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County recorders, registers of deeds: We're losing money to MERS

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One-point-three million dollars in Guilford County, N.C. since 2005; \$15 million in Montgomery County, Pa. since 2004 — that's how much those counties' recorders or registers of deeds say they've lost in mortgage-related filing fees for the same reason — Mortgage Electronic Registration Systems, Inc., more commonly known as MERS.

And those dollar estimates are "conservative," registry officials say. They've called on their county and state treasurers to withdraw all government funds on deposit with MERS-affiliated banks as a "wake-up call."

When a mortgage is sold or servicing interests are transferred, MERS tracks the transaction in its electronic database but doesn't record additional mortgage assignments, nor pay fees to local recorders and registers.

"If every county started pulling money from these banks, it would give them a wake-up call...It's like, wait a second, people are angry," said Nancy Becker, Montgomery County's recorder of deeds.

MERS was created in 1998 by the mortgage banking industry "to streamline the mortgage process by using electronic commerce to eliminate paper," according to its website. It's the only national, centralized database that tracks mortgage loans and was supposed to make counties' jobs easier. MERS-affiliated banks hold some 60 million mortgage loans.

"MERS greatly reduces the workload of county recorders, resulting in lower operating expenses for the county recorder's office," MERS says in its mission statement. Other intended beneficiaries include mortgage originators, wholesale and retail lenders, title companies and consumers, among others.

Several county registers and recorders vehemently disagree.

"I have a sworn duty to record, preserve and protect the chain of title for all documents, and a fiduciary duty to collect recording fees," Becker said, "and I feel MERS has undermined both of these duties."

County land records officials say the problem with MERS began amid the overheated housing market that preceded the mortgage meltdown. MERS, acting as agent for its bank affiliates, pays recording fees when a mortgage is first recorded. But the county officials say when MERS banks began bundling mortgages and selling them as mortgage-backed securities, the subsequent multiple resellings of mortgages deprived them of additional fees.

Things were moving fast in the mortgage banking industry in the go-go first decade of the 2000s, and MERS was created, in part, because the industry felt local land recording offices were paper-bound and insufficiently computerized to keep up.

John O'Brien is register of deeds for the Southern Essex District of Massachusetts. His office won a national award for putting public records online in 2000, and he rejects the notion that registers were stuck in the 20th century, if not earlier.

"They claim that we were back in the days of the quill pen and oil lamps," he said. "Nothing could be further than the truth, I think, for registries across the county and in particular mine."

In some states, foreclosures have been contested or overturned because MERS could not substantiate who owns the mortgage, and several state attorneys general have launched investigations into MERS's practices.

"It's very hard to determine ownership rights right now, and MERS has been an enabler of that," said Jeff Thigpen, Guilford County register of deeds and a former county commissioner.

Becker said there have been instances when homeowners — who had not defaulted on their loan — have been foreclosed on by the wrong bank because MERS sold the same loan twice. While the homeowner faithfully paid one lender, the other found them in default. "None of this is malicious," she said. "It's just the sheer volume of transactions happening..."

She thinks the concept of MERS, when it was first established, was a good one. "What happened was it just got sloppy."

Two associations that represent registers and recorders — the International Association of Clerks, Recorders, Election Officials and Treasurers (IACREOT) and the National Association of County Recorders, Election Officials and Clerks (NACRC) — have not taken official positions on the MERS issue.

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However, Jack Cunningham, Kane County, Ill. register of deeds and president of NACRC, said the association "is very much aware of it and monitoring it" and is "cautiously watching" the issue.

O'Brien has also asked his state to pull its public funds from MERS-affiliated banks. He is scheduled to make a presentation about MERS at IACREOT's annual conference next month. His is a state office, but eight of the 21 register of deeds offices in Massachusetts are county offices. He said statewide, counties have lost "about \$200 million" in unpaid filing fees.

"Counties survive on fees," he added, "so every time someone concocts a way to avoid a fee, it hurts everyone."

In his state, as in others, mortgage filing fees support the land records office but also provide other community benefits. O'Brien's \$75 fee to record an assignment includes \$20 that funds community preservation in cities and towns, and \$5 to make computerization improvements in his office. Becker's \$54 fee includes \$13 for affordable housing in Montgomery County.

Thigpen maintains the lost recording fees would help local elected officials reduce budget deficits and maintain core services such as public education and public safety in this time of fiscal stress for counties.

In a letter to Massachusetts Atty. Gen. Martha Coakley (D) last November, O'Brien asked her office to investigate MERS, saying it "may have wrongfully bypassed Massachusetts recording requirements, thereby frustrating the borrower's right to know the true identity of the holder of their mortgage."

MERS Communications Manager Karmela Lejarde said in an email, "The use of MERS is in compliance with the purpose and intent of the state recording acts.

"MERS members pay recording fees when the mortgage is recorded," she continued. "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. The need for an assignment is eliminated because title to the mortgage lien has been grounded in MERS."

Nevertheless, O'Brien said as a result of MERS, "For the first time in my tenure ... I can't honestly look somebody in the eye that has a MERS mortgage and tell them who owns it, because they (MERS) have not followed the same rules as everyone else."

As states' investigations into MERS's practices continue, O'Brien hopes recorders and registers of deeds will "have a seat at the table."

"Anybody negotiating a settlement with these banks on these recording fees and the damage that they've done to the chain of title and such, registers of deeds should be in that room," he said. "We're the front-line men and women who deal with this every single day. We need to be in that room before this thing is shuffled off to Buffalo."