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MICHIGAN COURT OF APPEALS VOIDS NONJUDICIAL FORECLOSURES IN THE NAME OF MERS

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On April 21, 2011, the Michigan Court of Appeals reversed district court and circuit court rulings in two separate, consolidated cases, holding that Mortgage Electronic Registration System (MERS) does *not* qualify under the Michigan statute to foreclose by advertisement.¹ The State of Michigan provides for non-judicial foreclosure actions by its local statute, MCL 600.3201, et seq. The majority opinion, with one dissent, from the Michigan Court of Appeals was that MERS does not meet the requirements of the statute and therefore, may foreclose only by *judicial* process. In so ruling, two non-judicial foreclosures, in separate counties, initiated by MERS as mortgagee, were rendered void *ab initio*.

In both of these cases, the sheriff's sales were completed, MERS was the purchaser of the properties at the sales, and the properties were subsequently quit-claimed to the successor lenders. This is the intended procedure with mortgages registered in the MERS system. The respective lenders then initiated eviction actions and the foreclosures were challenged by the defendants in these proceedings. The defendants in each case argued that MERS did not have the authority to foreclose by advertisement and, therefore, the foreclosures were invalid. The district courts in both cases rejected the defendants' arguments and the foreclosures were upheld. Both decisions were appealed and affirmed by their respective circuit courts. Defendants sought leave to appeal to the Michigan Court of Appeals, which was granted in both cases. The cases were consolidated with the sole issue being whether MERS met the requirements of the Michigan statute allowing foreclosure by advertisement. The majority opinion was that it did not.

The Michigan foreclosure statute specifically allows for foreclosure by advertisement if the foreclosing party is either: "the owner of the indebtedness or [the owner] of an interest in the indebtedness secured by the mortgage or the servicing agent of the mortgage". MCL 600.3204(1)(d). Two of the three judges determined that MERS did not have an interest in the *indebtedness* secured by the mortgage. The majority opinion's analysis of MERS' background and its relationship as agent for lenders led to its conclusion that MERS holds an interest in a *mortgage* but does not hold an interest in the note. In other words, it only holds an interest in real property but it has no ownership interest in the debt, or note, which the property secures.

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The opinion distinguishes this case from *Jackson v Mortgage Electronic Registration System, Inc.*², a well-known Minnesota case, which also challenged MERS right to foreclose under Minnesota's non-judicial foreclosure statute. *Jackson* held that MERS did meet the statutory requirements for foreclosure by advertisement. The Minnesota statute at issue in *Jackson* also provides for foreclosure by advertisement, however the important distinction is it specifically allows "nominees or agents for a third party identified in the mortgage to foreclose by advertisement". In other words, the Minnesota statute provides for entities exactly like MERS and was further distinguished by its references to the *mortgage* as oppose to the note or the *indebtedness* as specified in the Michigan statute. The majority found this distinction to demonstrate that, had the Michigan Legislature intended to allow MERS to foreclose by advertisement, they could have used clear language in its statute as used in the Minnesota statute.



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Since the majority of foreclosures conducted in Michigan are non-judicial, this opinion has had a major effect on eviction and REOs throughout the State. Previous non-judicial foreclosures in the name of MERS are deemed void preventing evictions and REOs from completing. An appeal is already in the works. In the meantime, this is another obstruction in the already painfully slow default process.

1. *Residential Funding Co, LLC v Saurman*, unpublished order of the Court of Appeals, entered May 15, 2009 (Docket No. 290248); *Bank of New York Trust Co v Messner*, unpublished order of the Court of Appeals, entered July 29, 2009 (Docket No. 291443).
2. *Jackson v Mortgage Electronic Registration Sys, Inc*, 770 NW2d 487 (Minn, 2009)



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