
United States Court of Appeals
for the
Third Circuit

Case No. 14-4315

MONTGOMERY COUNTY, PENNSYLVANIA, RECORDER OF DEEDS, by
and through NANCY J. BECKER, in her official capacity as the Recorder of
Deeds of Montgomery County, Pennsylvania, Plaintiff/Appellee,
v.
MERSCORP, INC. and MORTGAGE ELECTONIC REGISTRATION
SYSTEMS, INC., Defendants/Appellants.

Appeal Pursuant to 28 U.S.C. §1292(b) of Questions Certified by District Court In
Civil Action No. 114-CV-6968 (E.D. Pa.) Honorable J. Curtis Joyner

BRIEF OF:
NATIONAL ASSOCIATION OF INDEPENDENT LAND TITLE AGENTS
AND
PENNSYLVANIA RECORDERS OF DEEDS ASSOCIATION
AS AMICI CURIAE
IN SUPPORT OF PLAINTIFF-APPELLEE

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**JOINT CORPORATE DISCLOSURE STATEMENT AND
STATEMENT OF FINANCIAL INTEREST**

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, National Association of Independent Land Title Agents and Pennsylvania Recordors of Deeds Association make the following disclosures:

1) For non-governmental corporate parties please list all parent corporations:

None.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:

None.

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:

None.

/s/ Gregory W. Happ Dated: March 23, 2015
Gregory W. Happ

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/s/ John M. Smith Dated: March 23, 2015
John M. Smith

/s/ Jeffrey S. Shank Dated: March 23, 2015
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Christopher L. Peterson, *Two Faces: Demystifying the Mortgage Electronic Registration System's Land Title Theory*, 53 Wm. & Mary L. Rev. 111 (2011) **22**

14 Richard R. Powell, Powell On Real Property §82.01(1)[b], (Michael Alex Wolf ed., 2000) **7, 13**

INTERNET SOURCES:

MERS at <http://www.mersinc.org/inform> (last visited March 19, 2015)
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MERS at <http://www.mersinc.org/inform/join-in> (last visited March 19, 2015)
.....**.25**

MERS at <http://www.mersinc.org/information-for-homeowners/my-mortgage-info>
(last visited March 19, 2015)**.25**

I. INTERESTS OF AMICI CURIAE

Amicus Curiae, The Pennsylvania Recorder of Deeds Association, (“PRODA”), is a Commonwealth-wide membership organization. The elected county recorder of deeds or recording officer in each county of the Commonwealth is entitled to membership, and as such PRODA is the appropriate body authorized to speak for its members in all matters related to the real estate record recording process. The Plaintiff is a member of PRODA and served as president of the association for the 2011-2012 term.

County officers (commonly known as “row officers”), including Recorders of deeds, are authorized by statute to organize themselves as a state association by Pennsylvania law. 16 P.S. § 440.

Amicus Curiae, National Association of Independent Land Title Agents (NAILTA), is a non-profit, member-supported national trade organization working to protect the transparency, credibility and sanctity of the United States land title records. NAILTA is a national trade association consisting of state-licensed independent title insurance agents, and state-licensed title insurance agencies, with

associate membership extended to title insurance underwriters, attorneys and title insurance industry stakeholders from across the United States.¹

NAILTA's and PRODA's sole interest in this case is in the preservation of the historical and legally authoritative open public land records as the official repository of copies of documents or instruments touching on interests to real property in the Commonwealth of Pennsylvania. It is from these records that the ever important "chain of title" to any specific parcel of real property can be gleaned. The for-profit and private electronic mortgage registration system established by Mortgage Electronic Registration System, Inc., ("MERS"), and its parent company MERSCORP Holdings, Inc., ("MERSCORP"), deprives the courts, lawyers, litigants and title insurance agents vital mortgage information necessary for a reliable and complete "chain of title."

¹ In accordance with Federal Rule of Appellate Procedure 29(a) and (c)(5), NAILTA and PRODA state that all parties have consented to the filing of this *amici curiae* brief, that no party's counsel authored the brief in whole or in part, and that no party, no party's counsel, and no person other than NAILTA and PRODA contributed money that was intended to fund preparing or submitting the brief.

II. SUMMARY OF ARGUMENT

Pennsylvania Recorders of Deeds are the stalwart and loyal keepers of the records which comprise each county's historic land records. The offices of the Recorders of Deeds are open to the public and allow a reliable and transparent review of the indexes and copies of documents and instruments maintained in each county.

The offices of the Recorders of Deeds provide: (a) efficient and live person guidance to the records to the public including homeowners, lawyers, title searchers, title abstractors and title insurance agents; (b) free access to their repository of records for a determination of a reliable "chain of title" to any parcel of real property in Pennsylvania; (c) true and accurate copies of any document or instrument recorded with the Recorder of Deeds; and (d) certification of any copy in order to allow their admission into evidence in any Court in Pennsylvania.

The mortgage electronic registry system maintained by MERSCORP, through its wholly-owned subsidiary, MERS,² negatively impacts the official records and duties of the Recorder of Deeds. The MERS® System creates a fragmented non-

² The electronic mortgage registration system maintained by MERS is herein referred to as the "MERS® System", which includes both residential & commercial real property mortgage interests.

document mortgage based registry system that extends beyond the reach of Recorders of Deeds.

Pennsylvania Recorders of Deeds are subject to statutory duties and are answerable to the public at the ballot box. MERS is not directly answerable to the citizens of the Commonwealth and does not stand for election by popular vote in the same manner as a Recorders of Deeds. A registration of a mortgage with the electronic system managed by MERS is not controlled by a Recorder and therefore a Recorder's duty to comply with statutory directives is thwarted. In addition, the MERS® System's avoidance of mortgage assignments and the fees associated with the filing of mortgage assignments deprive Pennsylvania Recorder of Deeds the needed resources to maintain and improve the public recording system that homeowners/borrowers, courts, litigants, the legal profession and the real estate title industry has relied on for over two hundred years.

The MERS® System also negatively impacts other third parties to that system, including the Commonwealth's courts, litigants, lawyers and title insurance agents,. MERS and MERSCORP, and their members and shareholders have broken the previously unbroken "chains of title" to mortgages that the courts, lawyers and title insurance agents have always relied upon to determine who holds the beneficial interest in a mortgage to any specific parcel of real property. "Chains of title" that

link mortgages from the mortgagors (“grantors”) to the originating mortgagees (“grantees/lenders”) and their assignees (“subsequent grantees”) thereafter.

Based upon an attenuated theory of the divisibility and transferability of the secured promissory note from the mortgage, the MERS® System has interrupted the previous unbroken documented recorded evidence of mortgages and their subsequent assignments maintained in the office of the Recorders of Deeds. Entry of a mortgage interest into the MERS® System no longer permits the public free access to the information regarding that mortgage interest. Previously public accessible mortgage information is now being secreted from public access.

Mortgage assignments entered into the records of the Recorders of Deeds adds an additional level of trustworthiness to mortgage assignments. In order to be recorded a mortgage assignment has to be in writing and acknowledged by the assignor or assignors before a notary public. 21 P.S. § 623.1. The MERS® System lacks such legislative mandates for the information placed in its registry. Information of transfers is voluntarily entered by members into the MERS System and being voluntary necessarily puts into question the reliability, accuracy and timeliness of any mortgage registry information available in the MERS System.

Members of the MERS® System undermine the Commonwealth’s documented land records in several notable ways: (a) by refusing to assist Recorders of Deeds in maintaining accurate document/instruments of mortgage interests; (b)

by maintaining a private system that results in a higher cost to the public of having to deal with one public system of records and another private system for MERS mortgages; and (c) by not economically contributing to a mandated public system that benefits all the citizens of the Commonwealth including MERS and its members.

Unlike the land records maintained by the Recorders of Deeds, the MERS® System is a non-document electronic computer based system without any public accessible offices. Economically disadvantaged homeowners and/or electronically challenged persons, i.e. the elderly or small businesses, have no readily accessible manner in which to either access much less search any of the information contained in the MERS® System. Sanctioning and permitting the continuation of such a private electronic only system discriminates against those who do not have the financial means or technical skills to retrieve and/or examine the information held within the MERS® System.

III. ARGUMENT

A. THE UNITED STATES PUBLIC LAND TITLE RECORDS SYSTEMS

The publicly accessible land title records systems throughout the United States can trace their creation by legislative enactment from the early days of

Colonial America to present. *14 Richard R. Powell, Powell On Real Property* § 82.01(1)[b], (Michael Alex Wolf ed., 2000). “The Pennsylvania statute of 1775 became a part of the law of the Northwest Territory in 1795 and thereafter passed into the laws of the states formed from the Territory.” *Id.* at 82.01(2)[a]. Currently, every state and the District of Columbia have enacted laws to establish a public recording system for real property ownership and transactions involving the same, e.g. transfers, mortgages, mortgage assignments, land contracts, leases and easements. *Id.* at 82.02(1)[b], footnote 2.

The recording systems maintained by the public officials of our states have, through the centuries, provided and continue to provide accessible, transparent and reliable records of all documents and instruments of those claiming an interest in real property. Public land records allow any person, with or without access to a computer or without payment to for the right to enter a privately maintained electronic system, to examine a full land record document with all its authorizations, acknowledgements, emblements, terms, and conditions, to identify a transaction and its terms and parties.

B. THE DESIGNATED REPOSITORY OF LAND RECORDS IN PENNSYLVANIA

There are two major types of county governments in Pennsylvania – those operated by county commissioners (generally referred to as a traditional form of

county government) and home rule charter governments. The majority of Recorders in Pennsylvania are constitutionally-mandated officers of county government and are therefore elected by the direct vote of the general electorate for a four-year term. (Article 9 § 4 of Constitution of 1968).

Elected Recorders are answerable to the public as they must stand for election every four (4) years and are subject to Pennsylvania's Election Code, 25 P.S. 2600 et. seq. Under the Pennsylvania Public Official and Employee Ethics Act ("Ethics Act"), a recorder holds a public office which is a public trust and any effort to realize personal financial gain through public office, other than compensation provided by law, is a violation of that trust. *See: 65 Pa. C, S. § 1101 et seq.*

Currently, there are eight home rule counties – Philadelphia (city), Allegheny, Delaware, Erie, Lackawanna, Lehigh, Luzerne and Northampton. The recorder, or the recorder's functional equivalent, in home rule counties can be appointed rather than elected, but none the less is subject to supervision pursuant to the home rule charter. Recording of land records is required in home rule counties in the same manner as counties operating under a traditional form of government. Pennsylvania recording statutes do not differentiate recording requirements between traditional counties and home rule charter counties.

The duties and requirements of the Recorder of Deeds are governed by the County Code. 16 P.S. § 9731 mandates that:

“[e]very recorder of deeds in this province shall keep a fair book, in which he shall immediately make an entry of every deed or writing brought into his office to be recorded, mentioning therein the date, the parties and the place where the lands, tenments or hereditaments, granted or conveyed by the said deed or writing, are situate, dating the same entry on the day in which such deed or writing was brought into his office, and shall record all such deeds and writings in regular succession, according to their priority of time in being brought into the said office; and shall also immediately give a receipt to the person bringing such deed or writing to be recorded, bearing date on the same day with the entry, containing the abstract aforesaid; for which entry and receipt he shall take or receive no fee or reward whatever.”

Pennsylvania Recorders of Deeds offices house recorded deeds, mortgages, mortgage assignments and miscellaneous documents related to real estate in various mediums, from paper bound books, to microfilm, to digitized scanned images and electronic paperless form. The Recorder’s office is also the repository for the recording of powers of attorneys, assignments, subdivision plans, security agreements, notary public bonds and commissions, military discharge documents and other records and recordings which are permanently maintained and accessible to the public as permitted and required by law. The County Code further requires that the Recorder of Deeds index every deed and mortgage recorded in the office which serves as notice to the public of the recording of a deed, mortgage or mortgage assignment. 16 P.S. §§9852 and 9853.

The Uniform Real Property Electronic Recording Act (E-recording act) established the Pennsylvania Electronic Recording Commission in order to provide

administrative support for the E-recording Act. 21 P.S. §483.5. Recorders are designated to constitute the majority of the membership of this Commission and the Commission has been vested with the authority to establish guidelines for the adoption and implementation of uniform standards in Pennsylvania for electronic recording. The general assembly, therefore, clearly has again recognized the importance of Recorder of Deeds within Pennsylvania's recording system and further confirms the need for a uniform single repository recording procedure in Pennsylvania.

C. THE NEGATIVE IMPACT OF THE MERS® SYSTEM ON MAINTAINING AND IMPROVING THE PENNSYLVANIA LAND RECORDS SYSTEM

The Recorder of Deeds serves as an agent for the Commonwealth of Pennsylvania in the collection of realty transfer tax, and collects various fees and surcharges imposed upon recordings for judicial services.

The Recorder of Deeds, through statutory authority, is tasked with recording a myriad of real estate and other documents. To meet those duties, Recorders have purchased, and continue to purchase, and upgrade sophisticated recording systems to accommodate the speed and method of recording that the public and industry demands.

By statute, \$5 of each fee collected by the Recorders of Deeds upon most recordings, including mortgage assignments, directly benefits maintaining the

official records of the county. Of the fees collected, the sum of \$3 is retained in a separate fund within the office of Recorder of Deeds to be used in connection with regular county budgeting practices in furtherance of improving record management activities and systems in the office of Recorder of Deeds or in its equivalent in a home rule charter county under the provisions of 42 P.S. §21052.1. The remaining \$2 of the fee is deposited in the county record improvement fund. The goal for which the fee is imposed is to “standardiz[e] and equalize[e] the capabilities of all county offices consistent with their need to receive, manage and provide information to the public as efficiently as possible.” 42 P. S. § 21052.1(c).⁴

As funding from the above-referenced source has become available, Pennsylvania Recorders have engaged in an ongoing process to upgrade hardware and software systems and enable faster, more efficient and cost effective recording processes through the use of technology. Technology companies aid Recorders in implementing electronic recording system to enable the remote recording of most real estate documents.

A Recorder’s authority and importance in the recording process is further recognized by the Pennsylvania general assembly and the public. The recently enacted (2012) Uniform Real Property Electronic Recording Act, 21 P.S. §483.1 et

⁴ The County Record Improvement Fund applies to Second Class A through Eighth Class Counties. 42 PS §21052.1

seq. (E-recording act), permits a recorder to accept e-filings. 21 P. S. §483.4. This Act defines a recorder as “a county Recorder of Deeds, or a county official responsible for recordation of documents in counties without Recorder of Deeds.”

**D. THE IMPORTANCE OF A “CHAIN OF TITLE” AND THE
“EXAMINATION OF TITLE” OF REAL PROPERTY FROM THE PUBLIC
RECORDS**

In the context of existing mortgages, the critical issue is who has the right to receive any “pay off” of the mortgage debt. This most often arises in the sale of real property or if an owner elects to refinance the mortgage debt. In these situations “paying off” the current mortgage holder is the only manner in which to secure a release of the recorded mortgage thereby unencumbering the parcel of real property subject to the mortgage.

From the standpoint of the ability of the real estate owner to sell his property or refinance the mortgage debt or for a title insurance agent to issue a policy of title insurance in order to facilitate a sale or a refinance, the actual legal holder of the promissory note secured by the mortgage must be readily identifiable. It is only through a title search of the public records and an examination of the public recorded documents disclosed by a “chain of title” that the true beneficiary of the mortgage can be identified, subsequently paid and the mortgage released of record.

The legislatively enacted public land title recording systems throughout the United States including Pennsylvania have provided a discoverable chronological

list of mortgages and the beneficiaries of mortgage interest to any parcel of real property within the jurisdictional responsibility of a given Recorder. In addition, the Recorders have scrupulously retained copies of mortgages and mortgage assignments. From the Recorder's indexes and the copies of the mortgages and mortgage assignments, a "chain of title" can be compiled for each real property tract, parcel, lot or subplot.

A chain of title, like any other chain, is composed of two or more links. In real estate conveyancing, each link consists of the period of time during which a person holds the interest in the real property. If one then puts together all of the links in chronological fashion so that they overlap or interconnect, the resulting product is a "chain of title." To assure the interconnection of each link with the next, it is usually said that each link begins with the date on which the interest is conveyed to a specific individual in the chain and ends with the date on which a conveyance from that individual is recorded. This chain of title then produces a chronological succession of conveyances, all interconnected, that link the current titleholder to the original conveyance from the sovereign, or at least to a firm root of title.

14 Richard R. Powell, Powell On Real Property supra at §82.03(2)[b].

A "land title searcher" pieces together the chronological order of documents or instruments within the "chain of title". Once a "chain of title" is completed by the title searcher for a specific parcel of real property, the recorded documents which create the "chain of title" are examined for content and validity. Normally it requires an attorney or title insurance agent to examine the documents or instruments within the "chain of title" for their legal significance, i.e. sufficiency of witnesses,

acknowledgements or other terms, conditions or defects that may exists in the documents. *See: Ticor Title Insurance Company et al. v Federal Trade Commission*, 922 F. 2d 1122 (3rd. Cir. 1991), rev. 504 U. S. 621, (1992).

While often difficult to separate, a title search is distinct from a title examination. The search denotes the act of compiling a chronological account of the publicly recorded instruments that are found in the chain of title to a particular piece of real estate. Many jurisdictions require that the search extend back sixty years, although some jurisdictions have marketable title acts that require a shorter resort to history while other jurisdictions require tracing title as far back as the original issuance by the sovereign. The examination requires the critical evaluation of the title's condition as reflected in the documents gathered in the search.

Id. at 1128.

At any given time, prior to the creation of the MERS® System, the holder of a mortgage and the holder of the secured promissory note could easily, readily and reliably be identified by a search of the public mortgage records maintained by the Commonwealth's Recorders. However, the private and electronically secreted MERS® System has hindered, if not made it impossible for, the real property owner/borrower, purchasers of real estate, courts, lawyers and or title insurance agents, to readily identify the actual holder of the promissory note who has the authority to release the mortgage upon payment of the amount due on the note.

The importance and usefulness of a "chain of title" created from the public documents or instruments within the records of the Recorder and the subsequent

examination of the documents or instruments that have revealed a mortgage interest in a particular parcel of real property, cannot be underestimated. Without an examination of those documents or instruments, real property owners, buyers of real property, the courts, lawyers, title insurance agents and their title insurance companies would be at a loss to determine the current beneficial holder of a mortgage interest.

E. THE NEGATIVE IMPACT OF THE MERS® SYSTEM ON THE LEGAL SYSTEM

Of importance to courts, lawyers and title insurance agents entrusted to search a title, is the ability to identify all those who claim an interest in a parcel of real property, if a claim arises involving the real property. Courts, lawyers and title insurance agents have long relied upon the public record and certified copies of recorded mortgages and mortgage assignments to reveal and validate the parties who may claim an interest in the real property at issue. The courts have long accepted a “chain of title” as the starting point in any controversy over the title to real property. See: *Russel et al. v. The Trustees of the Transylvania University*, 114 U.S. 432 (1816).

It is only through a “chain of title” created from the public land records of the *situs* of the real property that all the parties in interest can be determined with any certainty. In cases of foreclosure of a mortgage or foreclosure of another lien, (e.g.,

a judgment lien or tax lien), all the interested parties in the real property must be identified and named as parties.

Under Pennsylvania law a mortgage is a conveyance of an interest in the real property. *Appellee's Br.* at 45, citing *Pines v. Farrell*, 848 A.2d 94 at 100 (Pa. 2004). Therefore, any holder of the promissory note secured by a mortgage has been conveyed an interest in the real property. The long standing rule is that the mortgage interest in the real property follows the promissory note. *Carpenter v. Longan*, 83 U.S. 271, 274 (1872).

Under the MERS® system, MERS ostensibly holds title to the mortgage as “mortgagee” and “nominee for the lender”. *Appellants' Br.* at 2. However, MERS is not the real party in interest regarding the actual beneficial interest conveyed by the mortgage. According to MERS the “equitable interest” remains with the original lender and is passed on to subsequent assignees or holders of the promissory note secured by the mortgage. The assignees or holders of the promissory note are not publically known until MERS assigns the mortgage to an entity that is placed on the public record. *Id.* at 33-35.

MERS' status as the mortgagee is contradictory, confusing and problematic for anyone trying to determine the current holder of the beneficial interest to a mortgage as a holder of the promissory note.

Indeed, the fundamental economic reality of MERS's involvement in the mortgage lending industry suggests that MERS is not a mortgagee with respect to any loan registered on its database. A mortgagee is simply the party to whom a parcel of real estate is mortgaged. Or, as Black's Law Dictionary explains, a "mortgagee" is "one to whom property is mortgaged; the mortgage creditor, or lender. -- Also termed mortgage-holder." MERS is not the party to whom family homes are mortgaged for at least three fundamental economic reasons. First, MERS does not fund any loans. No money coming out of a MERS deposit account is tendered as loan principal to homeowners. Second, no homeowners promise to pay MERS any money. To this effect, MERS is never identified as the payee in a promissory note and MERS is never entitled to receive any monthly payments from the mortgagor. Finally, and perhaps most important, MERS is never entitled to receive the proceeds of a foreclosure sale. Instead, these funds go to the actual mortgagee (or assignee of the mortgagee), who is the true owner of the lien.

Christopher L. Peterson, Foreclosure, Subprime Mortgage Lending, and The Mortgage Electronic Registration System, 78 U. Cin. L. Rev. 1359, 1377-1378 (2010). *See also*: Bryan E. Meek, Mortgage Foreclosure Proceedings, 48 Akron L. Rev. 129, 135-136 (2015).

Given the questionable legal status of MERS, a mortgage held in the name of MERS as the "mortgagee" and "nominee for the lender" places the court, the lawyer and title insurance agent on notice that MERS is not the real party in interest to the mortgage. Therefore, in order to determine who holds an interest to the mortgage held in the name of MERS a lawyer is left with naming MERS and extracting that information by costly discovery.

Since all transfers and negotiations of a promissory note secured by a mortgage held by MERS are not evidenced in the public land records by mortgage assignments for each transfer or negotiation, each transfer and negotiation becomes relevant in determining who the real party in interest to the mortgage is. The Pennsylvania Uniform Commercial Code issues of “negotiation”, (32 P.S. § 3201), “transfer of an instrument”, (32 P.S. § 3203), “indorsement”, (32 P.S. § 3204) and “persons entitled to enforce the instrument”, (33 P.S. § 3301), are now necessary considerations in determining who owns the beneficial interest in the mortgage and who is the real party in interest for purposes of any litigation involving a MERS mortgage.

The MERS® System has placed the burden on the judicial system to sort out who is the real party in interest to a mortgage based upon the law of negotiable instrument under the Uniform Commercial Code. In order to insure that the real party in interest has been joined in a foreclosure or other real property related action that requires the joining of all interested parties, the court can no longer rely upon a “chain of title” derived from the public land records of recorded mortgage and mortgage assignments. The court is now burdened with reviewing the numerous transfers within the MERS® System and the validity of each transfer or negotiation of the promissory note secured by the mortgage. It is only through this cumbersome, timely and costly review will the court be able to verify the real party in interest, the

holder of the promissory note who has the beneficial interest in the real property via the mortgage.

For example, a judgment lien creditor intending on foreclosing on real property owned by the judgment debtor can no longer rely on the public record to determine who should be joined in the foreclosure action if a mortgage encumbering the judgment debtor's real property is held by MERS as the "mortgagee." The judgment lien creditor will have to evaluate each transfer of the promissory note among the MERS® System's members to see if the transfers meet the requirements of the Pennsylvania Uniform Commercial Code. It is only through a process of Uniform Commercial Code validation of each transfer will the judgment lien creditor be able to determine the promissory note's current holder and beneficial owner of the mortgage interest to the real property being foreclosed.

It is difficult for judgment lien creditors and other litigants in determining the beneficial owner of a mortgage interest within the MERS® System. For example, whether an "allonge" purporting to be an indorsement of a promissory note is physically attached to a negotiable instrument/promissory note is critical to a court's determination of the validity of a transfer. See: *John M. Adams, Jr. et al. v. Madison Realty & Development, Inc.*, 853 F. 2d 163 (3d Cir. 1989). Under the MERS System, only by determining the validity of a negotiation or indorsement will the holder of

the promissory note be identified as the holder of the beneficial interest to the mortgage securing the promissory note.

Requiring assignment of mortgages concurrent with a transfer of a promissory note and the recording of the written mortgage assignment with the Recorder of Deeds simplifies who the real party in interest is for litigation purposes. MERS has unnecessarily engrafted the burdensome and complex law of negotiable instruments into a previously simple system of public recorded mortgages and mortgage assignments.

The MERS® System was founded on the basis of saving its members recording fees. Arguably, it may have been successful for that singular purpose. However, the result to the judiciary, lawyers and litigants who must untangle the complicated web of information and tracking details through costly discovery has been an abject failure.

**F. THE NEGATIVE IMPACT OF THE MERS® SYSTEM ON
TITLE INSURANCE AGENTS AND TITLE INSURANCE**

In simplest terms, title insurance is a contract of indemnity that is designed to protect purchasers or mortgage lenders from unforeseen loss due to title defects such as: liens, encumbrances upon, defects in, or the unmarketability of, the title to real property for which the policy is issued.

The issuance of title insurance is based upon “risk prevention” by the title insurance companies’ title agents. “Risk prevention” is the elimination of risks and the prevention of losses caused by defects in title arising out of events that occurred in the past. A necessary and indispensable step by title agents to prevent risks associated with the title to real property is a title search, the establishment of a “chain of title” for the real property parcel to be insured and an examination of the underlying documents disclosed by that “chain of title.” See: *Federal Trade Commission v. Ticor Title Insurance Company et al.*, 504 U. S. 621, 625-626 (U.S. 1992).

It is imperative for the title insurance agent to have an unbroken “chain of title” for any mortgage entered upon the public record. Prior to the MERS® System, a title insurance agent could rely upon the public land records to satisfactorily determine the existence of all mortgage interests, assignments of same and who held such interests. After the establishment of the MERS® System, the title agent could not rely upon a clear and reliable “chain of title” for any mortgage placed in MERS’ name. *Declaration of Charles W. Proctor*, JA 495-496.

MERS admits that an assignment, transfer or negotiation of the promissory note secured by a mortgage creates an interest in the mortgage and the real property encumbered by the mortgage. Therefore any transactions that occur while MERS is

the named ‘mortgagee’ becomes relevant to a title insurance agents’ examination of the “chain of title” for a MERS held mortgage.

A mortgage placed in the name of MERS may undergo multiple transfers of the beneficial interest to that mortgage while in the MERS® System. Until the mortgage held in MERS as “mortgagee” is finally assigned to one of the beneficial owners, there is not a mortgage assignment entered in the land records of a Recorder of Deeds. MERS assumedly expects a title insurance agent to accept that all of the transfers, assignment and transactions that occurred while the mortgage was held by MERS were legally sufficient.

However, even if the title insurance agent had access to the MERS® System, there may not be a link from the “chain of ownership” of the original lender to the current owner of the promissory note. Nor is there the ability of the title insurance agent to examine the actual document which evidences the transfer or negotiation of the promissory note for compliance with the applicable requirements of the Pennsylvania Uniform Commercial Code for negotiable instruments. The MERS® System does not record any physical document or instrument of transfer. Christopher L. Peterson, *Two Faces: Demystifying the Mortgage Electronic*

Registration System's Land Title Theory, 53 Wm. & Mary L. Rev. 111 (2011), at 129.⁶

A further difficulty that would be encountered by a title insurance agent's examination of the mortgage transactions in MERS® System, is the fact that registration of any transfers of the promissory note and interest in the mortgage securing same is voluntary by its members, and MERS makes no assurances that the information regarding a specific assignment of the promissory note is current or accurate. *Id.* at 126-128.

The MERS® System, from the stand point of a title insurance agent, has created a perpetual gap in the previously unbroken "chains of titles" to real property mortgages and their assignments. No longer does a conveyance to MERS as the ostensible "mortgagee" or "nominee" provide any verifiable title information regarding the transfers of interests in real property via assignments of mortgages.

Title issues and claims arising from the undisclosed assignment and transfers of the beneficial interest in a mortgage that have not been examined create potential liabilities for title insurance agents issuing a policy of title insurance on mortgages that have been granted to MERS and entered into the MERS® System. Title agents

⁶ Available at <http://scholarship.law.wm.edu/wmlr/vol53/iss1/4> (Last viewed March 18, 2015).

and title insurance underwriters facing any claims arising from the records maintained by the MERS® System are left with the following unsettling disclaimer:

DISCLAIMER: MERS makes no representation or warranties regarding the accuracy or reliability of the information provided. MERS disclaims responsibility or liability for errors, omissions, and the accuracy of any information provided. MERS does not input any of the information found on the MERS System, but rather the MERS Members have that responsibility regarding mortgage loans in which they hold an interest. Users of this information have the responsibility to verify the accuracy, currency and completeness of the information. The information does not constitute the official legal record and is for informational purposes only. The servicer listed should be contacted for further information.

Id. at 128-129.

G. THE MERS® SYSTEM DISCRIMINATES AGAINST ECONOMICALLY DISADVANTAGED AND/OR TECHNOLOGICALLY CHALLENGED PERSONS AND SMALL BUSINESSES

The MERS® System, because of its electronic private and opaque mortgage registry, discriminates against the economically and/or technologically disadvantaged persons and small businesses. The MERS® System is entirely electronically based and accessible only by computer by its paid members/subscribers and owners of residential real property through an on-line electronic system maintained by MERS. No hard copies of any sales, assignments,

or transfers records are maintain by MERS. MERS maintains no offices in Pennsylvania which are accessible to the public. ⁷

Unlike the public land records kept by each county Recorder of Deeds, which are free and open to all members of the public, the MERS® System denies public access to the records of the transfers, sales and assignments of the mortgages and the promissory notes secured by the mortgages entered into the MERS® System. Other than a member or a homeowner/borrower whose mortgage is entered into the MERS® System, all other persons and business are denied access to the information in the MERS System, unless the person or small business owner joins as a member of the MERS® System. ⁸

A greater restriction to even some homeowners/borrowers, whose mortgage is entered into the MERS® System, is the requirement that an inquiring homeowner must have access to a computer and have sufficient technological computer skills to be able to enter the MERS® System's electronic data base to retrieve information or the phone number to call MERS. ⁹ This also assumes the homeowner/borrower even knows who MERS is.

⁷ MERS at <http://www.mersinc.org/inform> (last visited March 19, 2015)

⁸ MERS at <http://www.mersinc.org/inform/join-in> (last visited March 19, 2015)

⁹ MERS at <http://www.mersinc.org/information-for-homeowners/my-mortgage-info> (last visited March 19, 2015)

The limited access MERS® System must be compared to the public land record system. Prior to the MERS System being established, any member of the public including homeowners/borrowers could physically go to the county recorder of deeds in the county where their property is located and determine the current beneficial owner of any mortgage or any assignee of that mortgage. This free and transparent system of mortgagees and assignees of mortgages, available to all persons, irrespective of their economic ability or technological skills, has been hijacked by a private system that requires either the economic where-with-all and/or the technological skills unavailable to many citizens and small businesses of Pennsylvania.

IV. CONCLUSION

An affirmance of the district judge's conclusions in this case will insure the protection of a public system of land records that has served the citizens of the Commonwealth of Pennsylvania, especially the courts, lawyers, litigants and title insurance agents for over two hundred and fifty years. It is imperative that the integrity of a system that insures a complete, transparent, secure and reliable view of all parties claiming an interest in real property, and a system that is periodically subject to a review by the legislature of the Commonwealth and each county's election every four years of its Recorder of Deeds be preserved.

The Courts, lawyers, litigants and title insurance agents have successfully relied upon the public mortgage records and the “chains of title” that can be gleaned from the mortgages and mortgage assignments physically copied and placed of public record with the Recorders of Deeds. Pennsylvania does not need or desire an alternate private electronically mortgage system that is opaque in its accessibility, does not guarantee its accuracy, and cannot be relied upon to inform any third person, who at any given time, claims a mortgage interest in and to a specific parcel of real property.

The established public recording system of mortgages and mortgage assignments is efficient and reliable due to the Recorders of Deeds performing their statutory duties. Fragmenting the long established recording system would not be a better way of serving the public interests of the citizens of Pennsylvania.

Respectfully submitted,

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JOINT CERTIFICATION OF BAR MEMBERSHIP

In accordance with Local Rule of Appellate Procedure 28.3(d), we certify that we are members of the bar of the United States Court of Appeals for the Third Circuit.

/s/Gregory W. Happ

/s/ John M. Smith

/s/Jeffrey S. Shank

JOINT CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELATE PROCEDURE 32(a) AND LOCAL APPELLATE RULE 31.1(c)

The undersigned hereby certify as follows:

1. This brief complies with the type-volume limitation. This final brief contains 6116 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This final brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). This brief has been prepared in Times New Roman – a proportionally spaced typeface – in 14 point.

3. The text of the electronic version of this final brief is identical to the text in the paper copy.

4. A virus detection program has been run on the file and no virus was detected. The virus detection program used is Symantec Endpoint Protection version Norton 360.

/s/ Gregory W. Happ Dated: March 23, 2015
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/s/ John M. Smith
John M. Smith
/s/ Jeffrey S. Shank Dated: March 23, 2015
Jeffrey S. Shank
Attorneys for Pennsylvania Recorder of Deeds Association

CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of March, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Gregory W. Happ

Dated: March 23, 2015

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