



Oregon State Supreme Court

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Ivan Hooker built his own home in Jacksonville, a town outside Medford in Southern Oregon, 20 years ago with his own hands. He raised four kids there and built a business selling commercial trucks.

When the housing market crashed in 2008, business dried up, and he fell behind on his mortgage payments. Hooker says his bank ignored his efforts to work something out. When his bank finally got in contact with him, he said they presented three options: He could sell the house, but still not make enough to pay off the loan. He could pay the loan in full. Or allow the bank to foreclose.

Hooker, instead, suggested a fourth option: To fight his bank in court.

This may sound like an all-too-familiar story, but the case Hooker brought against his bank challenges an obscure mechanism used to facilitate the housing boom, and the outcome could have far-reaching repercussions for homeowners in similar predicaments. As foreclosures have swept the state, other homeowners have made similar challenges, which have had mixed results. The Oregon Supreme Court is poised to weigh in, and how it rules could have consequences for how foreclosures such as Hooker's are conducted.

During the housing boom of 1990s, banks founded the Mortgage Electronic Registration System, Inc., or MERS, as a shell company to help process the large amounts of mortgages they were bundling into securities and selling off to investors.

"What's a MERS, anyways?" said Hooker, when he first heard about the Mortgage Electronic Registration System, Inc.

For centuries, real estate transactions have been recorded by counties for a modest fee, establishing a reliable and transparent record of land ownership. Operating under the mantra of "process loans, not paperwork," MERS offered a way for banks to quickly sell mortgages to investors without having to go through the cumbersome process of recording each re-assignment with the county and also avoiding the fees.

Instead of having to record the transfer of the mortgage each time it was sold, banks began entering MERS as the agent for the lender, making MERS the mortgagee of record with the county. The mortgage is then sliced and diced and sold to investors. But all of this becomes absent from county records as soon as MERS is designated as holder of the mortgage.

At the county recorder's office, mortgages are recorded in the name of MERS, instead of the bank or other entity that has an economic interest in the loan. Although it is designated as the beneficiary, MERS doesn't collect any money from the loans and doesn't service any mortgages.

No state legislature authorized MERS the long-established precedent of recording property transactions with the county. Meanwhile, cash-starved counties have missed out on recording fees. According to a report from Economic Fairness Oregon, Multnomah County alone lost nearly \$11 million in recording fees as a result of MERS. This includes fees collected that are dedicated to affordable housing preservation throughout the state.

MERS did not respond to Street Roots questions by press time, but Project REconomy, a Southern Oregon-based organization that works with homeowners facing foreclosure, estimates that of the 22,492 foreclosures in Oregon last year, 65 percent involve MERS.

Few people had any idea what MERS was,

until the housing market collapsed in 2008. Once foreclosures began sweeping the country, homeowners began challenging MERS in court. The cases varied by each state, each having different property laws, and the outcomes have varied.

The supreme courts of Arkansas, Maine, Kansas and New York have ruled that MERS does not have legal standing to foreclose on properties. Supreme courts in Michigan, Minnesota and Idaho came to different conclusions. In 2011, MERS ended its practice of foreclosing on properties.

According to Christopher Peterson, a University of Utah law professor who has studied MERS and written critically about it, the legal structure of MERS is highly unorthodox. He explained that MERS purports to act as the agent of banks and investors, but also as the beneficiary of the mortgage, an arrangement he describes as not only confusing but potentially fraudulent.

"There really hasn't been anything like this in property law," said Peterson.

According to Peterson, about 60 percent of mortgages are registered under MERS. He said that when state supreme courts rule against MERS, it has been a serious handicap for the banks and has caused foreclosures to slow. In such states, he said, banks need to go to court to foreclose on a property, which gives homeowners more leverage.

In other states, officials have taken an aggressive approach to MERS. Delaware Attorney General Beau Biden has filed a lawsuit against MERS.

"MERS engaged and continues to engage in a range of deceptive trade practices that sow confusion among consumers, investors, and other stakeholders in the mortgage finance system, damage the integrity of

Delaware's land records, and lead to unlawful foreclosure practices," reads the complaint of the Delaware attorney general against MERS.

New York Attorney General Eric Schneiderman has also taken legal action against MERS and several large banks, including Bank of America, J.P. Morgan Chase and Wells Fargo.

According to the complaint filed by Schneiderman, MERS has been involved in unscrupulous activities such as foreclosing on a property on behalf of an entity that had been dissolved and using false and deceptive documents in court. The complaint also states that inaccurate and bad recording keeping is "endemic" to MERS.

Oregon Attorney General John Kroger has filed an amicus brief in support of Hooker. Across the state there have been court cases challenging different legal aspects of MERS. In these cases, judges have produced conflicting rulings, which has drawn the attention of state lawmakers.

During the last legislative session, a handful of lawmakers attempted to settle any legal ambiguity of MERS through a bill that would retroactively validate it. The legislation was proposed by Rep. Gene Whisnant, a central Oregon Republican affiliated with the American Legislative Exchange Council, a controversial organization that has been in the news for pushing pro-corporate legislation at the state level. The bill failed, and judges have continued to disagree on MERS' legality.

Two of the central issues in these cases is whether or not banks violated Oregon law by not filing proper notices with counties, and if MERS can be designated as the beneficiary of a mortgage loan.

Some judges have found no legal problems

with MERS's structure and have ruled that banks don't need to update county records each time a loan is sold using MERS. Others have disagreed.

Hooker's case made its way all the U.S. District Court Judge Owen Panner, who ruled in his favor.

"In short, the MERS system allows the lender to shirk its traditional due diligence duties," reads Panner's ruling, which sharply criticized MERS for keeping bad records and cast doubt on foreclosures it's been involved in.

The ruling echoed a frequent criticism of the system: that the chain of title is muddled so badly as the loan is passed around through MERS that it becomes difficult for homeowners to determine who they owe money to and who they need to negotiate with.

In some rare cases, judges have found the chain of title so damaged that they have given the house to the homeowner free and clear.

But Michelle Glass, spokesperson for Project REconomy, says that most distressed homeowners aren't looking to squirm out of their mortgages and want to come to a responsible arrangement with their lender. But doing that is more difficult with MERS, she said.

"It's a really big, complicated mess and it's created a number of problems for homeowners," Glass said.

Because their loan has been passed around so many times, Glass said that homeowners seeking to negotiate have difficulty determining the entity that actually owns their loan. In many cases, said Glass, homeowners are passed around and then just end up in foreclosure anyway. In Oregon, she added, only 1 percent of distressed homeowners get a permanent modified loan.

Oregon allows for lenders to foreclose on homes without judicial review, a practice that could become less common depending on how the state Supreme Court rules on MERS.

According to Kelly Harpester, an attorney who has represented homeowners, if the Oregon Supreme Court doesn't rule favorably to MERS, she expects there to be far fewer foreclosures. More banks will go the judicial route to foreclose, she said, which requires banks to produce documentation that they in fact own the loan and will be likely to settle with homeowners.

Glass said that under a non-judicial foreclosure, the burden falls on the homeowner to ensure that everything has been done properly, which often requires getting a lawyer. But under a judicial foreclosure, there is more oversight and consumer protection.

"The MERS system raises serious concerns regarding the appropriateness and validity of foreclosure by advertisement and sale outside of any judicial proceeding," wrote Panner, who noted that nearly every non-judicial foreclosure he has presided over had been "deeply troubling" to him.

It's been nearly a year since Panner ruled in favor of Hooker, who says he has gotten phone calls from people across the country in similar predicaments. Hooker says that the ruling caused Bank of America (his lender) to retreat on foreclosing on his home. But his case is being appealed and he expects his bank to be back.

"What the working fellow is up against is a monstrous system," said Hooker, of the experience. "Basically we're in a state of limbo. Believe me, that's a very frustrating place to be."

Caveat Emptor

The Oregon Supreme Court considers the practices of the Mortgage Electronic Registration System, or MERS, and how it may or may not lay claim to its foreclosed homes

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