

FIFTH CIRCUIT COURT OF APPEALS UPHOLDS MERS’ AUTHORITY TO ASSIGN MORTGAGES

The Fifth Circuit Court of Appeals recently handed Mortgage Electronic Registration Systems, Inc. (MERS) another victory against challenges to MERS’ authority to assign a mortgage. In *Ferguson v. Bank of New York Mellon*, the Fifth Circuit ultimately held that MERS was a proper beneficiary of the subject deed of trust and, therefore, had the right to assign the deed of trust.

MERS’ authority to assign mortgages has been upheld by courts across the country, despite repeated challenges by borrowers. Just in the past year, the Sixth Circuit Court of Appeals upheld MERS’ authority to assign a mortgage in *Margelis v. IndyMac FSB*; the California Third Appellate District Court rejected a borrower’s challenge to MERS’ authority to assign a mortgage in *Boyle vs. Bank of America*; the Ninth Circuit Court of Appeals rejected a borrower’s argument that MERS lacked authority to assign a deed of trust in *Lam v. JPMorgan Chase Bank NA*; and the list goes on. Despite the building precedent holding otherwise, mortgage servicers continue to face litigation challenging MERS’ assignments.

The plaintiffs in *Ferguson* followed this typical pattern, alleging that the assignment of their deed of trust was void because MERS—as a book-entry system—lacked authority to act as a beneficiary of a deed of trust under Texas law. Alternatively, the plaintiffs alleged that New York law governed the validity of the assignment, and the assignment was void under New York law because it violated the applicable pooling and servicing agreement (PSA). Lastly, the plaintiffs argued that the foreclosure constituted a false lien under Texas’s false lien statute, on the same theory that the assignment was invalid because MERS lacked the authority to assign the deed of trust. The Fifth Circuit rejected all of these arguments in turn.

First, the Fifth Circuit noted that, under Texas law, the plaintiffs could only challenge the validity of the assignment on grounds that would potentially render the assignment void rather than voidable—a burden that they failed to meet. Nonetheless, the Fifth Circuit rejected the plaintiffs’ argument that MERS could not act as a beneficiary of the deed of trust, holding that Texas law granted MERS this authority and the deed of trust itself explicitly designates MERS as the beneficiary. Accordingly, the Court held, “MERS had the right to assign the [deed of trust].”

Next, the Fifth Circuit rejected the plaintiffs' contention that the assignment of the deed of trust was void under New York law for violating the PSA. Citing the Fifth Circuit's prior decision in *Reinagel v. Deutsche Bank National Trust Co.*, the Court held that borrowers lacked standing to enforce a PSA, since they are neither parties nor intended third-party beneficiaries of the PSA.

Lastly, the Fifth Circuit rejected the plaintiffs' claim that the foreclosure of the deed of trust constituted a false lien. Since MERS' assignment of the deed of trust was valid, the Court reasoned, the plaintiffs could not establish that the lien was in fact fraudulent.

By upholding MERS' authority to assign a mortgage, the Fifth Circuit leveled yet another blow to borrowers' challenges to the validity of MERS' assignments. *Ferguson* joins the other rulings from across the country as favorable precedent for mortgage owners and servicers against challenges to the MERS system.