Sixth Circuit issues final chapter" on electronic registration system's role as foreclosing mortgagee in Michigan

The Sixth Circuit Court of Appeals has affirmed a Michigan Supreme Court ruling that permits the Mortgage Electronic Registration System (**MERS) to foreclose mortgages – particularly nonjudicial foreclosures in states that permit them – even if it does not hold the underlying promissory note** at the time of foreclosure.

During the past several years, state and federal courts have been called upon to determine whether MERS could conduct mortgage foreclosures. MERS is a privately held company formed in 1995 to track servicing rights and ownership of mortgage loans made in the United States in an electronic registry in an era when most mortgage loans were bundled and sold in the mortgage securitization market. Typically, MERS will become the owner of the mortgage lien generated by a mortgage loan or the nominee of that owner with authority to foreclose on the mortgage upon the occurrence of an event of default. It has been estimated that MERS owns or controls approximately one-half of all U.S. residential mortgages.

Numerous borrowers who defaulted on their home mortgages owned or controlled by MERS beginning at the inception of the world financial crisis in 2007-2008 have commenced court challenges to foreclosures commenced by MERS as the foreclosing party. A common charge in this litigation is that MERS, as the mere mortgagee that does not hold the underlying promissory note secured by the mortgage, lacks standing to foreclose and, therefore, any foreclosure initiated by MERS is void or voidable under applicable state law.

In Michigan, such a challenge was initially upheld by the Michigan Court of Appeals in *Residential Funding Co., LLC v. Saurman*, 292 Mich.App. 321, 807 N.W.2d 412 (2011), where a number of mortgage foreclosures by advertisement pursuant to MCL 660.3201, et seq. were avoided by that court because MERS, as the foreclosing party, was neither the "owner of the indebtedness [nor] of an interest in the indebtedness secured by the mortgage [nor] the servicing agent of the mortgage." MCL 600.3204(1)(d). However, the Michigan Supreme Court on appeal reversed this decision, declaring that MERS was an "owner" of the mortgage indebtedness within the meaning of this statutory requirement even though it did not hold the underlying promissory note. According to the Michigan Supreme Court, "as record-

holder of the mortgage, MERS owned a security lien on the properties, the continued existence of which was contingent upon the satisfaction of the indebtedness. This interest in the indebtedness. . .authorized MERS to foreclose by advertisement." *Residential Funding Co., LLC v. Saurman*, 490 Mich. 909, 805 N.W.2d 183 (2011). For a subsequent Michigan decision following Saurman, see *Fawaz v. Aurora Loan Services*, LLC, 2012 WL 1521589 (Mich.Ct.App. May 1, 2012).

On July 3, 2012, the Sixth Circuit Court of Appeals weighed in on this issue and, unsurprisingly, followed the Michigan Supreme Court's Saurman decision permitting MERS to foreclose on a mortgage notwithstanding that MERS did not hold the underlying promissory note at the time of the foreclosure. In *Hargrow v. Wells Fargo Bank*, N.A., Case No. 11-1806, 2012 WL 2552805 (6th Cir. July 3, 2012), the Sixth Circuit was called upon by the plaintiffs/home mortgagors to determine whether a foreclosure by advertisement proceeding under MCL 600.3201 commenced by Wells Fargo Bank, N.A. was avoidable under Michigan law because, at the time of the commencement of the foreclosure proceedings and the subsequent sheriff's sale, Wells Fargo did not hold the underlying note. Wells Fargo had received an assignment of the mortgage prior to the commencement of the foreclosure proceedings from MERS, which was identified in the mortgage as the mortgagee of record and nominee for the lender, MHA Financial Service, and its "successors and assigns." The mortgage also contained an acknowledgment by the borrowers that MERS held "only legal title to the interests granted" by the borrowers in the mortgage but nevertheless had the right "to exercise any of those interests, including, but not limited to, the right to foreclose and sell" the real estate. After the sheriff's sale was conducted, Wells Fargo conveyed the property by quitclaim deed to Federal National Mortgage Association.

In its opinion, the Sixth Circuit cited to the Michigan Supreme Court's Saurman opinion and declared that MERS "indisputably had the power to foreclose by advertisement as the record-holder of the [appellants'] mortgage" and, because that interest had been validly assigned to Wells Fargo, it "would also have the right to foreclose by advertisement" under Michigan law. The Sixth Circuit, also relying on Saurman and another recent Michigan Court of Appeals decision, *Bakri v. Mortgage Electronic Registration System*, 2011 WL 3476818 (Mich.Ct.App. Aug. 9, 2011), rejected the appellants' contention that the assignment of the mortgage by MERS to Wells Fargo was invalid because any such transfer had to be

accompanied by an assignment of the underlying indebtedness. Because this assignment was validly made separate and apart from the debt and because the assignment was properly recorded in the land records prior to the commencement of the foreclosure proceedings, the Sixth Circuit determined that those proceedings complied in all respects with Michigan law.

In conclusion, the Michigan courts and the federal court of appeals that handles all appeals from Michigan federal district courts have given the green light to MERS and the assignees of MERS mortgages to foreclose on those mortgages upon the mortgagor's default even though MERS or its assignees do not hold the underlying promissory note evidencing the debt secured by the defaulted mortgage. There are other courts in the country, however, that refuse to follow Saurman and its progeny and insist that, under other state laws, the foreclosing party must hold both the promissory note and the mortgage in order to foreclose a mortgage lien in real estate. See, e.g., U.S. *Bank v. Dellarmo*, 94 A.D.3d 746, 2012 N.Y. Slip Op. 02481 (App.Div. 2d Dept. Apr. 3, 2012).