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Property: Innovations to Historic Legal Traditions—Jackson v. Mortgage Electronic Registration Systems, Inc

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**PROPERTY: INNOVATIONS TO HISTORIC LEGAL
TRADITIONS—*JACKSON V. MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC.***

Christian J. Hansen[†]

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I. INTRODUCTION

The United States is now recovering from the most severe economic meltdown since the Great Depression.¹ This meltdown was caused by the record number of defaults on mortgage loans and the foreclosures that followed;² the catalyst being the financial risks taken by the mortgage industry to capitalize on the rapid increase in property values experienced earlier this decade.³ Eventually, the risks became too great and borrowers began defaulting.⁴ Property values quickly decreased, and with the decrease came an even bigger wave of foreclosures.⁵

In the movie *It's a Wonderful Life*, George Bailey stopped a run on the Bailey Brothers Building & Loan Association by offering his explanation of mortgage finance:

You're thinking of this place all wrong. As if I had the money back in a safe. The money's not here . . . your money is in Joe's house, right next to yours . . . and in the Kennedy house, and Mrs. Macklin's house, and a hundred others. Why, you're lending them the money to build, and they're going to pay it back to you as best they can.⁶

Although most people are unaware, nearly everyone who maintains a savings account is also in the business of lending money to the mortgage industry.⁷ With that said, we've come a long way since

1. See A. Mechele Dickerson, *Over-Indebtedness, The Subprime Mortgage Crisis, and the Effect on U.S. Cities*, 36 *FORDHAM URB. L.J.* 395, 396 (2009) (noting that, in 2009, the United States was "in the midst of a severe economic meltdown" with government bailout efforts surpassed only by the Great Depression).

2. See *id.* at 396, 413; Kenneth R. Harvey, *The Lowdown on Low-Doc Loans*, *WASH. POST*, Nov. 25, 2006, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/11/24/AR2006112400503.html> (noting the significant risk lenders were undertaking by issuing more high-interest low-documentation and no-documentation home loans).

3. Dickerson, *supra* note 1, at 396. Once home prices start to rise, the market builds the expectation that the increase is the norm and this expectation, in turn, increases the demand for houses. *Id.* See, e.g., Harvey, *supra* note 2.

4. See Adam J. Levitin, *The Crisis Without a Face: Emerging Narratives of the Financial Crisis*, 63 *U. MIAMI L. REV.* 999, 1009–10 (2009).

5. Dickerson, *supra* note 1, at 414; Steven Gjerstad & Vernon L. Smith, *From Bubble to Depression?*, *WALL ST. J.*, Apr. 6, 2009, at A15, available at <http://online.wsj.com/article/SB123897612802791281.html>.

6. *IT'S A WONDERFUL LIFE* (Liberty Films 1946) (quoting James Stewart's character, George Bailey).

7. See Lee Ann Obringer, *How Banks Work*, *HOWSTUFFWORKS*, <http://money.howstuffworks.com/personal-finance/banking/bank4.htm> (last visited Oct. 23, 2010).

the days of George Bailey.⁸ To keep pace with the demands of modern banking, over the years the mortgage industry has made a number of business innovations, including some significant changes to the land records.⁹ This has allowed a mortgage debt to be purchased from loan originators, like the Bailey Brothers Building & Loan, and sold to large investment firms where each mortgage may be bundled together with hundreds of other mortgages and resold in fractionalized shares to private investors.¹⁰ In George Bailey's era, each time a mortgage was sold to another bank or financial institution, the new owner would record a mortgage assignment in the county land records.¹¹

Today, because of the complexity of the transfers, many of these assignments are now recorded electronically.¹² Looking at the security instrument in the county recorder's office, you are likely to find the name "Mortgage Electronic Recordation Systems" listed as the mortgagee of record—a stand-in for the real owner of the debt.¹³ Although this innovative business technique has saved millions of dollars since its inception,¹⁴ it also represents a departure from the long-standing traditions of property law.¹⁵

This departure was the focal point in *Jackson v. Mortgage Electronic Registration Systems, Inc.*,¹⁶ where the Minnesota Supreme Court interpreted the foreclosure by advertisement statutes.¹⁷ The

8. See Edward Rothstein, *What Would George Bailey Do?*, N.Y. TIMES, Nov. 4, 2008, at C1, available at <http://www.nytimes.com/2008/11/04/arts/television/04conn.html>.

9. See Phyllis K. Slesinger & Daniel McLaughlin, *Mortgage Electronic Registration System*, 31 IDAHO L. REV. 805, 812 (1995).

10. See R. K. Arnold, *Yes, There is Life on MERS*, 11 PROB. & PROP., July/Aug. 1997, at 32, 34.

11. See Slesinger & McLaughlin, *supra* note 9, at 810–11.

12. Steve Cocheo, *Moving From Paper to Blips*, 88 A.B.A. BANKING J., January 1996, at 48, 48 (1996).

13. Steve Brandt, *Lawsuit Seeks to Block Some Foreclosures*, STAR TRIB. (Minneapolis), Jan. 26, 2008, available at <http://www.startribune.com/local/west/14444016.html> (noting that in Hennepin County, MERS is listed as the mortgagee of record on at least half of all new mortgage filings).

14. See Slesinger & McLaughlin, *supra* note 9, at 812–13; Arnold, *supra* note 10, at 35.

15. See GRANT S. NELSON & DALE A. WHITMAN, REAL ESTATE FINANCE LAW § 5.27 (5th ed. 2007); *MERSCORP, Inc. v. Romaine*, 861 N.E.2d 81, 86 (N.Y. 2006) (Kaye, C.J., dissenting in part).

16. 770 N.W.2d 487 (Minn. 2009).

17. The foreclosure by advertisement statutes interpreted by the court in *Jackson* are essentially unchanged from the versions enacted over 160 years ago. *Id.* at 494 ("The requirements of the statutes have changed very little over the past 160 years.").

court found that although electronic recordation may not have been contemplated when common law principles were established, this innovation is in accord with the plain language of the statutes.¹⁸ Had the court reached the opposite conclusion, the borrowers in default may have benefited from the delay, but such a decision would have come at a high price to the public.¹⁹

This note first examines a brief history of the mortgage industry and foreclosures in Minnesota.²⁰ It then details the supreme court's holding in *Jackson*,²¹ followed by an analysis of that decision.²² Finally, this note concludes that the court's determination that the defendant's innovation complies with the long-standing traditions in Minnesota property law is a sound approach that favors the public's best interest.²³

II. HISTORY

A. *The Current Mortgage Crisis*

In the early part of this decade, the United States experienced an unprecedented appreciation in property values.²⁴ On average, between 1997 and 2005, national home values increased by over fifty-five percent.²⁵ However, these gains were not evenly distributed and resulted in unaffordable housing for many buyers.²⁶

18. *Id.* at 500–501.

19. *See infra* notes 233–38 and accompanying text.

20. *See infra* Part II.

21. *See infra* Part III.

22. *See infra* Part IV.

23. *See infra* Part V.

24. Dickerson, *supra* note 1, at 399.

25. ALLEN J. FISHBEIN & PATRICK WOODALL, EXOTIC OR TOXIC? AN EXAMINATION OF THE NON-TRADITIONAL MORTGAGE MARKET FOR CONSUMERS AND LENDERS, CONSUMER FED'N AM., 28 (2006), available at http://www.consumerfed.org/elements/www.consumerfed.org/file/housing/Exotic_Toxic_Mortgage_Report0506.pdf. Further, “[i]n 2005, the number of home sales hit a fifth consecutive record year and home price appreciation was steady across the country, with many metropolitan areas having annual price increases above 10 percent.” *Id.* at 28. *See also S&P/Case-Shiller Home Price Index for Seasonally Adjusted U.S. National Values*, STANDARD & POOR'S (Aug. 30, 2010), <http://www.standardandpoors.com/indices/sp-case-shiller-home-price-indices/en/us/?indexId=spusa-cashpidff-p-us> (follow the hyperlink at the “U.S. Home Price Values/Seasonally Adjusted” intersection). The index shows an increase in home values on par with inflation until 1998 when, over the course of a year, values began to grow rapidly reaching a value increase of over fifteen percent by 2005. *Id.* By early 2006, values had peaked and rapidly plummeted in the following quarters. *Id.*

26. Dickerson, *supra* note 1, at 400. Specifically, this included many first-time

Mortgage companies responded by offering nontraditional loans to make housing more affordable.²⁷ As a result, many consumers believed they could afford previously unaffordable property.²⁸

The extended duration of the housing boom further fueled the consumption of home buyers.²⁹ With the expectation that value increase was the norm, many borrowers began to view their home as an investment, borrowing recklessly based on a plan to refinance when their monthly payments increased.³⁰ Many renters were desperate to realize their own “American Dream of Homeownership”;³¹ and many of those who already owned homes were in a frenzy to either upgrade to a larger, more luxurious “McMansion”³² or buy a second home as an investment property.³³

To capitalize on this opportunity, lenders further ignored the risks by substantially relaxing payment requirements and using minimal standards to verify income and assets.³⁴ Compounding the financial risk was the fact that many consumers already had

buyers who had been renting during the boom and entirely missed the rapid increase in property values that homeowners experienced. *See generally id.* at 400 (“[H]ousing price appreciation ultimately created a significant unaffordability problem for renters who wanted to purchase homes.”).

27. FISHBEIN & WOODALL, *supra* note 25, at 1 (“[L]enders offered essentially two mortgage products: fully amortizing, fixed rate and adjustable rate mortgages.”).

28. *See* Fed. Deposit Ins. Corp., *Mortgages: More Choices, New Risk for Borrowers*, FDIC CONSUMER NEWS, Summer 2005, at 2, 2 http://www.fdic.gov/consumers/consumer/news/csum05/summer_05_bw.pdf (“[M]any new loan products are being widely offered that could benefit some people but be huge mistakes for others.”).

29. Dickerson, *supra* note 1, at 400.

30. *See* Larry Rohter & Edmund L. Andrews, *McCain Rejects Broad U.S. Aid on Mortgages*, N.Y. TIMES, Mar. 26, 2008, *available at* <http://www.nytimes.com/2008/03/26/us/politics/26mortgage.html?pagewanted=1&r=2> (quoting Senator McCain stating that “[s]ome Americans bought homes they couldn’t afford, betting that rising prices would make it easier to refinance later at more affordable rates”)

31. Dickerson, *supra* note 1, at 408.

32. *See* Christopher Solomon, *The Swelling McMansion Backlash*, MSN REAL EST., <http://realestate.msn.com/article.aspx?cp-documentid=13107733> (“The average American home swelled from 983 square feet in 1950 to 2,349 square feet in 2004—a 140% increase in size.”).

33. *See* Nicole Gelinas, *Sheltering Speculation*, CITY J., Oct. 29, 2008, <http://www.city-journal.org/2008/eon1029ng.html>. During 2006, twenty-two percent of homes were purchased for investment purposes. Les Christie, *Homes: Big Drop in Speculation*, CNN MONEY, Apr. 30, 2007, http://money.cnn.com/2007/04/30/real_estate/speculators_fleeing_housing_markets/index.htm.

34. *See* Harvey, *supra* note 2. Lenders partly protected themselves from increased risk by charging consumers higher interest rates. *Id.*

significant consumer debt with minimal savings set aside as an emergency fund.³⁵ Worst of all, shady lenders took advantage of the housing frenzy and began promoting a variety of predatory lending schemes.³⁶

Eventually, the risks became too great and borrowers began defaulting.³⁷ As the number of foreclosed homes started to rise, property values quickly dropped, reducing or eliminating the home equity many borrowers required in their plan to refinance.³⁸ Further complicated by lenders no longer willing to take the same risks they had during the housing boom,³⁹ coupled with the aforementioned lack of consumer savings, 2008 foreclosure rates in the United States hit record levels.⁴⁰ The financial losses quickly spread to the rest of the economy and eventually morphed into a national financial crisis.⁴¹

35. See Dickerson, *supra* note 1, at 410 (“[C]onsumer debt has grown exponentially since 1976.”); Kelly Evans, *Hard-Hit Families Finally Start Saving, Aggravating Nation’s Economic Woes*, WALL ST. J., Jan. 6, 2009, at A1, available at <http://online.wsj.com/article/SB123120525879656021.html> (stating that during the last decade many Americans had a negative savings rate—spending more than they earned—and that economists now expect the savings rate to rebound to three percent to five percent or higher).

36. See Kathleen C. Engel & Patricia A. McCoy, *Turning a Blind Eye: Wall Street Finance of Predatory Lending*, 75 FORDHAM L. REV. 2039, 2043–44 (2007) (defining predatory lending as “a syndrome of loan abuses that benefit mortgage brokers, lenders, and securitizers to the serious detriment of borrowers”). In states with weak anti-predatory lending laws, the screening process is often “minimal or nonexistent.” *Id.* at 2041.

37. For a discussion of some of the risks taken by national banks, see Levitin, *supra* note 4, at 1009.

38. See Dickerson, *supra* note 1, at 413; FISHBEIN & WOODALL, *supra* note 25, at 9–12.

39. See generally Dickerson, *supra* note 1, at 414 (indicating that it became harder to refinance or borrow once home values began to drop).

40. *Id.* at 412. By 2008, nearly one in ten mortgages was either past due or in foreclosure. *Id.*

41. See *id.* at 415–16 (noting that the housing crisis had a “catastrophic effect” on the entire financial industry). President Franklin D. Roosevelt viewed the housing market as the “wheel within the wheel to move the whole economic engine.” Matthew D. Ekins, *Large-Scale Disasters Attacking the American Dream: How to Protect and Empower Homeowners and Lenders*, 30 W. NEW ENG. L. REV. 351, 366 (2008). See also Gjerstad & Smith, *supra* note 5, at A15 (“[A] financial crisis that originates in consumer debt, especially consumer debt concentrated at the low end of the wealth and income distribution, can be transmitted quickly and forcefully into the financial system.”).

B. *A Brief History of Foreclosures*

The common law principles applicable to mortgages developed in England in the fourteenth century.⁴² Initially, the mortgagor was treated especially harshly. For example, if a mortgagor failed to make a required payment on its due date, the property often reverted to the mortgagee, causing the mortgagor to lose all equity in the property.⁴³ This is known as strict foreclosure and is almost never used today.⁴⁴ To prevent inequitable results, most modern foreclosures involve a public sale of the property.⁴⁵ These sales may be initiated by either judicial or nonjudicial foreclosure in accordance with a state-specific statute.⁴⁶ A judicial foreclosure may be initiated in virtually every state and in twenty-two states is the only method.⁴⁷ Minnesota is among the twenty-eight states that also allow nonjudicial foreclosure.⁴⁸

Although either judicial or nonjudicial foreclosure proceedings are allowed in Minnesota, nonjudicial foreclosure, normally called foreclosure by advertisement, is the preferred method.⁴⁹ Foreclosure by advertisement is a process by which,

42. WILLIAM F. WALSH, A TREATISE ON MORTGAGES §§ 2–3 (1934).

43. See JESSE DUKEMINIER ET AL., PROPERTY 544 (6th ed. 2006).

44. *Id.*; see also Gregory R. Henrikson, *Perfecting Oregon's Land Sale Contract: Beyond Notice and Cure*, 76 OR. L. REV. 945, 961 (1997) (“Nationally, strict foreclosure was already rare by 1929.”).

45. DUKEMINIER, *supra* note 43, at 544. Strict foreclosure is now prohibited in all states except Illinois, Vermont, and Connecticut, and only then under certain limited circumstances. GRANT S. NELSON & DALE A. WHITMAN, REAL ESTATE TRANSFER, FINANCE, AND DEVELOPMENT 584 (7th ed. 2006); Debra Pogrud Stark, *Facing The Facts: An Empirical Study of the Fairness and Efficiency of Foreclosures and a Proposal for Reform*, 30 U. MICH. J.L. REFORM 639, 647 (1997).

46. Stark, *supra* note 45, at 643.

47. Plaintiffs’ Brief at 12 n.6, Jackson v. Mortg. Elec. Registration Sys., Inc., 770 N.W.2d 487 (Minn. 2009) (No. A08-397) [hereinafter Plaintiffs’ Brief].

48. *Id.* Minnesota Statutes section 580.01 also specifies that nonjudicial foreclosure is only authorized when the mortgage contains a “power of sale” provision. See also Backus v. Burke, 48 Minn. 260, 267, 51 N.W. 284, 285 (1892) (“The authority conferred upon a mortgagee to foreclose a mortgage by advertisement is that found in the power of sale, as that power appears in the instrument itself . . .”).

49. See Soufal v. Griffith, 159 Minn. 252, 256, 198 N.W. 807, 809 (1924) (noting that foreclosure by advertisement was “devised to avoid the delay and expense of judicial proceedings”) (internal quotations omitted). Amber Hawkins also stated the following:

Judicial foreclosure is expensive and time consuming for the lenders because they have to file a lawsuit and get a court order allowing them to take the property, which is why the lenders almost always choose to foreclose by advertisement. However, one benefit of judicial foreclosure

“according to the mortgage instrument and a state statute, the mortgaged property is sold at a nonjudicial public sale by a public official . . . without the stringent notice requirements, procedural burdens, or delays of a judicial foreclosure.”⁵⁰ The original Minnesota foreclosure by advertisement statutes were enacted in 1849, the same year Minnesota was established as a territory.⁵¹ Comparing these statutes with the modern statutes reveals that very little has changed over the past 160 years.⁵²

To be in compliance with the foreclosure by advertisement statute, the following are required: (1) the mortgagor must first have defaulted on his payment (or have satisfied another condition giving the mortgagee the power to sell); (2) there must not be any pending judicial proceeding concerning the mortgage; and (3) the mortgage, and all assignments thereof, must have been recorded in the county recorder’s office.⁵³ Additionally, a notice of foreclosure must be served upon the occupant of the premises and published in the newspaper for at least six consecutive weeks prior to the sheriff’s sale.⁵⁴ All foreclosure sales must be conducted by the county sheriff or the sheriff’s deputy, who will issue a “Sheriff’s Certificate of Sale,” which must be recorded by the purchaser within twenty days of the sale.⁵⁵ After the sale, the mortgagor who was foreclosed on is granted a statutory period in which he may pay

is that it provides a forum where the borrower can ask questions, request information about their loan, and assert any defenses they may have to the foreclosure.

Interview with Amber Hawkins, Staff Att’y, Legal Aid Soc’y of Minneapolis, in Minneapolis, Minn. (July 21, 2010). *See also* Plaintiffs’ Brief, *supra* note 47, at 12 (stating that foreclosure by advertisement deprives the homeowner of a judicial forum to raise Truth in Lending Act (TILA) defenses, or to challenge the process in which their home is being foreclosed).

50. BLACK’S LAW DICTIONARY 719 (9th ed. 2009).

51. *See* Act of Mar. 3, 1849, ch. 63, §§ 41, 42, 1849 Minn. Laws 139–40.

52. *Compare id.*, with MINN. STAT. §§ 580.02, .04 (2008).

53. MINN. STAT § 580.02.

54. *Id.* §§ 580.03–.04. Furthermore, because foreclosure by advertisement is a statutory creation, failure to strictly comply with the statutory requirements renders the foreclosure void. *Moore v. Carlson*, 112 Minn. 433, 434, 128 N.W. 578, 579 (1910).

55. MINN. STAT. §§ 580.06, .12. One criticism of the foreclosure process is that when the lender purchases the foreclosed home they can obtain an unfair double recovery by bidding less than the debt due and then reselling the property within one year for more than they bid. Stark, *supra* note 45, at 665. However, one empirical study during the last decade shows that this inequity occurs only two percent of the time. *Id.* In reality, lenders rarely make any true profit upon resale, and in most cases suffer a loss. *Id.* at 664–68.

off the amount necessary to redeem the property.⁵⁶ Typically this period is six months from the date of sale; but it may be up to a year in situations where a longer period is needed for agricultural reasons or the mortgagor has satisfied more than one-third of the original principle balance.⁵⁷ The mortgagor may tender the amount due for redemption to either the foreclosure purchaser or the sheriff on behalf of the foreclosure purchaser.⁵⁸ If the mortgagor does not tender the amount due within the statutory redemption period, the Sheriff's Certificate of Sale acts as a conveyance of the property to the foreclosure purchaser.⁵⁹

C. *Development of the Electronic Registration Concept*

After generating a loan, the originating lender often sells the loan on the secondary market to government-sponsored entities such as the Federal National Mortgage Association (Fannie Mae) or the Federal Home Loan Mortgage Corporation (Freddie Mac).⁶⁰ Alternatively, the originator may assign the loan to an affiliated trust or sell the loan to a loan aggregator or wholesale lender.⁶¹ After being sold or assigned, the individual loan is often pooled together with hundreds of other loans.⁶² If purchased by an entity such as Fannie Mae or Freddie Mac, they are issued as publicly traded stock, which is then purchased by third-party investors.⁶³

56. MINN. STAT. § 580.23.

57. *Id.* When it is established that the property has been abandoned, the redemption period may be reduced to five weeks. *Id.* § 582.032.

58. *Id.* § 580.24.

59. *Id.* § 580.12.

60. *Hashop v. Fed. Home Loan Mortg. Corp.*, 171 F.R.D. 208, 210 (N.D. Ill. 1997). The primary market is where the originating financial institution creates the mortgage loan to the borrower. *Id.* Often this is done via a third-party salesperson known as a mortgage broker. Mortgage brokers are typically paid a fee of between one and three percent of the loan value. James R. Hagerty, *Mortgage Brokers: Friends or Foes?*, WALL ST. J., May 30, 2007, available at <http://finance.yahoo.com/loans/article/103075/mortgage-brokers-friends-or-foes>.

61. Engel & McCoy, *supra* note 36, at 2045; Christopher L. Peterson, *Predatory Structured Finance*, 28 CARDOZO L. REV. 2185, 2209–10 (2007).

62. *Hashop*, 171 F.R.D. at 210; Peterson, *supra* note 61, at 2209.

63. See *About Fannie Mae*, FANNIE MAE, <http://www.fanniemae.com/kb/index?page=home&c=aboutus> (last visited Sept. 17, 2010); see also *Our Business*, FREDDIE MAC, http://www.freddie.com/corporate/company_profile/our_business/ (last visited Sept. 17, 2010) (stating how the process of securitization works).

If held in an affiliated trust or sold to an intermediary party, the mortgage pool is typically sold to a Wall Street investment firm known as an “issuer/depositor.”⁶⁴ The issuer/depositor then assigns the mortgage pool to a trust, and the trust issues mortgage-backed bond certificates to third-party investors with beneficiary interests in the trust.⁶⁵ The trust (which technically still owns the loans) guarantees the third-party investors the return of the loan principle plus a portion of the interest payments over the life of each loan.⁶⁶ The issuer/depositor and the loan servicer⁶⁷ also receive a portion of the interest payments.⁶⁸ Over the life of a mortgage, it is common for the loan to be bought and sold several times.⁶⁹ This type of financing is essential to the American mortgage industry in order to free the capital necessary for the continuing creation of additional loans.⁷⁰

Traditionally, each time a mortgage was sold, the security instrument would be recorded in the public land records.⁷¹ However, as the secondary mortgage industry became an increasingly common player, the recordation requirements created a rising tide of paper that began to stifle loan productivity.⁷² Loans

64. Plaintiffs’ Brief, *supra* note 47, at 5.

65. *Id.* at 6; accord *Hashop*, 171 F.R.D. at 210. Government-sponsored entities such as Fannie Mae and Freddie Mac also issue mortgage-backed securities. *Mortgage-Backed Securities*, U.S. SEC. & EXCHANGE COMMISSION, <http://www.sec.gov/answers/mortgagesecurities.htm> (last modified July 23, 2010).

66. *Hashop*, 171 F.R.D. at 210.

67. A loan servicer is a company that secondary market purchasers hire “to handle payment processing, tax and insurance escrows, foreclosure and other matters related to the loan or the property.” Arnold, *supra* note 10, at 34. In many cases, the servicer is the loan originator. *Id.* (noting that a servicing contract does not represent an interest in the land and thus does not appear in the public land records).

68. *Hashop*, 171 F.R.D. at 210.

69. Affidavit of William C. Hultman ¶ 9, *Jackson v. Mortg. Elec. Registration Sys., Inc.*, No. 08-305, 2008 U.S. Dist. LEXIS 10798 (D. Minn. Feb. 13, 2009) [hereinafter Affidavit of Hultman] (Hultman is the Senior Vice President of MERSCORP, discussed below). A mortgage note by itself (as opposed to the combination of a mortgage note and a security instrument) is a negotiable instrument under U.C.C. section 3-203. Arnold, *supra* note 10, at 34.

70. See Arnold, *supra* note 10, at 34 (“Home ownership in most other countries is far less attainable, largely because financing is not as readily available.”).

71. See Slesinger & McLaughlin, *supra* note 9, at 810–11.

72. See *id.* at 811; see also Arnold, *supra* note 10, at 34 (“[T]he sheer volume of transfers between servicing companies and the resulting need to record assignments caused a heavy drag on the secondary market. The burden affected lenders, title companies, consumers and even local recorders.”).

often were traded several times before the first assignment was recorded, leaving the public land records out of date and “clogged with unnecessary assignments.”⁷³ Many times these assignments were recorded in the wrong sequence, creating title problems.⁷⁴

In an effort to “streamline the lending process,”⁷⁵ the Mortgage Electronic Registration Systems, Inc. (MERSCORP) was created.⁷⁶ MERSCORP is a “nonstock corporation”⁷⁷ currently managed by twenty-six shareholding financial institutions that are also its users.⁷⁸ With the cooperation of the Mortgage Bankers Association of America and several leading mortgage banking firms, including several government agencies, MERSCORP developed a secure computer database to electronically track mortgage assignments for the secondary mortgage industry.⁷⁹ This database is known as the MERS System.⁸⁰

The MERS System is modeled after the Depository Trust Corporation (DTC), which has enabled securities markets to eliminate paper stock certificates to record the transfer of stocks, bonds, and other securities since the 1970s.⁸¹ Similarly, the

73. Arnold, *supra* note 10, at 34.

74. *Id.* (stating that error rates as high as thirty-three percent were common). See, e.g., Cocheo, *supra* note 12, at 48 (noting that prior to the MERS System, discussed below, the process of recording multiple assignments added up to a “massive paperwork challenge” such that, by one industry estimate, “it can cost as much as \$250,000 to clean up assignment problems relating to a single block of 2,500 loans”).

75. This phrase is used by Carson Mullen. See Carson Mullen, *MERS: Tracking Loans Electronically*, ALLBUSINESS (May 1, 2000), <http://www.allbusiness.com/finance/3594162-1.html>.

76. See Arnold, *supra* note 10, at 33; see also MERS’s Brief and Addendum at 3, Jackson v. Mortg. Elec. Registration Sys., Inc., 770 N.W.2d 487 (Minn. 2009) (No. A08-397) [hereinafter MERS’s Brief] (stating that the severe title problems created during the savings and loan crisis were one of the main catalysts for the creation of MERS). MERS was conceived in 1993 and incorporated in 1995, becoming fully operational in 1997. See Arnold, *supra* note 10, at 33.

77. Arnold, *supra* note 10 **Error! Bookmark not defined.**, at 33.

78. Brandt, *supra* note 13. MERSCORP is registered in Delaware and headquartered in Virginia. Peterson, *supra* note 61, at 2211.

79. Arnold, *supra* note 10, at 33; Peterson, *supra* note 61, at 2211.

80. Affidavit of Hultman, *supra* note 69, ¶ 2. MERS members, including some 3100 mortgage lenders and secondary market investors, pay the membership dues necessary to maintain this database. See *id.*; Peterson, *supra* note 61, at 2211; see also Arnold, *supra* note 10, at 34 (“[A]nnual membership fees currently range from \$500 to \$7,500, depending on a member’s size and types of business.”).

81. Arnold, *supra* note 10, at 35 (“[The DTC] revolutionized the way securities are traded.”); see also Mullen, *supra* note 75 (“The Depository Trust Corporation (DTC), of New York City, provided a good model.”).

creation of the MERS System reduces paper recording in the mortgage industry, greatly simplifying property chains of title.⁸²

The concept works by MERS acting as the “nominal mortgagee of record” for the MERS member/lender or secondary mortgage investor who actually owns the debt.⁸³ In other words, MERS doesn’t own the debt obligation, but it keeps track of who does. All the while, MERS is listed in the public land records as the party holding the security interest in the property, but only as a stand-in for the true owner of the debt.⁸⁴

MERS becomes the nominal mortgagee of record in one of two ways: (1) the borrower and lender designate MERS as the nominal mortgagee of record at the time the mortgage loan is originated, or (2) the mortgagee of record for an existing loan subsequently assigns the record to MERS.⁸⁵ Ideally, MERS then remains mortgagee of record throughout the life of the loan.⁸⁶ When loans are transferred, an assignment of the promissory note is executed electronically within the MERS System, but the security instrument remains registered with MERS in the county recorder’s office.⁸⁷ Considering that there are no means available to publicly record assignments of the promissory notes alone, the MERS System technically supplements the public land recording system.⁸⁸ As an additional benefit to vastly improving the accuracy of land records, the MERS System also significantly reduces the transaction

82. Arnold, *supra* note 10, at 35; *see also id.* at 33 (“Some have called MERS the most significant event for the mortgage industry since the formation of Fannie Mae and Freddie Mac.”).

83. *See* Peterson, *supra* note 61, at 2211; *see also* Slesinger & McLaughlin, *supra* note 9, at 806–7 (“Consistent with mortgage participations where a lead participant holds legal title on behalf of the other participants, and with secondary market transactions where mortgage servicers hold legal title on behalf of their investors, MERS will serve as mortgagee of record in a nominee capacity only.”). This eliminates the need to record each assignment of the promissory note. Slesinger & McLaughlin, *supra* note 9, at 806–7.

84. *See* Brandt, *supra* note 13.

85. Affidavit of Hultman, *supra* note 69, ¶ 5.

86. Arnold, *supra* note 10, at 34.

87. *Id.* However, when changing loan servicers, the Real Estate Settlement Procedures Act (RESPA) requires both the old and new servicer to notify the homeowner in writing when loan servicing is traded. 12 U.S.C. § 2605 (2006). These notifications are commonly called “hello/goodbye letters.” Arnold, *supra* note 10, at 34.

88. *See* MERS’s Brief, *supra* note 76, at 9 (“MERS thus fills an information void that the county recorders and registrars of title cannot provide—the identity of the servicer of the mortgage loan, which is not required to be recorded in Minnesota.”).

costs and filing fees that had previously been associated with preparing and recording the security interest in the public land records each time the loan was sold.⁸⁹

Since its inception, MERS has grown substantially. MERS now operates in all fifty states and the District of Columbia, and is regularly accepted as nominal mortgagee of record by over 3000 county clerks and county recorders throughout the United States, including all eighty-seven counties in Minnesota.⁹⁰ Over the course of the last decade, MERS registration has grown very rapidly.⁹¹ MERS is the current mortgagee on approximately sixty million mortgage loans,⁹² which represents roughly sixty percent of all newly originated mortgages nationwide.⁹³ In Hennepin County, MERS is listed as the mortgagee of record “on at least half of all new mortgage filings.”⁹⁴

D. *A Glitch in the System*

Although the MERS System was specifically “designed to operate within the existing legal framework in all U.S. jurisdictions,” defending the MERS concept has been a continuous uphill battle.⁹⁵ The problem is that mortgage documentation in America is bifurcated into the promissory note and security

89. Joint Brief of Am. Land Title Ass’n et. al. as Amici Curiae for Defendant at 4–5, *Jackson v. Mortg. Elec. Registration Sys., Inc.*, 770 N.W.2d 487 (Minn. 2009) (No. 08-305) [hereinafter Amici for MERS].

90. Affidavit of Hultman, *supra* note 69, ¶ 32; *see also* MERSCORP, Inc. v. Romaine, 861 N.E.2d 81, 85 (N.Y. 2006) (affirming a ministerial duty ordering the county clerk to record and index instruments in which MERS is mortgagee of record).

91. *See* Peterson, *supra* note 61, at 2211 n.161 (stating that in 2001, the total number of loan registrations within the MERS System was less than just five percent of all loans nationwide; and in the following years, MERS experienced growth rates of nearly two-hundred percent). The MERSCORP Website touts “[o]ur mission is to register every mortgage loan in the United States on the MERS® System.” *About MERS*, MERS, <http://www.mersinc.org/about/index.aspx> (last visited Aug. 2, 2010).

92. Mike McIntire, *Tracking Loans Through a Firm That Holds Millions*, N.Y. TIMES, Apr. 23, 2009, at B1, available at http://www.nytimes.com/2009/04/24/business/24mers.html?_r=1&ref=mortgage_electronic_registration_systems_inc.

93. Karmela Lejarde, *SunTrust Becomes Third Major Mortgage Provider in Recent Months to Require MERS® System*, MERS (Mar. 18, 2010), http://www.mersinc.org/newsroom/press_details.aspx?id=235; *see also* *Jackson v. Mortg. Elec. Registration Sys., Inc.*, 770 N.W.2d 487, 491–92 (Minn. 2009).

94. Brandt, *supra* note 13 (paraphrasing comment by Mike Cunniff, the Hennepin County Recorder and Registrar of Titles).

95. Arnold, *supra* note 10, at 35.

instrument.⁹⁶ Historically, these two parts could not be separated.⁹⁷

The MERS concept is based on two ideas: (1) every state permits a nominee to hold legal title in the public land records for another person, and (2) the “mortgage follows the note.”⁹⁸ Consequently, the rights to the security interest in the land will naturally follow each time a debt is assigned.⁹⁹ However, quite possibly, using these two notions in conjunction was never contemplated.¹⁰⁰ A leading treatise on mortgage law states the following:

[S]ecurity is worthless in the hands of anyone except a person who has the right to enforce the obligation; it cannot be foreclosed or otherwise enforced. . . . [Separating the security interest from the debt] will leave one person with an unsecured debt and the other with a security instrument that cannot be enforced.¹⁰¹

Thus, the modern day concept of the MERS System detracts from the authority of the common law rule.

Minnesota real estate professionals foresaw this derogation as a potential roadblock to real estate transactions and banded together to find a common solution.¹⁰² The solution came in the form of

96. Dale A. Whitman, *Chinese Mortgage Law: An American Perspective*, 15 COLUM. J. ASIAN L. 35, 62 (2001) (noting that bifurcation derives from historic English traditions).

97. Affidavit of Ann Burkhardt ¶ 3, Jackson v. Mortg. Elec. Registration Sys., Inc., 770 N.W.2d 487 (Minn. 2009) (No. 08-305) [hereinafter Affidavit of Burkhardt].

98. Arnold, *supra* note 10, at 34–35.

99. *Id.* at 34.

100. See Brandt, *supra* note 13. MERS represents “an off-record system which the statute didn’t contemplate.” *Id.* (quoting Rick Little, the former Deputy Examiner of Titles for Hennepin County).

101. NELSON & WHITMAN, *supra* note 15, § 5.27; see also Affidavit of Burkhardt, *supra* note 97 ¶ 3 (citing Nelson & Whitman in her assertion that mortgage bifurcation is a derogation to the common law). But see MERS’s Brief, *supra* note 76, at 32 (stating that despite the common law rule that a promissory note and security interest *should* not be separated, “[t]here is no requirement under Minnesota law that the mortgagee of record and the beneficial owner of the mortgage loan *must* be the same entity . . .”) (emphasis added).

102. See MERS’s Brief, *supra* note 76, at 13 (stating that “the real property section of the Minnesota State and County Bar Associations, the Registrar of Title for Hennepin and Ramsey Counties, and other Minnesota county recorders’ offices” worked together to address the MERS title problem). See also Interview with Chuck Hoyum, Chief Underwriting Counsel, Old Republic Nat’l Title Ins. Co., in Minneapolis, Minn. (July 20, 2010) (stating also that Minnesota is blessed in that, unlike many other states, the property law community here works particularly well together).

Minnesota Statutes section 507.413, commonly referred to as the “MERS statute,”¹⁰³ which was intended to officially recognize MERS as a nominee of record.¹⁰⁴ Specifically, the statute grants nominal mortgagees of record the authority to record assignments, satisfactions, releases, and powers of attorney to foreclose.¹⁰⁵ The statute applies to all instruments executed, recorded, or filed before, on, or after August 1, 2004.¹⁰⁶

Just two years later, the Minnesota Court of Appeals heard *In re Sina*,¹⁰⁷ where a couple sought to void the foreclosure sale conducted by MERS for their home in Champlin, Minnesota.¹⁰⁸ In December 2002, David and Candice Sina financed their new home with a mortgage originated by Maribella Mortgage, LLC (Maribella), and the mortgage was recorded in the Hennepin County land records with Maribella listed as the mortgagee of record.¹⁰⁹ Subsequently, MERS was assigned as the nominal mortgagee of record and the debt was sold on the secondary market to Aurora Loan Services, Inc. (ALS).¹¹⁰ By June 2003, the Sinas had become delinquent on their mortgage payments.¹¹¹ Shortly thereafter, MERS initiated foreclosure by advertisement proceedings, which culminated in a sheriff’s sale of the property in November 2003.¹¹²

103. Jackson v. Mortg. Elec. Registration Sys., Inc., 770 N.W.2d 487, 491 (Minn. 2009).

104. See Act of Apr. 6, 2004, ch. 153, § 2, 2004 Minn. Laws 76, 76–77 (codified at MINN. STAT. § 507.413 (2008)); Audio tape: Mortgage Satisfaction Certificates and Assignments or Releases, Hearing on S.F. 1621 Before S. Judiciary Comm., 83rd Legislative Session (Feb. 10, 2004) (on file at the Minnesota Legislative Reference Library) [hereinafter Hearing on S.F. 1621]; *Mortgage Satisfaction Certificates and Assignments or Releases: Hearing on H.F. 1805 Before the H. Civ. Law Comm.*, 2003–2004 Leg., 83rd Sess. (Minn. 2004) (statement of Chuck Parsons, at 9:07; and statement of Rep. Thomas Pugh, at 13:10), *audio available at* http://www.house.leg.state.mn.us/audio/archivescomm.asp?comm=4&ls_year=83 (follow “Listen Now” hyperlink under “Civil Law” and “Tuesday, February 3, 2004”). MERS was, however, referenced in connection with the statute. *Id.*

105. MINN. STAT. § 507.413.

106. *Id.*

107. No. A06-200, 2006 Minn. App. Unpub. LEXIS 1094 (Minn. Ct. App. Sept. 26, 2006).

108. *Id.* at *1–2.

109. *Id.* at *2.

110. *Id.*

111. *Id.*

112. *Id.*

Believing that MERS had not complied with the Fair Debt Collection Practices Act,¹¹³ the Sinas brought an action in state court to void the foreclosure and vacate the sale.¹¹⁴ MERS removed the case to federal court, where the court granted summary judgment for MERS.¹¹⁵ The Sinas appealed to the Eighth Circuit, which affirmed the district court's decision.¹¹⁶ The Sinas then amended their original complaint, again bringing the action in state court, alleging that MERS, acting as nominee for ALS, did not fulfill the foreclosure requirements necessitated by Minnesota state law.¹¹⁷ On appeal, the Minnesota Court of Appeals found that MERS had standing to foreclose and met the statutory requirements of foreclosure by advertisement; affirming what each of the previous courts had determined.¹¹⁸

It would seem that this case properly addressed the observed derogation, filling in with common law situations (such as foreclosure), that which was either ambiguous or omitted by the MERS statute.¹¹⁹ However, the plaintiffs' expert witness in *Jackson*

113. See 15 U.S.C. § 1692(a)-(p) (2006).

114. *In re Sina*, 2006 Minn. App. Unpub. LEXIS 1094, at *7.

115. *Id.*

116. *Sina v. Mortg. Elec. Registration Sys.*, 124 F. App'x 479 (8th Cir. 2005).

117. *In re Sina*, at *8.

118. *Id.* at *5-6. The court also determined that even if MERS had violated state law, res judicata barred vacating the foreclosure sale because the Sinas' amended claim arose from the same operative facts that had been the subject of previous litigation. *Id.* at *7-8.

119. *In re Sina* was just one of many similar lawsuits that were filed across the country prior to *Jackson*. The majority of jurisdictions favored MERS's standing to foreclose as nominee of record, but unlike *In re Sina* and *Jackson*, many of the cases involved MERS's authority to appear in court on behalf of the MERS members, not to foreclose by advertisement. See *Trent v. Mortg. Elec. Registration Sys., Inc.*, 288 F. App'x 571, 572 (11th Cir. 2008) (stating that MERS has standing to foreclose as nominee for lender); *Morgera v. Countrywide Home Loans, Inc.*, No. 2:09-cv-1476-MCE-GGH, 2010 U.S. Dist. LEXIS 2037, at *21 (E.D. Cal. Jan. 12, 2010) (stating that the majority of courts have found that MERS has standing to foreclose as the nominee of the lender); *Hilmon v. Mortg. Elec. Registration Sys., Inc.*, No. 06-13055, 2007 U.S. Dist. LEXIS 29578, at *8-9 (E.D. Mich. Apr. 23, 2007) (finding that MERS does not need to hold the note to foreclose and that borrower expressly gave MERS right to foreclose as nominee); *In re Huggins*, 357 B.R. 180, 183 (Bankr. D. Mass. 2006) (finding that MERS had authority to conduct a foreclosure by power of sale under Massachusetts law); *Mortg. Elec. Registration Sys., Inc. v. Ventura*, No. CV054003168S, 2006 Conn. LEXIS 1154, at *3 (Super. Ct. Apr. 20, 2006) (finding that "there is no question that [MERS] is the correct party to bring this [foreclosure] action"); *Mortg. Elec. Registration Sys., Inc. v. Revoredo*, 955 So. 2d 33, 34 (Fla. Dist. Ct. App. 2007) (finding that the clear majority of cases support MERS's standing to maintain mortgage foreclosure proceedings); *Mortg. Elec. Registration Sys., Inc. v. Azize*, 965 So. 2d 151, 153-54

noted that *Sina* is an unpublished decision, and is thus without precedential value.¹²⁰ She also noted that the Sinas were not represented by legal counsel.¹²¹ Therefore, *Sina* only represented a temporary fix to any gaps not expressly covered by the MERS statute. Given the high rate of foreclosures in the years that followed, it was only a matter of time before MERS's ability to foreclose in Minnesota was challenged again.¹²²

(Fla. Dist. Ct. App. 2007) (finding that a party seeking to foreclose need not be beneficial owner of the note); *MERSCORP, Inc. v. Romaine*, 861 N.E.2d 81, 84 (N.Y. 2006) (holding that the county clerk must accept the MERS assignments and discharges of mortgage for recording). *But see In re Vargas*, 396 B.R. 511, 516 (Bankr. C.D. Cal. 2008) (finding that without knowing the identity of the beneficial owner of the note, MERS lacked standing to obtain stay relief in court); *Mortg. Elec. Registration Sys., Inc. v. Sw. Homes of Ark., Inc.*, 301 S.W.3d 1, 5 (Ark. 2009) (finding that MERS held no authority to act as an agent for foreclosure because they held no interest in the land); *Landmark Nat'l Bank v. Kesler*, 192 P.3d 177, 179–80 (Kan. Ct. App. 2008) (finding that MERS was not the true mortgagee but rather an agent of the true mortgagee because mortgage stated MERS was “solely” nominee); *Mortg. Elec. Registration Sys., Inc. v. Neb. Dep't of Banking & Fin.*, 704 N.W.2d 784, 787–88 (Neb. 2005) (MERS does not acquire mortgage loans as defined under state law and, therefore, it is not subject to the requirements of the Act).

120. Affidavit of Burkhart, *supra* note 97, ¶ 7. *See also* *Vlahos v. R&I Constr. of Bloomington, Inc.*, 676 N.W.2d 672, 676 n.3 (Minn. 2004) (“[W]e pause here to stress that unpublished opinions of the court of appeals are not precedential. The danger of miscitation is great because unpublished decisions rarely contain a full recitation of the facts. Unpublished decisions should not be cited by the district courts as binding precedent.”) (citations omitted); *State ex rel. Hatch v. Emp'rs Ins. of Wausau*, 644 N.W.2d 820, 828 (Minn. Ct. App. 2002) (“We remind courts that our unpublished opinions are [a]t best of persuasive value and are not controlling.”) (alteration in original) (citation omitted) (internal quotation marks omitted).

121. Affidavit of Burkhart, *supra* note 97, ¶ 7. Although the opinion indicates that David Sina represented himself pro se, *In re Sina*, No. A06-200, 2006 Minn. LEXIS 1094, at *1 (Ct. App. Sept. 26, 2006), David Sina possesses a J.D. degree from William Mitchell and claims to have at least thirty years of experience in construction law. *See Dave Sina's Biography*, FIVE STAR LEGAL SERVICES, <http://sinalegalservices.com/biography.aspx> (last visited Sept. 16, 2010).

122. Not long after *In re Sina*, foreclosure rates in the United States hit record levels. *See Dickerson*, *supra* note 1, at 396. In the Minneapolis-Saint Paul metropolitan area, MERS was the mortgagee of record in approximately forty percent of all foreclosures. *See Brandt*, *supra* note 13. *See also* FISHBEIN & WOODALL, *supra* note 25, at 1 (“There has been a proliferation of new mortgage products in recent years.”); Michael Grover, *Fed-Led Research Reveals Need For Better Twin Cities Foreclosure Data*, COMMUNITY DIVIDEND, Sept. 2006, http://www.minneapolisfed.org/publications_papers/pub_display.cfm?id=2200 (“MERS-related loan volume is growing quickly. When the researchers compared later records with the foreclosure sales records from 2002, the portion of foreclosure sale documents with MERS listed as the lender was much larger, with over one-third of the foreclosure sales in Hennepin County alone in 2005.”).

III. SUMMARY OF THE CASE

A. *Background*

In the barest sense, the plaintiffs in *Jackson v. Mortgage Electronic Registration Systems, Inc.*¹²³ could be described as five individuals who collectively borrowed nearly one million dollars from various lenders and, for one reason or another, did not comply with their loan obligations.¹²⁴ However, telling each plaintiff's story not only better describes the background of this case, it also paints a clearer picture of what led America into the mess we found ourselves in just a few short years ago.

Jewelean Jackson and her daughter lived in a house in North Minneapolis since 1991¹²⁵ in what has long been regarded as a rough neighborhood.¹²⁶ Early in 2004, Jackson's home, which was in severe disrepair, was condemned by the City of Minneapolis.¹²⁷ Shortly thereafter, Jackson missed several mortgage payments and the property was sold at a foreclosure sale.¹²⁸ At the time, she owed approximately \$40,000 on the mortgage.¹²⁹

Sometime after the mortgage foreclosure sale, Jackson was approached by a real estate agent-investor who offered to help her keep the property.¹³⁰ After Jackson accepted his help, the investor paid roughly \$45,000 to redeem the property and arranged for the

123. *Jackson v. Mortg. Elec. Registration Sys., Inc.*, 770 N.W.2d 487 (Minn. 2009).

124. See MERS's Brief, *supra* note 76, at 2.

125. Plaintiffs' Complaint ¶ 40, *Jackson v. Mortg. Elec. Registration Sys., Inc.*, No. 08-305, 2008 U.S. Dist. LEXIS 10798 (D. Minn. Feb. 13, 2008) [hereinafter Complaint]; Affidavit of Jewelean Jackson in Support of Motion for Temporary Injunction ¶ 1, *Jackson v. Mortg. Elec. Registration Sys., Inc.*, No. 08-305, 2008 U.S. Dist. LEXIS 10798 (D. Minn. Feb. 13, 2008) [hereinafter Affidavit of Jackson].

126. See, e.g., Minneapolis Police Dep't, *Fourth Precinct Other Tracked Offenses: January 6, 2008-January 12, 2009*, http://www.ci.minneapolis.mn.us/police/crime-statistics/codefor/maps/572_Pct4_OtherC4Offenses.pdf (last visited Oct. 11, 2010) (depicting high crime activity in North Minneapolis); City Pages Staff, *North Side Story: This Year the Murder Rate Has Doubled in North Minneapolis. What's Changed? Nothing, Really. That's the Trouble.*, CITY PAGES, Aug. 25, 2004, available at <http://www.citypages.com/2004-08-25/news/north-side-story> ("In June, the residential street erupted in violence. An ice-cream man was shot during a botched robbery involving just \$40. Later that month, a teenager involved in gang activity was shot three times in the leg.").

127. Complaint, *supra* note 125, ¶ 41.

128. *Id.* ¶ 42.

129. *Id.* ¶ 41.

130. *Id.* ¶ 43.

necessary repairs to the house to lift the condemnation order.¹³¹ Jackson moved out while the repairs were in progress.¹³²

Early 2006, the investor informed Jackson that the repairs were complete and that it was time to compensate him for his services.¹³³ The investor arranged a meeting with a mortgage broker and guided Jackson through the loan application process, which resulted in her obligation to a thirty-year ARM with a principle balance of \$229,500.¹³⁴ The initial annual interest rate began at 8.9% and after six months became adjustable to a maximum of 15.9%.¹³⁵ Additionally, the amortization schedule was based on a forty-five year term; thus, after making thirty years of payments Jackson would be required to make a balloon payment of approximately \$160,000.¹³⁶ For his services, the investor would have received a payoff of \$215,317.¹³⁷

David Williams purchased his home in South Minneapolis, where he had lived and cared for his eighty-two-year-old uncle since 1989.¹³⁸ Williams, despite only being able to read at a fourth grade level,¹³⁹ was employed and consistently paid his mortgage for twenty years.¹⁴⁰ However, in 2006, Williams responded to an internet survey that promised him a free gift.¹⁴¹ Within hours of filling out the survey, Williams was contacted by a mortgage broker who offered to refinance his existing mortgage.¹⁴² Williams was told the new loan would be about the same interest rate as his current loan, and as an added bonus he could obtain some cash out.¹⁴³ Needing money to make repairs on the home and pay off consumer debt, Williams agreed.¹⁴⁴ As a result, Williams ended up with two new

131. *Id.*

132. *Id.*

133. *Id.* ¶ 44.

134. Affidavit of Jackson, *supra* note 125, ¶¶ 2–3.

135. Complaint, *supra* note 125, ¶ 49.

136. *Id.*

137. *Id.* ¶¶ 43, 45 (“Many of the repairs done to the home were shoddy and unprofessional.”).

138. Complaint, *supra* note 125, ¶¶ 86–87.

139. Affidavit of David Williams ¶ 3, Jackson v. Mortg. Elec. Registration Sys., Inc., No. 08-305, 2008 U.S. Dist. LEXIS 10798 (D. Minn. Feb. 13, 2008) [hereinafter Affidavit of Williams].

140. Interview with Amber Hawkins, *supra* note 49. Hawkins was the colead attorney for the plaintiffs.

141. *Id.* ¶ 4.

142. *See id.* ¶ 4.

143. *Id.* ¶ 7.

144. *Id.* ¶ 6.

mortgages: one for \$192,000 and a junior mortgage for an additional \$48,000.¹⁴⁵ The first mortgage was a thirty-year ARM with an initial annual interest rate of 8.125%.¹⁴⁶

Like Jackson's loan, the payments were based on a forty-five year amortization schedule.¹⁴⁷ Thus, after thirty years Williams would still owe a balance of over \$162,000.¹⁴⁸ The junior mortgage was a thirty-year fixed at the rate of 11.125%, with payments based on a forty-year year amortization schedule.¹⁴⁹ At the closing, Williams was presented with many documents that he could neither read nor understand.¹⁵⁰ These documents and the terms of the mortgages were never correctly explained.¹⁵¹ Unable to keep up with the new payments, Williams's home eventually went into foreclosure, and was purchased by MERS in November 2007.¹⁵²

Brenda Doane, a single mother of two, purchased her home in Richfield in 2004, where she was employed as a dental assistant.¹⁵³ Early in 2007, Doane lost her job.¹⁵⁴ She searched for a new job to no avail, and within months she fell behind in her mortgage payments.¹⁵⁵ Eventually, her home went into foreclosure and was sold to MERS in July 2007.¹⁵⁶

Ethylon and William Brown purchased their home in Southwest Minneapolis in 2007.¹⁵⁷ Rather than selling their old home, the couple decided to keep their previous residence as an investment property.¹⁵⁸ However, not long after their first renters moved in, they stopped paying rent.¹⁵⁹ After evicting the renters, the property was vacant for several months.¹⁶⁰ Eventually, the

145. See Complaint, *supra* note 125, ¶¶ 96, 99 n.9.

146. *Id.* ¶ 96.

147. *Id.*

148. *Id.*

149. *Id.* ¶ 99 n.9.

150. Affidavit of Williams, *supra* note 139, ¶ 8.

151. Complaint, *supra* note 125, ¶ 93.

152. See *id.* ¶ 102.

153. *Id.* ¶ 70.

154. Affidavit of Brenda Doane ¶ 4, Jackson v. Mortg. Elec. Registration Sys., Inc., No. 08-305, 2008 U.S. Dist. LEXIS 10798 (D. Minn. Feb. 13, 2008).

155. *Id.* ¶ 4; Complaint, *supra* note 125, ¶ 77.

156. See Complaint, *supra* note 125, ¶¶ 78, 83.

157. See *id.* ¶ 63.

158. Interview with Amber Hawkins, *supra* note 49; see Affidavit of Ethylon B. Brown ¶ 5, Jackson v. Mortg. Elec. Registration Sys., Inc., No. 08-305, 2008 U.S. Dist. LEXIS 10798 (D. Minn. Feb. 13, 2008).

159. Interview with Amber Hawkins, *supra* note 49; see Affidavit of Brown, *supra* note 158, ¶ 6.

160. Interview with Amber Hawkins, *supra* note 49; see Affidavit of Brown, *supra*

couple's savings dried up and they missed several mortgage payments.¹⁶¹ Shortly after, both of their properties went into foreclosure, and the Browns' new home was sold at a sheriff's sale in February, 2008.¹⁶²

Thus, each plaintiff arrived at financial troubles in different ways. However, each of their stories is shared by thousands of others,¹⁶³ both in Minnesota and around the country.¹⁶⁴ Whether by an equity-stripping scheme, shady lending practices, unemployment, or over-reliance on a booming housing market with too little cash savings, the common element among the plaintiffs was that their mortgages were held by MERS as a nominee of record.¹⁶⁵ Moreover, following default, it was MERS that instituted the foreclosure by advertisement proceedings.¹⁶⁶

B. District Court

Banding together in an effort to prevent losing their homes, the plaintiffs filed a class action suit in state court claiming that MERS violated Minnesota property law by foreclosing mortgages by advertisement without the proper recordation of all mortgage assignments.¹⁶⁷ Accordingly, the plaintiffs sought to restrain MERS from commencing any further nonjudicial foreclosures without first recording assignments and from evicting homeowners following the redemption period on MERS-initiated foreclosures.¹⁶⁸ MERS responded by removing the case to federal court.¹⁶⁹ Believing the likelihood of the plaintiffs' success at trial to be slight,

note 158, ¶¶ 6–7.

161. Interview with Amber Hawkins, *supra* note 49; see Complaint, *supra* note 125, ¶ 64.

162. Complaint, *supra* note 125, ¶¶ 65–66; Affidavit of Brown, *supra* note 158, ¶¶ 7, 10.

163. See, e.g., Ford Fesseden, *The American Dream Foreclosed*, N.Y. TIMES, Oct. 14, 2007, available at <http://query.nytimes.com/gst/fullpage.html?res=9A0CEFDE1038F937A25753C1A9619C8B63&sec=&spon=&pagewanted=all>.

164. See Interview with Amber Hawkins, *supra* note 49; see also Prentiss Cox, *Foreclosure Reform Amid Mortgage Lending Turmoil: A Public Purpose Approach*, 45 HOUS. L. REV. 683, 688 (2008) (describing the scope and magnitude of the foreclosure crisis).

165. See *Jackson v. Mortg. Elec. Registration Sys., Inc.*, No. 08-305, 2008 U.S. Dist. LEXIS 10798, at *6 (D. Minn. Feb. 13, 2008).

166. *Id.* at *7.

167. *Id.* at *1–2.

168. See *id.* at *2.

169. *Id.* at *1.

the district court denied a temporary injunction.¹⁷⁰

In contemplation of a permanent injunction, the court realized that the dispositive issue in the case concerned the interpretation of Minnesota state law.¹⁷¹ Furthermore, in addition to being novel and likely to reoccur, the court also recognized that the class action suit sought sweeping relief and had arrived in federal court solely on the basis of diversity rather than being a federal question.¹⁷² The district court therefore certified the following question for the Minnesota Supreme Court:

Where an entity, such as defendant MERS, serves as mortgagee of record as nominee for a lender and that lender's successors and assigns and there has been no assignment of the mortgage itself, is an assignment of the ownership of the underlying indebtedness for which the mortgage serves as security an assignment that must be recorded prior to the commencement of a mortgage foreclosure by advertisement under Minn. Stat. ch. 580?¹⁷³

C. Minnesota Supreme Court—the Majority Decision

In answering this question, the court first looked to the foreclosure by advertisement statutes, ultimately determining that a phrase within the statute unambiguously distinguished a “mortgage” (i.e., the instrument used to secure a debt) as separate from the “debt” itself (represented by the promissory note).¹⁷⁴ Since, according to the statute, only recordation of the “mortgage” is required, MERS, as the continuous record holder of the security interest, was in full compliance.¹⁷⁵

The court next considered the effect of the traditional concept

170. *See id.* at *2, *4–12.

171. *See Jackson v. Mortg. Elec. Registration Sys., Inc.*, No. 08-305, 2008 U.S. Dist. LEXIS 14785, at *5 (D. Minn. Feb. 27, 2010) (“In a federal system, it is obviously desirable that questions of law which . . . are both intensely local and immensely important to a wide spectrum of state government activities be decided in the first instance by state courts.”) (quoting *Elkins v. Moreno*, 435 U.S. 647, 662 n.16 (1978)).

172. *Id.* at *4.

173. *Jackson v. Mortg. Elec. Registration Sys., Inc.*, 770 N.W.2d 487, 489 (Minn. 2009) (stating the Minnesota Supreme Court’s reformulation of the district court’s certified question).

174. *Id.* at 496; *see* MINN. STAT. §§ 580.02, .04 (2008).

175. *Jackson*, 770 N.W.2d at 496.

that “the mortgage follows the note.”¹⁷⁶ In short, each time a promissory note is assigned, an equitable interest in the mortgage is created in the assignee.¹⁷⁷ Thus, the question was whether this change in equitable interest of the mortgage required recordation.¹⁷⁸ Case history indicated that the “manifest purpose” of the recording requirement was “to make the title to the mortgage [a] matter of record,” thus creating certainty of ownership;¹⁷⁹ however, the requirement is not one of “supertechnical niceties and details of description.”¹⁸⁰ Therefore, the court has never required the recording of equitable interests to be in compliance with the foreclosure by advertisement process.¹⁸¹

Last, the plaintiffs contended that because MERS acted only as nominee for MERS members, they did not actually hold legal title to the mortgage.¹⁸² They claimed that legal title was actually held by the MERS member who was assigned the debt; thus, each time the debt was assigned, legal title transferred, which required recordation.¹⁸³ But the court held that this argument also failed because it has been established that assignment of a debt did not affect legal title to the security interest.¹⁸⁴ Therefore, the court found that MERS properly held both record and legal title to each of the plaintiff’s mortgages.¹⁸⁵

Finally, the court verified MERS’s authority to foreclose, stating that “the power of sale must be exercised in the name of the

176. *Id.* at 497; *see also* First Nat’l Bank v. Pope, 85 Minn. 433, 434, 89 N.W. 318, 318 (1902); Affidavit of Burkhart, *supra* note 97, ¶ 3 (footnote omitted) (quoting NELSON & WHITMAN, *supra* note 15, § 5.27) (“The security [mortgage] is virtually inseparable from the obligation unless the parties to the transfer expressly agree to separate them.”).

177. *Jackson*, 770 N.W.2d at 497.

178. *See id.*

179. *Id.* (quoting Morrison v. Mendenhall, 18 Minn. 232, 236 (1872)).

180. *Id.* at 498 (quoting Soufal v. Griffith, 159 Minn. 252, 255–56, 198 N.W. 807, 808–9 (1924)).

181. *Jackson*, 770 N.W.2d at 498; *see also* Morrison, 18 Minn. at 237 (stating that a “mere equitable” interest does not require recordation to be in compliance with the statutes).

182. *Jackson*, 770 N.W.2d at 498.

183. *Id.*

184. *See id.* at 499 (“[I]t is possible for a party to hold legal title in the security instrument . . . without holding an interest in the promissory note.”); *see also* Wilson v. Hayes, 40 Minn. 531, 42 N.W. 467 (1889) (holding that a promissory note did not affect legal title in the mortgage).

185. *Jackson*, 770 N.W.2d at 499.

party who has the legal title.”¹⁸⁶ Accordingly, the certified question was answered in the negative.¹⁸⁷

D. *The Dissent*

In his dissent, however, Justice Alan Page believed that MERS had not complied with the foreclosure by advertisement statutes.¹⁸⁸ The statutes state that foreclosure by advertisement is not available until “*all* assignments . . . have been recorded.”¹⁸⁹ Thus, when the majority acknowledged that each transfer of debt also conferred an assignment of equitable interest in the mortgage,¹⁹⁰ Justice Page concluded that, to be in compliance, this equitable interest must also be recorded.¹⁹¹

IV. ARGUMENT

A. *What About the MERS Statute?*

As mentioned previously,¹⁹² by passing the MERS statute, the legislature appears to have officially recognized MERS and expressly approved MERS’s authority to record mortgage instruments on behalf of its members.¹⁹³ Ever since this amendment took effect, MERS has contended that because the Minnesota Legislature gave its blessing to the MERS concept, the statute naturally extended to foreclosure by advertisement proceedings.¹⁹⁴ However, the plaintiffs referred to this perceived extension as a “sweeping exception to the requirements of the foreclosure by advertisement statute.”¹⁹⁵ Ultimately, the court did not agree with the plaintiffs.¹⁹⁶

186. *Id.* at 500 (quoting *Burke v. Backus*, 51 Minn. 174, 179, 53 N.W. 458, 459 (1892)).

187. *Id.* at 503.

188. *See id.* (Page, J., dissenting).

189. *Id.* (emphasis added) (quoting MINN. STAT. § 580.02(3) (2008)).

190. *Id.* at 494.

191. *See id.*; *see, e.g.*, *Moore v. Carlson*, 112 Minn. 433, 434, 128 N.W. 578, 579 (1910) (stating that because foreclosure by advertisement is a statutory creation, the foreclosing party must “must show an exact and literal compliance with its terms”).

192. *See supra* note 104 and accompanying text.

193. *Jackson*, 770 N.W.2d at 494.

194. *See* MERS’s Brief, *supra* note 76, at 18–19.

195. Plaintiffs’ Reply Brief at 9, *Jackson v. Mortg. Elec. Registration Sys., Inc.*, 770 N.W.2d 487 (Minn. 2009) (No. A08-397) [hereinafter Plaintiffs’ Reply Brief].

196. *Jackson*, 770 N.W.2d at 495.

Most convincing is what is *not* in the legislative history of section 507.413. There is no discussion of MERS's right to foreclose by advertisement and very little indication that the legislature intended its blessing to extend beyond the authority of recording mortgage instruments.¹⁹⁷ The plaintiffs contended that it is the legislature's duty alone to determine whether or not the MERS statute also confers the right to foreclose.¹⁹⁸

The plaintiffs further contended that when the foreclosure by advertisement statutes were enacted, the legislature never intended to allow "an entity with as little interest as MERS to act as a straw man to hide the chain of assignments of a mortgage loan in foreclosure."¹⁹⁹ Construing section 507.413 to allow MERS the right to foreclose as nominal mortgagee would defeat the purpose of the foreclosure by advertisement statutes by allowing assignments of the mortgage to no longer be a part of the public record.²⁰⁰ The plaintiffs maintained that the legislature enacted the MERS statute as a recording act solely to grant MERS the authority to record.²⁰¹ Thus, plaintiffs argued, when a MERS member decided to initiate foreclosure proceedings, MERS had the ability to update the security instrument by tracing the chain of custody of the note and to file corresponding mortgage assignments in the county recording office to be in compliance with the foreclosure statutes.²⁰²

MERS, however, contended that this logic gave way to inconsistent results.²⁰³ After all, MERS argued, if the requirement

197. Plaintiffs' Brief, *supra* note 47, at 35–36; see Hearing on S.F. 1621, *supra* note 104. This possibly is the case because when the bill was passed in 2004, property values were increasing rapidly and foreclosure rates were relatively low. See *supra* note 25 and accompanying text.

198. See Plaintiffs' Reply Brief, *supra* note 195, at 9 ("[The] legislature alone should determine whether the convenience and cost savings for MERS and its members justify such a fundamental change.").

199. Plaintiffs' Brief, *supra* note 47, at 32. To be clear, when legal title to the mortgage and note are separated, there is no method of recording besides the MERS System that determines who maintains the right to foreclose on the promissory note. Interview with Chuck Hoyum, *supra* note 102 ("Only the security interest is recorded in the land recording office . . . not the note, and certainly not assignments of the note.").

200. Plaintiffs' Brief, *supra* note 47, at 35.

201. See *Jackson*, 770 N.W.2d at 495 ("[A] Recording Act creates no obligations; rather, it uses recording to resolve disputes between parties who have no contractual relationship, but who lay claim to the same title.").

202. Plaintiffs' Brief, *supra* note 47, at 35.

203. MERS's Brief, *supra* note 76, at 19.

to record assignments was to make transfers of the debt a matter of public record, then why shouldn't the ninety-eight percent of mortgagors who honor their debt obligations have also benefited from this requirement?²⁰⁴ MERS stated that under the plaintiffs' analysis, only those who failed to honor their debt obligations benefited from this interpretation of the MERS statute.²⁰⁵

Ultimately, the Minnesota Supreme Court recognized that the MERS statute represented the legislature's approval of the MERS concept, but because the amendment was technically a recording statute and never specifically addressed foreclosure, the court refused MERS the authority to foreclose by advertisement.²⁰⁶

B. *Hiding Behind an Opaque Corporate Wall*

A common theme that seems to unite all of the plaintiffs among the different jurisdictions who have brought suits against MERS was their belief that MERS helped to facilitate the mortgage crisis.²⁰⁷ A number of lawyers and academics claimed that the MERS System served as nothing more than an "opaque corporate wall" hiding the true owner of the mortgage loan,²⁰⁸ that MERSCORP was simply a corporate-driven "profit-engine" for the mortgage industry,²⁰⁹ and that this wall provided an impenetrable shield for the wealthy investors who controlled the capital.²¹⁰

Academics also argued that plaintiffs in different jurisdiction can also claim that in the heyday of shady lending practices, thinly financed loan originators would be used as "disposable filter[s]" for Wall Street investment firms.²¹¹ The theory was that after a

204. *Id.*

205. *Id.*

206. *See Jackson*, 770 N.W.2d at 495.

207. *See* Mark A. Cohen, *Foreclosure Challenge is Rebuffed by Minnesota Supreme Court*, MINN. LAWYER, Aug. 17, 2009, available at <http://www.allbusiness.com/legal/legal-services-litigation/12687396-1.html> ("The rapid and careless expansion of mortgage loan sales on the secondary market is a well recognized cause to the current financial meltdown . . .") (quoting Amber Hawkins).

208. *See, e.g., Peterson, supra* note 61, at 2266.

209. Brief for South Brooklyn Legal Services et al. as Amici Curiae Supporting Appellant at 46, *MERSCORP, Inc. v. Romaine*, 861 N.E.2d 81 (N.Y. 2006) (No. 179), available at <http://4closurefraud.org/2010/06/09/amicus-brief-challenging-mers-standing-to-foreclose> [hereinafter Amici for Romaine].

210. *See Engel & McCoy, supra* note 36, at 2041.

211. *See, e.g., Peterson, supra* note 61, at 2275 ("If Wall Street firms use the tools of structured finance to knowingly or recklessly facilitate and profit from predatory lending, surely they are as responsible as the fly-by-night brokers, originators, and servicers they capitalize."); *see id.* at 2273 ("The lending entities

predatory lender made a loan, the debt would quickly be sold via MERS to the lender's financier on the secondary market.²¹² This practice would continue while claims against the predatory lender accumulated.²¹³ When enough lawsuits mounted to make the scheme unprofitable, the lender would simply declare bankruptcy and close up shop.²¹⁴ All the while, the bulk of the capital in this operation was held securely by an unknown party in the secondary market—with MERS serving as a shield.²¹⁵

In the dissent, Justice Page noted that being unable to identify who owns a debt also precludes a number of defenses under the Truth in Lending Act (TILA).²¹⁶ After the trial, the plaintiffs' lead attorney, Amber Hawkins, stated that “[a]s a result of the court’s decision, an agent with no responsibility or authority related to the loan can foreclose upon a homeowner through an expedited non-[judicial] process without identifying who it is working for.”²¹⁷ She claimed that because the MERS concept was developed to avoid recording laws, the result is a private structure that conceals crucial information from the public.²¹⁸ Defendants in New York also counterclaimed that a single corporation should not be allowed to privatize the nation’s land records without greater transparency

are used like a disposable filter: absorbing and deflecting origination claims and defenses until those claims and defenses render the business structure unusable.”). It should be noted that “[m]ost individual consumers bring their predatory lending claims not as plaintiffs, but as counterclaims in defense of foreclosure proceedings.” *Id.* at 2267.

212. *See id.* at 2273.

213. *Id.* at 2189.

214. *Id.*

215. *See id.*; Brandt, *supra* note 13.

216. *See* Jackson v. Mortg. Elec. Registration Sys., Inc., 770 N.W.2d 487, 503–4 (Minn. 2009) (Page, J., dissenting). The TILA specifies that if certain disclosures are not made (e.g., incorrect calculation of finance charges or payment schedules) the loan may be rescinded for up to a period three years. *See* 15 U.S.C. § 1635(a), (f) (2006). Upon rescission, the loan principle must be paid back but the borrower is not responsible for any finance charges (i.e., like an interest free loan, all payments made up to that point are credited toward repayment of the principle). *See* § 1635(b). However, a rescission can only be made “against any assignee of the obligation.” § 1641(c). This defense does not affect the loan originator or servicer. *See id.* MERS noted that none of the plaintiffs were raising a TILA defense. *See* MERS’s Brief, *supra* note 76, at 36 (“It should be noted that Plaintiffs raise absolutely no defenses to the foreclosures they are seeking to stop, reverse, void, cancel, or delay.”).

217. *See* Cohen, *supra* note 207, at 1 (quoting Amber Hawkins).

218. *See id.*; *see also* Peterson, *supra* note 61, at 2266–67, 2280 (noting that homeowners can no longer turn to the land records to learn the identity of owner of their debt).

and significant government oversight.²¹⁹

Partly in response to the numerous MERS lawsuits raising this issue, the federal government recently passed the Helping Families Save Their Homes Act of 2009, which amended the TILA by requiring lenders to notify homeowners within thirty days when their loan is sold or transferred.²²⁰ Following this amendment, MERS announced its new InvestorID program, which is designed to automatically send a notice to borrowers when ownership of their loan changes.²²¹

In an effort to address predatory lending concerns, Minnesota Attorney General Lori Swanson pushed the legislature to make several amendments to state banking laws.²²² Amber Hawkins, former Staff Attorney for the Legal Aid Society of Minneapolis, stated that “Minnesota’s new anti-predatory lending laws are now among the strongest in the country.”²²³ Unfortunately, these laws were not enacted in time to help the plaintiffs in *Jackson*.

219. See, e.g., Amici for Romaine, *supra* note 209, at 1 (“MERS is eroding the public databases of this nation and unjustly withholding critically important information from homeowners. . . . [MERS is designed] without regard to its infringement of essential public and individual rights.”).

220. Interview with Amber Hawkins, *supra* note 49. See also Helping Families Save Their Homes Act, Pub. L. No. 111-22, 123 Stat. 1632 (2009) (codified as amended in scattered sections of the United States Code) (promulgating an effort to prevent mortgage foreclosures and enhance mortgage credit availability).

221. See Karmela Lejarde, *MERS Response to New TILA Legislation Passed by Congress and the Obama Administration*, MORTGAGEMAG NEWS (June 10, 2009), <http://www.mortgagemag.com/news/2009/0601/1000010667070.htm>. On its website, MERS also offers the ServicerID function, which provides a number of ways to search for the servicing agent for loans registered with MERS. See *MERS® Servicer Identification System*, MERS, <https://www.mers-servicerid.org/sis/> (last visited Sept. 17, 2010). Typically, the results display the names of the servicer and the investor, with contact information for both. *Id.* See also *supra* note 87 and accompanying text (discussing the Real Estate Settlement Procedures Act’s requirement of sending a “hello/goodbye letter” when changing loan servicers).

222. See MINN. STAT. §§ 58.13, .137, .161, .18 (2008). The amendments protect borrowers by (1) creating a duty of agency between the borrower and mortgage broker, (2) preventing fraud on mortgage applications, and (3) requiring verification of a borrower’s ability to repay their obligation over the entire course of the loan, as opposed to just the first year. See Drum Major Institute’s Marketplace of Ideas, *Predatory Mortgage Lending with Lori Swanson* (Jan. 4, 2010), <http://www.mortgagerefinancingref.com/predatory-mortgage-lending-with-lori-swanson.html> (online video recording of Minnesota Attorney General Lori Swanson speaking on Minnesota’s “successful predatory mortgage lending law”).

223. Interview with Amber Hawkins, *supra* note 49. Minnesota has also amended the foreclosure by advertisement statutes by requiring that the foreclosing party provide a defaulting borrower with information on the availability of counseling prior to foreclosure. See MINN. STAT. § 580.021 (2008).

When reading the plaintiffs' affidavits, you can't help but feel sorry for them, particularly Jeweleen Jackson and David Williams. Both were taken advantage of through predatory lending schemes.²²⁴ However, the legal issue for the Minnesota Supreme Court was solely to decide whether MERS was in compliance with the foreclosure by advertisement statutes.²²⁵ MERS considered the plaintiffs' attempt to interject any connection between the MERS System and predatory lending as "unfounded and irrelevant to the legal question [the] Court must decide."²²⁶ Ultimately, the court chose to narrow its focus to the issue of foreclosures, leaving the broader predatory lending issues for the legislature.²²⁷

C. Tax Evasion or Efficient Business?

Advocates of the MERS System often point out the substantial cost savings electronic recordation provide over the traditional method of recording a paper copy of the security instrument with the county recorder or registrar of titles each time the loan changes hands.²²⁸ Others claim that these "cost savings" really amount to a form of legalized tax evasion.²²⁹

MERS currently charges a fee of \$4.95 to register a loan on the MERS System.²³⁰ Once on the system, MERS members, who pay annual fees based on their size and trading volume, can transfer

224. See Affidavit of Jackson, *supra* note 125, at 1–2; Affidavit of Williams, *supra* note 139, at 1–2.

225. See MERS's Brief, *supra* note 76, at 40–41.

226. *Id.* at 40. The plaintiffs' Amicus Brief also largely focused on racial discrimination. See Brief for Myron Orfield et al. as Amici Curiae for Plaintiffs at 1, Jackson v. Mortg. Elec. Registration Sys., Inc., No. 08-305, 2008 U.S. Dist. LEXIS 10798 (D. Minn. Feb. 13, 2008) (stating in the first two sentences that "housing discrimination did not end with the passage of the Fair Housing Act. Discrimination against racial minorities seeking to rent, buy, and insure houses continues to be an endemic problem across the United States.>").

227. Jackson v. Mortg. Elec. Registration Sys., Inc., 770 N.W.2d 487, 502 (Minn. 2009) ("[R]esolving these problems is beyond the scope of the issue before us and thus beyond our decision-making authority."). Robert Pratte, MERS's attorney, stated that he respects the plaintiffs' attorneys' efforts in trying to help the plaintiffs avoid foreclosure, but "this is not the way to do it." Cohen, *supra* note 207, at 1.

228. Amici for MERS, *supra* note 89, at 4–5; see also *supra* note 88 and accompanying text.

229. Peterson, *supra* note 61, at 2212.

230. Affidavit of Hultman, *supra* note 69, ¶ 10.

loans electronically to other members.²³¹ By contrast, the filing fee for each mortgage assignment in Hennepin County is \$46.²³² Depending on the number of transactions a company makes in a year, this difference can represent a significant cost savings per transaction. One estimate claims MERS saves the mortgage industry \$200 million a year.²³³

Those who are opposed to MERS argue that the money the county recording offices charge is often used to fund a variety of other government functions, including court systems, legal aid organizations, and schools.²³⁴ With respect to how the loss indirectly harms the public, they consider the MERS System as a tool for tax evasion.²³⁵

Advocates of MERS maintain that the public greatly benefits from this business innovation.²³⁶ Not only is lending capital more quickly freed up to create more loans,²³⁷ a portion of the cost savings is typically passed onto the borrower.²³⁸ The remaining portion of the savings benefits the millions of investors who have a direct interest in mortgage-backed securities and, to a lesser degree, nearly everyone else who maintains an interest-bearing account through indirect exposure.²³⁹

The amici brief point out that, “without such benefits, it is unlikely that consumer-oriented government corporations and agencies—Fannie Mae, Freddie Mac, Ginnie Mae, and the Federal Housing Administration, and the Department of Veteran Affairs—would have participated in the creation of MERS and served on the

231. See Arnold, *supra* note 10, at 34–35; see also MERS Pricing, MERS, <https://www.mersinc.org/MersProducts/pricing.aspx?mpid=1> (last visited Sept. 17, 2010).

232. Brandt, *supra* note 13.

233. Arnold, *supra* note 10, at 35.

234. Peterson, *supra* note 61, at 2212.

235. *Id.* See also Diane Lim Rogers, *Even Taxes on ‘Evil Corporations’ Will Affect Real People*, SEEKING ALPHA (May 5, 2010), <http://seekingalpha.com/article/203090-even-taxes-on-evil-corporations-will-affect-real-people> (stating that ultimately the burden of evaded taxes falls on individual taxpayers).

236. See Slesinger & McLaughlin, *supra* note 9, at 812–13.

237. See *supra* note 70 and accompanying text.

238. Affidavit of Hultman, *supra* note 69, ¶ 10.

239. Brett Arends, *Should You Invest In Toxic Assets?* WALL ST. J., Jul. 29, 2009, http://online.wsj.com/article/NA_WSJ_PUB:SB10001424052970203609204574316610509900476.html; see also *Mortg. Elec. Registration Sys. v. Revoredo*, 955 So. 2d 33, 34 (Fla. Dist. Ct. App. 2007) (describing the MERS System as a “commercially effective means of business”).

MERS steering committee.”²⁴⁰ Beyond the federal government, many state and county officials have also served on the MERS Advisory Council.²⁴¹ Considering all this government support for MERS, as well as the benefits passed on to the public, the opposition’s highly theoretical argument that these cost savings amount to tax evasion appears to be broken from reality.

D. The Implications of Ruling Against MERS

MERS considered the plaintiffs’ suit “nothing less than a frontal attack” on the current methods to maintain land records used by Minnesota’s property law community.²⁴² They claimed that the plaintiffs’ efforts to avoid or delay foreclosure were nothing more than an attempt to undercut the sanctity of the contracts they agreed to by avoiding the debt obligations they owed while remaining in their homes.²⁴³ According to MERS, not only would a ruling in favor of the plaintiffs require more expensive and inefficient foreclosure procedures, it would have also had a devastating impact on the ability of many Minnesotans to obtain future financing.²⁴⁴ MERS also argued that an affirmative answer to the certified question had the potential to cloud thousands of titles in Minnesota, further eroding the value of many properties and doing nothing to help the current economic crisis.²⁴⁵

Justice Anderson stated that the majority affirmed the long-standing principles that govern Minnesota real property law,²⁴⁶ a decision which is in accord with the majority of other jurisdictions

240. Amici for MERS, *supra* note 89, at 4.

241. See Arnold, *supra* note 10, at 36 (“Generally, county recorders have been far more supportive than some would believe.”). Some believe the future of land recording offices lies in electronic recording systems. Interview with Chuck Hoyum, *supra* note 102. “Over the course of one generation we are likely to see some major changes in our current recording system.” *Id.* “One major change will likely be a push towards electronic recordation” but it will likely be one that is similar to the current grantor-grantee indexes now used, rather than one that is similar to MERS. *Id.* Some have expressed concerns about MERS destroying land records, others fear losing their jobs. See Arnold, *supra* note 10, at 36 (“Some recorders have expressed concerns that MERS will eliminate their offices nationwide or destroy the public land records by breaking the chain of title.”).

242. MERS’s Brief, *supra* note 76, at 35.

243. *Id.*

244. *Id.* at 35–36.

245. Interview with Chuck Hoyum, *supra* note 102.

246. Jackson v. Mortg. Elec. Registration Sys., Inc., 770 N.W.2d 487, 500–501 (Minn. 2009).

who have considered MERS's authority to foreclose.²⁴⁷ The dissent, on the other hand, was left unconvinced that an "equitable assignment" required no recordation.²⁴⁸ Justice Page stated that if the assignment can be made in writing, according to plain language of the foreclosure by advertisement statutes, it must be recorded.²⁴⁹

However, if taken literally, this interpretation of what must be recorded would require a wholesale transformation of Minnesota's recording system. Currently, there is no way to record anything other than legal title to the security instrument in the county recording offices.²⁵⁰ As Judge Schwartz from the Florida District Court of Appeals stated, "the problem arises from the difficulty of attempting to shoehorn a modern innovative instrument of commerce into nomenclature and legal categories which stem essentially from the medieval English land law."²⁵¹

It is doubtful that an electronic database that tracks loans being bundled together and traded nationally could have been foreseen under the lamp light over 160 years ago when the

247. See *supra* note 119 and accompanying text. Since *Jackson*, several new cases have been tried; the majority of jurisdictions continue to favor MERS. See *Cervantes v. Countrywide Home Loans, Inc.*, No. CV 09-517-PHX-JAT, 2009 U.S. Dist. LEXIS 87997 (D. Ariz. Sep. 24, 2009) (dismissing claims made by three borrowers against a group of defendants that included MERS); *Mortg. Elec. Registration Sys. v. Mosley*, No. 93170, 2010 Ohio LEXIS 2380 (Ct. App. Jun. 24, 2010) (finding MERS had standing to foreclose); *Bucci v. Lehman Bros. Bank*, No. PC-2009-3888, 2009 R.I. LEXIS 110 (Sup. Ct. Aug. 25, 2009) (holding that MERS had the authority to foreclose as a nominee for the debts owner). *But see* *Mortg. Elec. Registration Sys. v. Chong*, No. 2:09-CV-00661-KJD-LRL, 2009 U.S. Dist. LEXIS 127500, at *9 (D. Nev. Dec. 4, 2009) (stating that because MERS provided no evidence that it was the agent or nominee for the current owner of the beneficial interest in the note, it failed to meet its burden of establishing that it is a real party in interest with standing); *In re Sheridan*, No. 08-20381-TLM, 2009 Bankr. LEXIS 552 (D. Idaho Mar. 12, 2009) (denying MERS standing in court because they failed to provide evidence of any interest in the note and deed of trust); *Mortg. Elec. Registration Sys. v. Johnston*, No. 420-6-09 Rdcv, 2009 Vt. LEXIS 15 (Super. Ct. Oct. 28, 2009) (dismissing MERS's action to foreclose for lack of standing).

248. *Jackson*, 770 N.W.2d at 503 (Page, J., dissenting).

249. *Id.*

250. Interview with Chuck Hoyum, *supra* note 102.

251. *Mortg. Elec. Registration Sys. v. Revoredo*, 955 So. 2d 33, 34 (Fla. Dist. Ct. App. 2007); see also *MERSCORP, Inc. v. Romaine*, 861 N.E.2d 81, 101 (N.Y. 2006) (Kaye, C.J., dissenting in part) ("It is the incongruity between the needs of the modern electronic secondary mortgage market and our venerable real property laws . . . that frames the issue before us.").

foreclosure by advertisement statutes were enacted.²⁵² The question then becomes: How is a court to determine the legislative intent when the issue falls outside of what reasonably could have been contemplated at the time the law was conceived?

To resolve a dilemma such as this, the court must turn to the canons of construction. In part, these statutes state that in ascertaining the intent of a statute, a court must “presume that the legislature intended to favor a public interest over a private interest.”²⁵³ Thus, when contemplating the certified question, the court likely weighed the effect of a decision either way, on both the plaintiffs and the public.

The prevailing negative answer resulted in Jeweleen Jackson, David Williams, and Brenda Doane losing the opportunity to challenge the foreclosure of their homes and to discover who owned the note at the time of foreclosure.²⁵⁴ Fortunately, Ethylon and William Brown were able to save their primary residence through a loan modification.²⁵⁵ This was a sad and unfortunate outcome, but it was also the lesser of two evils. After all, had the court ruled against MERS, the delay in the plaintiffs’ foreclosures sooner or later still would have ended. Eventually, MERS would have either traced the chain of custody of the debts and filed the corresponding mortgage assignments in the county recording office,²⁵⁶ initiated judicial foreclosure,²⁵⁷ or pursued and received the legislative blessing to foreclose what many argue section 507.413—the MERS statute—was intended to confer.²⁵⁸

Thus, in the end, more than likely, whichever course pursued after trial would have concluded with the same results; however, the cost to society would have been staggeringly high. A ruling against MERS would have affected many more than just those in or soon facing foreclosure. Because secondary market investors would be forced to bear the additional costs of preparing and recording old assignments prior to initiating foreclosure, the present value of

252. See *Jackson v. Mortg. Elec. Registration Sys., Inc.*, No. 08-305, 2008 U.S. Dist. LEXIS 10798, at *14 (D. Minn. Feb. 13, 2008).

253. *Amaral v. St. Cloud Hosp.*, 598 N.W.2d 379, 384 (Minn. 1999); see also MINN. STAT. § 645.17(5) (2006).

254. Interview with Amber Hawkins, *supra* note 49.

255. *Id.*

256. See *supra* note 203 and accompanying text.

257. Amici for MERS, *supra* note 89, at 13.

258. Interview with Chuck Hoyum, *supra* note 102.

mortgage loans would be substantially reduced.²⁵⁹ If the investment value of mortgage debt decreased, naturally fewer investors would be willing to purchase the debt from mortgage originators.

Thus, ultimately the consequences of this decision would impact future borrowers by not only increasing the associated mortgage fees and title insurance costs,²⁶⁰ but also by severely limiting the availability of capital to generate new loans.²⁶¹ Therefore, it would be both more difficult and more costly to obtain a mortgage loan in Minnesota.

Worse yet, an affirmative answer had the potential to cloud an enormous number of titles.²⁶² If the court had ruled that MERS never actually held legal title or that the debt holder's equitable interest somehow needed to be recorded, property owners who have satisfied their debts would be faced with the daunting task of first retracing the chain of custody of each debt that had been registered on the MERS System and then preparing and filing the corresponding mortgage assignments in the county recorder's office.²⁶³ In the end, individual property owners would likely be stuck with the bill.

Then, there are the even more troubling problems of what to do with properties purchased at foreclosure sales initiated by MERS or those acquired through bankruptcy proceedings.²⁶⁴ If it was deemed that MERS was never the proper mortgagee of title, all of the sales in which they were the seller or trustee are put in question.

In a suit against MERS initiated in Florida's circuit court in Miami-Dade, the Honorable Judge Jon Gordon stated,

I am not certain what remedy, if any, these people would have were it to be determined that MERS was not ever the proper party notwithstanding that these folks might have been in default what their recourse, if any, would be. I'm not certain with the satisfaction of mortgages that have been filed on behalf of MERS how good those are and I

259. See Amici for MERS, *supra* note 89, at 12–13.

260. *Id.* at 13; Cohen, *supra* note 207, at 2.

261. See MERS's Brief, *supra* note 76, at 36–37.

262. See Jackson v. Mortg. Elec. Registration Sys., Inc., No. 08-305, 2008 U.S. Dist. LEXIS 14785, at *4–5 (D. Minn. Feb. 27, 2008) (“[T]he premise of Plaintiffs’ claims threatens grave uncertainty with respect to establishment of chain of titles for releases and satisfactions of mortgages . . .”).

263. See *supra* notes 198–202 and accompanying text.

264. Interview with Chuck Hoyum, *supra* note 102.

am not certain how good title to property is that people bought at these foreclosure sales if it turns or becomes established that MERS was indeed not only not the right party but misrepresented by way of their pleadings and affidavits that they held something they didn't own, so I'm not certain of the consequences but it seems vast.²⁶⁵

With over sixty million mortgage loans registered on the MERS System nationwide,²⁶⁶ indeed the consequences would be vast.

V. CONCLUSION

Although the number of foreclosures in this country is staggeringly high, the Minnesota Supreme Court was correct in their analysis of this decision. There is no doubt that greed of the mortgage industry played a significant role in the current economic recession. However, MERS, representing one of the most significant business innovations in the mortgage industry since the formation of Fannie Mae and Freddie Mac, is not the proper party to blame. The correct parties to blame are the shady lenders and financiers who funded and originated the predatory loans that ultimately caused the subprime lending crisis. MERS simply acts as a middleman for its members; unfortunately, on occasion, this may include dishonest individuals and companies.

The MERS System represents significant change by developing the way transfers of interests in mortgage loans are tracked. With any change as great as this, there are bound to be those who resist. New legal issues may surface that we have never addressed before. Many may attempt to take advantage of this new development by seeking results that would otherwise not be available. These growing pains are to be expected. This, however, does not mean that this new innovation is not an improvement over our historic land recording system or without benefit to the public.

In *Jackson v. Mortgage Electronic Registration Systems, Inc.*, the Minnesota Supreme Court had the power to severely limit MERS's ability to foreclose on behalf of their members. Fortunately, they realized such a decision would have come at a high price.

265. See Serving History, *MERS: Litigation and Major Legal Decisions*, available at http://www.servinghistory.com/topics/MERS::sub::Litigation_And_Major_Legal_Decisions (last visited Oct. 10, 2010).

266. McIntire, *supra* note 92.