

Beyond the Split Note Theory: Recent Developments and Trends in Foreclosure Litigation

1. Challenges to MERS.

- a. Challenges to the use of Mortgage Electronic Registration System as a means to track servicing rights and ownership of mortgage loans that had been securitized constituted the bulk of foreclosure litigation from 2009-2011.
- b. *Commonwealth Property Advocates, LLC v. Mortgage Electronic Registration Systems, Inc. and CitiMortgage, Inc., et al.*,¹ addressed the use of MERS in the foreclosure process.
 - i. *Commonwealth* involved theories relating to the authority of MERS to act as a beneficiary and nominee for the lender as well as dealing with issues relating to the effect of securitization on the note and deed of trust.
 - ii. Plaintiff asserted that the deed of trust was separated from the note shortly after being executed because although Citi continued to service the mortgage, they sold the debt represented by the mortgage note – which was later securitized – and therefore the debt became unsecured.
 - iii. The court rejected the plaintiff’s argument that the securitization of the borrowers’ mortgage nullified MERS’ rights as expressly set forth in the deed of trust:

Here, we believe the plain meaning of the statute is clear. The statute simply states, the transfer of any debt secured by a trust deed shall operate as a transfer of the security... Utah Code Ann. § 57-1-35 (2010)...The plain language of the statute does nothing to prevent MERS from acting as nominee for Lender and Lender's successors and assigns when it is permitted by the Deed of Trust...[W]e do not interpret the statute as preventing, implying or somehow indicating that the original parties to the Note and Deed of Trust cannot validly contract at the outset to have someone other than the beneficial owner of the debt act on behalf of that owner to enforce rights granted in [the security

¹ *Commonwealth Property Advocates, LLC v. Mortgage Electronic Registration Systems, Inc.*,--- P.3d ----, 2011 WL 2714429 (Utah App, July 14, 2011).

instrument].²

- iv. The Court also noted that the borrowers agreed to the terms of the deed of trust, which allows MERS, as “nominee for the lender and the lender’s successors and assigns,” to exercise any or all of the lender’s interests, including, but not limited to, foreclosing or assigning the deed of trust. Judge Davis stated, “...the plain language of the Deed of Trust gave MERS the right to foreclose on behalf of [the] Lender and Lender’s successors and assigns.”³

2. Trustee Issues – Procedural Defects.

- a. A common problem was that trustees would notice default before they had been substituted as default. This resulted in litigation regarding whether or not the notice of default was proper.
- b. *RM Lifestyles, LLC v. Ellison* -- the Utah Court of Appeals affirmed the validity of a trustee’s sale where the notice of default was recorded before the successor trustee had been substituted as a trustee.⁴ The plaintiffs raised the invalid foreclosure sale argument as a defense against an unlawful detainer action, but the court refused to reach the merits of this argument because “...in attacking the trust deed sale’s validity after the sale, [the plaintiffs] have not met their burden of proving that the alleged irregularity affected their rights”.⁵ The court cited *Concepts* and *Occidental* with approval, among other cases, explaining:

A sale once made will not be set aside unless the interests of the debtor were sacrificed or there was some attendant fraud or unfair dealing...The remedy of setting aside a trustee’s sale is appropriate only in cases which reach unjust extremes...A party who seeks to have a trustee sale set aside for irregularity, want of notice, or fraud has the burden of proving his contention, it being presumed, in the absence of evidence to the contrary, that the sale was regular. Defects in the notice of foreclosure sale that will authorize the setting aside of the sale must be those that would have the effect of chilling the bidding or causing an inadequacy or price...Whatever irregularities the trustor may allege in the technicalities of the notice requirement, they are immaterial if she does not demonstrate that she was unable to protect her interests...⁶

² *Id.* At ¶13.

³ *Id.* at 15.

⁴ *RM Lifestyles, LLC v. Ellison*, 2011 UT App 290.

⁵ *Id.* at ¶ 15.

⁶ *Id.* at ¶ 16 (internal citations and quotations omitted)(emphasis added).

3. Other MERS Arguments and Trustee arguments
4. Current Litigation Trends
 - a. TILA & RESPA violations
 - i. Common Defenses
 - b. Fair Lending Cases
 - c. Dodd – Frank and Consumer Financial Protection Bureau
 - d. Consent Decrees
 - e. Qui Tam Actions (MERS and Servicers/County Recorders)
5. Other Legal Theories
 - a. HAMP
 - b. Other Loan Modifications
 - c. Common law claims