

A Salem Trial for MERS?

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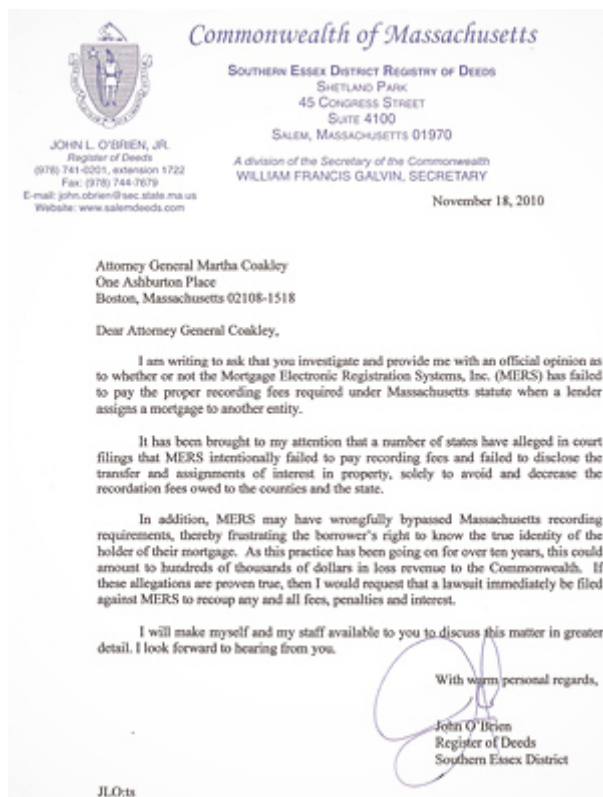
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The register for deeds in Southern part of Essex County, Massachusetts has asked the state's attorney general to investigate whether the Mortgage Electronic Registration system has failed to pay recording fees required when mortgages are transferred.

MERS, an electronic mortgage database that touches 3 out of 5 mortgages in the United States, has come under fire from an array of critics. Some say it encourages sloppy record keeping and contributed to the robo-signing scandals that led **Bank of America** [BAC 9.985 ▼ -0.025 (-0.25%) ▲] and others to suspend foreclosures last month. Others say the system is an attempt to privatize public land records. And some say the system is so flawed it could result in a great unwinding of the mortgage backed securities whose assets passed through it.

John O'Brien, the Salem based register for deeds in Southern Essex County, said in the letter to Coakley that it had come to his attention that a number of states have alleged in court filings that MERS intentionally failed to pay recording fees, and failed to disclose the transfer and assignments of interest in property, solely to avoid and decrease the recordation fees owed to the counties and the state.



Perhaps more seriously, MERS may have wrongfully bypassed strict Massachusetts recording requirements. Unlike some states which allow for opt-outs or voluntary recordation, the Massachusetts recording requirements are mandatory.

Coakley has a reputation as a strong advocate for consumers, which could pre-dispose her to look unfavorably on MERS.

MERS is taking the charge seriously enough to respond. It denies any wrong-doing and promises to “fully cooperate with any inquiries from proper authorities.”

[\(Click here or on image to enlarge\)](#)

MERS also lays out its theory of why it doesn't need to pay new recording taxes when mortgages are passed between members. The basic idea is that MERS becomes the mortgage owner, holding legal title to the mortgage lien. What's more, MERS argues that transfers of mortgage notes are

not recordable events—only the lien transfer is a conveyance.

Here's MERS full statement:

It is not the case that recording fees are somehow owed or outstanding. MERS pays recording fees when the mortgage is recorded. Fees are paid for a service performed, and if a document is eliminated because it is no longer necessary, no fee is due because there is nothing to record. In fact, MERS greatly reduces the workload of county recorders, resulting in lower operating expenses for the county recorder's office. Moreover, it would be the borrower, and not the lender, who ultimately pays the costs of recording assignments, either directly or indirectly.

When servicing rights or promissory notes are sold for loans where MERS is not the mortgagee, the usual practice is for the seller to execute and record an instrument assigning the mortgage lien to the purchaser (commonly referred to as an "assignment"). In general, the primary reason assignments are recorded (in cases where MERS is not the mortgagee), stems from the need of servicers to be in the land records to fully administer the loan on behalf of the mortgage loan owner. In which case, the servicer will be assigned the mortgage lien (thus becoming the mortgagee) in order to receive the service of process related to that mortgage loan. When Mortgage Electronic Registration Systems, Inc. is the mortgagee (i.e., holds the legal title to the mortgage lien), there is no need for an assignment of the mortgage lien between its members because MERS remains the mortgagee holding legal title to the mortgage as the common agent for them. It is not the case that the assignments are now being done electronically through the MERS® System instead of being recorded in the land records. The need for an assignment is eliminated because title to the mortgage lien has been grounded in MERS. Moreover, transfers of mortgage notes and servicing rights are not recordable transactions (and have never been reflected in the land records) because they are not a conveyance of an interest in real property that is entitled to be recorded; only the transfer of the lien is a conveyance. The only reason servicers needed to appear in the county land records before MERS was so they could receive legal notices pertaining to the property. Now, MERS as their common agent receives the legal notices. The chain of title starts and stops with Mortgage Electronic Registration Systems, Inc. as the mortgagee. MERS, as the agent for the note-owner, holds legal title for the note-owner in the land records.

The use of MERS is in compliance with the statutory intent of the state recording acts. When MERS is the mortgagee, the mortgage is recorded at the county land records, thereby putting the public on notice that there is a lien on the property. The MERS® System also complements the county land records by providing additional information that was never intended to be recorded at the county level, namely the information about the mortgage loan servicer, and now, with the addition of MERS® InvestorID, the name of the investor.

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