

Is Mortgage Electronic Registration Systems, Inc. Liable for Assignment of Mortgage Recording Fees?

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In a battle playing out across the country in multiple forums, there is a debate about whether the Mortgage Electronic Registration Systems, Inc. or its parent corporation MERSCORP, Inc. (hereafter, MERS) is liable to the local county recorder of deeds offices for recording fees for assignments of mortgage. This article examines the types and locations of the cases, the status and the legal questions involved. The article also focuses on the matter currently pending in the United States District Court for the Eastern District of Pennsylvania where the Montgomery County Recorder of Deeds, Nancy J. Becker, has recently succeeded in obtaining class certification in her action against MERS.

Background of the MERS System

By way of background, it is first necessary to examine what exactly MERS is, and its role in the mortgage marketplace. MERSCORP is a Delaware corporation that has its principal place of business located at Reston, Virginia. MERS is a subsidiary of MERSCORP. MERS is made up of member organizations that include residential mortgage lenders and servicers. One of the ideas behind the creation of MERS was to maintain a registry of ownership of the loans secured by mortgages. Mortgages could be originated naming MERS as the original mortgagee,² and with MERS therefore appearing in the local recorder of deeds office as the mortgagee of record. When a particular loan would be originated, a borrower would execute a promissory note to the lender and a mortgage naming MERS as the mortgagee as nominee for the lender.

After origination, as loans or notes sold or changed hands, the MERS registry would track ownership of the loan, but MERS would still remain on the local county office as mortgagee of record. It is important to note that “MERS does not itself originate, assign, or service mortgages, but instead charges a fee when participating members transfer mortgages on the MERS Registry.”³ “[A]mong other benefits to the mortgage industry, MERS proponents claimed that ‘once MERS is established as the mortgagee of record, all subsequent transfers of ownership would be recorded electronically, eliminating the need to physically prepare, deliver, record, and track assignment documents. The estimated cost savings for assignment processing for a single transfer would be an average of \$45.50 per loan.’”⁴

The effect of this registry system is that it avoids a great deal of time and cost to lenders each time a loan changes hands, as there is no need to create, execute, and record an assignment of mortgage.

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² These are sometimes known as “MOM’s” – MERS as Original Mortgagee.

³ *County of Ramsay v. MERS Corp., et al.*, United States District Court for the District of Minnesota, 13-474.

⁴ *Montgomery County, PA v. MERSCORP, Inc.*, 904 F. Supp.2d 436, 440 (E.D. Pa. 2012).

Background of Litigation

A movement began across the country focusing on whether, when a loan was transferred or specifically assigned, the recorder of deeds office, in its capacity as the record keeper of mortgages in the local jurisdiction, would be entitled to a recording fee. This section of the article examines a chronological history of opinions throughout the states as to how the issue is playing out.

The Montgomery County, Pennsylvania, Class Action

Nancy J. Becker, the Recorder of Deeds of Montgomery County, Pennsylvania, initiated an action against MERS in the United States District Court for the Eastern District of Pennsylvania, challenging that MERS had deprived the county of revenue by failing to record assignments. The Recorder also raised the issue that this “shadow” of hidden assignments also served to harm the public and to deprive the residents of Montgomery County from knowing whom truly owned a particular loan that was on the county records.

As will be discussed in the summary of the growing body of decisions regarding these issues involving MERS, the various counties or governmental bodies that brought actions against MERS and related lending institutions all followed similar theories: claims of unjust enrichment, failure to follow recording laws, claims of civil conspiracy, and requests for injunctive or declaratory relief. Likewise, throughout the country, MERS responded to the lawsuits in similar fashions. Most of the actions were removed from state courts to a federal venue. Almost all cases were either decided on motions to dismiss or summary judgment. The theories advanced in those cases were, generally, that recorders lacked standing to bring such actions, that recording statutes did not grant private rights of action, or that the particular state law did not affirmatively require recording to begin with.

Throughout the cases decided in the last two years, MERS has racked up an impressive record of success – which in ways makes the Montgomery County case stand out. As will be discussed, while *Montgomery County* is premised in Pennsylvania recording statutes, it is notable as the case has recently received class certification.

By way of background, Montgomery County initiated its class action on November 7, 2011. The defendants thereto moved to dismiss, and the Court denied the motion in almost its entirety on October 19, 2012.⁵ The defendants filed an additional motion to dismiss the quiet title claim on December 10, 2012.⁶ After disposition of the motions to dismiss, two claims remained: unjust enrichment and quiet title. The Court denied that second motion to dismiss on March 6, 2013, and Plaintiff moved for class certification on April 26, 2013. Via an Opinion on February 12, 2014, the Court issued its decision certifying the class.⁷

⁵ Id. at 454.

⁶ *Montgomery County, Pa. ex rel. Becker v. MERSCORP, Inc.*, No. 11-cv-6968, 2014 WL 550805, at *1 (E.D. Pa. February 12, 2014).

⁷ Id. at *13.

Montgomery County contended that Pennsylvania’s recording statute requires that all mortgage assignments be recorded.⁸ As such, the County argued that the beneficial owners of mortgages were avoiding recording fees when they transferred these loans.⁹ “The Defendants... moved to dismiss, arguing principally that the Pennsylvania recording statute, 21 Pa. Stat. § 351, does not require that mortgage assignments be recorded and that, even if it did, no private right of action exists to enforce the requirement.”¹⁰

In response, the Court:

conclude[d] that the recording statute does require recordation of all conveyances. We further conclude that we need not reach the question whether the recording statute creates an implied right of action to enforce this requirement because the Legislature intended the quiet title action to permit such relief. And, because we conclude that the Plaintiff has pleaded sufficient facts to state a quiet title claim, we deny the motion to dismiss on these bases. We also conclude that the Plaintiff has pleaded sufficient facts to proceed on her unjust enrichment claim but not on her civil conspiracy claim; the civil conspiracy claim is therefore dismissed.¹¹

The Court based its conclusion on the Pennsylvania recording statute which states:

All deeds, conveyances, contracts and other instruments of writing wherein it shall be the intention of the parties executing the same to grant, bargain, sell, and convey any lands, tenements, or hereditaments situate in this Commonwealth, upon being acknowledged by the parties executing the same or proved in a manner provided by the laws of this Commonwealth, shall be recorded in the office for the recording of deeds in the county where such lands, tenements, and hereditaments are situate¹²

The Court read this section to contain mandatory language for recording: “The statutory command is therefore quite clear: ‘all . . . conveyances . . . shall be recorded in the [relevant] office for the recording of deeds.’”¹³ As described below, courts in other jurisdictions, when interpreting somewhat similar statutory language, concluded that this type of mandate did not mandate the *actual recording* of a document, but rather mandated *where* the recording must be. The defendants in *Montgomery County* made that argument, and the Court rejected it. The Court concluded it could not read any words into a statute, especially since doing so in this instance would change the effect or meaning of the language.¹⁴

Being that the Court concluded that recording was mandatory, the next issue was whether the recorder of deeds had the power to bring an action. The Court reviewed Pennsylvania’s quiet title procedures, and concluded “that Pennsylvania law permits any person in any manner

⁸ *Montgomery County, PA*, 904 F. Supp.2d at 441; 21 Pa. Stat. Ann § 351.

⁹ *Id.* at 441.

¹⁰ *Id.* at 442.

¹¹ *Id.* at 443.

¹² *Id.* at 443-444; 21 Pa. Stat. Ann. § 351 (emphasis added).

¹³ *Id.* at 444, quoting 21 Pa. Stat. Ann. § 351.

¹⁴ *Id.* at 444.

interested in a conveyance, such as a mortgage assignment, to bring a quiet title action under Pennsylvania Rule of Civil Procedure 1061(b)(3) to compel the person with the appropriate documents in his or her possession to record them.”¹⁵

Being that the recorder of deeds pleaded facts sufficient to maintain a quiet title claim, the Court likewise then concluded that she could maintain her claims for declaratory and injunctive relief.¹⁶ The Court also permitted the claim of unjust enrichment to proceed, but dismissed the civil conspiracy claim.

After the second motion to dismiss was decided, the defendants eventually answered the complaint. The Montgomery County Recorder of Deeds has now been granted class certification. Presently before the Court are motions for summary judgment. Time will tell whether this Recorder succeeds in recovering recording fees for her county. For now, however, she has clearly prosecuted her claim further than any of the other jurisdictions where these cases have been attempted.

Below is the analysis of state by state decisions in chronological order.

Kentucky, February 21, 2012

In *Christian County Clerk v. Mortgage Electronic Registration Systems, Inc., et al.*, filed in the United States District Court for the Western District of Kentucky,¹⁷ the Court addressed a motion of MERS (and the large banking institutions who had also been named as defendants) to dismiss the complaint pursuant to Federal Rule 12.¹⁸ The County Clerks for Christian County and Washington County initiated the action, naming MERS, its parent company, and fifteen lending institutions. The plaintiffs asserted three claims: “(1) negligent and/or willful violation of KRS § 382.360; (2) unjust enrichment by willful violation of Kentucky statutes; and (3) civil conspiracy to violate KRS § 382.360.”¹⁹ The Court started out its analysis by noting that, “Under Kentucky law, when a mortgage is assigned to another person, the assignee is required to record that assignment in the County Clerk’s Office.”²⁰ The Court gave a history of the MERS system and how the registry works, and then turned its attention to the defendant’s motion to dismiss, which was premised upon claims:

that (1) the Plaintiffs lacked standing; (2) the statutes in question do not provide a right of action for county clerks; (3) the Plaintiffs lack authority to file a damages lawsuit; (4) Kentucky law imposes no duty to create assignments; (5) Plaintiffs are not entitled to receive any of the relief they seek; and (6) the conspiracy count fails to allege an underlying tort.²¹

¹⁵ Id. at 445.

¹⁶ Id. at 451-52.

¹⁷ *Christian County Clerk ex rel. Kem v. Mortgage Electronic Registration Systems, Inc.*, No. 5:11CV-00072-M, 2012 WL 566807, (W.D. Ky., February 21, 2012).

¹⁸ Fed. R. Civ. P. 12(b)(6).

¹⁹ *Christian County Clerk ex rel. Kem*, No. 5:11CV-00072-M, 2012 WL 566807, at *1.

²⁰ Id., citing KRS § 382.360.

²¹ Id. at *2.

The first item addressed by the Court's opinion was whether the plaintiffs lacked Article III standing to initiate the action. The Court concluded that "Plaintiffs have alleged injury to its financial interest caused by the actions or omissions of Defendants and seek redress in this Court. At this stage of the litigation, these allegations are sufficient to establish Article III standing."²²

Therefore, the Court turned next to whether there is a private right of action for the plaintiffs. The Court stated "Defendants maintain, and the Court agrees, that Michael Kem and Glen Black, the County Clerks for Christian and Washington counties, do not have statutory standing to assert a claim against the Defendants under KRS § 382.360 and KRS § 382.365."²³

The Court cited section 382.360, specifically "[w]hen a mortgage is assigned to another person, the assignee shall file the assignment for recording with the county clerk within thirty (30) days of the assignment...."²⁴ The Court stated that "[t]here was nothing in the plain language of the statute that indicates that the statute was designed to be enforced by the county clerk."²⁵

The Court looked at the other recording statutes and noted that private rights of action can only be maintained by any owner of real property under the recording statutes. "Thus, the legislature conferred standing upon real property owners or parties acquiring an interesting real property, not upon county clerks, with respect to enforcing the mortgage assignment recording obligations of KRS § 382.360 and KRS § 382.365."²⁶

Alternatively, the plaintiffs argued that a different section of state law provided a remedy for violation of the recording statute. The Court flatly disagreed with that argument. In order to use KRS § 446.070, the plaintiff would have to be a member of a class of persons which was to be protected by the particular regulation. The Court noted that, "the county clerks are not members of the class of persons the General Assembly intended to protect by the recording statutes cited by Plaintiffs. Here, the class of persons intended to be protected by Kentucky's land recording system consists of existing lienholders seeking to give notice of their secured status; prospective purchasers and creditors seeking information about prior liens; and owners of property seeking release of liens once debts are paid off."²⁷

The court stated that "nowhere in KRS § 382.360 and KRS § 382.365 has the General Assembly provided any indication that it passed those statutes to protect county clerks. This conclusion is reinforced by the fact that the General Assembly chose to grant a private remedy for enforcement only to those with an interest in the property."²⁸

The court then concluded by saying, "Furthermore, the lack of intent to protect the County Clerks is further demonstrated by the fact that the recording fees Plaintiffs seek to

²² Id.

²³ Id.

²⁴ Id., quoting KRS § 382.360.

²⁵ Id.

²⁶ Id. at *3.

²⁷ Id. at *4.

²⁸ Id.

recover are not mentioned in the recording statutes, but rather are contained in an entirely different chapter, KRS § 64.012. Since the Plaintiffs do not fall within the class protected by the statutes, summary judgment on this basis is proper.”²⁹

Florida, June 27, 2012

The case was also visited in Florida. On or about September 6, 2012, MERS issued a statement on the Florida appeal. In that particular instance the Clerk of the Circuit Court of Wall County Florida voluntarily dismissed his appeal to the 11th Circuit Court of Appeals in the matter of *Fuller v. MERS*. The press release for MERS noted that MERS expected the appellate court to sustain the holding of the trial court which dismissed the case with prejudice on June 27, 2012. As such, the matter is settled in Florida that the MERS System is permissible.

Iowa, August 21, 2012

Next is the matter of *Plymouth County, Iowa v. MERSCORP*, in the United States District Court for the Northern District of Iowa.³⁰ In that particular opinion, the Court was once again faced with the issue of whether MERSCORP, as an “owner and operator of a national registry that tracks ownership interests and servicing rights associated with residential mortgage loans”³¹ could be held liable for failure to record assignments of mortgages.

In addition to MERS, the complaint also named various lenders who were referred to as the “member defendants.” The matter was originally filed in state District County Court in Plymouth County, and was removed to the federal court on the basis of diversity. In addition to claims relating to the failure to record assignments of mortgages as required by law, the County, as in the other cases, asserted “claims for unjust enrichment, civil conspiracy, piercing the corporate veil, declaratory judgment and injunctive relief.”³²

The defendants moved to dismiss the action premising their argument mainly on the fact that the Iowa recording statutes would have no private right of action in favor of the County. Consistent with other cases, the defendants also argued that there was no obligation to record mortgages or assignments under Iowa law, and therefore that the County had no right to bring the action.

The Court summarized the position of the County, quoting directly from the complaint:

106. In order to avoid the payment of recording fees to Plymouth County and the other Class members, MERS Members caused MERS to appear in the public land records of Plymouth County and the Class as mortgagee of record on mortgage loans that MERS Members registered on the MERS System. MERS serves as mortgagee of record with respect to all such mortgage loans solely as

²⁹ Id.

³⁰ *Plymouth County, Iowa v. MERSCORP*, 886 F. Supp.2d 1114, (N.D Iowa, 2012).

³¹ Id. at 1116.

³² Id. at 1116-17.

nominee, in an administrative capacity, for the beneficial owner or owners thereof, and their successors and assigns.

107. By naming MERS as the mortgagee of record, MERS and MERS Members, through the MERS System, intended to and did transfer mortgages among MERS Members without recording such transfers in the public land records of Plymouth County and the Class, and without paying the attendant recording fees.

108. But-for the existence of the MERS System, such transfers would have been recorded and *the required recording fees* would have been paid by MERS and/or the MERS Members in order to properly transfer mortgages for purposes of mortgage securitization's and otherwise.³³

In the motion to dismiss, the defendants asserted that the county's claims were dependent upon allegations that the holder of assignments of mortgages was required to record those mortgage assignments.

The first argument addressed by the Court in rendering its decision related to the allegations of recording requirements. The Court stated that the County's "allegations assume that any assignment or transfer that changes the mortgagee of record *must be recorded*, and that it is only by keeping MERS as the mortgagee of records that such a requirement is avoided."³⁴

The Court noted that the other counts in the complaint depended upon a violation of a requirement to record the mortgage assignments. The Court stated "the County's attempt to recharacterize its claims as in no way dependent upon a *requirement* to record mortgage assignments is disingenuous at best. The claims plainly are based on such an alleged requirement."³⁵

From there the Court went on to analyze the Iowa recording scheme and whether there is an outright requirement that assignments be recorded. The Court states that there is no such requirement of recording of assignments in that state: "it could be not be plainer that none of the statutes upon which the County relies imposes a *requirement* on a party assigning a mortgage or receiving such an assignment to record the assignment."³⁶

The Court goes on to finally indicate that the sections of the Iowa Code impose "no duty or requirement on a mortgagee or assignee to record an assignment."³⁷ The statute only imposes a duty upon the recorder of deeds to record any assignment that is delivered to the recorder.

As in the other cases, the recorder of deeds filed claims for unjust enrichment. The Court noted that the County's unjust enrichment cause of action would rely upon "an alleged—but

³³ Id. at 1118-19

³⁴ Id. at 1122.

³⁵ Id. at 1122-23.

³⁶ Id. at 1123.

³⁷ Id. at 1124.

nonexistent—legal requirement to record assignments of mortgages, as the basis for the contention that the defendants’ conduct somehow resulted in enrichment that was ‘unjust.’”³⁸ Essentially, with the fact that there is no requirement to record an assignment, there could therefore be no missed assignment recording fees, and, accordingly, no unjust enrichment. For those reasons on May 1, 2012 the District Court dismissed the action.

Arkansas, September 17, 2012

The issue was also visited in the matter of *Mayme Brown v. MERS*, United States District Court for the Western District of Arkansas.³⁹ Before the Court in this particular opinion was the motion of the defendants to dismiss the action. In this particular case, the Circuit Clerk of Hot Springs County, Arkansas, filed an action against the MERS’ defendants, alleging that the defendants used the MERS System “to deprive Arkansas counties of recording fees.”⁴⁰ The Clerk contended that the deprivation of recording fees amounted to a violation of the Arkansas Deceptive Trade Practices Act. In addition, as with the other cases, the County Clerk argued that the deprivation of recording fees served to unjustly enrich the defendants. The Clerk filed the case in a state court, and defendants removed the action to federal court.

The Court stated, “The essential point of Plaintiff’s claims is that Defendants are using MERS to deprive Arkansas counties of recording fees Defendants should be paying but are avoiding through MERS.”⁴¹ The Clerk contended “that Defendants have a duty to record mortgages and to record them truthfully.”⁴²

The Court stated that this claim rested “on two alleged duties: (1) a duty to record every mortgage transfer; and (2) a duty to record every mortgage transfer truthfully.”⁴³ Defendants moved to dismiss, saying that Arkansas law imposed no such duty to record a mortgage.

The first area the Court addressed was Plaintiff’s argument that the defendants’ use of the MERS System amounted to an “illegal–exaction claim” under the Arkansas State Constitution. The Arkansas court indicated that such an illegal-exaction claim “is properly brought by a *citizen* to protect *against* the enforcement of any illegal execution.”⁴⁴ The action is premised upon the Arkansas state constitution, and in this instance, the particular recorder was “not a taxpayer suing because the government made an illegal exaction.”⁴⁵ Rather, the Clerk is a receiver of taxes suing private entities that she claims illegally withheld recording fees. As such, that claim failed to state a claim and was dismissed with prejudice.

The Court next turned its attention to the Deceptive Trade Practices Act and unjust enrichment claims. In order to determine the legal sufficiency of those claims, as in with the

³⁸ Id. at 1125.

³⁹ Docket number 6:11–CV–06070.

⁴⁰ U.S.D.C. AR, Opinion at p. 1.

⁴¹ Id. at 2.

⁴² Id.

⁴³ Id. at 3.

⁴⁴ Id. at 4, citing Ark. Const. art. XIII, § 13.

⁴⁵ Id. at 5.

other cases explored herein, the Court was required to examine Arkansas law on recording statutes.

In this particular instance, the Court plainly stated that Arkansas' laws do not require assignments of mortgage to be recorded.⁴⁶ “In Arkansas, a recorded mortgage provides constructive notice to subsequent purchasers that the subject property is encumbered by the mortgage.”⁴⁷ However, the Court noted that even an un-recorded mortgage is valid between the parties thereto, and constitutes a lien that could be at enforced against the particular mortgagor.⁴⁸ Therefore, the mortgage’s legal effectiveness “as to the original parties is not diminished if the mortgage goes unrecorded.”⁴⁹ In this particular instance, with no requirement under Arkansas law that there be a recorded mortgage, let alone a recorded assignment, there would be no basis for the Plaintiff’s claim.

The Clerk also argued that MERS and the other defendants “have imposed upon themselves by contract a duty to record a mortgage when the underlying loan debt is sold to a non-MERS purchaser—in other words, when a mortgage leaves the MERS member pool.”⁵⁰ The Court found little validity to that argument stating that “[t]he Court thus finds that Plaintiff is not a third-party beneficiary of Defendants’ contracts, and may not enforce any recording duty contained therein.”⁵¹ The last argument for the Plaintiff was there was a duty for truthful recording. The defendants argued that if they have no duty to record a mortgage in the first place then there is no duty to record and track truthfully. The Court noted that recording is for their own benefit so, therefore, the Court stated, “the Court thus finds that Defendants have no legal obligation to record truthfully that is enforceable by Plaintiff.”⁵² For those reasons, on September 17, 2012, the Court dismissed the case, resulting in another victory for MERS.

Missouri, January 14, 2013

The next opinion relating to the MERS issue is *Jackson County, Missouri v. MERSCORP*, in United States District Court for the Western District of Missouri.⁵³ This action was filed by Jackson County, Missouri, naming as defendants MERSCORP as well as other lending institutions. Plaintiff’s allegations therein arose from defendants’ alleged “failure to record deeds of trust assignments and failure to pay the applicable recording fees.”⁵⁴ The class-action sought to address the economic and public harm caused by the use of the MERS System as a private electronic registry designed to avoid recording and internally track ownership of servicing rights.⁵⁵

⁴⁶ Id.

⁴⁷ Id., citing Ark. Code. Ann. § 14-15-404(a) (West 2012).

⁴⁸ Id.

⁴⁹ Id.

⁵⁰ Id. at 6.

⁵¹ Id. at 7.

⁵² Id.

⁵³ *Jackson County, Missouri v. MERSCORP*, 915 F. Supp.2d 1064 (W.D. Mo. 2013).

⁵⁴ Id. at 1067.

⁵⁵ Id.

Based upon the alleged use of the scheme to avoid recording fees, the plaintiff asserted five causes of action: unjust enrichment, civil conspiracy, *prima facie* tort, declaratory judgment, and injunctive relief. This complaint also sought to pierce the corporate veil of MERS and MERSCORP. The defendants moved to dismiss contending “that the Missouri recording statutes create no private cause of action in favor Jackson County, that Jackson County lacks standing because it cannot recover recording fees for assignments it never recorded, that there is no duty under Missouri law to record deed of trust assignments, and that Jackson County’s allegations fail to state claims upon which relief can be granted.”⁵⁶

The Court first addressed the issue of whether the plaintiff had standing to bring the action. With regard to standing, the Court said, “Plaintiff has alleged an injury to its financial interest in the form of lost recording fees caused by the actions of Defendants and seeks redress in this Court.”⁵⁷ The “Plaintiff alleges it has suffered an injury in the form of an inaccurate county land records. These allegations are for sufficient to establish Article III standing.”⁵⁸

Since the plaintiff had standing, the Court next turned to whether a private right of action exists for the purpose of alleged violations of statutes on recording of assignments. The defendants alleged that “the Missouri General Assembly did not create a private right of action to enforce alleged violations of statutes concerning recording assignments of deeds of trust.”⁵⁹ Plaintiff responded by saying that it was not seeking to enforce alleged violations, but rather that the County was suing to collect lost funds. The Court sided with the plaintiff that the plaintiff had standing to bring the action.

Being that there was standing to bring the action, the Court first focused on count one of the complaint for unjust enrichment. The Court analyzed the elements of unjust enrichment which are rather similar throughout the country. Under Missouri law, the Court cited *Johnson v. Estate of McFarlin ex rel. Lindstrom* for the elements of unjust enrichment, stating, “(1) the plaintiff conferred a benefit on the defendant; (2) the defendant appreciated the benefit; and (3) the defendant accepted or retained the benefit under inequitable or unjust circumstances.”⁶⁰

In the argument for dismissal, the defendants relied on two cases discussed herein: the MERS case out of the Middle District of Florida and the Iowa case. The defendants cited these for the proposition that the unjust enrichment claim could not stand. In order to first analyze whether there was a claim for unjust enrichment under Missouri law, the Court focused on whether there is a duty to record assignments under Missouri law. The Court cited to Missouri Revised Statute § 443.035, which states that “Security instruments may be assigned..., and *may be recorded* in the office of the recorder of deeds in the county or counties in which the security instrument being assigned was recorded.”⁶¹ The Court cited to *Sando v. Phillips*,⁶² stating,

⁵⁶ Id. at 1068

⁵⁷ Id.

⁵⁸ Id.

⁵⁹ Id. at 1069.

⁶⁰ Id., quoting 334 S.W.3d 469, 474 (Mo. Ct. App. 2010).

⁶¹ Id. at 1070, quoting Mo. Rev. Stat. § 443.035 (emphasis in opinion).

⁶² 319 S.W.2d 648, 653(Mo. 1959).

“There is no duty on a grantee to record a deed, and the failure to record does not in any way affect the validity of a deed between parties.”⁶³

The Court stated that “Plaintiff’s unjust enrichment claim is premised on the notion that Defendants acted improperly by not recording assignments after initial deeds of trust were recorded...”⁶⁴ To support its argument, the plaintiff cited to the *Montgomery County* case. The Court stated, “However, Plaintiffs reliance on *Montgomery County* only highlights the flaw in its claim. In that case, the court found the plaintiff’s allegations stated a viable unjust enrichment claim because Pennsylvania’s recording statute requires that all assignments be recorded.”⁶⁵ The Court then stated, “Unlike the Pennsylvania statute at issue in *Montgomery County*, under Missouri law, there is no duty record deeds of trust or other assignments.”⁶⁶ As such, the Court dismissed count one for unjust enrichment.

The plaintiff in this case premised the civil conspiracy claim on the basis of its unjust enrichment claim. With the failure of the unjust enrichment claim, the plaintiff’s claim for civil conspiracy also had to fail because it was based on the same scheme that was alleged to be unjust. As such that claim was dismissed.

Next, the Court turned to the claim for *prima facie* tort. In this case, “Plaintiff’s Amended Complaint merely asserts that Defendants ‘intended that their conduct would injure’ Plaintiffs.”⁶⁷ The Court stated that, “[u]nder Missouri law, the mere awareness that one’s conduct would harm the Plaintiff is not enough to establish an actual intent to injure; Plaintiff must prove that Defendant acted with ‘specific, clear-cut, express malicious intent to injure.’”⁶⁸ Defendants pointed out, “the Amended Complaint’s factual allegations demonstrate that Defendants intended only to save money and time by not recording assignments.”⁶⁹ Therefore, there was no such intent to injure and the *prima facie* tort claims was dismissed.

The Court addressed the declaratory relief and injunctive relief request together. In order to sustain an injunctive relief case, the plaintiff would have to allege some type of wrongful conduct on the part of a defendant such that an injunction would be appropriate relief. The Court concluded that, “Plaintiff’s injunctive relief remedy is not attached to a viable claim because this Court has dismissed Plaintiff’s common law claims.”⁷⁰ Therefore, the counts for declaratory relief and judge injunctive relief were dismissed as well.

⁶³ *Jackson County, Missouri*, 915 F.Supp.2d at 1070, quoting *Sando v. Phillips* 319 S.W.2d 648, 653(Mo. 1959).

⁶⁴ *Id.* at 1070.

⁶⁵ *Id.* at 1070-71.

⁶⁶ *Id.* at 1071.

⁶⁷ *Id.* at 1072.

⁶⁸ *Id.*, quoting *Tamko Roofing Products, Inc.*, 450 F.3d at 381.

⁶⁹ *Jackson County, Missouri*, 915 F. Supp.2d at 1072.

⁷⁰ *Id.* at 1073.

Illinois, January 30, 2013

The matter was also visited in the United States District Court for the Southern District of Illinois in *Union County v. MERSCORP, Inc., et al.*⁷¹. In this particular case, it had originally been filed in state court and then removed to federal court. The Plaintiff claimed that the defendants' system and registry tracking ownerships of mortgage loans failed to comply with Illinois applicable recording statutes. "According to Plaintiffs, MERS 'masquerades' as the title holder, while shareholder/members actually prepare "MERS"'s initial mortgage assignments for record."⁷²

As such, the recorder brought the complaint for four claims: (1) declaratory judgment / injunctive relief, (2) restitution and civil penalties for violation of the Illinois Consumer Fraud Act, (3) restitution for unjust enrichment, and (4) damages relating to a civil conspiracy to violate Illinois recording laws. The defendants jointly moved to dismiss, first claiming that the plaintiffs had no standing to bring the action, and, second, that no duty to record an assignment of mortgage exists under applicable Illinois law.

The Court began with a review of the language of Illinois's recording statute, 765 ILCS 5/28 and the fee statute, 55 ILCS 5/3-5018. Premised upon those two statutes, defendants argued that the plaintiff had no right to bring this private right of action.

The Court stated, that "[u]nderlying the bulk of Defendants' argument for dismissal (and their most consequential argument) is that there is no duty to record mortgages or assignments in Illinois."⁷³ Defendants, in further reliance upon the statutory language of the recording statute, noted that the statute only refers to *where* a recording is to occur. The statute does not state that a recording *must* occur. Being that there are no legal mandates for recording, the defendants contended that the claims for unfair deceptive active practices, unjust enrichment, civil conspiracy and declaratory judgment had to fail along with the main claim.

The Court in its initial analysis noted all of the decisions relating to this MERS issue, including citations to 13 other cases including the *Montgomery County* case. "The Court has reviewed these cases, but does not borrow any of the rationale – as it is directive of *Illinois's* recording statute that is dispositive here."⁷⁴

"The Court finds that the question of whether or not Illinois law *requires* Defendants to record all mortgages and substantive assignments is dispositive. If there is no duty to record, then the complaint states no claim for relief for violation of ICFA, unjust enrichment, civil conspiracy, or any declaratory or injunctive relief."⁷⁵ The Court reviewed various decisions from Illinois law to determine whether or not recording of mortgages is mandatory. "The Illinois

⁷¹ *Union County v. MERSCORP, Inc., et al.*, 920 F. Supp.2d 923 (S.D. Ill. 2013).

⁷² *Id.* at 925.

⁷³ *Id.* at 927.

⁷⁴ *Id.* at 929 (emphasis in original).

⁷⁵ *Id.* (emphasis in original).

Supreme Court mentioned no such duty created by any Illinois statute, and here, Plaintiffs have provided no alternate source of a duty to record.”⁷⁶

The Illinois recording statute reads:

Deeds, mortgages, powers of attorney, and other instruments relating to or affecting the title to real estate in this state, shall be recorded in the county in which such real estate is situated; but if such county is not organized, then in the county to which such unorganized county is attached for judicial purposes. No deed, mortgage, assignment of mortgage, or other instrument relating to or affecting the title to real estate in the State may include a provision prohibiting the recording of that instrument, and any such provision in an instrument signed after the effective date of this amendatory Act shall be void and of no force and effect.⁷⁷

The defendants argued that there are no provisions within the statute for this type of enforcement or any outright requirement that a document be recorded. Based upon a review of case law from Illinois and that statutory scheme, the Court concluded that there is no fraud in the failure to record a document. The Court went on to state, “the only non-absurd, non-inconvenient way to read the language of the law itself and the language of Illinois appellate courts is to read that the law ‘requires’ a recording only insofar as a mortgagee’s interest in property might otherwise be in jeopardy.”⁷⁸

The Court concluded, “[t]he statute does not create a general, public cause of action arising when an instrument is not recorded. Therefore, in context and upon consulting Illinois Supreme Court and appellate court decisions, the Court finds that, by the plain meaning of 765 ILCS 5/28, there is no mandatory duty to record here and Plaintiffs’ complaint fails to state any claim upon which relief may be granted.”⁷⁹ As such the Court dismissed the actions.

Oklahoma, April 24, 2013

In the *Board of County Commissioners of the County of Cleveland v. MERSCORP, Inc.*,⁸⁰ the Court addressed MERS’s and Citimortgage’s motions to dismiss. In that particular case, the Board of County Commissioners of the County of Cleveland, filed “a putative class action on behalf of the Cleveland County Clerk and all other similarly situated offices in Oklahoma, seeking to compel Defendants to record mortgage assignments, past and future and to pay the associated fees as required by statute.”⁸¹ The recorders asserted that MERS and the lending defendants violated Oklahoma law by failure to record assignments of mortgages. The defendants moved to dismiss the action under two primary bases. First, MERS contended that

⁷⁶ Id. at 930.

⁷⁷ 765 ILCS 5/28 (Emphasis added). This language is similar to the Pennsylvania Recording Statute. In this instance, the Illinois court did not read this to mandate recording, but rather to dictate where it should be recorded.

⁷⁸ *Union County*, 920 F. Supp.2d at 931.

⁷⁹ Id. at 932.

⁸⁰ District Court of Cleveland County, OK, Docket number CJ-2011-1727.

⁸¹ Oklahoma Opinion at para. 1.

46 O.S. § 1, *et seq.*, does not require their mortgages to be recorded. Second, the defendants argued that, even if the Oklahoma recording statutes required recordation of a mortgage, there would be no private right of action to enforce such a requirement.

The Court took notice of lawsuits of this type from all over the country. The Court also noted the most of the cases “have been dismissed based upon the law applicable in that state...”⁸² The Court actually referenced the *Montgomery County* case. However, the Court noted that each side in this particular matter in Oklahoma was relying upon matters from *other* jurisdictions as this was a case of first impression in the state.

The Court stated that, “no authority is presented where the recording statutes and other underlying law of the state at issue are congruent with Oklahoma law.”⁸³ The Court found a way to differentiate both the *Jackson County Missouri* case and *Montgomery County* case.

The Court stated that “[i]t is clear from a plane reading of the statutes that recording of mortgages and assignments is mandatory under Oklahoma law.”⁸⁴ While deciding that recording mortgages is mandatory in Oklahoma, the Court stated that “[t]he next argument is far more difficult—whether the legislature intended to confer a private right of action to enforce the statutes at issue.”⁸⁵ The plaintiff relied on the *Montgomery County* decision. This Court in Oklahoma stated that none of the arguments in the *Montgomery County* case decided this particular issue. In *Montgomery County*, the cause of action could be recast as a quiet title action under Pennsylvania law while “[t]his remedy is not available under Oklahoma law....”⁸⁶

The Court indicated that the case must be dismissed because Oklahoma law did not confer any kind of private right of action on the recorder of deeds. The Court stated:

None of the language in the statutes at issue lend to any interpretation other than providing for the rights directly effected by the mortgage or assignment. These statutes clearly have the purpose of providing notice to the world of asserted interest in property and do not convey a cause of action other than to those with a direct interest in the property or mortgage. Based upon the authority presented, this Court finds there is no private right of action to enforce the provisions of 46 O.S. § 1, *et seq.*⁸⁷

The Court likewise found that the county’s argument for unjust enrichment failed as well. To finalize the matter, the Court also dismissed any claim for civil conspiracy.

⁸² Id. at para. 3.

⁸³ Id.

⁸⁴ Id. at para. 4.

⁸⁵ Id. at para. 5.

⁸⁶ Id.

⁸⁷ Id.

Michigan, May 3, 2013

The issue was brought before the court in the United States District Court for the Western District of Michigan in the matter of *Hertel and Hutchins v. Mortgage Electronic Registration Systems, Inc.*⁸⁸ This case is mentioned as it involved MERS and recording issues, though the case is somewhat different, in that it focused on whether realty transfer taxes were due, as opposed to fees for missing assignments.

On or about November 10, 2011, Hertel, who is the Register of Deeds of Ingham County, and Hutchins, Register of Deeds from Branch County, filed a complaint in the state court. Defendants removed the matter to federal court. In that matter, the defendants first raised the issue of whether the plaintiffs had standing to bring the suit.

Plaintiffs contended that MERS and the other defendants violated the Michigan State Real Estate Transfer Act and the County Real Estate Transfer Tax Act (CRETTA), specifically, Michigan law sections 207.502 and 207.523, by improperly claiming exemptions from them. The first argument related to the plaintiffs' standing to bring the action. "In Michigan, a governmental entity or officer may only exercise those powers which it or he has been expressly granted."⁸⁹

The bank defendants and MERS argued that the plaintiffs lacked standing to bring the action because Michigan did not authorize any Registry of Deeds to file a lawsuit. Plaintiffs countered that argument by claiming that they were not suing as register of deeds, but instead as authorized as representatives of their counties.⁹⁰ The Court agreed with the defendants, and held that the individual Register of Deeds did not have standing to bring the action, even on behalf of the County.

While finding that the plaintiffs lacked standing, the Court indicated that the defect in standing could perhaps be cured by amendment. However, the Court stated that because it believed dismissal was warranted no matter who the plaintiff was, the Court proceeded to analyze the underlying merits of the case. The defendants argued that the case must be dismissed because the real estate transfer tax act did not confer any kind of private right of action on the register of deeds. Plaintiffs conceded that there is no express right of action under the statute. However, they argued that there should still be a private action as it must be inferred because somebody would have to have a right to bring action to ensure collection of unpaid transfer tax.

The Court ultimately stated that, "the lack of clarity over whether the state can enforce the CRETTA, and the fact that dismissal is warranted in the case on the merits, the Court declines to imply a private right of action for the CRETTA."⁹¹

⁸⁸ *Hertel and Hutchins v. Mortgage Electronic Registration Systems, Inc.*, No. 1:12-CV-174, 2013 WL 1874718, (W.D. Mich. May 3, 2013).

⁸⁹ *Id.* at *2, citing *Citizens for Protection of Marriage v. Board of State Canvassers*, 688 N.W.2d 538, 541 (Mich. Ct. App. 2004).

⁹⁰ *Hertel and Hutchins*, No. 1:12-CV-174, 2013 WL 1874718, at *2.

⁹¹ *Id.* at *5.

The Court noted that even if there were a private right of action under that law, the claims should still be dismissed. The bank defendants all argued that “these instruments are exempt from taxation under the CRETTA and are not required to conform to CRETТА’s drafting requirements.”⁹² The Court ruled in favor of MERS on that argument.

Minnesota, August 26, 2013

In the matter of *County of Ramsey v. MERSCORP Holdings, et al.*, in the United States District Court for the District of Minnesota,⁹³ the Court began its opinion on a motion to dismiss by examining Minnesota law on recording: “[e]very conveyance of real estate shall be recorded in the office of the county recorder of the county where such real estate is situated.”⁹⁴ In the action, Ramsay County argued that whenever a mortgage was transferred on the MERS Registry, an accompanying assignment of mortgage (and recording fee) should have been lodged with the appropriate recorder office. In its action, Ramsay County made claims for declaratory relief, unjust enrichment and public nuisance.

MERS and the lender defendants moved to dismiss the action pursuant to Federal Rule 12.⁹⁵ The first argument by the defendants was that the recorder lacked standing to bring the action. The District Court disposed of that argument in one paragraph, stating that the averment of loss of recording fees was sufficient to establish Article III standing. The Court then turned to the motion to dismiss.

The Court looked at Minnesota statute 507.34.⁹⁶ The defendants argued that this particular section was *permissive*, and did not *require* recording. The statute itself states that “every such conveyance *not so recorded* shall be void as against any subsequent purchaser”⁹⁷ Thus, the statute implies that there could be conveyances where such a document was not recorded.

The Court started with an examination of the legislative intent behind section 507.34. The Court noted that it must give effect to all the words of the statute, and just not a partial sentence. In other words, the entire statute section had to be read as a whole. When doing so, the Court agreed with MERS that the statute did *not* require recording of all instruments that are conveyances of land. The use of the mandatory word “shall” in the section referred to *where* the particular document must be recorded, not that it *must* be recorded. Indeed, when read in conjunction with the next phrase, the Court concluded that it was apparent that recording was not required.

To further bolster its argument, the Court pointed out that in other areas governing mortgages and recording of documents, the state legislature was quite specific in its desire of

⁹² Id. at *6.

⁹³ *County of Ramsey v. MERSCORP Holdings*, 962 F. Supp.2d 1082 (D. Minn. 2013).

⁹⁴ Id. at 1085, quoting Minn. Stat. Section 507.34.

⁹⁵ Fed. R. Civ. P. 12(b)(6).

⁹⁶ Minn. Stat. 507.34.

⁹⁷ *County of Ramsey*, 962 F. Supp.2d at 1086, quoting Minn. Stat. 507.34 (emphasis added).

when documents must be recorded. As such, the Court concluded that there was no basis for declaratory relief. As the claim for declaratory relief failed, the other counts for unjust enrichment and public nuisance likewise failed and the entire case was therefore dismissed.

Massachusetts, November 14, 2013

Next is *Bristol County v. MERSCORP Inc.*,⁹⁸ out of the Superior Court of the Commonwealth of Massachusetts. This case consists of three consolidated actions: Bristol County, Norfolk County and Plymouth County all challenged the MERS System, contending that the defendants were unjustly enriched under the MERS System, and as such, the counties sought disgorgement of benefits that MERS and the lender defendants received.

In this opinion, the Court first took a look at what documents are executed at the time a lender issues a secured loan. The borrower signs two documents: the promissory note and the mortgage. A lender then takes possession of the promissory note which note can be freely sold.⁹⁹ The mortgage is a contract that transfers legal title to the property to the mortgagee. Under Massachusetts law, a mortgage and a note can be held by two different persons.¹⁰⁰

The court noted that under the way MERS operates, a borrower and a lender contractually agree that MERS will be designated as a mortgagee under the mortgage document. Thus, MERS holds the security interest. When the loan (*i.e.*, the Note) transfers within the “MERS System, the transfer is simply tracked within the system, and MERS remains as the mortgagee, now acting as the nominee of the new holder of the note.”¹⁰¹

The Counties contended that the defendants were unjustly enriched. In other words, the County argued that, as members of MERS System, lenders are able to make multiple assignments (or transfers) of mortgages, without having to record any assignments or pay an accompanying recording fee to the County. MERS the other defendants’ primary argument was that there was no unlawful conduct in the action. As the Court noted, “[t]he gravamen of each Complaint is that the defendants wrongfully failed to pay recording fees on mortgage assignments.”¹⁰² However, as noted previously, Massachusetts law does *not* require recordation of mortgage assignments. If there is no statutory requirement for recording of a mortgage or an assignment, there is no cause of action.

In addition, the defendants argued whether the plaintiffs had standing to bring the actions. The Court noted that this argument provided an additional basis for allowing a motion to dismiss:

The claim for unjust enrichment alleges that the defendants received two benefits. The first was that they were able to avoid paying a recording fee in connection with an assignment from one MERS member to another. But the Registry of

⁹⁸ Superior Court of Mass., No. 12-1246-BLS2, consolidated with 12-1247-BLS2 and 12-1251-BLS2.

⁹⁹ *Id.* at 2.

¹⁰⁰ *Id.*, citing *Eaton v. Federal National Mortgage Ass’n*, 462 Mass 569, 576 (2012).

¹⁰¹ *Id.* at 3.

¹⁰² *Id.* at 3-4.

Deeds is entitled to charge such fees only if it performs the public service to which the fee relates.¹⁰³

The Court noted that “[h]aving recorded no document which would entitle them to a fee, plaintiffs cannot be said to have suffered any legally cognizable injury.”¹⁰⁴ The Court further went on to analyze a second alleged benefit unjustly conferred upon the defendants. The Court noted that laws regarding assignments “were passed not to assist counties in raising revenue. Rather, their purpose is [to] give notice of a creditor’s interest in property and to protect potential purchasers and lenders who rely on certain documents.”¹⁰⁵ For those reasons, the Court on November 14, 2013 entered the order dismissing the proposed class actions.

Texas, March 4, 2014

The next case is *Dallas County, Texas v. MERSCORP, Inc.*, from the United States District Court for the Northern District of Texas.¹⁰⁶ In that matter, the Court’s ruling on cross-motions for summary judgment filed on November 12, 2013.

In the action, the Plaintiffs requested that a declaratory judgment be entered based upon Texas local Government code § 192.007(a). That section reads:

Records of Releases and Other Actions

- (a) To release, transfer, assign, or take other action relating to an instrument that is filed, registered, or recorded in the office of the county clerk, a person must file, register, or record another instrument relating to the action in the same manner as the original instrument was required to be filed, registered or recorded.
- (b) An entry, including a marginal entry, may not be made on a previously made record of index to indicate the new action.¹⁰⁷

Essentially, Dallas County argued that the MERS System enabled lenders to avoid the filing, registering, recording another instrument relating to the action in the same manner as the original instrument was required to be filed, registered, or recorded.¹⁰⁸

Dallas County initiated the action against MERS where:

[t]he gravamen of Dallas County’s complaint is that Defendants conspired to create a private electronic mortgage registration system for tracking ownership interests and servicing rights associated with residential mortgage loan mortgage loans. According to Dallas County, this system usurps the county clerk’s role

¹⁰³ Id. at 5.

¹⁰⁴ Id.

¹⁰⁵ Id. at 5-6.

¹⁰⁶ *Dallas County, Texas v. MERSCORP, Inc.* No. 3:11-cv-02733-O, 2014 WL 840016 (N.D. Tex. March 4, 2014).

¹⁰⁷ Tex. Local Gov’t Code §192.007.

¹⁰⁸ See, generally, *Dallas County, Texas*, 2014 WL 840016, at *1 and Tex. Local Gov’t Code § 192.007.

under the statutorily created recording systems in a manner inconsistent with Texas law, thereby depriving Dallas County of recording fees and corrupting its real property records.¹⁰⁹

The counties asserted claims for unjust enrichment, negligent, grossly negligent and fraudulent misrepresentations, as well as other negligence claims, conspiracy and state statutory claims for alleged violations of the Texas Civil Practice and Remedies Code and Texas Local Government Code. The counties also sought monetary damages and declaratory and injunctive relief.

In an earlier opinion of November 4, 2013, the Court granted summary judgment in favor of the defendants as to the Counties' claims for fraudulent misrepresentation and unjust enrichment, as well as the derivative claims for civil conspiracy and request for declaratory and injunctive relief.

The request for summary judgment by the defendant stated first that the state statutory sections impose no duty to record assignments of previously recorded deeds of trust. Defendants contend that the statutory scheme tells the county clerk how to record a document. In other words, that is not a substantive mandate mandating that anyone must record anything.

Second, the defendants argued that the Court should enter summary judgment because § 192.007 does not require anyone to present or create assignments or other documents. Finally, the defendants argued (as did the other defendants in the other matters) that there was no private right of action permissible by the counties to enforce that section. As such, the counties would be barred from seeking declaratory relief.

First addressing the issue of whether the counties could seek declaratory judgment, the Court noted that “[t]he Declaratory Judgment Act allows a federal court to ‘declare the rights or other legal relations of any interested party seeking such declaration.’”¹¹⁰ However, the Federal Declaratory Judgment Act does not create a substantive cause of action. In other words, it is not an independent source of a federal jurisdiction.

The Court, citing the United States Supreme Court stated, ““since its inception, the declaratory judgment actions been understood to confront federal courts unique and substantial discretion in deciding whether to declare the rights of litigants.””¹¹¹

The Court reiterated that being that Texas law did not provide a private right of action to the plaintiff, there would be no basis for declaratory judgment as a remedy. In other words, “a plaintiff may not obtain a declaratory judgment under statute such as section 192.007 that provides no private right of action.”¹¹² The Court therefore rejected Dallas County's claim.

¹⁰⁹ *Dallas County, Texas*, 2014 WL 840016, at*2.

¹¹⁰ *Id.* at *7, citing 28 U.S.C. § 2201(a).

¹¹¹ *Id.*, quoting *Wilton v. Seven Falls Co.*, 515 U.S. 277, 286 (1995).

¹¹² *Id.* at *8.

The Court stated, “[i]n short, the Court determines that the county declaratory judgment claim is barred by the Court’s previous dismissal of the counties’ section 192.007 substantive claim for lack of a private right of action under the statute. As the federal declaratory judgment act is procedural, it is not creating an independent private right of action, defendants are entitled to judgment as a matter of law on the Counties’ declaratory judgment claim.”¹¹³

The Court went on to state that, alternatively, even if the county could seek declaratory relief, that the counties have not properly interpreted the statute requiring recordation of intermittent interim instruments, such as assignments of the deeds of trust.

The Court also discussed the motion of the County to reconsider the order dismissing the remaining claims. The Court noted that being that § 192.007 does not impose upon a lender a duty of recording assignments, that there was no basis to reconsider the prior ruling. Thus, judgment was granted in its entirety in favor of defendants and against the plaintiff. That order was entered by the United States District Court on March 4, 2014, and it dismissed the counties’ claims with prejudice.

Conclusion

As the Montgomery County Recorder has succeeded in obtaining class certification, it will be interesting to see how this issue ultimately plays out. MERS has won an overwhelming number of the legal battles, but could MERS ultimately lose the war?

¹¹³ Id. at *9.