

LENDER ALERT

MERS: Courts Question the Evidence Necessary to Prove Status as a Secured Creditor

A recent decision by the United States Bankruptcy Court of the Eastern District of New York should be carefully considered by any entity using the Mortgage Electronic Registration System (“MERS”) and seeking to prove its status as a secured creditor.

In *In re Ferrel L. Agard* (--- B.R. ---, 2011 WL 499959 (Bkrtcy. E.D.N.Y., February 10, 2011 (NO. 810-77338-REG), **Select Portfolio Servicing, Inc.**, as servicer for **U.S. Bank National Association** (collectively, “**US Bank**”) brought a Motion for Relief from the Automatic Stay (the “Motion”) against the Debtor in order to enforce a judgment of foreclosure and sale against the Debtor’s real property, which US Bank had previously secured in state court.

The Debtor filed an objection to the Motion, arguing that US Bank had no right to seek relief because any interest US Bank held in the mortgage was by way of an invalid “assignment” from MERS, as a “nominee” for the original lender.

To seek relief from the stay against real property, the creditor must show that it is both the holder of the promissory note as well as the mortgagee. In an attempt to prove it was the noteholder, US Bank provided an “Assignment of Mortgage” and evidence that the MERS electronic database reflected that the note had been assigned to it. The court found that the “Assignment of Mortgage” was legally insufficient to act as an assignment. The court also held that the MERS database was not proof that an assignment of the note had actually occurred. Accordingly, US Bank failed to prove its status as the noteholder.

In an attempt to prove its status as mortgagee, US Bank and MERS both argued that the mortgage, the MERS membership agreement and rules, and the New York state law each provided MERS with the authority to validly assign the mortgage. The court disagreed and found that although perhaps a “nominee,” there was no evidence that MERS had the authority to act as an agent and legally assign the mortgage. As such, US Bank failed to prove that it was the mortgagee.

Although the court’s findings as to MERS and the evidence necessary to prove standing are not binding on other courts, the court makes a well reasoned argument which may very well be followed by courts in Texas. Therefore, it is wise for you (or your attorney) to ensure that you have sufficient evidence to prove a valid security interest in the subject property beyond mere evidence of a MERS assignment.

If you have any questions, please call our office at **(214) 752-2222**, or email **Josh Shepherd** at jshepherd@curtislaw.net.

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