

# HUFFPOST BUSINESS



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## **County Register of Deeds Picks Fight with MERS**

About a week ago, John O'Brien, Register of Deeds in Essex County Massachusetts, sent a letter to Massachusetts Attorney General Martha Coakley asking that she look into whether MERS (Mortgage Electronic Registration Systems, Inc.) failed to pay legally required recording fees in Massachusetts when a MERS-mortgage is assigned to another entity, like a trust or a bank.

MERS [is a privately held company that operates an electronic registry designed to track servicing rights and ownership of mortgage loans in the United States.](#)

MERS has seen a lot of attention of late because of the number of [robo-signing cases](#) popping up at banks and mortgage servicers. [MERS has no employees](#), it simply assigns and designates an estimated [20,000 unpaid VPs and officers](#) around the country as certifying officers to sign off on mortgage transfers, foreclosures, and assignments, according to R.K. Arnold, President and CEO of Mortgage Electronic Registration Systems, Inc., in a [recent testimony before Congress](#).

The recording fees Essex County has missed out on as a result of MERS purportedly bypassing normal recording channels was O'Brien's primary concern.

In his November 18 letter to Attorney General Coakley, O'Brien wrote, "I am writing to ask that you investigate and provide me with an official opinion as to whether or not the Mortgage Electronic Registration Systems, Inc. (MERS) has failed to pay the proper recording fees required under Massachusetts statute when a lender assigns a mortgage to another entity."

O'Brien's action in sending that letter, [picked up by a local paper](#), was just the tip of the iceberg.

"As the keeper of the land records in Essex County, I take my job very seriously," O'Brien told ["The Marblehead Reporter"](#), a North Shore newspaper. "Every day, hard-working people come into the Registry to record their documents, and they pay the proper fees. It troubles me greatly that these major lenders may have devised a scheme to avoid paying what the average citizen is legally required to pay. In many cases, MERS has assigned homeowners' mortgages dozens of

times to various MERS-related entities, thereby avoiding recording the proper assignments in the respective registries of deeds."

According to Kevin Harvey, 1st Assistant Register, who was fielding phone calls from media outlets for the better part of the day before Thanksgiving, MERS may have wrongfully bypassed Massachusetts recording requirements, making it difficult, if not impossible for the borrower to know who is actually collecting on the mortgage.

Massachusetts law requires a fee of \$75.00 each time a mortgage is assigned. "Individually it's not a lot of money," Harvey said. "But do that a million times and now we're talking about real money."

To put that into perspective, between November 12, 2010 and November 26, 2010, MERS was involved in 808 mortgages that were recorded in Southern Essex County. That's \$60,600.00 in potential lost revenue, just from one week, just for recording fees, just in one county. Assuming even an average of 500 mortgages per week, this year alone, Southern Essex County has lost a potential \$1.95 million in recording fees because of the MERS system of "avoiding" recording assignments.

In [a response to O'Brien's letter, MERS posted a press release on its site](#). "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," the statement says.

So somehow stealing millions of dollars in potential revenue is justified by claiming it saves counties from having to pay someone - someone with a family and potentially a mortgage. But why stop there? Blaming the homeowner seems to be all the rage and the statement also makes the claim that the homeowner is somehow responsible for the lost revenue. In other words, if MERS were to transfer a mortgage from one mortgagee to another twenty times (not unheard of), in Massachusetts the homeowner would be on the hook for \$1,500 in fees, according to MERS' logic - a claim Harvey says is an "absolute falsehood".

These fees, in many cases by the way, are used to fund the county offices and in most cases contribute to county and state revenue. Some counties use real property recording fees to fund their courts, police departments, legal aid offices, and schools - the apparent lower operating expenses.

With an additional \$1.95 million in the Registry's budget, Southern Essex County could easily afford to hire more employees to handle the extra work that MERS claims to have saved them. Hence, it could be argued that MERS has contributed to the job loss, economic downturn and deterioration of entire school systems in not only Massachusetts but the entire country as a result of lost recording fees to county Registries and Recorders of Deeds.

"If we had just a percentage of that money we could afford to re-hire the twelve people we lost as a result of budget cuts," Harvey said.

If that weren't enough, that's not quite the whole iceberg.

There's a lot wrong with MERS and plenty of arguments against it. If you're interested in knowing more about MERS, I've provided some links at the end of this post to get you started, but the abridged version and what's important for the purposes of this story is that somewhere in the mid-1980s securitization came along - a process of pooling piles of mortgages into a trust and selling it off in chunks on Wall Street.

In the mid-1990s, mortgage bankers (including the Mortgage Bankers Association, Fannie Mae, Freddie Mac, Bank of America, Nationwide, HSBC, American Land Title Association, and Wells Fargo, among others) decided that since they were flinging mortgages around like monkeys fling poop, they didn't want to pay recording fees for assigning mortgages anymore, so they came up with MERS, a bogus company that would pretend to own all the mortgages in the country and bankers wouldn't have to record assignments since all the mortgages were "owned" by the same company. Now, 66 million mortgages (nearly 60 percent of all mortgages in the country) are recorded in the name of MERS as opposed to a bank, trust, or company that actually has any interest in the debt being repaid.

Another gigantic potential issue is that roughly 90 percent of all residential mortgage loans originated over the last decade have been sold to either Fannie Mae, Freddie Mac, or to private securitization trusts, few of whom prepared, and none of whom actually recorded a complete unbroken chain of assignments of the mortgage together with the notes, so the mortgages (borrower IOU) have been separated from the note (proof of ownership, i.e. collateral).

This separation, [known as bifurcation](#), means that the entity that purchased and allegedly holds the note does not have the legal rights contained in the mortgage. The consequence of this bifurcation is that the debt has become unsecured. Unsecured debt is when a lender loans money without the security of an underlying asset - like a house.

[Yves Smith of Naked Capitalism wrote:](#)

"In 45 states, that position would seem to be a non-starter. In those states, the note (the borrower IOU) is the critical document; in these states, the mortgage is a mere "accessory" to the note and has no independent force. Indeed, in these states, you cannot be a mortgagee unless you are also the creditor. But in depositions, MERS has repeatedly acknowledged that it does not lend money and does not collect interest payments. But MERS effectively takes the position that you can separate the mortgage from the note and reunite them, a position that was rejected in an 1873 (no typo) Supreme Court decision, *Carpenter v. Longan* (*Carpenter v. Longan*, 83 U.S. 271, 21 L.Ed. 313 [1873])):

"The note and mortgage are inseparable; the former as essential, the latter as an incident. An assignment of the note carries the mortgage with it, while an assignment of the latter alone is a nullity. Case law in virtually every state follows *Carpenter*."

This could potentially mean that 60 percent of homeowners in this country are currently paying on unsecured debt - which can be dealt with in bankruptcy.

Taking into consideration the number of loans currently under water (where the home is worth less than the money owed), that's a gigantic iceberg.

*If you're interested in more information about MERS here are some places to start:*

[Mortgage Electronic Registration Systems, Inc.: A Survey of Cases Discussing MERS' Authority to Act](#)

[Clouded Titles](#)

[Where's The Note, Who's The Holder](#): Enforcement Of Promissory Note Secured By Real Estate  
- by Hon. Samuel L. Bufford & Hon. R. Glen Ayers

[Christopher Lewis Peterson Professor of Law University of Utah - S.J. Quinney College of Law](#)

[MERS 101 at StopForeclosureFraud](#)

***Remember:*** You can post your own mortgage horror story at [www.Shamethebanks.org](http://www.Shamethebanks.org)