

Financial Institution Compliance Update



August 5, 2014

This month's article is ***MERS Lawsuits: What it means for your financial institution.*** You have access to previous newsletters by visiting our website at Experis.us/Finance.

This communication is designed to provide you with quick snapshots and timely perspective on recent regulatory developments.

[MERS Lawsuits: What it means for your financial institution](#)

Background of issue

Recent court rulings and pending legal actions are bringing into question what activities are within the scope of Mortgage Electronic Registration System Inc. (MERS) registered mortgages and the legality of MERS assignments. Consider these rulings in conjunction with the Office of the Comptroller of the Currency (OCC) April 2014 Foreclosure Related Consent Order Status report requiring servicers to repay \$3.9 billion in payments to borrowers and \$6.1 billion in loss mitigation and foreclosure prevention assistance to borrowers. This underscores the importance of complete and accurate mortgage documentation and adequacy of mortgage servicing.

Maine's Supreme Court vacated a foreclosure action in *Bank of America, N.A. v. Greenleaf et al* (2014) stating Bank of America had not established ownership in the mortgage which is a requirement under the State's statutes in order to foreclose. In part, the ruling calls into question MERS ability to assign the mortgage as the language on the mortgage signed by the borrower indicates, "for the

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knowledge@experis.com

purpose of recording this mortgage, MERS is the Mortgagee of record... and "having only that right, MERS [did] not qualify as a mortgagee pursuant to our foreclosure statute." The court cites that the subsequent assignments MERS completed from the original bank to subsequent banks only allowed transfers of the right to record the mortgage as the court indicated MERS could not grant more authority than originally given by the borrowers.

In another ruling, the Pennsylvania District Court indicated MERS violated Pennsylvania statute(s) 21 P.S. §351. The Court questions the legality of the "practice by which MERS serves as the mortgagee of record in the public land records as the "nominee" for a lender who holds the mortgage note and its successors and assigns and thereby circumvents the need to record the transfer of the note each time it is sold;" Montgomery County, Pennsylvania v. MERSCORP, INC. (2014) NO. 11-CV-6968. The summary judgment indicates MERS has been unjustly enriched at the expense of the county recorder, however the consequences are still to be determined at trial. Plaintiff testimony indicates a forensic audit shows "MERS affiliated mortgage was transferred on average between 4 and 12 times, and conservatively estimates that Montgomery County alone has lost \$15.7 million in recording fees."

It is certain that continued monitoring of the trial results will occur by other counties throughout the United States as many counties' current financial situation may have them viewing legal action as a partial solution to their fiscal difficulties.

The OCC has indicated they will be reviewing the effectiveness of loss mitigation and foreclosure prevention programs implemented since the consent orders original execution in 2011. An Independent Foreclosure Review (IFR) identified additional weaknesses including:

- Loan modification denials that were improper or executed in an untimely manner
- Bankruptcy protection errors
- Service members Civil Relief Act (SCRA) protection violations
- Fee errors related to external parties services such as legal representation and property management.

The importance of a quality control for the loan origination process

Understanding the impact of MERS registered mortgages in your portfolio is a fluid process due to the ongoing

litigation. Compliance with MERS existing standards is important to ensure you retain all mortgage rights. In addition, the foreclosure processing problems cited by the OCC add additional areas to be monitored related to servicing of loans.

However, even if you don't utilize MERS for recording mortgages, the initiation of legal activity requires complete and accurate mortgage documentation along with the ability to establish that your bank has legal ownership of the mortgage document itself as evidenced through the assignment process. Confidence in your mortgage processes ability to comply with laws, regulations, and secondary market parameters are required to confidently enter into a legal action on a mortgage loan.

Financial Institutions selling in the secondary market are required to have a quality control (QC) program to assess the adequacy of the origination process. In addition, there are servicing standards that must be met to ensure the right actions are taken in a timely manner with regard to collections and related default activity.

How to address deficiencies and ensure compliance

Assess the results of both your origination and servicing quality control programs. Appropriate changes should be made to remediate any deficiencies and create a more effective process to better ensure compliance. Other items to address these issues include:

- Stay current on the changing legal environment
- Ensure timely completion of MERS risk assessment and annual audit
- Complete Mortgage Quality Control Reviews timely to ensure file documentation is accurate and in compliance with constantly changing requirements
- Analyze the results of the QC reviews to ensure that a systemic problem is not occurring
- Remediate any identified failures timely
- Conduct an audit of the bank's quality control program according to GSE requirements to ensure your bank complies with GSE standards and your internal policies and procedures
- Ensure you have a servicing QC process that assesses whether the delinquency and default management servicing are in compliance with secondary market standards.

How Experis can help

Experis Finance offers industry experience in each of these areas:

- Completion of annual MERS audits
 - MERS System Quality Assurance Plan (QAP)
 - Review of related policies and processes for compliance with MERS standards
- Evaluation of your current quality control plan(s) for compliance with secondary market standards
- Provide recommendations for best practices
- Completion of post-closing mortgage origination QC
- Assessing the adequacy of your mortgage QC audits
 - Origination Reviews
 - Servicing
 - Gap analysis review of documented procedures
 - Delinquency and Default Management
- Rationalization and assessment of mortgage operations (including origination, servicing, loss mitigation, foreclosure and secondary market units), credit risk, operational risk and other related policies and procedures.

If you have any questions or need additional support with evaluating your mortgage operations, contact your local [Experis representative](#) or visit us at ExperisUS/Finance.com .



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100 Manpower Place , Milwaukee , WI USA