

California Courts Continue to Endorse the MERS Model

California Appellate Courts continue to recognize the role played by Mortgage Electronic Registration Systems (“MERS”) in the mortgage loan and foreclosure process. Mortgage Electronic Registration Systems, Inc. is an entity, whose purpose is to be the mortgagee of record and nominee for the beneficial owner of mortgage loans. The MERS® System eliminates the need to prepare and record assignments when trading residential and commercial mortgage loans.

During 2011, two important cases were decided by the Fourth and First Appellate Districts of California, *Gomes*¹ and *Fontenot*², respectively. The majority of legal attacks on MERS in the mortgage process are born of a lack of understanding of the system and its benefits. Under the MERS System, MERS is designated as the beneficiary in deeds of trust, acting as “nominee” for the lender, and granted the authority to exercise legal rights of the lender. Included in these legal rights is the ability to initiate foreclosure, when a loan is in default. Such an action will include the assignment of the underlying promissory note. This aspect of the system has come under attack in a number of state and federal decisions across the country, under a variety of legal theories.³ These recent Appellate Court decisions have affirmed the notion that the burden is not on MERS to prove the existence of a proper assignment, while supporting MERS’ role as beneficiary and nominee for the lender under the Deed of Trust.

In *Gomes*, the court found that the plaintiff had agreed in the deed of trust that MERS could proceed with foreclosure and nonjudicial sale in the event of a default. Because the deed of trust did not require MERS to provide further assurances of its authorization prior to proceeding with foreclosure, the plaintiff was not entitled to demand such assurances. In *Fontenot*, the court addressed the plaintiff’s claims that MERS had wrongfully assigned the Note and Deed of Trust to HSBC, because MERS lacked the authority to make an assignment of the underlying promissory note. The complaint in that action alleged that MERS bore the burden of proving a proper assignment occurred. The court was quick to dispel such a burden, relying on the *Moeller*⁴, which established that a nonjudicial foreclosure sale is presumed to have been conducted regularly, and the burden of proof rests with the party attempting to rebut that presumption.

The court also addressed the deed of trust language, which names MERS as the beneficiary and the nominee for the lender. The court concluded there is nothing inconsistent in MERS being designated both as the beneficiary and as a nominee, i.e., agent, for the lender. The legal implication of the designation is that MERS may exercise the rights and obligations of a beneficiary of the deed of trust, a role ordinarily afforded the lender, but it will exercise those rights and obligations only as an agent for the lender, not for its own interests. The *Fontenot* Court found that other statements in the deed of trust regarding the role of MERS were consistent with this interpretation, and there is nothing ambiguous or unusual about the legal arrangement.

The attorneys of Houser & Allison, APC, are continually on the forefront of the legal issues facing the mortgage banking and loan servicing industry. If we can be of assistance in addressing these issues, please contact Brian Wagner at bwagner@houser-law.com or Eric Houser ehouser@houser-law.com.

¹ *Gomes v. Countrywide Home Loans, Inc., et al.* (2011) 192 Cal.App.4th 1149

² *Fontenot v. Wells Fargo Bank, N.A.* 2011 WL 3506177 (Cal.App. 1 Dist.)

³ *Fontenot* at *6.

⁴ *Moeller v. Lien* (1994) 25 Cal.App.4th 822