling lenders to offer loan modifications or settle the matters with new loans in any way they can is contributing to the actions by these lenders; however, the lenders have the right NOT to engage in such behavior. Again however, the argument that the pretender lender is not the true holder in due course (but rather an intervening assignee or by contractual agreement, a trustee or servicing lender, if indeed they have provable documentation) stands to reason that the authority to grant a loan modification was not present thus lending itself to one fraud being perpetrated upon another (the pretender lender's right to foreclose). The "shell game" has again victimized the borrower and placed him in this condition, unknowingly (until now).

## **CAUSE OF ACTION FOR WHICH RELIEF CAN BE GRANTED**

In virtually every instance, homeowners who have faced lenders in court have seen a Motion for Summary Judgment or Motion for Declaratory Judgment filed, based on "failure to state a claim for which relief can be granted". The foregoing state statutes the author has placed into context may not apply directly to your given situation, but as educational information, it helps you to understand the intent of any given state legislature as to consumer protections when it passed these statutes.

The author has noticed that many an attorney will use a "shotgun" approach, citing fifty causes of action, hoping one of them will "stick" in an effort to force the lender into mediation or settlement conference. Lender's attorneys are well versed and have "geared up" to defend this sort of thing and will quickly dissect every single claim that appears to be "unfounded" and "have their way with it".

The author disagrees with this approach and encourages those homeowners that really think they have “cause” to thoroughly discuss this with an attorney and take a realistic look at: (1) direct pecuniary loss (where actual loss of money occurred); (2) indirect pecuniary loss (where a lender’s actions resulted in the loss of the borrower’s employment); (3) mental anguish and suffering (where the “pain” of the treatment by the lender forced the borrower to seek psychiatric or medical care in order to cope with the stress involved in their given situation); (4) statutory involvement (direct violation of law); and (5) tortious behavior on the part of the lender (lender liability issues). If one or two of the foregoing elements don’t work doesn’t mean the other three won’t.

The foregoing statutes are used to demonstrate misrepresentation in its relationship to lender liability issues, such as “good faith” and “fair dealing”, terms which are almost interchangeable. Any breach of duty or responsibility on the part of the lender certainly warrants legal examination to see if a cause of action for which relief can be granted is prevalent.

**AUTHOR’S NOTE: The author has a different take on the phrase “no child left behind” when it comes to a newcomer researching the law. It’s called “no stone left unturned”.**

In this instance, if your title to property has been clouded, which will be discussed in more detail in the following section, it is possible (through discovery) to determine WHO may have been involved in the actual “acts” (in legal jargon, the perpetrators are called “actors”) that caused the title to be clouded. If a lender was involved, could it not give rise to a lender liability issue for breach of duty of care in recognizing the potential that title could be slandered by securitizing or assigning the loan to a party that was never disclosed to the borrower?

In doing further paralegal level research, the author has found that Deceptive Trade Practices Acts have been used to determine when lender liability issues do not apply. This is why he suggests you have your attorney further research each element that is necessary to be able to prove your claim and have it stand on its merits. In *Section 4, Identifying Lender Liability*, the author covered the basic ideas. Here, the author expounds further, for the benefit of both you and your attorney:

## **BASIC COMMON LAW LENDER LIABILITY ISSUES**

The list of possibilities for common law-type actions dates back into the 1950’s and 1960’s, when lender liability theories moved to the forefront. What started as lawsuits by businesses against banks for causing damage through cutting off lines of credit has further evolved into the mortgage foreclosure market.

Here are some examples for you to consider:

## **FRAUD or DURESS**

This could be termed as “blatant cheating” to establish what the lender’s true intentions were when they made the mortgage loan in the first place. For example, did the lender make full disclosure about the interest charges on the loan?

## **BREACH OF FIDUCIARY DUTY**

In this instance, the standard of care owed to the borrower come first, not the lender’s. For example, were the interests of your predatory mortgage broker placed above yours as the borrower? (i.e., placing you in a home loan the lender knew you could not qualify for and thus be expected to default on).

## **BREACH OF CONTRACT**

An example of this type of behavior may arise when the lender promises something to the borrower, such as a promise to release loan proceeds for construction of a property it has agreed to finance and then reneging on its promise.

## **BREACH OF GOOD FAITH or FAIR DEALING**

This opens limitless possibilities for you as the borrower, from false Good Faith Estimates that didn’t show the real true numbers to any other number of conduct violations. Fair dealing violations could also include unconscionable contracts.

## **BREACH OF JOINT VENTURE AGREEMENTS**

In the event a lender partners with you to help you with a business project (or becomes involved with you in your business in some way) and the loan goes bad, the bank’s position it created in the joint venture makes it a part of the borrower’s company, which makes the bank’s interests supersede the interests of its partner/borrower.

## **INDEMNITY**

When the lender exercises control over the borrower’s business, it creates a relationship of making the bank the “principal” and the borrower the “agent”. If the agent (borrower) is damaged in some way, shape or form while acting on the principal’s behalf, they are entitled to indemnity (save or hold harmless) from their lender (principal).

This in essence demonstrates that if the lender doesn’t act to save the borrower, it’s liable; if it does act and something goes wrong, it’s liable for not exercising proper control or commits malpractice.

## **MALADMINISTRATION or MALPRACTICE**

This cause of action arises when the lender commits some sort of behavior such as interference with a contractual relationship or interference with a business relationship, even against third parties involved in the business relationship with the agent prior to the principal's involvement. The massive jury awards in issues like these date back to August 1984, when Farah Manufacturing Company (an apparel firm out of El Paso, Texas) sued the State National Bank of El Paso for fraud and duress when the bank demanded that Farah as a company replace its Board of Directors. The damage award was \$19,000,000. The Eighth Circuit Court of Appeals affirmed the jury's findings, that the lender's participation in the company's business excluded the Board of Directors from active management of the company.

## **IN SUMMATION**

Here are questions to consider regarding lender liability issues:

- How much of your cause involves the foregoing elements listed in this section?
- Within each cause, can all elements be thoroughly proven?
- If multiple elements are involved, can they all be tied together to create prima facie evidence?
- Are all of the elements of a contract in place to show that a tort was committed?
- Could this be further resolved through a deceptive trade practices action, where treble damages could be sought?
- Could loan modifications put the borrower in a condition of economic duress?

Here are thoughts to consider when assessing lender liability issues:

- Lender liability torts are primarily rooted in case law, not statutes.
- Lender liability and deceptive trade practices are not necessarily interchangeable.
- Many attorneys do not understand all of the specifics of lender liability; thus one would have to argue that because of tort reform and the eventual reduction of damage awards, arguing these cases could be considered a waste of time.
- Lender liability originated in the commercial realm; but is now just showing to be of valuable concern in assessing certain breaches of duty or contract in residential mortgage contracts and side agreements pertaining to those contracts.
- Ongoing lender liability issues could possibly extend the statute of frauds.
- Ongoing lender liability issues could further breach contracts and thus incentivize the lender's position to foreclose on the homeowner.



## Section 12: Quiet title actions

### BY DEFINITION

An action to quiet title is a proceeding to establish the plaintiff's title to land by bringing into court an adverse claimant and there compelling him either to establish his claim or be forever after estopped from asserting it. In virtually every state, the quiet title action is afforded to every property owner under statute.

A quiet title action generally is an action in rem, meaning a proceeding taken directly against property or one which is brought to enforce a right in the thing itself. Generally, when a suit to quiet title is filed, a lis pendens lien must also be filed, warning others that they may find themselves in an adversarial position if they interfere with it. Since the action in rem is against the property, the property should also be named as a Defendant in the action unless prohibited by law. (Leave the property out of the suit and see where the "other side" attempts to remove it to.)

It is also distinctly possible and more appropriate to refer to this as quasi in rem, since it involves a mortgage or other claim or cloud on title (as opposed to proceedings brought not strictly and purely in rem), but are brought against a Defendant personally, though the objective is to deal with some aspect of a particular property or towards the subject property for which asserted claims are to be discharged. Freeman v. Alderson, 119 U.S. 185, 7 S.Ct. 165, 30 L.Ed. 372.

NOTE: Again, from the author's paralegal and investigative journalist standpoint, the research appears to dictate certain patterns in the way a quiet title action is pursued. The author's research indicates that each case presents itself with different scenarios; yet structurally, the cases are similar in presentation and the options of attack strategies are also similar. The apparent key here is to KEEP IT SIMPLE!

### REASONING IN THE PRESENT DAY

To further Black's Law Dictionary, 6<sup>th</sup> Edition (in layman's terms) ... you the Plaintiff, bring an action to court and you state to the court that your Defendant pretender lender claims to have some interest in the land that you assert is your own estate by title.

Further, you assert that the lender's claim is without foundation (meaning the lender probably sold or transferred this to a new creditor somewhere, still to be brought forward as proof); thus, you are calling upon the Defendant pretender lender in court to actually prove his claim (or another way of saying "produce the note" without searing the conscience of the judge). If you approach this reasoning as stated herein with the court head-on ... you will fail miserably! The lender will immediately start up the "free and clear house" argument! (*Well, someone has to play the devil's advocate here!*) And if the lender's attorney doesn't do it, the judge more than likely will.

So you can see from the preceding reasoning of definition as applied to mortgage loans, what would appear that you would have to do is different from just a standard quiet title action. True, under most statutes, the condition of title would have to be affected to bring an action. Customarily, a majority of the quiet title actions involve tax deeds and their respective sales (*Bellistri v. Ocwen*); or legitimate errors (which you can also throw in) like misstatements or omissions of legal descriptions, improper or deficient conveyance and the like. This appears to be the way most legal forms are drafted and presented by Deering's, Vernon's, Matthew Bender and others. This type of action (involving creditor challenges) will involve a little more explanation and forethought. In this instance, the lender got involved because MERS got involved. The Bellistri Court ruled that MERS can't convey something it doesn't own, thus granting quiet title was proper. How does this play into your situation? Does your state have similar rulings?

### **APPLICATION TO YOUR CASE ... THIS IS NOT CUTTING EDGE!**

Let's say (hypothetically) you were trying to figure out HOW to maintain a quiet title action. Sure, you could go to a title company and have them do a title search and pay them to tie all of the ends together. They will come back and tie the ends together ending with your Deed of Trust or Mortgage. How simple is that? But ... that's NOT what you want. This is where you need to get creative.

Think about it ... what if you brought in a title company search report and presented that to the court and the paper showed everything on the title search was "hunky dorey"? What does that title search represent? It represents the same thing that a judge would get if he ordered a title search. Even though procedurally the court can order a title search from any given moment in time (let's say, from the point of "root", the grant) forward; what would it accomplish? What would it tell the court as far as current claims of interest? Nothing. It would in essence make your quiet title action look foolish and frivolous. You're lucky if you don't get sanctioned! So that means what you have to show is just the opposite. What you need is ...

### **A DECLINATION LETTER**

This is chiefly referred to as a "Commitment Letter with Exclusions and Conditions" ... this is the apparent "kicker" to the whole crux of maintaining the action!

Let's say that you visit a competing title company. You come armed with a chunk of paperwork that you just retrieved from the courthouse records. It's been certified, so it's official; ready to present as evidence in your quiet title action. You provide copies to your prospective title insurance carrier. (Make sure the title company does NOT currently insure your lender at the present on this property. That could be construed as a conflict of interest in this situation and your title company very easily could hang you out to dry.) If it was the author (and this has actually been done already by someone testing the author's theories) ... your set-up might go something like this:

1. Mr. Title Insurance Man? I would like to purchase a homeowner's indemnity policy (this is a homeowner's title insurance policy) from your company (XYZ Title), but I'm afraid I've got some bad news. I think I have clouds on my title that are going to need to be cleared off in a quiet title action and I was wondering if you had a minute to look at them with me.
2. The problem I have here is ... here's my Deed of Trust. It shows MERS on it as a nominee and beneficiary. There's obviously a title policy on this property currently insuring to the lender but it only covers the past from the time the deed was issued. Why would this title company [the title company you're talking to] put its E&O carrier on the hook for all of the potential future damages when MERS is hiding all of the subsequent lenders (from the point in time your deed of trust or mortgage was recorded, forward) in its electronic database?
3. If there are improper recordations of agency assignment or appointments of successor trustee that aren't filed in proper order, wouldn't the title be slandered? If you knew this in advance, would you insure it?
4. Obviously, you would probably want to do a more thorough search and attempt to figure out exactly WHAT documents would have to be recorded in order to "legally tie the ownership interest in the property together", would you not? How much would you charge me to do an assessment of that? This would then be shown to the title company agent to see if he agrees that those documents would be necessary to "tie the ends together". Most attorneys can figure this out.
5. If I manage to get quiet title in court, would you then issue me a homeowner's indemnity policy to inure to me as the beneficiary in the event another cloud is discovered?
6. I would be happy to sign a letter of intent with you to purchase a title policy if you would be so kind as to give me a declination (exclusionary) letter, outlining some of these things that would need to be corrected in order for you to insure this property. It certainly would keep things straight in my mind as to what would have to be recorded in order to perfect the chain of title and remove the "clouds".

## **SIDEBAR**

*If the title company agent starts giving you a hard time, let him know you'd like to talk personally to his errors and omissions insurance carrier to see if they agree with his lack of interest and concern. If the E&O carrier's agent will only talk to your attorney, then have the attorney follow up and get the declination letter as directed by the E&O carrier. Technically, the E&O Company has to worry about paying out future claims. Once you've explained that you are trying to accomplish a two-fold purpose: (1) prove to the court that even a title company agrees the title has clouds on it; and (2) remove any liability from the title company and the E&O carrier by endorsing the action in the first place ... you've made that E&O carrier a hero in issuing you your "letter".*

*Because of the “deep pockets” theory however and the amount of exposure a title company wants to keep to a minimum, they are more than likely going to listen to you, especially in the wake of more of these quiet title suits being filed. What has happened to date is an actual commitment letter was issued, with exceptions listed in Schedule B, and then again in the “Conditions” section, pertaining to exclusions and conditions having to do with suspected “current clouds” and that in their present state, your title is uninsurable. Could this be your way to maintain a cause of action?*

*That is where the declination is ... where the exceptions call for you to clean up the mess before the title company will insure you and follow through on its commitment. The letter doesn't come right out and say DECLINATION LETTER. The title company is a little more legally graceful than that. So ... analyzing this letter could obviously give rise to the fact that a title search was done by the company issuing the commitment letter; that exclusions were listed which verify your claims of clouds on title; and that you couldn't get a homeowner's indemnity policy unless you had the clouds legally removed. The commitment letter with exclusions (for the sake of argument) is the “bad boy” you are looking for.*

#### **PROPER FOOTNOTES TO CONSIDER:**

Study the qui tam actions that have been filed in California and Nevada in State Court. Bring a copy of them with you because most title companies probably won't take you seriously unless they know you're informed and you've got proof. If they know there's a buck in it for them however, they'll probably at least talk to you. Even though the qui tams are still considered “pending litigation”, the fact they were filed says something.

If MERS is on your deed of trust or mortgage, you have to assert that MERS is clouding the title. The funny thing about all of this is ... that one of MERS founding members is the American Land Title Association (ALTA). It kinda ramps up the element a bit, huh?

What do you think people are going to say about title companies when they find out that the very entity that is electronically hiding everything from the public (and the county recorder) is leaving the title company's E & O carrier potentially “on the hook” for millions of dollars in potential damages for every title it insures when the lender's nominee is hiding data? Could that potentially cause money damages in some way?

Why would a title company insure you if you disclosed there were clouds on your title and provided reasonable proof of that? By pure logical reasoning, a title company would be crazy to insure a chain of title that was full of bogus assignments, deeds of trust that voided statute and fraudulently created conveyances and assignments of deeds or mortgages filed out of sequence. How hard of a question is that to ask a title company when asking it if they would insure your property? At this point in time, the author has it on good authority from at least one major title company E&O attorney that title companies are very uncomfortable with the current state of title recordation problems and all of the fingers are pointing at problems created by MERS!

**It will be up to you and your attorney whether you should disclose to the title company that you will be using this “letter” as an exhibit in your pleadings. THIS COULD BE CONSTRUED AS A RELIANCE DEFENSE! THE JUDGE SHOULD RESPECT YOU FOR DOING YOUR HOMEWORK. YOU’VE DONE HIS HOMEWORK FOR HIM. HE IS GOING TO BE ASKING THE SAME QUESTIONS OF THE LENDER’S TITLE COMPANY ... “How can you insure this property knowing of its potential defects?” He is going to understand why you are relying on a declination letter as a reason to bring an action. If the declination letter spells out what errors there are, you at least have something to go into court with on your pleadings! ... AND YOU GOT IT FROM A TITLE COMPANY!**

To further illustrate this point, the author would refer you to the California Civil Code §762.040. Pretrial orders; Joinder; Title report:

The court upon its own motion may, and upon motion of any party shall,  
Make such orders as appear appropriate:

- (a) For joinder of such additional parties as necessary or proper.
- (b) Requiring the Plaintiff (that’s you) to procure a title report and designate  
A place where it shall be kept for inspection, use, and copying by the parties.

Hypothetically, how would a current title report show potential clouds on title? Think about this ... if a judge ordered a title report, what clouds would be readily observed? All that is typically recorded in most instances is the mortgage or deed of trust (unless there is an assignment or appointment of successor trustee filed afterwards due to foreclosure).

So if you’re a homeowner trying to illustrate clouds on title at present, would you not have to use current letters and statements issued by your lender as evidence that someone other than the original lender is claiming an interest in your property?

In the event there was an appointment of successor trustee or an assignment of deed (and/or note) filed with the county recorder, if they were not properly filed, or improperly conveyed (when that authority didn’t exist in the first place), would that not constitute a slander of title?

**AUTHOR’S NOTE: The author has readily analyzed documents that did just that according to the attorneys who verified that information.**

As one of the “Conditions” the title company will tell you that you are required to disclose all known potential or existing defects. So, what do you think you’re going to say to them? If you really don’t want all of those exclusions ... which if discovered later it was proven that you knew about them ... they’re not covered (at least in what you’re about to read).

The fact that the deed of trust or mortgage may have been bifurcated from the note is irrelevant at this point. What is relevant is that the chain of title is irrevocably broken and there is no feasible way (without exposing all of the mortgage frauds) to correct it.

## A SLIPPERY SLOPE

Let's assume that with the current system of insurance protections afforded by title policies, that there is another source of money for attorneys looking for deep pockets. The title companies underwriting the marketable titles where MERS is involved have reason to be shaking in their boots.

Theoretically, here are 7 reasons why:

1. MERS, if listed on a deed of trust or mortgage, is part of the contractual nexus between the property, the lender and the homeowner-borrower-grantor.
2. Someone has title insurance in force, generally to inure to the benefit of the lender. However, MERS claims it has authority to act on behalf of the lender. So whatever the "agent" does, the lender is also held liable due to the nexus; thus, so is the title company when title to property is slandered and damages are claimed. So would your mission then be to establish proof of that nexus? Would establishing proof that MERS isn't a lender be of any help to your case?
3. Because the lender is more than likely a MERS subscriber, the nexus is further established by a contract between the two (the subscription). When the note or deed is transferred OUT of the MERS system to a non-subscriber, is the title further clouded because the MERS system itself breaks the chain of title between what is recorded in the courthouse versus what would be recorded in the courthouse in a future action against a property owner, like a foreclosure? And would the non-subscriber, now on the backside of the chain of title with a gap in between, then be caught without the ability to establish nexus to his benefit?
4. Because of the way MERS portrays itself in a mortgage or deed of trust, its position is vague, ambiguous and quite legally undefined. Because of this, there is more likelihood that MERS and its agents/actors will cloud title through its actions as a nominee. The weak link in the insurance chain however, is that the title company now insuring your property only insures from the claims prior to your encumbering the home with your loan and your claim of ownership. You are NOT covered moving forward through your claims. No insurance carrier will give you a title policy without these "clouds" being removed. This is why you'd have to ask yourself, why would the judge order a title report if a Plaintiff established prima facie evidence bringing the clouds forward and under scrutiny to where a title company would issue a commitment letter with exclusions and conditions?
5. While the quiet title action is a virtual "stand-alone", it can be alleged that there may have been fraudulent behavior involved in the way title was slandered. This would be HOW fraud would be brought into the mix, especially if MERS and its agents/actors did not have legal authority to record documents purporting to assign or transfer certain rights only reserved to the lenders. With the chain of title hidden from the county recorder, can you see how easy this would be to prove?

6. In most cases, due to MERS' recordation system, the system of recordation in county courthouses is deficient. How is a title company supposed to verify chain of title when MERS hides it? Most lenders don't update their recordations until they absolutely have to. When they actually file the document (assuming the balance of the chain wasn't effectuated throughout the entire process of assignment, meaning the intervening assignees weren't properly placed within the chain in proper order with all proper valid documentation), slander to title occurs. How is a title company supposed to insure against future defects in a homeowner's policy when they can't track the movement of the claim of lien?
7. In most instances, MERS agents/actors are not who they say they are. Even though the function of a notary is mostly overlooked, getting to depose one is a "reach" in most instances. If all of the paperwork moves offshore, as what might happen when Genpact takes over, this will further complicate discovery for the true holder in due course.

Even though the quiet title claims will give the homeowner more the opportunity to allege multiple counts (if necessary; although they should be rooted in state statutes); it is best to keep your action simple and to the point. The evidence in your quiet title action is exhibits (or the lack thereof pointed out to the court as to what's missing); plus, further action is maintained through the declination letter by a title company. If there's an established or even suspected cloud on title, title companies will NOT insure it. This is a given. The author has been told this by title companies. Thus, reliance defense appears to be honorable. The letters you're about to read prove this.

You should at least notify your current title company of the pending action and the recordation of the lis pendens. They certainly are going to want to know if they're liable, even if you're not listing them as a defendant. However, if another title company runs a search and finds past defects, your current title company IS going to have to be listed as a defendant to get their errors and omissions carrier to pay up at least part of the legal fees necessary to correct any errors. If MERS conveyed title to property (and recorded a release of lien was filed, wherein MERS claimed it was "paid", when in fact it wasn't) you might have another problem. The former owner of the property is going to have to be notified that MERS can't convey what it doesn't own. This again brings the former title company AND the former owner (which could be YOU) into "the mix".

Do you really think the E&O carriers for title companies want to pay out a bunch of claims when this whole mess starts to unravel?

Pretty soon, they won't insure ANYTHING with MERS' name on it! It's a rear-end collision and there's nothing that ALTA can do to convince its membership to insure anything that stands to be in potential harm's way of a court action, especially when 5,000 suits a week get filed by all homeowners who have MERS on their deeds of trusts or mortgages. The end result would be association in-fighting at ALTA.

As you claim that MERS and other parties have “clouded” your title to property, this type of quiet title action (known as “suit to remove a cloud”) seeks to have you the Plaintiff aver to the source and nature of the pretender lender’s appearance at the hearing to be the legal owner of the claim (the note and mortgage) whereby you get to point out the defect to that claim using the title company’s written analogy in its declination letter. This follows common logic. If you have proof that the note was securitized and thus the note has now been assigned to another lender, do you need the PSA to back that up? More than likely, yes. THAT’S when you get the PSA involved ... when the trustee for that trust comes forward. Use the PSA and your “source information” to impeach their claim.

Without proper documentation, you couldn’t distinguish how the party claiming an interest in your property could prove their claim. It certainly isn’t recorded in the county records and the title company certainly doesn’t know that someone else is the real party in interest because it’s NOT recorded! Could it be asserted that the title company would insure you if the missing items were recorded into the county recorder’s office, provided they exist? There’s no way they can be accurately reproduced with MERS involved.

You have your declination letter as a backup. Try calling for the documents that you need to tie the whole chain of title together to be brought forward into court (as it’s a little late to be running to the courthouse now to record all of the necessary documents after the fact) by the claimants to rebuild the chain of title. The author has heard title company executives claim that they could rebuild it; to which the response was, “Not legitimately.”

**THERE WOULD BE VIRTUALLY NO WAY THAT ALL OF THE PROPER DOCUMENTATION COULD BE PROVIDED! IT WOULD ALL HAVE TO BE BACKDATED AND A COURT WOULD HAVE TO HAVE ALL THE PARTIES COME FORWARD, PROVE THEIR CLAIM, PROVE THEIR POSITION IN THE CHAIN OF TITLE AND PROVE THAT THEY HAVE THE AUTHORITY TO ASSIGN EVERYTHING TO THE NEXT PARTY IN THE CHAIN OF TITLE. THERE IS NO COURT IN THE LAND THAT HAS THE PATIENCE FOR THAT AND NO LENDER THAT COULD PROVE IT!**

You would have to in essence declare that the court would expunge the lien and all other clouds, thus removing the cloud from the title (not as easy as it sounds). But wait ... there’s hope!

*It would be pretty obvious that the lender coming into court has absolutely no idea of the reliance defense unless the lender’s attorney is very astute and can recognize the declination letter attached as an exhibit for what it is. Using the declination letter virtually sidesteps the judge ordering a title search and gets to the core of your argument. The declination letter pits Title Company ABC’s viewpoint of your given situation against Title Company XYZ, who currently insures your title from the point in time BACKWARD, from when you purchased it. Title Company XYZ may not be liable, but someone will be held accountable for slandering the title ... maybe MERS?*



**Here's actual letter (as a sample) of what one litigant sent their title company:**

GWEN G. CARANCHINI  
1203 W. 62<sup>nd</sup> Street  
Kansas City, Missouri 64113

August 18, 2010

Chicago Title Company  
4200 Somerset Drive, Ste. 101  
Prairie Village, Kansas 60208

Re: Request for Preliminary Title Search on the above property

To Whom It May Concern:

I have done some research on my title at the Jackson County Courthouse. I originally signed a note in 2006 with Aegis Lending for \$300,000. Subsequently apparently it was sold to Citibank into a security instrument denominated MLMI2006-HE5 which I did not know about until recently. The house went into foreclosure in 2008 but before sale I was able to redeem it and it never went to sale.

In the fall of 2009 I went into a modification under HAMP with Wilshire Credit who was then alleged servicer of the Note. They approved the modification but then the note was sold or transferred (it is not exactly known which although there is no known new recording) to BAC. BAC sent me a notice that they would not honor the HAMP modification and asked that I start the process over. I did and they denied it after I filed suit in April against them, Wilshire and several other entities. At any rate, I now have the opportunity to potential to settle with them (the terms of which are confidential) but I am insisting on the title being clear of anything to do with Aegis, Citi, MLMI2006he-5 and any entity except for a second with Gorman & Associates (which I intend to pay off personally) and a lien by LEWIS RICE & FINGERSH (which I am also paying off personally). They are fidgeting over this. Part of the suit is a quiet title action to take care of the issues that I see in the title.

If they will not agree to give me a clear title as part of the settlement I will ask the Court to make them quiet title as part of any settlement as well as indemnify me on the note if someone comes forward claiming they are the true note holder.

I believe there are several problems with the title, including but not limited to the notarials and signatures—signed in one state and notarized in another as well as the timing of the 2007 and 2008 filings which seem to be “backward”. Kozeny & McCubbin who acted as trustees in 2008 for the foreclosure are totally closed mouth in the suit and the court is bringing some pressure to bear on them.

At any rate, I am looking to get a preliminary title report on this property. If there is a declination to insure I will know that a quiet title needs to be done. I would appreciate your doing this and letting me know the findings.

I might add that I do not believe that Chicago Title was ever the title company on this matter.

Finally, please let me know the cost of a formal title search which I may need to have done to present to the court.

Sincerely,

Gwen G. Caranchini

CC: Scott Galvin  
Enclosure

## **ANALYSIS**

You can see from the foregoing letter that the Plaintiff in this quiet title action did her due diligence and disclosed all of the potential or existing defects that she felt necessary to disclose to the title company. Since this letter was used to obtain the commitment letter (which the author will include as a response to the foregoing letter) it would be easy to illustrate the following:

- The concerns on the part of the Plaintiff that there were clouds on her title.
- That the Plaintiff wanted to obtain a Homeowner's Indemnity Policy to make sure that she would not be out excess legal costs if there were ever a challenge to her title.
- That the Plaintiff exercised due diligence in informing the title company of potential or existing defects in the current state of title.
- That the title company made clear to the Plaintiff that she would have to clear the title of defects BEFORE they could issue her an official policy. All they could do at this point was to issue a "commitment letter with exclusions and conditions".
- That the Plaintiff fully understood that in order to make the property "whole", the title to the property would have to be quieted by a court in order for it to be "good" and "marketable" to be insured.

**On the next few pages ... is the response she got from the title company:**

## COMMITMENT FOR TITLE INSURANCE

Issued by

## CHICAGO TITLE INSURANCE COMPANY

CHICAGO TITLE INSURANCE COMPANY, a Nebraska corporation ("Company"), for a valuable consideration, commits to issue its policy or policies of title insurance, as identified in Schedule A, in favor of the Proposed Insured named in Schedule A, as owner or mortgagee of the estate or interest in the land described or referred to in Schedule A, upon payment of the premiums and charges and compliance with the Requirements; all subject to the provisions of Schedules A and B and to the Conditions of this Commitment.

This Commitment shall be effective only when the identity of the Proposed Insured and the amount of the policy or policies committed for have been inserted in Schedule A by the Company.

All liability and obligation under this Commitment shall cease and terminate 6 months after the Effective Date or when the policy or policies committed for shall issue, whichever first occurs, provided that the failure to issue the policy or policies is not the fault of the Company.

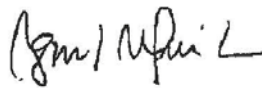
The Company will provide a sample of the policy form upon request

IN WITNESS WHEREOF, Chicago Title Insurance Company has caused its corporate name and seal to be affixed by its duly authorized officers on the date shown in Schedule A.

Issued by:  
CHICAGO TITLE INSURANCE COMPANY  
4200 Somerset #101B 913-649-0316  
Prairie Village, Kansas 66208  
(913) 649-0316

Chicago Title Insurance Company

By:

  
President

By:

  
Secretary

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Issued By:

**Chicago Title Insurance Company**

**Schedule A**

1. Effective Date: August 20, 2010 at 8:00 A.M.

Order No: 201018294

2. Policy or Policies to be issued:

a. OWNER'S POLICY 1:

Proposed Insured:

Charge:

OWNER'S POLICY 2:

Proposed Insured:

Charge:

b. LOAN POLICY 1:

Proposed Insured:

Charge:

LOAN POLICY 2:

Proposed Insured:

Charge:

3. The estate or interest in the land described or referred to in this Commitment is:  
Fee Simple

4. Title to the above estate or interest in the land is at the Effective Date vested in:  
Gwen G. Caranchini

5. The land referred to in this Commitment is described as follows:  
Lot 84, EXCEPT the East 120 feet thereof, measured at right angles to the East Line of said Lot 84, and Lot 85,  
EXCEPT the West 69.45 feet thereof, all in SUNCREST, a subdivision in Kansas City, Jackson County, Missouri,  
according to the recorded plat thereof.

This Commitment is valid only if Schedule B is attached.

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09CA 12/08 VLW

JLA

MNS

08/25/10

MLW

ALTA Commitment - 2006

Issued By:

Chicago Title Insurance Company

Schedule B

Order No: 201018294

SCHEDULE B  
EXCEPTIONS

Schedule B of the policy or policies to be issued will contain exceptions to the following matters unless the same are disposed of to the satisfaction of the Company:

1. Defects, liens, encumbrances, adverse claims or other matters, if any, created, first appearing in the public records or attaching subsequent to the Effective Date but prior to the date the proposed Insured acquires for value of record the estate or interest or mortgage thereon covered by this Commitment.
2. Rights or claims of parties in possession not shown by the public records.
3. Easements or claims of easements, not shown by the public records.
4. Any encroachment, encumbrance, violation, variation, or adverse circumstance affecting the Title that would be disclosed by an accurate and complete land survey of the Land.
5. Any lien, or right to a lien, for services, labor, or material heretofore or hereafter furnished, imposed by law and not shown by the public records.
6. Taxes or special assessments which are not shown as existing liens by the public records.
7. The lien of real estate taxes or assessments imposed on the Title by a governmental authority due or payable November 1, 2010, delinquent January 1, 2011.

City, State and County Tax ID No.: 47-320-07-02

2009 Base Amount: \$5,133.45, Paid.

2009 Assessed Value: \$61,761

2010 Assessed Value: \$61,761

2009 Mill Levy: 7.9131

(a) We require proof of payment of special assessments and sewer usage fees, if any, due and payable to the City of Kansas City. If unpaid, these charges may become a lien against the property.

Our Policy, when issued, will contain the following exception, unless proper proof of payment is provided:

"Special Assessments, if any, which are DUE AND PAYABLE to the City of Kansas City."

8. Special Tax Bill No. 63186, issued on January 01, 2010 under Ordinance No. 040411, for Sidewalk, \$2,241.53; payable in 6 annual installments, 0 paid.
9. FOR YOUR INFORMATION:

According to tax records, the street address is listed as:  
1203 W. 62nd Street  
Kansas City, Missouri 64113

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Issued By:

Chicago Title Insurance Company

Schedule B (continued)

Order No: 201018294

10. Deed of Trust that secures a debt:  
Dated: June 10, 2006  
Filed: October 03, 2006  
Document No.: 2006E0101461  
Mortgagor: Gwen G. Caranchini, a single woman  
Trustee: Todd Hamby  
Mortgagee: Mortgage Electronic Registration Systems, Inc. acting solely as a nominee for  
Aegis Lending Corporation  
Amount: \$300,000.00

By the instrument filed November 05, 2007 under Document No. 2007E0142762, Kozeny & McCubbin LC was appointed Successor Trustee of the foregoing Deed of Trust.

By instrument filed December 24, 2008 under Document No. 2008E0130689, the foregoing Deed of Trust and note secured thereby were assigned to CitiBank, N.A as Trustee for the MLMI Trust Series 2006-HE5.

11. Deed of Trust that secures a debt:  
Dated: October 25, 2006  
Filed: November 08, 2006  
Document No.: 2006E0119456  
Mortgagor: Gwen G. Caranchini, A Single Person  
Trustee: David M. Fedder  
Mortgagee: Deborah M. Gorman & Kevin M. Gorman  
Amount: \$35,000.00

By the terms of the instrument filed April 02, 2010 under Document No. 2010E0030902, the foregoing Deed of Trust was modified and amended as therein set forth.

12. Three foot easement reserved by Kansas City Life Insurance Company across the entire rear or South end of the premises in question for utility purposes by deeds dated April 12, 1940 and April 29, 1940 and recorded respectively in Book B-3435, Page 738, as Document No. A-652893 and in Book B-3436, Page 692 as Document No. A-654295.
13. Prohibition to construct or maintain billboards exceeding 10 square feet in size, as established by the plat of said subdivision.
14. Covenants and restrictions, but omitting any covenant or restriction based on race, color, religion, sex, handicap, familial status, or national origin, unless and only to the extent that said covenant (a) is exempt under Chapter 42, Section 3607 of the United States Code or (b) relates to handicap but does not discriminate against handicapped persons, contained under Document No. A-330172 in Book B-2751 at Page 452, as modified on August 9, 1940 in Book B-3453, Page 640.
15. Covenants and restrictions, but omitting any covenant or restriction based on race, color, religion, sex, handicap, familial status, or national origin, unless and only to the extent that said covenant (a) is exempt under Chapter 42, Section 3607 of the United States Code or (b) relates to handicap but does not discriminate against handicapped persons, contained in the deeds filed in Book B-3435 at Page 738, and under Document No. A-652893, in Book B-3436, Page 692, and modified on August 29, 1956,



Order No: 201018294

as Document Nos. B-207986 and B-207988 in Book B-7077, at pages 141 and 145 respectively.

16. Easement granted to Kansas City Power and Light Company by Document No. A-967154 in Book B-4322, Page 148, over the South 4 feet of the West 40 feet of Lot 84.

17. This company performed a 24 month chain of title and results are as follows:

**Chain of Title**

Correction Warranty Deed executed by Gwen G. Caranchini, a widowed woman and single person, Grantor, to Gwen G. Caranchini, Grantee, filed January 25, 2006 under Document No. 2006K0005109.

18. NOTE: This report constitutes an informational report only and is not to be construed as a commitment to insure, and by acceptance hereof, the Company liability shall be limited to the amount paid for same. Any commitment to insure which may be issued in the future may include certain requirements as a condition to any requested title insurance.

19. Any documents being executed in conjunction with this transaction must be signed in the presence of an authorized Company employee, an authorized employee of an agent, an authorized employee of the insured lender, or by using Bancserv or other approved third-party service. If the above requirements cannot be met, please contact your closer. If your transaction does not involve a closer, please contact the title production office, CHICAGO TITLE INSURANCE COMPANY at (816)833-4117.

Escrow Closer: Laurie Winkler (913)649-0316

20. We require full payment of premiums as a condition to the issuance of the policies pursuant to this Commitment. If you request a split of this premium please contact the title office immediately. Policy will not be issued unless full payment of premium is received.
21. Certain counties in Missouri require that deeds transferring real estate be accompanied by the Real Property Certificate of Value. Presently those counties include Jackson, St. Louis, City of St. Louis and St. Charles. This form must be executed by the BUYER/Grantee in these transactions. Certain exemptions do apply. The official form can be obtained from the Recorder of Deeds or from Chicago Title Insurance Company.
22. If Chicago Title Insurance Company acts as the final settlement agent, pursuant to HUD Regulation 73 FR 14030, we are charging an average recording fee which may be more or less than the exact fee charges by the government to record your documents.
23. Our company e-Records in all counties where this service is offered. E-Recording in Jackson County, Missouri is only done upon request or for special circumstances. An additional electronic recording service fee of \$4.00 per document will be assessed by the county at the time of recording.

Issued By:

Chicago Title Insurance Company

Conditions

Order No: 201018294

CONDITIONS

1. The term mortgage, when used herein, shall include deed of trust, trust deed, or other security instrument.
2. If the Proposed Insured has or acquired actual knowledge of any defect, lien, encumbrance, adverse claim or other matter affecting the estate or interest or mortgage thereon covered by this Commitment other than those shown in Schedule B hereof, and shall fail to disclose such knowledge to the Company in writing, the Company shall be relieved from liability for any loss or damage resulting from any act of reliance hereon to the extent the Company is prejudiced by failure to so disclose such knowledge. If the Proposed Insured shall disclose such knowledge to the Company, or if the Company otherwise acquires actual knowledge of any such defect, lien, encumbrance, adverse claim or other matter, the Company at its option may amend Schedule B of this Commitment accordingly, but such amendment shall not relieve the Company from liability previously incurred pursuant to paragraph 3 or these Conditions.
3. Liability of the Company under this Commitment shall be only to the named Proposed Insured and such parties included under the definition of Insured in the form of policy or policies committed for and only for actual loss incurred in reliance hereon in undertaking in good faith (a) to comply with the requirements hereof, or (b) to eliminate exceptions shown in Schedule B, or (c) to acquire or create the estate or interest or mortgage thereon covered by this Commitment. In no event shall such liability exceed the amount stated in Schedule A for the policy or policies committed for and such liability is subject to the insuring provisions and Conditions and the Exclusions from Coverage of the form of policy or policies committed for in favor of the Proposed Insured which are hereby incorporated by reference and are made a part of this Commitment except as expressly modified herein.
4. This Commitment is a contract to issue one or more title insurance policies and is not an abstract of title or a report of the condition of title. Any action or actions or rights of action that the Proposed Insured may have or may bring against the Company arising out of the status of the title to the estate or interest or the status of the mortgage thereon covered by this Commitment must be based on and are subject to the provisions of this Commitment.

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Conditions

09CCON 12/08 V.L.W.

JLA

MNS

08/25/10

MLW

ALTA Commitment - 2006



## ANALYSIS

Now that you've had a chance to review the foregoing response, refer back to page 202 and look for paragraphs #1 and #2. Do you notice the exclusions in coverage?

After disclosing potential and existing defects in her cover letter to the title company, the title company covered its own assets (and rightly so) from any clouds on title that might otherwise be removed through a quiet title action.

The upside to the title company insisting that the homeowner do everything in their power to insure good and marketable title by taking the necessary steps to correct it is also evidenced in #2 of the Conditions section on page 205. These steps must be taken BEFORE the title policy would be issued; thus forcing the homeowner to have to deal with all adverse claims affecting title. This includes assignments of ownership, appointments of substitute trustee, notices of sale and any foreclosure activity coming against the title and any other "unknown" claims that could arise prior to a commitment being guaranteed and the homeowner paying the premium for coverage.

In this particular homeowner's case, she divulged to the title company that there were two such recordings in the Jackson County, Missouri Recorder's office that are suspect because of potential fraud that has yet to be proven. A title company certainly would not insure against frauds brought by claimants who in reality did not have a legal claim, thus slandering title to the property and putting the title company at risk of exposure.

That is as plain and simple as you're going to get.

On the flip side, you can expect more of the following in the future:

On June 22, 2010 State of New York Supreme Court Justice F. Dana Winslow came down on heavy on Mortgage Electronic Registration Systems, Inc. acting as a "nominee" for Amtrust Bank in a foreclosure action where the Plaintiff (MERS) was seeking a default judgment against the homeowner defendants (who did not show up to their hearing) by virtue of a determination of its interest in real property, namely, the defendant's home. MERS was asking the Court to direct the Nassau County, New York Clerk's office to accept a copy of a deed and mortgage for recordation (because the originals were misplaced and never recorded).

Besides attacking the very elements of MERS' claim to be a "holder" of the first mortgage, the Court also refused to allow the recordation because of improper service of process upon the Defendants AND most importantly to relate here, as listed in the last line of the short form order:

Finally, the Court is reluctant to grant declaratory or other relief without evidence of the recorded interest in the Property from July 20, 2007 (the day the mortgage was allegedly executed) **and the current state of title.**

Because of the fact no original mortgage had been recorded, there also was no proof that any other claimants **didn't** have an interest in the Property prior to the institution of suit by MERS and Amtrust Bank ... so the default judgment was denied. This of course could be appealed after a number of legal maneuvers ... which brings the author to his next point:

Don't be a bit surprised if you start seeing (which some cases have seen in Florida) of (1) backdated recordations; (2) recordations that are "new and improved" over prior recordations because of flaws in the former recordations that were filed previous to the "new and improved" ones; and (3) trespass on lis pendens liens after you've filed suit. MERS and its agents (including those at LPS and DOCX) and their assigns will stop at nothing to "manufacture" evidence (as seen in the Harpster case in Section 10). It also appears that "trustees" are becoming more arrogant as well when trying to foreclose. This forces attorneys representing homeowners to examine every single document for all potential defects and flaws; but more importantly, in recognizing a fundamental portion of Judge Winslow's ruling in the foregoing case, that the "state of title" may be affected by unknown claimants as well as known claimants. This will virtually change the aspect of quiet title actions in America because the adverse claimants are going to be MERS and their charter member banks that have sadly lost sight of how to perfect a claim of lien due to lost documents and a pre-empting of the tried and true system of legal recordation in our nation's county courthouses.

In the event a challenge to an action by a lender becomes necessary, attorneys like Wade Kricken of Dallas (in a wrongful foreclosure case that involves quiet title because there are eleven defendants in the action; of which very few actually recorded their interest in the property because all of their "interests" were hidden by MERS) file what is known as a lis pendens lien. Once a suit is filed, it is customary for an attorney to record the cause number on a separate lien notice and record it in the county recorder's office, thus protecting future claims or causes of action against the property until they can be properly adjudicated in a court of law or equity.

### **THE NEXT STEP: THE LIS PENDENS**

The reason a lis pendens is required is to "tie up" the property during the suit. Lis pendens means "suit pending". If you look at California Civil Code §761.010 Complaint; Lis pendens ... it very clearly says:

- (a) An action under the chapter is commenced by filing a complaint with the court.
- (b) Immediately upon commencement of the action, the plaintiff shall file a notice of the pendency of the action in the office of the county recorder of each county in which any real property described in the complaint is located.

So this should tell you that in a quiet title action, you would file a lis pendens, right?

Without a lis pendens being filed, the property can apparently be sold right out from under the action. Why would you NOT then file a lis pendens to stop all further actions until your case could be heard? Attorneys filing suit have actually overlooked doing this!

### **OPTION ONE: ATTACKING THE DEED OF TRUST HEAD-ON**

A trust instrument (as previously discussed in Section 10) includes a Deed of Trust. If there weren't any "trust" involved, there would be no need for a Trust Deed or Deed of Trust. Thus, the parties which come into play are certainly up for further scrutiny.

In one instance, in Missouri, there is a trustee named "Todd Hamby" recorded on a Deed of Trust for seven different homeowner-borrowers in Jackson County, Missouri. In each case, MERS, Aegis Lending (a now-bankrupt, table funding broker) and Todd Hamby as Trustee, appear on all seven documents. Whether Todd Hamby actually exists is a matter to prove in court in a quiet title action. There is reason to suspect that Todd Hamby (as a Trustee) is related to the "beneficiary" (MERS or Aegis Lending). He also may not exist.

This is significant for two reasons: First, because the Trustee has to be independent of the beneficiary (or in the case of multiple beneficiaries, independent of all of them) and have specific duties for which a contract or some paperwork proving the relationship would be necessary to prove the Trustee's existence and legitimate standing.

Second, circumventing the Trustee on the original Deed of Trust by having MERS or some other "beneficiary" appoint a successor trustee (devoid of participation of the original Trustee) could be characterized as being in violation of the Merger Doctrine. When violation of the Merger Doctrine in Trust Law occurs, one of the elements of the Deed of Trust ceases to exist ab initio (from the beginning); thus the Trust is voidable. Fraud on the face of the Deed of Trust occurs because the "Trustee" was not really a "Trustee" but was just a figurehead put there by the beneficiaries. The other side, of course, will argue this is not so.

If MERS is involved in your mortgage or deed of trust, it would appear that you have to sue MERS and its agents for damages for slandering your title to property. It's fraud because MERS cannot convey something it doesn't own. Because of the fact that MERS is a bankruptcy remote subsidiary of MERSCORP, Inc., it will have to be named as well. Any document it purports to have created MUST be challenged on the grounds that MERS committed fraud on the county by causing the document to be recorded in its "four corners" standing (in some states that is a state jail felony). On the other hand, when you go into the document and you pick it apart line by line and challenge the parties creating it and uncover fraud, that document can easily be stricken from the record. When that happens (when each document is ejected from the records) the title is further slandered and thus ANOTHER CLOUD is on the title because a part of the chain is broken and the entire chain is affected! There is no feasible way that the lender appearing in court can legally perfect the title to your property; thus the lien AND the note may be expunged from the courthouse!

## **OPTION TWO: ATTACKING THE DEED OF TRUST UNDER STATUTE**

Now let's go one step further and let's challenge the Deed of Trust under statute. In Missouri, under RSMo 443.350, the trustee cannot be an out-of-state trustee unless a duly recorded in-state co-trustee is made a part of the Deed of Trust.

Do you know how many Deeds of Trust in Missouri would be voidable just under that statute alone? *The author shudders to think what would happen if every homeowner in the State of Missouri alone looked at their Deeds of Trust and found out-of-state trustees on their Deeds of Trust with no in-state nexus. Even though there are contradicting arguments present, a statute is a statute. Check your state for comparable laws.*

Is a class-action of all similarly situated homeowners possible? The author would say no. If a judge voids one Deed of Trust, does that mean all of the applicable Deeds of Trust need to be voided too? Probably only on an individual basis. Anything en masse would send the entire recordation system into a tailspin (probably what we need anyway) and "shock" the system. Does your state have a statute like that you can rely on? If so, it would be found under "Mortgages and Deeds of Trust". Use the statutes to pick apart the Deed of Trust and attack it as many times as possible.

If the judge voids the Deed of Trust or Mortgage, the security instrument or evidence of the lien is gone and the note that instrument secured now becomes an unsecured obligation. If the lender can't prove it owns the note AND can tie all of the agency assignments together in the Mortgage or Deed of Trust recordations in the courthouse (title company analysis and expert witnesses can be brought in to testify to that, dontcha think?) If Todd Hamby was a Trustee for MERS, that fundamentally means that MERS acted outside of Hamby's authority as a Trustee, removing Hamby's duties and securing them unto itself (MERS), thus eliminating the need for a Trustee, one of the key elements in the design of a Deed of Trust.

Nowhere in the Appointment of Successor Trustee does Todd Hamby sign off on anything in this particular case. So Todd Hamby was a "figurehead" in name only with no official duties as a "trustee"?

Are there potential violations of the Uniform Trust Code and possibly the Uniform Fraudulent Transfer or Conveyance Act (when MERS actually assigned the Deed of Trust to another entity)? Check your state for all three types of Codes or Acts to see if they apply. You can raise these issues right there in court and file motions on the spot.

## **OPTION THREE: ATTACKING THE PROPER PARTIES HEAD-ON**

Quiet title actions are reserved to the county courts in which the subject property is located. Venue for actions which affect title to real estate cannot be waived. Gorman v. State Highway Commission, 552 SW 2d 335.

You and the subject property are opposed to each other in rem. Case citations like this means that when you file a quiet title action, the lenders involved in your action will have a harder time removing the case to federal court and slam dunk you on jurisdictional or subject matter issues. That's the author's opinion based on research. Argue with it if you like. The author did win a quiet title action. The Defendant was an offshore corporation.

If you are claiming fraud or any other types of violations, you could reserve those issues in your pleadings to be pertinent to your quiet title action. If you're attacking the trust head-on and are alleging violation of Trust Law, make that clear from the outset. As a cause of action specifically reserved to the States, the following case should shed some light on the subject of MERS and its interference in court cases.

#### **OPTION FOUR: ATTACKING FRAUDULENT CHAIN OF TITLE**

In many instances, the author has reviewed documents where the lender and its agents (more commonly its agents) "put the cart before the horse". By recording specific actions of the holder in due course BEFORE the holder actually was assigned the deed or mortgage AND the note, the chain of title was disrupted because of misfiling in sequential order.

Let's say for example (not hypothetical to one case in Kansas) that a foreclosure suit was filed by a lender (claiming to be the lender) on September 1, 2009 (in Johnson County, Kansas District Court) and the actual recorded assignment giving the lender "holder in due course" status wasn't filed for record until October 9, 2009 (at the Register of Deeds in Johnson County, Kansas). This would represent a potential argument that the "holder in due course" committed fraud on the court by NOT being the owner of the note until AFTER it filed suit. The specific attack on title would be the gap left between the original filing of the mortgage or deed of trust and the time the actual assignment was filed. The foreclosure is an attack on title that "clouds" it, as attorney Mark Mausert mentioned in one conversation with the author. If there were gaps between the time that the lender actually came into possession of the note and the time the lender took action, a court might consider that fraudulent behavior. In Kansas, the K.S.A. 60-260(b)(3) claim of fraud might be a potential claim to revisiting a summary judgment made where the lender didn't officially "own" a property at the time foreclosure proceedings were commenced. In this actual scenario, the case was reopened and is now awaiting adjudication.

In other words, the court is now making the lender "produce the note". The "lender" of course (for some strange reason), is having a problem locating it. In the particular instance described here, the homeowner's attorney "missed" the lender's mistake and didn't even show up to the summary judgment hearing because she apparently didn't feel it necessary (because "there wasn't anything she could have done" to contest it) when in fact, the fraud was sitting right in front of her. The second attorney (after the author's assessment on the case) successfully re-opened the case AFTER summary judgment to foreclose was issued. Now the lender is having a problem producing the note? (Now, why would a lender do that?

Because they could get away with it procedurally ... because of the ignorance of the defendant homeowner's attorney?) This is why we need CLE for attorneys on this subject matter. Not all attorneys "get it", as attorney Neil Garfield claims.

Further scrutiny on title, after months of continuances by the court, would then have to be asserted because of the time it would take to potentially "manufacture" a note with all of the proper assignments and allonges containing the proper indorsements. One homeowner the author spoke with was told by his California attorney that it would be virtually impossible to "manufacture" a chain of title to the satisfaction of any title company without completely exposing some kind of fraud and having to quiet the entire chain of fraudulent events before a homeowner's indemnity policy could effectively be issued. Certainly (using all reasonable common sense) it would be something the banks would want to avoid.

Also under scrutiny could be the way a holder took possession of the property. Let's say for example (in one case in Washington State) where the lender appointed a successor trustee (to foreclose on a property in Seattle) BEFORE the lender actually was assigned the note and deed of trust. Would that not make the action appointing a successor trustee "out of order" with the way the trustee was appointed? Would the successor trustee then be considered a third-party debt collector that didn't actually have that legal duty to act as such? Would this then make the successor trustee's actions then illegal and fraudulent? Another case in Kansas City, Missouri has already been referred to the FBI for fraud investigation because of the way the documents appear to have been "manufactured". These documents were actually recorded 13 months apart in the Jackson County Recorder's office (in the same way they were recorded in Seattle, where the documents were recorded "out of sync"). According to the California Civil Code §760.030 Availability of other remedy:

- (a) The remedy provided in this chapter is cumulative and not exclusive of any other remedy, form or right of action, or proceeding provide by law for establishing or quieting title to property.
- (b) In an action or proceeding in which establishing or quieting title to property is in issue the court in its discretion may, upon motion of any party, require that the issue be resolved pursuant to the provisions of this chapter to the extent practicable.

This means other "allegations" could be asserted, like fraud on the court claims of "manufactured" or "out of sync" assignments or appointments.

### **THE BELLISTRI OPINION (MISSOURI)**

A suit to quiet title ended up in the Court of Appeals for the Eastern District of Missouri, upon which the Court upheld the lower court's ruling on behalf of the Plaintiff [Bellistri], who filed a suit for quiet title and to terminate any right of the property's former owner to possess the property.

“After discovering the assignment of the deed of trust to Ocwen, Bellistri added Ocwen as a party to the quiet title suit, so that Ocwen could have an opportunity to prove that it had an interest in the property, or be forever silenced”, according to O. Max Gardner, a North Carolina attorney who has analyzed this case and the qualities it presents for those interested in pursuing a quiet title action where MERS is involved.

Bellistri's attorney Phillip Gebhardt argued that Ocwen had no interest in the property, because the deed of trust that it got from MERS could not be foreclosed. As a matter of law, the right to foreclose goes away when the promissory note is "split" from the deed of trust that it is supposed to secure.

The note that the former owner of the property signed and gave to BNC didn't mention MERS, so MERS had no right to assign the note to Ocwen. The assignment that MERS made to Ocwen conveyed only the deed of trust, splitting it from the note. When MERS assigned the note to Ocwen, the note became unsecured and the deed of trust became worthless. Ironically, the use of MERS to make ownership of the note and mortgage easier to trace also made the deed of trust unenforceable.

**AUTHOR’S NOTE: In the foregoing case, rendering the Deed of Trust split from the promissory note means the note is now unsecured debt, meaning Ocwen would be faced as a loan servicer of attempting to enforce collection as a third-party debt collector on the original borrower. Good luck with that, because the challenges to Ocwen’s right to collect it are deficient if it couldn’t withstand this case.**

**PARALEGAL’S NOTE: Guaranteed ... the lender will be in court arguing that you’re just using the quiet title action to get a free and clear house. That argument will not work if you are current on your mortgage. The “note” argument is about all that they have, because in most instances, they have at best nothing more than fraudulent documents to support their claim, or no paperwork at all. Quiet title actions are for removing clouds on titles and false claims of lien. If the Deed of Trust is found to be a fraud ab initio, quiet title actions should allow you to prove that. If the end result is all liens extinguished against the property, then your lender is, for lack of a better acronym: SOL.**

## **OPTION FIVE: ATTACKING UNKNOWN CLAIMANTS**

While a lot of lender’s attorneys consider this “laughable” ... they won’t be laughing when they understand that quiet title statutes allow for unknown claimants to be added. While California Civil Code **§762.010 Known persons** says that “the plaintiff shall name as defendants in the action the persons having adverse claims to the title of the plaintiff against which a determination is sought”; **§762.020 Unknown persons or claims** says:

- (a) If the name of a person required to be named as a defendant is not known to the plaintiff, the plaintiff shall so state in the complaint and shall name as parties all persons unknown in the manner provided in §762.060.

**AUTHOR'S NOTE: In one lender attorney's pleadings in a Kansas City, Missouri case, the attorneys mocked the Plaintiff's allegations of "John Does 1-1000" in their answers to the court, as if the Plaintiff had no right to maintain an action against them.**

**Washington State statutes (R.C.W.) at §4.28.150 – Title of cause – Unknown claimants – Service by publication:**

In any action brought to determine any adverse claim, estate, lien, or interest in real property, or to quiet title to real property, the plaintiff may include as a defendant in such action, and insert in the title thereof, in addition to the names of such persons or parties as appear of record to have, and other persons or parties who are known to have, some title, claim, estate, lien, or interest in the lands in controversy, the following, viz.: "Also all other persons or parties unknown claiming any right, title, estate, lien, or interest in the real estate described in the complaint herein." And service of summons may be had upon all such unknown persons or parties defendant by publication as provided by law in case of nonresident defendants.

**Would this not mean that you CAN claim and publish against unknown claimants?**

In the instance of publication, the property would also be listed by legal description, because there may be unknown claimants that need to be legally served to make your quiet title service of process proper. This is commonly found in most local court rules handbooks.

## **THE DEBACLES OF DEBATE IN FLORIDA**

To gain more impetus for the offensive stance, let's examine the defensive perspective. There are actions to quiet title getting ready to be launched in Jacksonville, Florida soon under the guiding hand of Area Legal Aid Attorney April Charney (and others).

Examine the case of one of her clients, John McCampbell. The 61-year-old car mechanic, who lives in a modest ranch-style home in Jacksonville, lost his job and ended up locking horns with Washington Mutual Bank NA, which foreclosed on his home in 2004. Thanks to Charney's "produce the note" defense, McCampbell is still living in his home today. The \$156,000 mortgage that he defaulted on is still in limbo because WAMU (since taken over by Chase Bank NA) can't find the paperwork (probably because it doesn't exist).

Now we come to 2010 and the true test of time is about to translate itself into history with a quiet title action being filed to extinguish the lien. In effect, the loan would be wiped out and the house would be free and clear. Procedurally, this is done much the same way as was described in the preceding paragraphs; however, this claim was the result of a dormant foreclosure, which must lie dormant and "ripen" for five years from the time the note was accelerated, according to Tampa attorney Mike Wasylik.



Another example ... in Georgia, research shows it is 4 years. Check your state to make sure what the statute of limitations dictates. In a recent news story that appeared in the *Jacksonville Business Journal* (written by Kimberly Morrison ... who the author spoke with at length and who covers April Charney quite regularly for the *Journal*), Morrison hit up Anthony DiMarco for comment (DiMarco represents the Florida Bankers Association) regarding Charney's upcoming logistical move to quiet title to a host of properties that she has represented in foreclosure defense cases.

DiMarco of course then deferred to the sensitivities of handing over a home free and clear when all he claims this amounts to is taking advantage of a legal technicality, stating that errors in paperwork are not tantamount to a person not taking financial responsibility for their mortgage loan. [... *sounds like a typical banker thought, huh?*]

"When you are doing lots and lots of anything — and there were lots of these loans written — there are human beings involved and there were mistakes along the way just like anything else," DiMarco said (*quoted from the article*).

After speaking with Ms. Morrison directly, she informed the author that since this article ran, she has gotten at least two angry calls from readers of that article (who she thinks were from the banking industry) that expressed dissatisfaction about airing this kind of legal strategy in the public where others can get ideas about getting a free home.

Morrison has even taken April Charney's seminar and grimaced at the overwhelming amount of information there is involved with this scenario ... a thick, voluminous amount of information and case law. It should come as no surprise that the best the banking industry can say about this mess they've created, is certainly cause for alarm when banking industry spokespeople admit that "mistakes were made along the way". Don't you think the banks should be held to a higher standard? After all, borrowers relied on those banks' representatives for advice when taking out mortgage loans, right?

Morrison is quick to point out the same thing the author has researched: That the courts in Florida now require the lenders to bring all the paperwork proving ownership or face perjury charges and sanctions. [*This has been proven to have been ignored however.*] The Florida Supreme Court has since mandated this practice to the lower courts. And so what if it cripples the lender's rights to foreclose? If they aren't the legal lender, what are they doing in the court in the first place?

By its own admission, the Florida Bankers Association told the state's Supreme Court task force on residential mortgage foreclosure that paperwork was deliberately eliminated in favor of electronic recording to "avoid confusion" (*as taken from the Journal, supra*). April Charney notes that when the originating lenders systematically pledged the loans they didn't actually transfer these loans into trusts, which are supposed to hold them in escrow as the securities were issued. That of course, was not the case. The end result is MERS and a paper trail that runs into a brick wall and leads to nowhere. This indeed has not only caused question of proper party in the courts but also gives rise to reason to quiet title. There's something else that stands to reason as well: jurisdiction.

## **HOW TO DEFEAT DIVERSITY JURISDICTION (just a thought)**

When taken into an evidentiary stance, a suit to remove a cloud on a title would seem like a reverse strategy as opposed to foreclosure. But say that you as a homeowner wanted to sell your home and you wondered whether you could legally do so because of a potential cloud on the title to your land.

If the note was securitized and sold and re-sold to someone else, then how could the lender that is listed as being the “lien holder” or “MERS” who has no standing or capacity whatsoever as a party in interest NOT be clouding the title? This is only a question upon which a court can rule; hence, the “quiet title” option.

**Rule #1: (a.) File quiet title actions in state court, (b.) they are granted by state statute!**

**Rule #2: If the lender removes it to federal court, see Rule #1(b.)!**

Now that the thought is “out there” ... here’s another one:

Is your property not also a Defendant in this action?

It’s certainly NOT a Plaintiff! You’re the Plaintiff!

In two quiet title actions, the author listed his legal description as a Defendant. You serve the property as a Defendant by publication in the county where the property is situated. You notice all interested parties, secured and unsecured, with the legal description and situs address of the property so any potential lien claimants or anyone with an interest can be duly notified of the hearing and/or if answers are required to be filed; and when. Notice and response has to be directed to the county court that is assigned to hear the matter. Service of Process by Publication has to be duly recorded with the Court for service on the property to be effective.

Now you’re asking why the property has to be a Defendant.

**TWO REASONS:** (1) because it’s in the county of record, in which jurisdiction resides and venue resides and **IT CAN’T LOGICALLY BE REMOVED TO FEDERAL COURT** on diversity jurisdiction; and (2) a quiet title action is an “in rem” action. (Unless you load it up with federal questions and claims for damages above \$75,000 ... duh?)

Two mistakes (the author thinks out loud here) you might want to avoid: (1) do not list a damage amount; and (2) do not put federal questions in your allegations or counts. This is a state action, remember? If you’re going to cite case law and statutes, cite state-related cases and statutes. There aren’t that many because these actions are relatively new in this “arena” where mortgage loans are part of the “clouded title”. The more state claims and known state defendant-claimants you have listed, the better chance your suit will stay in state court. Once removed to federal, it becomes a costly pain to get them remanded.

If you're asking for damages, make them exemplary and let the court decide what damages are proper. If you put a figure on your suit, you risk the lender (usually a national association) removing it to federal court. **DO NOT LET THE LENDER** (after they've been noticed) **GET YOU INTO A SETTLEMENT CONFERENCE!**

They will use that settlement figure (if it's above \$75,000 especially) to remove it to federal court, claiming diversity jurisdiction. They've done this in one case the author is familiar with. The federal court cannot quiet title and it's stuck with diversity issues that will bog your case down for months as it did in this particular case!

## **DETERMINATION OF LIEN VALIDITY PRIOR TO FILING QUIET TITLE**

There may be an option in the offensive strategist's arsenal for getting the court to examine the validity of a lien against your real estate. For example, in Kansas, the lone statute under this paragraph gives you, the borrower/homeowner, the right to bring an action before the district court to review and determine whether a lien is valid or not (emphasis in BOLD).

### **Chapter 58.--PERSONAL AND REAL PROPERTY**

#### **Part 6.--MISCELLANEOUS PROVISIONS**

##### **Article 43.--EXPEDITED DETERMINATION OF VALIDITY OF LIENS**

58-4301. Liens and claims against real or personal property; expedited process to review and determine validity. (a) (1) Any person who owns real or personal property or an interest in real or personal property or who is the purported debtor or obligor and who has reason to believe that any document or instrument purporting to create a lien or claim against the real or personal property or an interest in real or personal property previously filed or submitted for filing and recording is fraudulent as defined in subsection (e) may complete and file, at any time without any time limitation, with the district court of the county in which such lien or claim has been filed or submitted for filing, or with the district court of the county in which the property or the rights appertaining thereto is situated, a motion for judicial review of the status of documentation or instrument purporting to create a lien or claim as provided in this section. Such motion shall be supported by the affidavit of the movant or the movant's attorney setting forth a concise statement of the facts upon which the claim for relief is based.

Such motion shall be deemed sufficient if in substantial compliance with the form set forth by the judicial council.

(2) The completed form for ordinary certificate of acknowledgment shall be deemed sufficient if in substantial compliance with the form set forth by the judicial council.

(3) The clerk of the district court shall not collect a filing fee for filing a motion as provided in this section.

(b) The court's findings may be made solely on a review of the documentation or instrument attached to the motion and without hearing any testimonial evidence. The district court's review may be made ex parte without delay or notice of any kind. An appellate court shall expedite review of a district court's findings as provided in this section.

(c) After review, the district court shall enter appropriate findings of fact and conclusions of law in a form as provided in subsection (d) regarding the documentation or instrument purporting to create a lien or claim, which shall be filed and indexed in the same filing office in the appropriate class of records in which the original documentation or instrument in question was filed. The court's findings of fact and conclusions of law may include an order setting aside the lien and directing the filing officer to nullify the lien instrument purporting to create the lien or claim. If the lien or claim was filed pursuant to the uniform commercial code, such order shall act as a termination statement filed pursuant to such code. The filing officer shall not collect a filing fee for filing a district court's findings of fact and conclusions of law as provided in this section. A copy of the findings of fact and conclusions of law shall be mailed to the movant and the person who filed the lien or claim at the last known address of each person within seven days of the date that the findings of fact and conclusions of law is issued by the district court.

(d) The findings of fact and conclusions of law shall be deemed sufficient if in substantial compliance with the form set forth by the judicial council.

(e) As used in this section, a document or instrument is presumed to be fraudulent if the document or instrument purports to create a lien or assert a claim against real or personal property or an interest in real or personal property and:

(1) is not a document or instrument provided for by the constitution or laws of this state or of the United States;

(2) **is not created by implied or express consent or agreement of the obligor, debtor or the owner of the real or personal property or an interest in the real or personal property, if required under the laws of this state, or by implied or express consent or agreement of an agent, fiduciary or other representative of that person;** or (3) is not an equitable, constructive or other lien imposed by a court with jurisdiction created or established under the constitution or laws of this state or of the United States.

(f) As used in this subsection, filing office or filing officer refers to the officer and office where a document or instrument as described in this section is appropriately filed as provided by law, including, but not limited to the register of deeds, the secretary of state and the district court and filing officers related thereto.

History: L. 1998, ch. 116, § 1; L. 2000, ch. 142, § 154; L. 2005, ch. 101, § 1; July 1.

*AUTHOR'S NOTE: It is hopeful that some of you will petition your legislators to add a supplement to this type of "lien validity check" statute to include a lien that may contain a false or material misrepresentation (this could be used to attack MERS liens). This could also give rise to the lack of perfection of a security interest in establishing prima facie evidence to be presented during a quiet title action. This statute may seem inapplicable to your circumstances; but quiet title actions are certainly applicable.*

**PARALEGAL'S NOTE: Take notice of the fact that most of what is in the foregoing statute may have been generated solely for dealing with "Patriot" or "nuisance" liens. Every state has these statutes now, because the Patriot Movement of the 1990's slandered title to a lot of peoples' property by filing these types of liens.**

**Many of these were either generated by a common law court or drafted in what are known as “commercial liens” which assess damage based on violations of the Constitution.**

## **YOUR TITLE COMPANY IS NOT LIABLE?**

Those who would seek to hold their title company liable for negligence (in not demonstrating or informing the homeowner for whom a title insurance policy has been issued) might want to take note of the following Illinois case:

*First Midwest Bank, N.A. v. Stewart Title Guaranty Company* (100162, January 20, 2006)

In this instance, the Court cited a brief submitted to it by the American Land Title Association (one of the founders of MERS) in determining the obligations of a title insurer by a review of the terms of the title commitment. The Court also examined “Schedule B” to the title policy and noted that the section listed encumbrances that would not be covered if the policy were issued without further action.

The Court concluded that a title insurer is not in the business of supplying information when it issues a commitment or title policy, adding, “... it is not the purpose of a title commitment to provide a listing of all defects, liens and encumbrances affecting the property. A title commitment is simply a promise to insure a particular state of title.” (Quoting ALTA’s brief) “Nowhere does the commitment contain any guarantee concerning the performance of a title search.”

Since the title company is NOT in the business of supplying information for the guidance of others in their business transactions, they cannot be held accountable for failing to state all restrictive covenants or encumbrances on title. Thus, the Court system has to be used to determine if there is a legitimate “cloud” on title. If the cloud on title caused damage, then an award could be assessed by the court. However, more than likely, the remedy would be to remove the cloud from the title.

If the title company that is insuring marketable title to property (insuring to the benefit of the lender) from before you acquired it (which is customary) and MERS and its agents were involved prior to your purchasing that property, the title company could be brought forward and made to pay for slanders to title BEFORE you acquired it. The weak link, again, is **after** you acquired it. Then you’re on the hook for the legal fees. Those are the damages you could ask for. If MERS was involved BEFORE you bought the home, then the title company currently insuring “marketable title” would have to deal with the “aftereffects” of MERS’s behavior. From indications the author has seen by MERS’ own hand in its “officer certifications”, MERS is held harmless from any illegal actions those certifying officers might commit in the performance of their duties. What then does this do for you as a homeowner in relation to your “quiet title”? A bit disconcerting, isn’t it? The best estimate here is to make the title company your friend and not your enemy.

## OTHER TYPES OF STATUTORY STRATEGIES

As previously discussed in an example from Texas, there are statutes in virtually all 50 states, similar to the one the author uses as an example (from the Louisiana Revised Statutes Title 14, Section 133 (criminal code, emphasis in **BOLD-FACED TYPE**) :

§133. Filing or maintaining false public records

**A. Filing false public records is the filing or depositing for record in any public office or with any public official, or the maintaining as required by law, regulation, or rule, with knowledge of its falsity, of any of the following:**

(1) Any forged document.

(2) Any wrongfully altered document.

**(3) Any document containing a false statement or false representation of a material fact.**

**B.** The good faith inclusion of any item of cost on a Medical Assistance Program cost report which is later determined by audit to be nonreimbursable under state and federal regulations shall be an affirmative defense to a violation of this Section.

**C. Whoever commits the crime of filing false public records shall be imprisoned for not more than five years with or without hard labor or shall be fined not more than five thousand dollars, or both.**

Amended by Acts 1980, No. 454, §1; Acts 1982, No. 676, §1; Acts 1992, No. 539, §1; Acts 1995, No. 787, §1.

## OPTION SIX: ATTACKING “OTHER LIENS” TO GET TOTAL RESULTS

This section is authored for the benefit of those who have mechanic’s or materialmen’s liens that have been satisfied that are clogging the clear title. The reasoning here would be that if you’re going to attempt to “clear” these defects, you may also wish to include any and all liens filed against the home that appear on record as legitimate defects. Again, the more of these you have on your quiet title action, the better it looks to the court for its legitimacy.

The burden of proof in such instances may be placed on you (especially in fact pleading states) the Plaintiff, but proving all the existing elements of the claim is strictly reserved for the creditors claiming an interest. You have the option of discovery and you can impeach any documents the lender attempts to enter into evidence. Once the documents have been impeached, you would then tell the court that the title to property is truly slandered by these documents, thus the clouds need to be removed by expungement of all liens and encumbrances proven NOT to be valid. The judge will then issue an Order quieting title.

Would it be really necessary to bring up “everything in the kitchen sink” all at once in your pleadings?

The author's take on this is "wait and see" what the claimant brings forward and then make whatever motions are necessary to counterattack or impeach its claims; however, your attorney may have a different take on the key elements, especially when some state statutes make it relatively easy to prove some claims. This is what you pay an attorney to research. Speaking of which ...

## **RESEARCH**

Most every state has a statute that gives the property owner the right to bring a quiet title action. Many states have forms and pleadings available as examples of what these actions look like. Matthew Bender and Vernon's have also come out with books of pleadings and forms you can use. Your law library will probably have a lot of this stuff in the annotated codes and statutes.

Deering's California provides an excellent resource for quiet title actions (the author researched at least 45 pages of data and sample forms). If you look at each state's statutes under quiet title actions, you will also find helpful related case law in the annotated versions. This will help you frame your arguments so you don't fall into certain procedural traps. Some cases will be relevant, like *Bellistri* for Missouri, others won't.

Insofar as "white papers" go towards research ... these are valuable (especially Peterson on MERS); and when coupled with the qui tam suits filed in California and Nevada, provide great supplemental research. There is a good smattering of amicus briefs out there as well (and with a little research you can locate them).

Again, the author can't stress enough to keep your case as simple as humanly possible. The title company's exclusionary letter (of declination) will be the "big stick" the late President Teddy Roosevelt was referring to.

**On the following pages, the author is displaying his own personal quiet title action on two resort lots in Arkansas.**

**AUTHOR'S NOTE: This petition was filed in 12/06/2006 and a decree quieting title was issued on 01/24/2007. The foregoing work constitutes legal research by the author. Any questions, concerns, rebuttals, etc. should be directed to the author at [clouedtitles@gmail.com](mailto:clouedtitles@gmail.com). Since this is research, it may be updated from time to time to reflect more pertinent and tested information.**

IN THE CIRCUIT COURT OF VAN BUREN COUNTY, ARKANSAS  
3rd DIVISION

FILED  
2006 DEC -6 AM 10:39

DAVID P. KRIEGER

PLAINTIFF

VS.

CIV-2006-248

RESORT NETWORK, INC.,  
AND CERTAIN LANDS

LOTS 374 AND 424, BLOCK 22,  
LAKEWOOD, FAIRFIELD BAY,  
VAN BUREN COUNTY, ARKANSAS

DEFENDANTS

COMPLAINT

Comes now the plaintiff, David P. Krieger, by and through his attorney, [REDACTED]

[REDACTED] Law Firm, P.A., and for his cause of action, states:

1. That the plaintiff is the owner and in possession of the following described property located in the City of Fairfield Bay, Van Buren County, Arkansas, being Lots 374 and 424, Block 22, Lakewood Addition.
2. That the aforementioned lots being located in Van Buren County, Arkansas, this court has jurisdiction and venue.
3. That the plaintiff acquired title to these properties through Tax Deeds recorded on June 28, 2006 as Document #20066661 for Lot 374, Block 22, Lakewood, Fairfield Bay, Van Buren County, Arkansas and Document #20066662 for Lot 424, Block 22, Lakewood, Fairfield Bay, Van Buren County, Arkansas. That the aforementioned Tax Deeds are attached hereto and incorporated herein by reference and collectively marked as Exhibit A.
4. That the plaintiff or plaintiff's predecessors in title have paid taxes on the property for more than seven (7) years.



5. No one is claiming possession of Lot 374, Block 22, Lakewood adversely to the plaintiff and no one is claiming title to said property adversely to the plaintiff except possibly the separate defendant, Resort Network, Inc., who acquired the property by deed dated March 8, 1999 and recorded on April 6, 1999 as Document No. 991708, which is attached hereto and incorporated herein by reference and marked Exhibit B. That George E. Glenn obtained the property from Fairfield Communities, Inc. in a deed dated November 18, 1988 and recorded as Document No. 885366, which is attached hereto and incorporated herein by reference and marked as Exhibit C.

6. That Resort Network, Inc., has failed and refused to pay the ad valorem taxes on Lot 374, Block 22, Lakewood, for the years of 2000 and subsequent years. The property was certified to the State Land Commissioner for the State of Arkansas due to the delinquent status of taxes and said Land Commissioner subsequently sold the property to the plaintiff as reflected in the deed recorded as Document No. 20066661.

7. No one is claiming possession of Lot 424, Block 22, Lakewood adversely to the plaintiff and no one is claiming title to said property adversely to the plaintiff except possibly the separate defendant, Resort Network, Inc., who acquired the property by deed dated August 11, 1999 and recorded on August 20, 1999 as Document No. 994372, which is attached hereto and incorporated herein by reference and marked Exhibit D. That Roger Anderson obtained the property from Fern M. Ihfe in a deed dated October 6, 1992 and recorded as Document No. 925476 on October 12, 1992, which is attached hereto and incorporated herein by reference and marked as Exhibit E. That Fern M. Ihfe acquired the property from Fairfield Communities, Inc. in a deed dated October 23, 1984 and recorded as Document No. 844858, November 18, 1988 and recorded as

8. That Resort Network, Inc., has failed and refused to pay the ad valorem taxes on Lot 424, Block 22, Lakewood, for the years of 2000 and subsequent years. The property was certified to the State Land Commissioner for the State of Arkansas due to the delinquent status of taxes and said Land Commissioner subsequently sold the property to the plaintiff as reflected in the deed recorded as Document No. 20066662.

WHEREFORE, the plaintiff prays that the title of these properties be confirmed and quieted and vested in the plaintiff; that any existing or potential adverse claims to the property, particularly those claims of the defendants herein be cancelled and declared a nullity, for its costs and all other proper relief.

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## Section 13: FDCPA and FCRA

**PARALEGAL’S NOTE:** For specific references on these types of claims as ancillary to your case, the Fair Debt Collection Practices Act [hereinafter FDCPA] has a section entitled, “Misrepresentation of a Debt” (§807). If the pretender lender is not the true creditor or holder in due course, the question has to be raised as to whether this statute was violated in the process of foreclosure; or in the case of foreclosure offense, whether the statute was violated in the fact the pretender lender misled the homeowner into believing it had the right to even collect mortgage payments and thus, to foreclose, in the first place.

In the event the pretender lender has reported these items on the homeowner’s credit report, §623 of the Fair Credit Reporting Act [hereinafter FCRA] comes into play for “Knowingly reporting false information on a consumer’s credit file.”

If the pretender lender places items on the credit report instead of the actual creditor (whether pre-foreclosure, post-foreclosure or deficiency judgment proceedings), the question has to be raised as to whether the Plaintiff or Defendant as “pretender lender” knew that they weren’t the actual creditor, or even whether the case would show that the pretender lender had no legal authority to assume the duty as a “creditor” by reporting late payments or foreclosure activity on the homeowner’s credit file in the first place. A separate motion for a ruling on either of these claims should be considered.

It may also be safe to bring all three credit repositories in as third-party defendants, to teach them as lesson as well about taking the statements of pretender lenders at face value, when in fact, the credit bureaus failed to ascertain whether the true holders in due course, the true creditors, were not represented when the pretender lender reported missed payments and foreclosure proceedings on the consumer’s credit file.

It has been held by the courts that credit bureaus are only repositories entrusted to maintain true and accurate credit files on consumers as prescribed by statute (FCRA).

However; in this instance, each of the 3 credit bureaus failed in their attempts to ascertain that their creditors, as subscribers, provided proof or were held accountable in proximal tort for damages resulting from misrepresenting to the credit bureaus that they, in fact, were the legitimate creditors as purported when they submitted the information that was reported on said consumer’s credit file.

### **Rule #1: File FCRA and FDCPA actions in federal court, NOT state court.**

Even though the states have adopted many of the statutes directly from the federal statutes into their own jurisdictions, the federal statutes carry more weight and because statutory violations have occurred, you do not need to pursue diversity jurisdiction to bring an action. Some of the states have “watered down” their federal versions, so it’s best to go to the real source to take action against a “creditor”.

## **SUING FOR FALSE REPORTING ON A CONSUMER CREDIT REPORT**

Ask yourself about the actual “capacity” of a “pretender lender” to report derogatory information on your credit report. It doesn’t seem right, does it?

In the author’s case, the now-defunct Washington Mutual Bank NA was reporting two PAID OFF mortgages on his credit reports (totaling six trade line items on all 3 bureaus). Then, without notice (in violation of 15 USC 1692g et seq., and in violation of the Fair Debt Collection Practices Act) Chase Bank deprived the author of the right to dispute the validity of the debt or any portion thereof, by first sending a letter regarding its acquisition of the author’s paid-off mortgage loans and its intent to report said loans on his credit files).

With six trade line items (2 per bureau) being reported, we have \$6,000 in statutory damages racked up so far, at \$1,000 per violation (plus attorney’s fees, court costs ... and possible exemplary damages ... attorneys, wake up! There really is money to be made here!)

In the author’s case, Chase Bank was pursued first by certified mail, return receipt requested at the address listed on the author’s credit reports ... a P.O. Box in Northridge, California. The envelope was returned “Undeliverable as Addressed”; and thus, unopened with the green card still attached. Should you elect to utilize a procedure like this, DO NOT OPEN THE ENVELOPE ... LEAVE IT SEALED! Put it in a file for evidence as an exhibit in your case.

Subsequently, since all of the credit bureaus carried the same trade line item information, they are all suspect for reporting erroneous information, as listed in §607 of the Fair Credit Reporting Act. This violation can be assessed to BOTH the credit bureaus and the “creditor”, jointly and severally, for acting in consort if they refuse to remove the trade line items in their entirety! That’s a total of three credit bureaus + Chase Bank X two trade line items X \$1,000 per statutory violation = \$6,000, just on the credit bureaus’ violation by not maintaining accuracy on a consumer credit file. Now add in Chase Bank’s verification of the accounts as accurate when it knew they weren’t accurate, and you’ve got another \$6,000 added onto that. Now, we’re up to \$18,000 in statutory damages!

Because Chase Bank NA never advanced the author any mortgage loan money, nor collected payments from the author, nor had the authority to collect any proceeds from foreclosure of the author’s properties, because at the time the loans were paid off, they weren’t Chase Bank’s mortgages to even “service”, Chase now has some explaining to do; reporting paid off WAMU items as their own!

Because Chase Bank NA misrepresented themselves on these two loans, in violation of the Fair Debt Collection Practices Act, §807(2)(A) for misrepresentation of the character and status of a debt, add another \$6,000 in statutory damages; now bringing the total to \$24,000!

Now because Chase Bank NA knowingly caused these items to be placed on the author's credit files, claiming these loans as their own, when they knew full well they were PAID WAMU loans, they violated §623 of the Fair Credit Reporting Act, adding another \$6,000 to the damages, now totaling \$30,000 (plus attorney's fees, court costs AND the possibility of exemplary damages to teach Chase Bank a lesson).

## **THE POTENTIAL FOR CLASS ACTION LAWSUITS**

Because there are probably thousands of similarly-situated WAMU borrowers whose loans are paid in full that Chase Bank NA is now claiming as their own (because the FDIC allowed transfer of the portfolio when WAMU went under), this could lend potential to be presented to the court in the form of a class action lawsuit against Chase Bank NA and ALL 3 CREDIT BUREAUS! Do you think this would get their attention?

You have to notice all the parties of your intent to file suit if they do not act and remove the trade line items; otherwise, federal judges will more than likely throw out your claim because the matter could have been settled out of court based on a directed verdict from the defendants because they weren't properly noticed in advance of the action.

Should you elect to pursue an action, it would be best to let your attorney read this section so he can see that this action is NOT a waste of time. As in the case of *Thompson v. SARMA*, the Trans Union affiliate paid off "like a slot machine" according to the attorney handling the case (whom the author spoke with).

Bad case law is something the credit bureaus can nil afford.

## **FDCPA AND ORIGINAL LENDERS**

In most instances, the Act does NOT apply to original lenders but only to third-party debt collectors. Again, in Texas for example, the courts have ruled that loaning of money does not constitute a "good" or a "service" under the deceptive trade practices statutes. Thus you're either seemingly faced with unfair acts under some FTC ruling or lender liability.

However, the promissory notes that the "lenders" sold to third-parties for pennies on the dollar can be attacked under these statutes if you so choose. As has now been evidenced, you can also attack trustee's sales under this Act as well.

Because of the fact that the leftover debt following a short sale or foreclosure in states where deficiency balances can be collected, most borrowers have made themselves "inaccessible" to third-party debt collectors who can serve them to sue them. Additionally, part of the problem for third-party debt collectors is the remaining balance is still unsecured and can be discharged by the already-disparaged homeowner in bankruptcy court. God forbid what would happen in the real party in interest showed up in bankruptcy court claiming an interest, when another lender did the foreclosing.

Unless you have State law that operates in virtually the same way as the Fair Debt Collections Practices Act, federal district court is where these actions are most appropriately filed. More than likely the successor in interest has minimal paperwork that it can use to make a case.

## **THE FDCPA AND TRUSTEE'S SALES: STOPPED!**

As of this writing, trustee's sales in Deed of Trust states are being stopped using a Supreme Court ruling under *Jerman v. Carlisle* and a very carefully crafted letter to the trustee holding the sale (usually an attorney). He is a third-party debt collector for the lender by all rights and definitions, especially when he is a "substitute trustee".

In deed of trust states (using this rationale), ask yourself WHY a lender would substitute a trustee in the first place. Is it because the first trustee that was put on the Deed of Trust was just a figurehead used to accomplish a purpose? Is it that the trustee of record was not really a trustee? Did the original trustee ever sign your deed of trust? Ever wonder why? That leads to more questions ... questions that might bring the original deed of trust under more scrutiny. Yet to be tested is merger doctrine. It has been tested in regular trust set-ups (like irrevocable, revocable, inter vivos, cestui que trusts, etc.) and the courts have constantly ruled that the trustee cannot be the beneficiary for tax purposes (see *Reinecke v. Smith*, listed in Black's 6<sup>th</sup> for what it's worth under the definition of "trustee").

Is it because of the fact that the successor trustees are generally foreclosure mills that they get substituted in later? After all, the trustee is the one foreclosing, right? However, when a substitute trustee is appointed later, it shifts the position away from the original trustee as listed in the deed of trust and places the new trustee OUTSIDE of the original trust, where that entity can be attacked. This is why the author has advocated researching the successor trustee's Articles of Incorporation (to see whether they have listed under their "intent and purpose" the reason they were created is to act as a trustee in real estate transactions or something similar to that) as a matter of challenge. Here's the paraphrased gist of one letter the author was privy to and some of its more "definitive" points:

- Faxed notice to trustee indicating engagement of attorney by client.
- Noticing trustee of client's receipt of number of letters in sum certain by the trustee regarding their foreclosure and notice of sale.
- Advising trustee it is acting under the Fair Debt Collection Practices Act.
- Identifies the pretender lender and that lender's lack of standing to foreclose.
- Attacks the actions of MERS and also a securitized trust, if applicable, as illegal.
- Cites case law and then relates the trustee to a third-party debt collector.
- Cites numerous violations under USC 1692(e) and (f) and tags them for damages under USC 1692(k) at a \$1,000 a whack; totals the damages and demands payment and mentions attorney's fees; asks for settlement. If not settled, then a suit will commence.
- Demands immediate contact from trustee. Have a nice day.

## Section 14: Deficiency Judgments

**PARALEGAL'S NOTE:** If you are picking this case up post-foreclosure, it more than likely has been decided that the court will hold you liable for any deficiency in the loan balance after the sale of the home. Most of the time (as the author has become aware) these actions are part of the Summary Judgment proceedings in the foreclosure case you chose to either ignore or you hired counsel that didn't specialize in defeating foreclosure.

### BY DEFINITION

A **deficiency judgment** is an unsecured money judgment against a borrower whose mortgage foreclosure sale did not produce sufficient funds to pay the underlying promissory note or loan, in full. The availability of a deficiency judgment depends on whether the lender has a recourse or nonrecourse loan. *Ballentine's Law Dictionary*

### “WHY” THE DEFICIENCY?

In many instances, the defendant homeowner will find legal action commenced to collect the deficiency balance, which may have been predicated on fraud. In other instances, you the homeowner (who is probably now renting somewhere or living with other family members) have received an IRS Form 1099-C in the mail, showing an amount calculated by the pretender lender that you acquired as “income”. This leaves a lot of room for challenge, not only with the Internal Revenue Service, but also the lender.

### POTENTIAL OPTIONS

As explained further in Oretsky's take in “Lender Liability Updates”, “courts have held that most lender liability claims are compulsory counterclaims in the lenders' suit on a note or to recover a deficiency judgment after foreclosure.” Oretsky specifically cites case law in his research, which merits further reading if lender liability issues seem to rear their ugly head.

In any judicial court action, the Defendant HAS TO BE NOTIFIED OF THE ACTION, HEARING, ETC. Defective service of process is one of the best ways to challenge the pretender lender's authority to gain access to your bank accounts and other relevant assets through garnishment or seizure; or to finalize a judgment for a deficiency balance.

To explain this through one scenario: In Texas, a bill of review has been used to challenge the authenticity of not only service of process but of the actual validity of the claimed judgment debt. The court, in reviewing the lack of response by the debt collector, vacated the judgment. Some states however, do not have provisions for this. An attorney familiar with collection procedures in your state would be best to get an opinion from.

Many times, as reported, the lenders (especially second mortgage lenders) will sell off their “notes” to third-party debt collectors for a “sum certain”. It could be a \$75,000 promissory note for example; which some might construe (once the sale to a third party has been proven) could be considered “unsecured debt”. Unless the “third party” can actually “prove” its claim by legitimate “perfecting of a security instrument” (and the author doesn’t see the likelihood in that), it would make it more difficult for the third-party debt collector to actually proceed without some legitimate challenge by the “borrower”.

It is important to recognize in this procedure that in getting a deficiency judgment against the homeowner, the pretender lender is going to make interest upon fees, upon fees, upon fees, upon penalties, upon ... ad infinitum, ad nauseum ... which is in retrospect, a further insult added to injury of the already financially destitute homeowner. Using the prima facie evidence established in the original foreclosure action, the pretender lender will seek to recover a balance that they “legally” may not be entitled to recover.

It is at this time that you can object to the proceedings as fraudulent, because you were not allowed to ask for discovery prior to the court awarding the judgment as was your right. The question arises to the fact as to whether the Plaintiff seeking deficiency judgment is the actual creditor that will receive this award once it is paid. This opens the door to further scrutiny as to whether the pretender lender was even the true creditor that brought the foreclosure action (for those of you who just “wised up” after the foreclosure sale of your home) in the first place. Based on the laws in your state, your attorney can determine the best course of action to fight the deficiency judgment in.

## **HOW MUCH ARE THEY REALLY ENTITLED TO COLLECT?**

When you talk to attorneys like Mark Mausert, whose cutting-edge tactics helped form the qui tam actions filed in Nevada and California said the consortium knew exactly what they were doing when MERS was created. According to Mausert, MERS was “designed” to play into the securitization game by hiding the paper trails while the resulting behind-the-scenes electronic recordations (endorsed by ALTA) resulted in the loss of millions of dollars in lost revenue for all of the counties mentioned in the suits already filed.

So when all is said and done and the homeowner is faced with a deficiency judgment balance, how does that play out in dollars and sense? (Yes, that is a play on words!) Mausert says according to his math, with the help of Nevada Revised Statutes 40.451 et seq, “there really is no deficiency judgment.” The author refers to this section at Mausert’s suggestion to take a look at HOW there wouldn’t be a deficiency.

If you look at NRS 40.451, you’ll see it covers foreclosures and deficiency judgments. In fact, all of Chapter 40 NRS covers actions concerning real property. NRS 40.451 – 40.463 specifically cover this example. By applying Mausert’s “suggestions”, one can see why his idea of NO DEFICIENCY would stick.



Here's how this theory plays out:

- (1) NRS 40.451 defines "indebtedness". The last sentence of that statute says: "Such amount constituting a lien is limited to the amount of the consideration paid by the lienholder." [In order to assess this, one would have to know if the lienholder was actually "paid off" in the first place; or whether the lienholder was the true party in interest.]
- (2) Even though Nevada is a deficiency state, according to NRS 40.455, there are exceptions to deficiency, as explained in subparagraphs (3)(a) through (3)(b) wherein the court will not grant it.
- (3) NRS 40.457 requires that an appraisal be done of the property to determine market value of that home at the time of foreclosure.

Mausert claims that if the property is short-sold, which many of them are, the actual market value of the home at the time (which may be way less due to market values dropping en masse) may be substantially less than what the homeowner borrowed and thus currently owed on his mortgage at the time of foreclosure or short sale.

This would mean that if you have a home that has a \$250,000 mortgage on it and the actual value of the home was really only worth \$160,000 (meaning the homeowner is "upside down" in it) at the time it was sold (according to appraisal ordered by the foregoing statute); and it was sold "at sale" for \$130,000, then the difference between the appraised value and the "sold" value is \$30,000 (assuming all costs of sale were included), which would represent the "deficiency".

- (4) According to NRS 40.459 however, there are still more limitations added to the equation:

**NRS 40.459 Limitations on amount of money judgment.** After the hearing, the court shall award a money judgment against the debtor, guarantor or surety who is personally liable for the debt. The court shall not render judgment for more than:

1. The amount by which the amount of the indebtedness which was secured exceeds the fair market value of the property sold at the time of the sale, with interest from the date of the sale; or
2. The amount which is the difference between the amount for which the property was actually sold and the amount of the indebtedness which was secured, with interest from the date of sale, whichever is the lesser amount.

If you look at Paragraph #1 of the foregoing, it indicates that the court shall not render judgment for more than the amount by which the amount of the indebtedness was secured (\$250,000, our example) exceeds the fair market value at sale (\$160,000); or if you apply Paragraph #2, the difference between the property's sale price versus the loan balance (plus interest), whichever is the lesser amount.

Using paragraph #1, between the FMV and the actual loan balance, the actual amount of our example of a deficiency would be \$90,000. If you apply paragraph #2 instead, the total deficiency according to paragraph #2 would be \$120,000, because the property in our example was sold for \$130,000. Since the statute says, “whichever is the lesser amount”, when applying it to this deficiency, Paragraph #1 would be the lesser amount.

But it gets better ... according to Mausert, once you factor in the securitized loan and the deductions from the credit enhancements paid to the lender through TARP, AIG, etc. on the credit default swaps; plus the amount of money the borrower paid down, PLUS all of the capital expenditures and improvements made to the property by the homeowner and there can be no deficiency judgment in this case.

Besides, the lender would also have to tie all of the ends together to prove they actually are the holder of the note. If the borrower wanted to “escape” the deficiency completely (without argument), they would file bankruptcy ... end of story.

But Mausert is leaning more heavily towards the lender’s unjust enrichment. He doesn’t believe that the courts want to do anything that is unreasonable, considering the fact that the foreclosure action “impairs the property”. Mausert says of the foreclosure action itself, “the lender clouds the title”.

With respect to all of this, Mausert says he favors an equitable mortgage based on “fundamental fairness”, citing the familiar phrase of old, “He who seeks equity must have clean hands.”

Mausert says he even approached Hon. Charles Jones one day and explained this theory to him and then played out his equitable mortgage solution (as opposed to the “conscience” problem with getting a “free and clear house”) of a 4.5% interest rate based on a principal reduction to fair market value from whatever the loan balance was (aligning with the statute’s reference to FMV) with the proceeds of the debtor’s property in monthly payments going to “Uncle Sam” (to reimburse TARP funds) to pay back the taxpayer. Mausert said the judge got “wide-eyed” over that idea.

Of course, there is still the issue of the qui tam actions and the unsettling thought that if the entire chain of events were to be revealed, MERS and the entire recordation system would be facing a virtual 12+ year enema. A lot would also depend on WHO is insuring MERS. The millions of titles that MERS affected by and through its actions would be subject to review and reorganization, which means the borrowers would have to be summoned to court with their attorneys to argue their separate cases. When you factor in that some mortgage holders were forced to take out title policies insuring to the benefit of Mortgage Electronic Registration Systems, Inc.; when in fact MERS doesn’t fit within the parameters of Restatement of Mortgages (Third), then this would give rise for MERS to justifiably foreclose, cloud title because it doesn’t have the RIGHT to foreclose, convey notes it doesn’t own ... all of this adversely impacts not only title, but also the entire fundamental system of recordation as it was advanced from centuries ago.

## PLAN OF ATTACK

It is suggested here that you will focus on attacking every piece of documentation brought forward by the Plaintiff [financial institution or judgment creditor]:

- a. Impeach the assignment
  1. Attack notarial seals for validity
  2. Attack statements made by affiants (first-hand knowledge?)
  3. Attack location and multiple use of signatures on multiple documents by the same “certifying officer”
- b. Impeach all affidavits
  1. Full disclosure and full regard for personal knowledge of each statement made by the Declarant
  2. Where the Declarant resided when the documents were signed
  3. Whether the signing of documents were actually witnessed
- c. Require full accounting (full disclosure of the assignment and transfer)
- d. No loss suffered means no remedy can be requested
  1. Was the assignment paid for in a sum calculated to pennies on the dollar?
  2. How much actual “proof” transferred as part of the paperwork?

## OTHER DISCONCERTING DISCOURSE

From a deficiency angle, let’s look at another picture ...

Let’s say that the lender you borrowed money from advanced you investor money from Wall Street (through their bond sales of the credit default swaps). The assumption here is, **if the money came first**, then there were no mortgage notes (yours included) in the pools at the time the money was advanced by investors to fund that round of loans. The prospectuses issued by the brokerage houses would be drafted in such a way as to mislead the investors into believing that the pools already contained “res”. It is also possible that the “res” listed in the prospectuses was “floated” into the subject pool through a side agreement to give it “res” so the deal wouldn’t be fraudulent ab initio. This is where the assertion of multiple pledging comes from.

Once the investor money funded the swap, the banks, **not using any of their own money**, loaned the borrower the investor funds with interest. The investors have no recourse; so to the banks, it’s like getting free cash (no strings attached). So what do they do? The proprietary trading kicks into full swing; loans that have no business being made due to lack of borrower credit and repayment histories are thrown into the mix and these items are then BET ON by the banks (using investor money from the credit default swaps) to fail. When the notes default, a “credit event” is declared, the accounts are written down as a loss, the “good notes” are floated into another pool to be used for the next round of scamming and the banks collect millions of dollars of insurance money! If the banks didn’t lend their own money, then what deficiency are they really entitled to?

## Section 15: Following the Money Trail

### THE BIG RIDDLE???

In *HSBC Bank USA, N.A. v. Valentin*, N.Y. Supp., 2008, (Judge Arthur Shack's court in King's County, New York), his Honor asked the supposed lender's attorney in the case a simple question, which the lender's attorney could not answer (to paraphrase):

**"Yet, four months later, plaintiff HSBC was willing to take an assignment of the instant nonperforming loan. (The Court wonders) why would HSBC purchase a nonperforming loan, four months in arrears?"**

**Why would a bank sell (or assign) their defaulted note to a new lender, knowing it's in default and could be foreclosed on?**

Since the lender couldn't answer the question, Judge Shack immediately voiced his concerns about fraud on the court (or at least malfeasance) on the part of the bank. He then placed a load of demands on the lender and his "henchmen" to prove their standing and capacity to foreclose if they were to amend their complaint. **As to the question the attorney could not answer:** The answer is three-fold ... and it involves the last section of this book: The Money Trail.

This will answer a lot of questions as to WHY so many of you on the front lines are seeing what appears to be an assignment of a defaulted mortgage to what appears to be a "securitized" trust or possible "shell" entity AFTER THE FORECLOSURE ACTION OR NOTICE OF DEFAULT HAS BEEN FILED!

There are a lot of suspect theories coming out of this. Here are some of them:

- (1) By all accounting standards, when a loan goes into default, it sits in that lender's respective portfolio. Let's say for example the defaulted loan was \$100,000. If the lender was going to re-loan that money, it would have to infuse 5 times that amount in cash to cover the default under bank rules (that's \$500,000 in cash) before it could re-loan the \$100,000. The transfer to a new entity gets the "bad paper" off their books so they can avoid that requirement! It also might mean that GAAP was deviated from.
- (2) By transferring the obligation to the new "assignee", the new assignee [such as a trust, puts the defaulted loan in a portfolio that is "similarly situated"; full of other defaulted loans]. By deviating in FASB accounting standards (Statement No. 140) the lender puts the defaulted note into a portfolio wherein the new assignee gets paid insurance, credit enhancements or some other benefit as part of the "payment" it would have had to pay for a worthless note. In such a way, the assignor and assignee could possibly do an off-the-books sharing of credit funds as a result. A lot of re-securitizations are alleged to have been set up this way.

In lieu of that, the “trust” takes on a character of its own, attempting to foreclose to pull cash out of the home to put in its pockets without any proof of standing whatsoever. The latter of the arguments here is more likely. Any money going into the “trust” (whether it’s actually been created as a shell trust or not) would inure NOT to the benefit of the investors, but to the master servicer’s pay account for the benefit of parties OTHER than the investors who originally funded the loan.

- (3) When counsel for the borrower pleads the fact that accounting rules were breached from the initiation of the loan; from the prospectus delivered to the investor (who actually owns the note) all the way down to the homeowner that “borrowed” the funds, the move to transfer the defaulted loan further obfuscates the truth from the “assignor” because the loan is no longer on its books and it no longer has to account for it; thus the evidence is “gone”. In the case *In Re Vargas*, the paperwork was alleged to have been eliminated, thus eliminating evidence of fraud. Again, the dummied up of fraudulent paperwork would have caused a severe dilemma for the lender; thus it had to “go away”.

## **FOLLOW THE MONEY TRAIL**

**Author’s Note:** The key here is to know who all of the intervening assignees were to the borrower’s note. Once a full accounting is demanded according to Generally Accepted Accounting Principles (GAAP), it will be easier to identify the frauds that were committed by the lenders throughout the entire chain of title.

**The payout of these investors on Wall Street has everything to do with the Money Trail! The investors are the ones that funded your loan. What has come to light NOW is that the investors were lied to when they invested their funds in the first place [*Plumbers’ & Pipefitters’ Local #562 Supplemental Plan & Trust et al v. J.P. Morgan Acceptance Corporation I et al.*].**

The foregoing suit clearly does that. It calls into question the accounting standards that were used to determine the value of the assets in the “trust” or “pool” as well as what ratings standards and formulas were applied in order to properly “rate” those accounts based on assumptive risk.

The allegations focus on material misrepresentations and omissions made by the lenders to investors through their prospectuses regarding appraisal standards and loan-to-value ratios; material misrepresentations and omissions made by the lenders to investors through their prospectuses regarding credit enhancements [how payments to the investors would be made and from what sources derived]; and the material misrepresentations and omissions made by the lenders to investors through their prospectuses regarding the ratings of the certificates [the bonds] that were purchased by the investors.

## THE FASB

The Financial Accounting Standards Board (FASB) is located in Norwalk, Connecticut and has been around since 1973. This organization is officially recognized by the Securities & Exchange Commission as well as the American Institute of Certified Public Accountants. The FASB claims that accounting standards are essential to an economy functioning efficiently. This is important because creditors, investors and auditors rely on credible, transparent and comparable financial data on which to base sound business decisions. In an honest business world, these standards would have to be maintained. You can access all of the statements and purchase their “standards” online at [www.fasb.org](http://www.fasb.org) or you can contact a certified public accountant that probably has their catalog and receives their updates for more details.

The FASB created the Derivatives Implementation Group in 1998, at the time they issued FASB Statement No. 133. This statement has within it disclosure requirements essential to the proper delivery of truthful information to be used in SEC filings, specifically, what is stated in prospectuses or IPO’s. Any deviation from GAAP could expose fraud, something the lenders and their Wall Street counterparts do not want you finding out.

Getting these documents is something the lenders don’t want to cooperate with because in examining these documents (once obtained) will prove they “fudged” on their figures and deviated from GAAP to achieve results only beneficial to them. It is also possible that if the FASB is lobbied hard enough that they can be “persuaded” to modify their accounting standards through rule changes to benefit the banking industry, which makes this whole accounting system fallible.

It is also possible that some of the documents you may be after DON’T EVEN EXIST.

These accounting standards can be used (with the help of an expert CPA as a witness) to demonstrate whether any person(s) in the chain of title deviated from GAAP and why. It could also be useful to prove whether or not there were actual “funds” paid as part of the “consideration” involved as an element of the contract in the “transfer of a financial asset” as mandated in FASB Statement No. 166.

No consideration means the contract has no “res” backing up the value of the underlying obligation proceeding forward into the mortgage-backed security. This would in turn mean that the portfolio holding all of the mortgage loans was made up of defaulted and worthless loans which the trustee could then submit for an insurance payment or could then cash in on the so-called “bet” on the credit default swap, which was created to sell this portfolio into the marketplace in the form of a bond.

It could also be used to demonstrate the value of the portfolio BEFORE any investors put up any of the money. What if the prospectus that investors received stated that the trust had a “res” value of \$1-billion, when in fact, the trust was empty, waiting to be filled with defaulted loans, which had yet to be split up into tranches and placed into a pooling and servicing agreement?

## **CHANGING OF THE GUARD**

Post-Notice Of Default filings (in non-judicial states) and Post-summons filings (in judicial states) changes not only the character and status of the debt (the promissory note backing the mortgage or deed of trust) but also changes the party; UNLESS a nexus can be proven by the lender to exist between the party initiating suit and the party acquiring the defaulted loan by assignment. This is where “proper party” challenges may succeed.

If the party suing to foreclose no longer owns the note; that party can no longer sue unless it has proof it still has some sort of “contract” with the new owner. That in itself is worth an evidentiary hearing to determine WHY the note was transferred or assigned to a new lender, post-foreclosure filing. This is why ALL documents proffered by a lender during the course of an action to foreclose are all suspect. Every document like these so-called assignments come into play not only in proving the proper party but in proving the lack of non-existent paperwork creating the nexus between the parties to make their respective transactions legal.

Thus, all assignments have to be fully accounted for; all accounting documents must be produced and proven to have adhered to GAAP; and all parties involved in the transaction from the notaries all the way to the “certifying officers” must be deposed or put under oath in open court.

Further, if your note is transferred or sold, all accounting of that transaction must be brought forward, especially if the lender sold your loan into a pool of mortgages! You must also verify that your loan ACTUALLY MADE IT INTO the pool.

The money trail, once fully accounted for, can demonstrate that the servicing lender is NOT the holder in due course and thus can’t even foreclose because they lack standing. You can also judicially notice the court that since this party did not suffer the loss, then who did (if in fact that party can be found). No bookkeeping and accounting documents? No proof of holder in due course.

## **SPECIFIC DOCUMENTATION: FR 2046**

FR 2046: This report is required by law [12 U.S.C. §§ 248(a)(2) and (i) and 347b]. This report is entitled, “SELECTED BALANCE SHEET ITEMS FOR DISCOUNT WINDOW BORROWERS”. So you know what you’re looking for, you can follow the link: [http://www.federalreserve.gov/reportforms/forms/FR\\_204620100113\\_f.pdf](http://www.federalreserve.gov/reportforms/forms/FR_204620100113_f.pdf)

As explained in the Federal Reserve Bank’s own summaries (which can be found in the Online Resource Guide):

The Board's Legal Division has determined that section 10B of the Federal Reserve Act [12 U.S.C. ' 347b] authorizes the Federal Reserve to require this report when institutions request discount window borrowing; that is, it is required to obtain a benefit.

Individual respondent data are regarded as confidential under the Freedom of Information Act [5 U.S.C. '552(b)(4)].

This means that in order to get this document, you will have to first find out whether the lender is required to file this form and if so, to require it in discovery. The data that is collected from these reports, when required, are received for every two-week period for which a borrowing of discount window funds is outstanding. All data is reported for the borrower's domestic offices only in thousands of dollars. The data elements include the amounts of total securities, federal funds sold and securities purchased under agreements to resell, total loans (gross of allowance for loan and lease losses and allocated transfer risk reserve), total assets, total deposits, and federal funds purchased and securities sold under agreements to repurchase.

Primary or secondary credit borrowers report daily data. A borrower need not supply deposit data on the FR 2046 when it already files such information weekly on the Report of Transaction Deposits, Other Deposits and Vault Cash (FR 2900; OMB No. 7100-0087). For these respondents, the two-week reporting period corresponds to their reserve maintenance period. [This is so you know what you're looking for to have analyzed.]

#### **SPECIFIC DOCUMENTATION: FASB STATEMENT NO. 95**

This documentation is entitled, "Statement of Cash Flows". It follows GAAP; or at least it is supposed to. This particular statement is given as part of the package of financial statements for all businesses (including banks), requiring that it classify cash receipts and payments based on where derived (from operating accounts, investments or financing activities); each area must be fully defined.

#### **SPECIFIC DOCUMENTATION: FASB STATEMENT NO. 133**

This documentation is entitled, "Accounting for Derivative Instruments & Hedging". This was specifically devised for Wall Street. This is where most GAAP will deviate, leaving room for fraud to occur.

As the Securities and Exchange Commission gets further into its case against Goldman Sachs, you will be able to follow testimony and transcripts (as reported) to see what GS disclosed and didn't disclose (the rules for disclosure are contained in this Statement).

The 176-page summary, which can be found through FASB's website, establishes standards for accounting and reporting of derivative instruments (including derivative instruments that are imbedded in other contracts, thereafter referred to as derivatives) and for hedging activities. Once analyzed, your expert accounting witness who knows what to look for can probably spot deviations from GAAP.



### **SPECIFIC DOCUMENTATION: FASB STATEMENT NO. 140**

This documentation is entitled, “Accounting for Transfers & Servicing of Financial Assets & Extinguishment of Liabilities”. This 102-page revised statement will be of peculiar concern because its topic matter establishes standards for securitization accounting of all transfers of financial assets and collateral. Further, standards are placed within this Statement to define particularly how much actual control a financial institution has over a financial component and whether it has granted another entity control of that component upon transfer, which must be documented.

It **MUST** disclose whether control has been surrendered to that other entity and it must be consistent with GAAP as outlined in this Statement. Since the Securities and Exchange Commission has sanctioned these standards, any deviation from them could warrant unwanted exposure.

### **SPECIFIC DOCUMENTATION: FASB STATEMENT NO. 161**

This documentation is entitled, “Disclosures about Derivative Instruments and Hedging Activities”. This amendment to Statement No. 133 is 32 pages of enhancement to the disclosure framework set forth in Statement No. 133. The Statement establishes objectives for those using derivative instruments to disclose the underlying risk and accounting designations for each entity:

- (1) How it manages the derivative;
- (2) The purpose of the derivative versus the risk managed;
- (3) Full disclosure of fair market values of each instrument and their gains and losses;
- (4) Disclosure of credit-risk-related contingent features within each derivative; and
- (5) The requirement to cross-reference within the footnotes, especially in the prospectuses, to help those who use these financial statements to better understand the derivative’s performance.

### **SPECIFIC DOCUMENTATION: FASB STATEMENT NO. 166**

This documentation is entitled, “Accounting for Transfers of Financial Assets”. The 320-page document took effect in the industry November 15, 2009. Its GAAP standards apply to all transfers past the foregoing date. What’s so confusing about this Statement is that it piggybacks onto statements made in Statement No. 140 yet it declares that the accounting of a special-purpose entity (SPV, “trust”) is no longer relevant. It basically leaves evaluation of these entities and related accounting practices up for consolidation (which means figures can be fudged). If consolidation of SPV’s occurs, this has to be disclosed as prescribed by this Statement. It is suggested that extra care and examination of this statement and how it is applied to your discovery of these Wall Street trusts should be handled by your expert witness (CPA).

Again, one must also take into consideration WHY the FASB modifies or amends these statements. The website contains the names of all Board Members for further scrutiny. One might even consider issuing a subpoena to one of these gentlemen to get them to “explain” their statements to the judge. These individuals might also be able to “officially” identify the deviations, if your expert CPA witness cannot.

One only has to study the Plumbers’ & Pipefitters’ suit, *supra*, to get a snoot-full of how private investment groups have studied the ways of the SEC and how they attack fraud to come to the realization of how to align and posture themselves when instituting suit. It is suggested you retain the services of an expert CPA that is familiar with the respective GAAP discussed here and one who has securities analysis experience and background.

#### **SPECIFIC DOCUMENTATION: FASB STATEMENT NO. 46**

According to CPA Michael Nwogugu (who has published two different “white papers” on the illegalities of securitization), this 2003 statement applies only to companies subject to regulation by FASB. Its goal is to substantially tighten the criteria necessary to obtain off-balance-sheet treatment for SPVs, and its main thrust is capital adequacy. The standard also imposes an obligation on originators to consolidate the accounts of an SPV (denying off-balance-sheet treatment) unless the total equity at risk is regarded as sufficient to enable the SPV to finance its own activities.

#### **SPECIFIC DOCUMENTATION: IAS 32, IAS 39 and IFRS 7:**

International Accounting Standards (IAS) 32 covers the disclosure and presentation of financial instruments, but from 2007 onwards the disclosure aspects will be replaced by the introduction of International Financial Reporting Standard (IFRS) 7. IAS 39 deals with the recognition and measurement of financial instruments, and has been challenged in two aspects: introducing the concept of “fair value” accounting for financial instruments and whether SPVs should be consolidated back into the balance sheet of the originator. Like Statement No. 46, IAS 32 is likely to result in consolidation of most SPVs on-balance-sheet of the sponsors.

#### **SPECIFIC DOCUMENTATION: BASEL II**

The proposals are aimed at the global banking industry and call for a more scientific measurement of risk and of capital requirements for banks in order to support that risk. Since the general expectation has been that, in overall terms, the proposals could require the banking industry to maintain a higher rather than lower capital base, the proposals have met resistance by many banks. The Basel Committee’s rules/codes are not binding because the committee is not a regulator. *[... but you get the general idea.]*

## **SPECIFIC DOCUMENTATION: SEC FORMS 424A THROUGH 424B8**

These forms outline required documentation necessary in drafting a prospectus; filed pursuant to Rule 424(a) et seq of the Securities Act of 1933. These documents cover the required filings of prospectuses. You can review the entire table of required filings by visiting the website below (This form is available by clicking the following link.):

<http://www.sec.gov/info/edgar/forms/edgform.pdf>

The requirements basically outline HOW a prospectus should look to form; what legal information and disclaimers are required; full discussion and disclosure about the specific offering; the risks involved (in the case of a mortgage-backed security, you will also be looking for specific information about anticipated performance of the pools and tranches if it goes into that much detail, such as ratings, loan-to-value ratios and appraised values). You can always consult the brokers directly on these, but oral information is probably not going to fly as evidence in court.

The money trail has to be accompanied by a prospectus. Money flows into the brokerage from investors who may or may not be fully aware of what trusts are going to be utilized and what Pooling and Service Agreements are in force to control them. In your particular instance, it is suggested that you examine what offerings are currently available and compare their anticipated performance to evidence you already have gathered. If it was possible to identify your home loan in a given pool, then you would depose the Trustee of that MBS and all of the relevant documents previously mentioned in Sections 7 and 10.

## **DEVISIVE DISCOVERY**

It would therefore be prudent to initially identify whether the loan in question (the note itself) was ever made a part of a pooling and servicing agreement. This is a subtle way of finding out whether or not the loan was indeed “securitized” or whether it was just transferred or assigned outright to another lender (and what consideration was paid).

One of the key elements of a contract is consideration. Too many people DON'T bother to ask what the originating lender (if not a REMIC) sold the note to the new buyer for. This is a key question that would lend one to think the “bank” might not have loaned money.

In many instances, it has been discovered that the Defendant borrower did not know who the originating lender was because it was never disclosed to him. This makes following the money trail that much more important.

## Section 16: Conclusions

### **DON'T ASSUME ANYTHING!**

In the world of finance, it has become apparent that the entire forum is inundated with fraud and greed. The number of court cases being filed by the USDOJ and the SEC, (whether knee-jerk reactions to political pressure or not) are attempting to take the “bull by the horns” (which kind of puts a damper on Merrill-Lynch’s old logo, doesn’t it?) and wrestling it to the ground. Here’s the author’s “Don’t Assume” list:

**Don’t assume that these criminal actions and lawsuits are going to be settled overnight.** Each of these will play out for at least a year or longer. Anticipate “shredding parties” (where employees are told to take all potential evidence and shred it), as Defendants in these actions attempt to avoid having to produce them for trial.

**Don’t assume that the lender who is foreclosing on you has all of their “ducks in a row”.** In 40% of the cases, the paperwork proving they have a real interest in your property is missing. This is what Production of Documents is used for: Produce the Note!

**Don’t assume that a “named Trust” exists, either ab initio or in perpetuity.** The basic claim of fraud implies that someone got screwed. In the case of the SEC and DOJ, the investors are complaining that fund managers and trustees ran off with their profits (this is where a majority of those bonuses came from that Wall Streeters got).

**Don’t assume that your loan was securitized.** It may have been directly sold to another lender. That lender may have sold it to some other lender who proprietarily traded it outside of an actual SPV [special purpose vehicle, trust]. If it didn’t make the pooling and servicing agreement, it probably didn’t get securitized. You will have to utilize discovery to get more details to follow the money trail.

**Don’t assume that all of the paperwork proving those third-party payments flowed back to their rightful owners is going to exist.** It is those papers that will show a jury just who to put in jail. True, there is a chance there might be credit enhancements available that weren’t applied to your loan; however, most of those enhancements went into the pockets of Wall Street brokers and their subordinates in the form of bonuses!

**Don’t assume that any lender or bank did not deviate from Generally Accepted Accounting Principles.** Sure, the banks, brokerage houses and the henchmen that supported them will be hard-pressed to prove a lot of their claims, but so will homeowners and investors alike. You may have to bring in expert witnesses to validate your claims that these principles were in fact deviated from.

**Don’t assume that every “assignment” is valid.** Examine every signature and stamp, notary and officer. Behind every assignment there’s a lender somewhere that stands to benefit, whether it was YOUR lender or not. The word here is “impeachment”.

**Don't assume that just because the lender filed suit to foreclose that the county recorder's office shouldn't be ignored for future filings.** This is the very action that generally requires extreme scrutiny because more than likely, the recorded documents were fraudulently assembled. There are laws against filing instruments known to contain material misrepresentations. Don't be afraid to get them enforced. When henchmen start going to jail, they're going to take their "directors" with them; they'll "roll over" at the first sign of trouble (it's just human nature).

**Don't assume that short sales and loan modifications work.** Generally, the borrower is going to suffer more dramatic consequences as a result. In a loan mod, the lender always wins, except when they bring fraud upon the court!

**Don't assume that the lender's attorneys are going to play fair in court and be nice!** There is a huge network of foreclosure mills that have been set up all over the United States for the sole purpose of filing legal actions against homeowners every chance they get. If you don't control the narrative in court, that "nice" little attorney on the Plaintiff's side of the courtroom is going to beat you to a pulp with the "note argument".

**Don't assume your quiet title action runs in perpetuity.** Lenders can sell their "extinguished" loans to other lenders, who can then come back in and muddy up the waters again, attempting litigation. You always have to keep checking county records!

**Don't assume that every case citation the lender's attorneys throw at you in their pleadings is legitimate.** In some cases, it's been demonstrated (upon review by the Court) that those Court cases were improperly used by the lender's attorneys to get one over on the court. Chase Bank lost an appeal by virtue of this very assumption.

**Don't assume that citing 50 causes of action is going to scare off the lender.** In most instances, using the "shotgun approach" doesn't work and more than likely, there is a statute somewhere that you overlooked whose limitations tolled. The best cases are ones where there are four or five counts, each element easily provable, which when tied together make for great prima facie evidence to warrant an evidentiary hearing.

**Don't assume that your judge is going to be fair and impartial.** Judges own stock in banks (and oil companies, as evidenced in the Gulf of Mexico drilling moratorium reversal) too; and if they got a great interest rate from the same bank you're pursuing, then they're likely to have some bias in your case. Therefore, background your judges!

**Don't assume your attorney knows all of this stuff.** Many times, people will select an attorney that is way in over his head and can't defend you. This field of study is fraught with malpractice. The author has seen it personally. Take the time and conduct thorough interviews BEFORE selecting the appropriate counsel to represent you.

**Don't assume that just because your case was dismissed with prejudice, that another lender won't come in and make a similar claim to attempt foreclosure!** And judges have stipulated in the Orders they issue that the Plaintiff can amend their complaint.

## **OTHER ALLEGATIONS WHICH MAKE SENSE**

It has been repeatedly alleged by many attorneys and accountants that securitization may be or is illegal (depending on who you talk to). Some of the concerns are legitimate. Some are reaching and harder to prove. The comments that are legit come from people that have background in securities analysis, like CPA Michael Nwogugu:

### **Bankruptcy courts and debtors that come before it are defrauded by securitization.**

While the court trustee in each bankruptcy case is asking the debtor about their assets, unknown to the debtor is the amount of credit enhancements the debtor would have derived had they known the “condition” of their mortgage loan. Because the “lender” has filed the customary Motion for Relief of Automatic Stay, the focus is what is owed on the note and that it wasn’t paid. What the focus is NOT on is: (1) whether the note in question was securitized and placed into a CDO; (2) whether the note is now unsecured because of the securitization; (3) whether the CDO’s fund managers participated in and received bailout or insurance payouts that would have inured to the benefit of investors and borrowers alike (which would have benefitted the debtor as an asset in bankruptcy); (4) whether the mortgage loan that for all purposes would have NOT forced the debtor into bankruptcy because securitization credit enhancements would have kept his loan out of default and thus out of foreclosure; and (5) the fact that whoever has filed the motion to lift stay is committing the final fraud against the debtor, to ruin their credit and put them into potential pauperism for ten years while cashing in on the property directly to further escalate its profit margin. Whatever enhancements derived from the securitized loan SHOULD HAVE paid down or paid off the pledged obligation (CDO); thus bankruptcy could have been avoided.

**The major banks were all whining to the federal government in the final months of 2009 that they were on the verge of ruin (and received bailout money); yet in the first quarter of 2010 were posting billion-dollar profits. The sudden turnaround is suspicious.** If one were to demand a full audit of each of these banks, one would probably discover the banks were writing down what they claimed were “direct losses” from mortgage loan failures, when in fact, the money that they derived from the portfolios on Wall Street was more than likely concealed from the IRS. This is blatant income tax evasion. Any individual doing this would be thrown in leg irons, but Wall Street? Further, because of the written down losses as “bad loans”, the banks profited from the direct sale of the homes. Because of the deviations in GAAP, it would be difficult if not impossible to trace every single transaction out of every single portfolio when tranches and non-performing loans can be so easily shifted from one failing portfolio (that has already been “collected” on ) into another (yet to be “collected” on). As part of following the money trail, one would want to know how much of what was “collected” on was supposed to “pay down” or “pay off” the investor; and after the investor’s proceeds were fairly distributed, then to the borrower. In addition, during the first quarter of 2010, banks changed their “funds holding periods” (the time in which funds become available AFTER deposit) to further collect interest off of their customers.

**The deviation from Generally Accepted Accounting Principles (GAAP) is where the “buck stops”.** According to CPA Michael Nwogugu, the securitization of loans was structured in such a way that manipulation of the CDO’s was made possible by the master servicer/trustee in order to avoid capital gains taxes by: (1) reducing the price of the collateral BEFORE it is placed into the SPV (this collateral is typically reported in the Sponsor’s statements); in effect, this places any gain into a non-taxable position as a “residual” inside the SPV; and (2) any income derived could then be converted into interest-only and principal-only securities. This is all part of an elaborate scheme that would have to be dissected by a CPA with securities law background. This ultimately means extra money spent by you to defend or pursue your claims. Are you sure “you want to go there”? In the bankruptcy scenario, it is highly unlikely that the court trustee in bankruptcy will do this for you by launching an independent evidentiary hearing to see how much money you actually got screwed out of.

**Someone “cashed out” in the form of a bonus when AIG and TARP paid out.** This is probably the most unnerving thing that the general public grasped when this became newsworthy. More than likely, these bonuses were excess “capital gains” that were stripped off of the top of the SPV’s (like skimming cream off the milk) and diverted to fund managers and henchmen with the intent on: (1) reducing the tax liabilities of the SPV; and (2) placing those accepting the bonus in a higher tax bracket and replacing what would have been capital gains tax on the SPV with standard individual income tax by transferring the tax liability onto the employees of the fund.

**If you were able to prove that your loan was “sold” during any aspect of the securitization process, you then would have to demand accounting to show what actual “gains on sale” there were.** Not having any gains or minimal gains would obviously lend credence to what Nwogugu claims that the “sale” was purposefully disguised to avoid “gains”. This (to the author) would be the next step in demonstrating that GAAP was deviated from. You could also demand to inspect records of the so-called “Trust” to see whether the SPV amortized the security (thus any capital gains are converted into interest payments). The question is: How much of that conversion could have been potentially allocated to your loan as a “credit enhancement”?

**The action that takes place POST-Notice of Default wherein the “lender” assigns your loan to a Trust (like MLMI 2006-HE5, a Countrywide ABS, for example) puts a non-performing loan into the hands of a party that stands to directly benefit from a payout somewhere.** If the Trust can then claim itself to be the “holder in due course”, one must then recognize that the “assignment” had to have “value consideration”. The questions then become: (1) How much consideration was paid to the assignor by the assignee for your loan; because in order for there to be a valid contract, an actual “sale” would have been recognized as a “gain”; (2) What portfolio was your loan placed into by the Trust claiming it now has “real party interest” in?; (3) Has a prospectus been issued by that Trust for the purposes of review by investors; (4) Were any securities laws violated via non-disclosure of pertinent information to investors?; and (5) Were all GAAP adhered to in the process of the assignment of your loan to the Trust?

## THEORIES REGARDING THE SLANDER OF TITLE TO PROPERTY

As suggested, follow the chain of custody on the note since it was transferred to MERS and see whether the note is split from the deed of trust. If in fact the chain of custody is terminated (see law of agency relationships), there is no proper custody in the current alleged holder that claims “real party interest”.

This will raise several issues: (1) the legal standing of MERS (there have been numerous decisions from across the country that directly state MERS has no standing whatsoever, based upon admissions by its CEO; and (2) since MERS gained placement on the original Deed of Trust FIRST and then caused under color of law for the Deed to be transferred, all subsequent transfers are basically void.

In this theory, there are also issues raised by cases around the country, that the various entities allegedly holding the note are backdating documents; engaging in fraudulent notarizations; misleading the courts with fraudulent filings (many in violation of state penal codes) and transferring properties into Trusts without proof of valid legal authorization. This is basically a system of the lender trying to cover its tracks. Fraud on the Court has been identified repeatedly in many instances (not withstanding Ally Financial’s “certifying officer” Jeffrey Stephan’s admitted behaviors, the ramifications of which are yet to be felt), for which the courts are now holding evidentiary hearings to determine fines, sanctions and possible criminal referral to be prosecuted.

Due to the frauds being brought on the courts, the homeowner now has additional grounds for which to maintain a quiet title action in his favor. The key to a quiet title action is to make the lender and/or his assigns come forward with all documentation; pick it apart through discovery and impeachment by fully examining the chain of title, especially to determine at what point the Deed of Trust (or mortgage) was split from the promissory note. *Carpenter v. Longan*, 83 U.S. 271, 274, (1872). (Where negotiable note is secured by mortgage, “the note and mortgage are inseparable... the assignment of the note carries the mortgage with it, while an assignment of the latter alone is a nullity.”)

The next theory, if an evidentiary hearing is granted, is to follow the money trail. It is possible to depose certain entities as a matter of convenience and introduce that into evidence during the hearing. More than likely, if your loan was originated (like so many others) between 2003 and 2007, it was placed into a portfolio which became part of a pooling and servicing agreement. To illustrate, let’s say Bank of America says that it is the current owner of a note is inside of an entity owned by them as MLMI2006-HE5 (which is a Merrill-Lynch Trust, set up by Countrywide). Since Bank of America now claims ownership of the trust (which there’s a good chance this new “trust” was never disclosed to you), the non-disclosure perhaps would be in violation of banking laws. In following the money trail, it could possibly be determined how the note was paid for originally (what investors put up the funding) and how that loan was being paid down (through borrower payments and credit enhancements). Did TARP pay the “pool” off?



## **THE GRAND SCHEME IS SIMPLE**

Even though this is a restatement from earlier theories, it lends itself to part of the larger scheme to utilize trusts and securitization procedures to avoid capital gains taxes and make huge profits for fund managers and lenders while manipulating the accounts to make them appear non-performing and insolvent.

As of this writing, Taylor, Bean & Whitaker, a Wall Street firm, has filed for bankruptcy in the U.S. Bankruptcy Court for the Central District in Florida and “Freddie” is holding all the cards and won’t let Bank of America play. What did come out of the whole scenario is that Bank of America is alleging that the portfolios were pledged not once, but two or three times, at the same time, for different Pooling and Servicing Agreements! Freddie Mac is in control of who sees what in this case since it’s the largest creditor. (By most standards, multiple pledging is regarded as a felony.) This now means that your discovery has to include questions or statements pertinent to those sideline deals.

**It has yet to be proven beyond any preponderance of evidence in any case in America that by virtue of the fact the note was split off and securitized, it became unsecured debt (at least not to this author’s knowledge). Without concrete evidence, using the previous rationale, the lender has nothing to lose and everything to gain by stealing your house through foreclosure, which severely impacts title to property.**

Certainly the utilization of this theory comes with a price tag, because this is one of the harder evidentiary items to achieve. This brings us to various causes of action based upon the foregoing. The causes of action for which quiet title could be effective could range from causes of action for fraud and misrepresentation (and fraud on the court); and then to state statutory claims for fraud to potential state civil RICO violations and for causes under the deceptive trade statutes.

## **IS THE SPV (THE TRUST) REALLY VALID?**

Not if it was used for an illegal purpose (manipulation of financial condition, value, investment criteria, gain of sale, deviation from GAAP, avoidance of tax liability, income tax evasion, securities fraud, characters in the trust acting outside of their designated authority ... trustee acting as someone else in addition to the trustee). Thus, if it was found that any of the above was true, the trust itself could be declared illegal and thus voidable.

When the trust is finally challenged, fraudulent conveyance comes into play, especially when you utilize a claim of constructive fraud under §548(a)(2) of the U.S. Bankruptcy Code or any one of the Uniform Fraudulent Transfer (or Conveyance) Act(s) that have been adopted by the States. All conveyances within the Trust by the Sponsor or any of its delegated henchmen all deprive the debtor of recognizable assets.

## IN SUMMATION

Here are some questions to consider about how this entire scenario is playing out:

- With all of the qui tam activity going on, how could the end result bring about resolve to your particular case, since the counties standing to receive benefit from this would also be setting precedent in proving that your Deed of Trust could have possibly been void ab initio?
- Do you realize that if you just visit your county courthouse, you can see firsthand exactly what documents (if any) really exist regarding the flawed perfected security interest involving your mortgage or deed of trust?
- With all of the major players being litigated against because they are MERS subscribers, how do you think this is going to affect the overall condition of the banking industry?
- As a result of all of what you've just read, do you now trust mortgage companies?
- Will Congress ever put aside its partisanship in straightening this mess out?

Here are some conclusory statements the author propounds, as an end to the means:

- The current system of recordation being circumvented by MERS as a “straw man” adversely affects title in that property because the owner has no idea who he is really indebted to because of the electronic wall of secrecy.
- Title companies are only minimally “exposed” to past liability as a result. They only insure against past defects in title; however, if MERS was involved in some way, (acting illegally) the title company could then be made to pay out claims to correct MERS’s mistakes from the deed of trust or mortgage, forward.
- This mortgage crisis is not over and more homeowners will suffer loss due to ignorance. All homeowners are affected, not just the “deadbeat” ones.
- If you do nothing to investigate the status of title to your property; subsequently taking action to correct the “clouds” on your title to property, your lack of inaction affects in part the entire cause and effect for America being made whole.
- Each time the Securities & Exchange Commission files suit against a lender or a brokerage, new clues are being unearthed that could be useful to your claim in disproving quiet title claims by lenders.
- The county in which you live is suffering because the current system of recordation has been subverted by a system that is being used to defraud your local tax base of millions of dollars a year. The county will either cut back on services it provides to you (police, fire, ambulance, libraries, parks, etc.) to make up for the shortfalls or in lieu of that will raise your property taxes, while the MERS’ subscribers fatten their pocketbooks, hiding behind its electronic wall.
- The lack of transparency will not be resolved until the recordation system is returned to its old standards; however, the lessons to be learned from all of this can be effectively implemented to improve the pre-MERS recordation systems.
- That said, for all intent and purposes, this is legal research and not legal advice. For legal advice, you need to consult with a qualified attorney. The author cannot guarantee any legal outcome through the use of any stated items in this book.