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CLARIFYING MURKY MERS[1]:

Does Mortgage Electronic Registration Systems, Inc., Have Authority to Assign the Mortgage Note in a Standard Illinois Foreclosure Action?

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INTRODUCTION

For various reasons, including layoffs and job losses in a struggling economy, increases in adjustable interest rates on mortgage loans, and decreases in home values, the nation is currently in the grips of a mortgage foreclosure crisis.[3] Due in large part to this crisis, the number of mortgage foreclosure actions filed in Illinois has drastically increased over recent years.[4] In Cook County alone, the Office of the Clerk of the Circuit

[1] The author derives the term "Murky MERS" from a New York Times article by Mike McIntire that discusses "the murky realm of MERS." *See* Mike McIntire, *Murky Middleman*, N.Y. TIMES, Apr. 24, 2009.

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[3] *See generally*, *e.g.*, Mary Ellen Podmolik, *Citi to Launch 'Cash for Keys'; Residents Would Get Relocation Aid After 6 Months*, CHI. TRIB., Feb. 11, 2010; Bob Tedeschi, *Beware of Neighbor's Home Foreclosure*, N.Y. TIMES, June 14, 2009; Peter G. Gosselin, *Fed Chief Urges Action on Foreclosure Crisis*, L.A. TIMES, May 6, 2008; Jonathon Karp, *Loan Plan Divides Neighbors; Some Express Doubts About Help for Foreclosures*, CHI. TRIB. Jan. 4, 2008; Tony Pugh, *Cities Being Hard Hit by Foreclosures; Rate is as High as 4 Percent in California*, CHI. TRIB., Aug. 24, 2007. *But see Fewer Borrowers are Delinquent*, CHI. TRIB., Feb. 20, 2010 (discussing a report from the Mortgage Bankers Association that may mark "'the beginning of the end' of the wave of delinquencies and foreclosures that started more than three years ago" in "hope that the foreclosure crisis is beginning to ebb.").

[4] *See* General Administrative Order No. 2010-01 (Ill. Cir. Ct. Cook County Apr. 8, 2010) (Kinnaird, P.J.) (available in Chambers of the Supervising Judge of the Mortgage Foreclosure Section, 2802 Richard J. Daley Center, 55 W. Washington St., Chicago, IL 60602) [hereinafter GAO 2010-01]. *See also* Podmolik, *Citi to Launch 'Cash for Keys'*, *supra* note 3 (noting that "one in every 291 Illinois homeowners received some sort of foreclosure filing" in January 2010).

Court anticipates between 48,000 and 52,000 foreclosure filings in 2010,[5] which is up from only 16,494 filings in 2005.[6] These increased filings have carried with them greater scrutiny of the foreclosure process across the board,[7] including in the legal system.[8] This article discusses one area of mortgage foreclosure law frequently questioned in the media: the role of a corporation called Mortgage Electronic Registration Systems, Incorporated ("MERS"), in prosecuting a mortgage foreclosure action.[9]

Mortgage foreclosure actions are rarely initiated by the original lender to whom a mortgage was given.[10] Instead, as promissory notes secured by mortgages trade hands, the mortgages are generally assigned to the party legally entitled to enforce the note,[11] who—at least in Illinois—is the party who brings the complaint to foreclose when the

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[5] GAO 2010-01. As of March 31, 2010, the Clerk of the Court showed 60,766 pending mortgage foreclosure cases in Cook County. *Id.*

[6] *Id.*

[7] *See* Bob Tedeschi, *A Crackdown on Rescue Schemes*, N.Y. TIMES, June 21, 2009 (discussing state and federal authorities' attempts to combat scams directed towards financially distressed homeowners); Bobert Schmidt & David Mildenberg, *Trouble Piles Up for No. 1 Lender; FBI Fraud Probe Latest Countrywide Setback*, CHI. TRIB., Mar. 10, 2008 (discussing the investigation of Countrywide Financial Corp., along with thirteen other companies—including mortgage lenders, housing developers, and Wall Street firms that packaged loans as securities—for "possible accounting violations related to the subprime lending crisis"); Gretchen Morgenson, *Dubious Fees Hit Borrowers in Foreclosures*, N.Y. TIMES, Nov. 6, 2007 (discussing increased questioning of appropriate legal fees stemming from foreclosure actions).

[8] *See* In re Foreclosure Cases, 2007 U.S. Dist. LEXIS 84011 (N.D. OH 2007) ("Plaintiff's 'Judge, you just don't understand how things work,' argument reveals a condescending mindset and quasi-monopolistic system where financial institutions have traditionally controlled, and still control, the foreclosure process. . . . The institutions seem to adopt the attitude that since they have been doing this for so long, unchallenged, this practice equates with legal compliance. Finally put to the test, their weak legal arguments compel the Court to stop them at the gate."). *See also* Gretchen Morgenson, *If Lenders Say 'The Dog Ate Your Mortgage'*, N.Y. TIMES, Oct. 25, 2009 ("[S]ome judges are starting to scrutinize the rules-don't-matter methods used by lenders and their lawyers in the recent foreclosure wave."); Gretchen Morgenson, *The Mortgage Machine Backfires*, N.Y. TIMES, Sep. 27, 2009 ("With the mortgage bust approaching Year Three, it is increasingly up to the nation's courts to examine the dubious practices that guided the mania."); Michael Powell, *A 'Little Judge' Who Rejects Foreclosures, Brooklyn Style*, N.Y. TIMES, Aug. 31, 2009 (quoting Judge Arthur M. Schack of the New York Supreme Court as saying about attorneys for the foreclosure industry: "I won't accept their comedy of errors").

[9] *See*, *e.g.*, Morgenson, *The Mortgage Machine Backfires*, *supra* note 8; McIntire, *Murky Middleman*, *supra* note 1.

[10] In re Wilhelm, 407 B.R. 392, 395 (D. Idaho Bankr. 2009). *See infra* note 50 and accompanying text.

[11] Morgenson, *The Mortgage Machine Backfires*, *supra* note 9.

mortgagor defaults on the loan.[12] Under the Illinois Mortgage Foreclosure Law ("IMFL"), a mortgage foreclosure complaint must attach both the mortgage and the note,[13] but, although the plaintiff must plead its capacity to bring the action,[14] it need not attach any assignments.[15] Despite the IMFL's silence on attaching assignments to the complaint at the pleading stage, many courts routinely require the plaintiff to provide a proper chain of assignments from the original lender to itself prior to entering judgment.[16] In current practice, that chain of assignments is generally replaced by a single assignment of the mortgage and the note to the plaintiff from MERS,[17] who is often named as the nominal mortgagee in the mortgage.[18]

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[12] *See* Bayview Loan Servicing v. Nelson, 382 Ill. App. 3d 1184, 1187-88 (5th Dist. 2008) (reversing and remanding the trial court's entry of summary judgment in favor of the plaintiff, who was the loan servicer, where "[t]here [wa]s no evidence that [the plaintiff] ever obtained any legal interest in the subject property").

[13] 735 ILCS 5/15-1504(a)(2).

[14] 735 ILCS 5/15-1504(a)(3)(N).

[15] U.S. Bank v. Komkov, No. 07 CH 16430, p. 5 (Ill. Cir. Ct. Cook County Nov. 24, 2008) (available in court file and copy on file with author).

[16] *See* LaSalle Bank v. Diaz, No. 08 CH 21809, p. 2 (Ill. Cir. Ct. Cook County June 1, 2009) ("The judges of this Mortgage Foreclosure section consistently require plaintiffs to show a proper chain of assignments from the original mortgagee to themselves.") (available in court file and copy on file with author). *See also Mortgage Foreclosure Courtroom Procedures*, Mortgage Foreclosure Section, Circuit Court of Cook County, Chancery Division, p. 2 (rev. Nov. 10, 2009) (requiring plaintiffs seeking entry of a judgment of foreclosure to provide courtesy copies of, "[w]here applicable, assignments.") (available in Chambers of the Supervising Judge of the Mortgage Foreclosure Section, 2802 Richard J. Daley Center, 55 W. Washington St., Chicago, IL 60602, and copy on file with author) [hereinafter *Courtroom Procedures*].

[17] *See*, *e.g.*, TCIF REO v. Allen, No. 07 CH 36243 (Am. Comp., Ex. C. filed Sept. 30, 2009) (Assignment of Mortgage) (available in court file and copy on file with author) [hereinafter MERS Assignment].

[18] *See*, *e.g.*, TCIF REO v. Allen, No. 07 CH 36243 (Am. Comp., Ex. A., p. 1, filed Sept. 30, 2009) (Mortgage) (available in court file and copy on file with author) [hereinafter MERS Mortgage].

This article questions MERS' authority to assign the note,[19] arguing that, at best, it only maintains authority to assign the mortgage, which for mortgage foreclosure purposes is effectively meaningless under Illinois law. The article first provides a brief background to mortgage foreclosure and negotiable instrument law in Illinois. It next discusses MERS' ability to assign the note, presenting an introduction to the concept of MERS and analyzing MERS' legal relationship to the note under applicable legal doctrine. Finally, it explains the practical impact of limiting MERS' assignment authority to that of assigning the mortgage but not the note.

Importantly, this article does not conclude that MERS' potential inability to assign the note necessarily impairs a given plaintiff's right to prosecute the action. It merely argues that a court should not consider an assignment of the note by MERS sufficient evidence of a plaintiff's legal capacity to foreclose under the IMFL and that the plaintiff should properly demonstrate its right to enforce the note without unnecessarily relying on the somewhat murky legal concept of MERS.[20]

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[19] This article does not address the issue of MERS' ability to act as the plaintiff itself in a mortgage foreclosure action. Pursuant to MERS' stated procedures, it will only initiate a foreclosure in its own name when an officer of MERS is in possession of a note indorsed in blank, making MERS the legal holder of the note. MERSCORP, INC., *Rules of Membership*, R. 8, § 2(a) (June 2009) (copy on file with author) [hereinafter *Membership Rules*], *available at* http://www.mersinc.org/Foreclosures (link to "Rules of Membership") (last visited Mar. 14, 2009). In practice, however, MERS obtains possession of the note by deputizing an employee of the entity for whom it is foreclosing as an officer of MERS, *see id.*, R. 3, § 3(a), which may call into question whether the note was ever delivered to MERS for the purpose of entitling MERS to enforce it—a pre-requisite to holder status under the Uniform Commercial Code, *see* 810 ILCS 5/3-203(a).

[20] For a description of the "murky realm of MERS," see McIntire, *Murky Middleman*, *supra* note 1. Similarly, in *Landmark Nat'l Bank v. Kesler*, 216 P.3d 158, 165-66 (Kans. Sup. Ct. 2009), the Kansas Supreme Court questioned MERS' defined role in a standard MERS mortgage, stating that it seemed to define its role "in much the same way that the blind men of Indian legend described an elephant—their description depended on which part they were touching at any given time."

BACKGROUND

A mortgage on real property generally exists to secure some underlying debt.[21] This secured debt is commonly evidenced by a promissory note payable to the order of the lender.[22] When foreclosed, the amount owed on the debt attaches as a lien against the mortgaged property in favor of the debt's owner, and the court may order a judicial sale to satisfy the lien.[23] Under Illinois law, the mortgage is a mere incident to the debt, meaning that a transfer of the debt automatically transfers the mortgage with it.[24] The note, however, does not similarly transfer with the mortgage.[25] Because the mortgage follows the note but the note does not also follow the mortgage, the question in a standard Illinois mortgage foreclosure action is whether the plaintiff owns the underlying debt secured by the mortgage—i.e. whether the plaintiff is entitled to enforce the note evidencing the debt.[26] A mere transfer of the mortgage without a corresponding transfer of the right to enforce the note is effectively meaningless.[27]

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[21] RESTATEMENT (THIRD) OF PROPERTY (MORTGAGES) § 1.1 (1997).
[22] *Id.*, § 1.1 cmt.
[23] 735 ILCS 5/15-1506(i)(1) ("Upon the entry of the judgment of foreclosure, all rights of a party in the foreclosure against the mortgagor provided for in the judgment of foreclosure or this Article shall be secured by a lien on the mortgaged real estate, which lien shall have the same priority as the claim to which the judgment relates and shall be terminated upon confirmation of a judicial sale in accordance with this Article.")
[24] Moore v. Lewis, 51 Ill. App. 3d 388, 391-92 (1st Dist. 1977) ("[A] mortgage, which in this State is only regarded as a mere incident to the debt, is not assignable at law. It is the debt which is assigned, and the transfer of the debt carried with it the mortgage security.") (internal citations omitted).
[25] *Id. See also* Elvin v. Wuchetich, 326 Ill. 285, 288 (1927) ("The assignment of the mortgage . . . without the transfer of the notes secured by the mortgage[ ] had no effect to transfer . . . any interest.").
[26] A distinction may arise between owning the debt evidenced by the note and being entitled to enforce the note. *See* 11 Am. Jur. 2d Bills and Notes § 210 (2009) (distinguishing the holder of a note from the owner of a note), *cited in Wilhelm*, 407 B.R. at 402. *Wilhelm* noted this distinction in the context of an entity who acquired the debt through some proven transaction but failed to demonstrate its possession of the note, which would prevent it from enforcing the note as a nonholder in possession with the rights of a holder. *Id. See also infra* notes 45-48 and accompanying text. This article does not address the question of whether a party who establishes ownership of the debt to which the mortgage attaches is entitled to foreclose the mortgage without also demonstrating its possession of the note evidencing the debt. But the issue could arise in the context of whether an entity unable to demonstrate it ever possessed the note may still foreclose the security for the debt evidenced by the note. *See* Gretchen Morgenson, *Guess What Got Lost in the*

The most common method for a plaintiff to establish its right to enforce the note, at least in the mortgage foreclosure context, is to present an assignment to the court.[28] Illinois law provides for the assignment of a party's interest in a promissory note.[29] No particular form is required.[30] Even oral assignments are allowed unless specifically prohibited by statute,[31] which neither the IMFL, the Conveyances Act, nor the Mortgage Act do.[32] An assignment is valid as long as (1) the instrument and surrounding circumstances manifest the parties' intent to assign at the time of the transfer; and (2) the subject matter of the assignment is described with sufficient particularity to identify it.[33]

But assignment is not the only manner whereby a party may transfer its interest in a note. The standard note in a mortgage foreclosure action is a negotiable instrument

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Pool, N.Y. TIMES, Mar. 1, 2009 (discussing legal situations relating to banks' inability to demonstrate their possession of the note).

[27] *See Elvin*, 326 Ill. at 288. *See also Moore*, 51 Ill. App. 3d at 391-92; Commercial Products Corp. v. Briegel, 101 Ill. App. 2d 156, 163 (3rd Dist. 1968) ("Our courts have long held that a mortgage is deemed a mere incident to the mortgage debt, and that an attempt to assign the mortgage without any transfer of the debt will not pass the mortgagee's interest to the assignee, but is a nullity.")

[28] The typical assignment in the mortgage foreclosure context assigns the mortgage "Together with all rights and interest in . . . the note or obligation thereby secured." *See* MERS Assignment, *supra* note 17 (underlining in original). In *National City Bank v. Pepin*, No. 97 CH 31807 (Ill. Cir. Ct. Cook County Mar. 31, 2009) (available in court file and copy on file with author), the Honorable Mathias Delort held that such language effectively assigns both the mortgage and the note. *Id.* at p. 2 ("Because . . . the assignment states that it not only assigned the mortgage but 'all moneys now owing,' the note was validly assigned along with the mortgage."). *See also* Young v. Chicago Federal Savings and Loan, 180 Ill. App. 3d 280 (1st Dist. 1989) (finding valid an assignment containing the language: "together with all of assignor's right, title and interest in and to (a) the note, notes, accrued interest and other obligations secured thereby and payable in accordance therewith, and (b) the real estate assigned therein."). Assignments are also often executed after the fact and contain language that the described assignment occurred at some time "prior to" a specified date. *See* MERS Assignment, *supra* note 17. Additionally, due to the fluidity with which mortgage loans are currently traded, owners of loans will sometimes record assignments executed after the fact to recreate a proper chain of assignments. McIntire, *Murky Middleman*, *supra* note 1. This article takes no position on the validity of such after-the-fact assignments and recreations.

[29] Strosberg v. Brauvin Realty Services, Inc., 295 Ill. App. 3d 17, 30 (1st Dist. 1998). *See also Williams v. Frederick*, 289 Ill. App. 410 (3rd Dist. 1937) ("It is true that a note may be assigned by a separate instrument without indorsement so as to vest the legal title in the assignee, provided the note is also transferred by delivery to the assignee.").

[30] *Strosberg*, 295 Ill. App. 3d at 30.

[31] *Id.*

[32] *See generally* 735 ILCS 5/15-1101 *et seq.*; 765 ILCS 5/1 *et seq.*; 765 ILCS 905/1 *et seq.*

[33] *Young*, 180 Ill. App. 3d at 283. *See also* Klehm v. Grecian Chalet Ltd., 164 Ill. App. 3d 610, 616-17 (1st Dist. 1987).

under the Uniform Commercial Code ("UCC"),[34] meaning it is an unconditional promise to pay a fixed amount of money with or without interest to order on demand or at a definite time.[35] For purposes of this article, two primary entities are entitled to enforce negotiable instruments: (1) the holder of the instrument; and (2) a nonholder in possession of the instrument who has the rights of a holder.[36]

An entity becomes the holder of an instrument through negotiation.[37] Negotiation requires indorsement[38] and transfer of possession, which is defined as delivery for the purpose of giving the recipient the right to enforce the instrument.[39] Indorsement may be either special or in blank.[40] A special indorsement names a specific payee,[41] who becomes entitled to enforce the instrument once in possession.[42] A note indorsed in blank may be negotiated by transfer of possession alone.[43] The general rule in Illinois is that possession of a note indorsed in blank is *prima facie* evidence of the right to enforce.[44]

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[34] The UCC is incorporated into Illinois law at 810 ILCS 5/1-101 *et seq*.
[35] *See* 810 ILCS 5/3-104(a). *See also Klehm*, 164 Ill. App. 3d at 619; U.S. Bank v. Knight, No. 08 CH 33133 (Ill. Cir. Ct. Cook County Dec. 1, 2009) (available in court file and copy on file with author); U.S. Bank v. Komkov, No. 07 CH 16430 (Ill. Cir. Ct. Cook County Nov. 24, 2008) (available in court file and copy on file with author).
[36] 810 ILCS 5/3-301. *See also Wilhelm*, 407 B.R. at 401. The UCC additionally provides for enforcement by "a person not in possession of the instrument who is entitled to enforce the instrument pursuant to Section 3-309 or 3-418(d)." 5/3-301. Section 3-309 relates to lost or destroyed instruments, 5/3-309, and Section 3-418(d) relates to instruments paid or accepted by mistake. 5/3-418(d). Because neither section relates to the subject matter herein, this article does not discuss the rights of entities entitled to enforce in relation to those sections.
[37] 810 ILCS 5/3-201(a).
[38] 810 ILCS 5/3-201(b).
[39] 810 ILCS 5/3-203(a).
[40] 810 ILCS 5/3-205.
[41] *Id.*
[42] *Compare* 810 ILCS 5/3-301 (naming a holder as a party entitled to enforce) *with* 5/3-201(b)(21)(A) (defining holder, in part, as a person in possession). *See also Wilhelm*, 407 B.R. at 401.
[43] 810 ILCS 5/3-205(b).
[44] Joslyn v. Joslyn, 386 Ill. 387, 395 (1944) ("[P]ossession of bearer paper is *prima facie* evidence of title thereto, and sufficient to entitle the plaintiff to a decree of foreclosure"). *See also* Foreman Trust and Savings Bank v. Cohn, 342 Ill. 280, 287 (1930); Rago v. Cosmopolitan Nat'l Bank, 89 Ill. App. 2d 12, 19 (1st Dist. 1967); First Securities Co. of Chicago v. Schroeder, 351 Ill. App. 3d 173, 176 (1st Dist. 1953).

In addition to holders, nonholders in possession with the rights of a holder are entitled to enforce negotiable instruments under the UCC.[45] Pursuant to the statute's official comments, a nonholder in possession includes any "person who under applicable law is a successor to the holder or otherwise acquires the holder's rights."[46] The comments additionally state:

> If the transferee is not a holder because the transferor did not indorse . . . there is no presumption . . . that the transferee . . . is entitled to payment. The instrument, by its terms, is not payable to the transferee and the transferee must account for possession of the unindorsed instrument by proving the transaction through which the transferee acquired it.[47]

Illinois case law also supports this proposition that, where a note is not indorsed to the plaintiff, the plaintiff must demonstrate both possession and the underlying transaction through which it obtained possession.[48]

DISCUSSION

Under Illinois law, only the entity entitled to enforce the note may bring a complaint to foreclose mortgage against the mortgagor.[49] But the relatively common practice of trading mortgage notes on the secondary mortgage market in recent years means that the plaintiff bringing a mortgage foreclosure action is rarely the party who originally issued the loan to the mortgagor.[50] The plaintiff must therefore demonstrate

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Though these cases officially deal with enforcing bearer paper, an instrument indorsed in blank becomes payable to bearer under the UCC. 810 ILCS 5/3-205(b).

[45] 810 ILCS 5/3-301.

[46] *Id.*, cmt.

[47] 810 ILCS 5/3-203 cmt. 2. *See also Wilhelm*, 407 B.R. at 402.

[48] *Collins v. Ogden*, 323 Ill. 594, 604 (1926) ("It must be regarded as the settled law in this State that while an equitable interest in negotiable instruments payable to order may be acquired either by gift or contract without indorsement by the payee, the mere possession of negotiable securities payable to order and indorsed by the payee, or, if indorsed specially, not indorsed by the special indorsee, is not alone evidence of title, either legal or equitable, in the possessor, but the burden of proof is on the possessor to prove his equitable title by showing a delivery to him with the intent to pass the title.").

[49] Bayview Loan Servicing v. Nelson, 382 Ill. App. 3d 1184, 1187-88 (5th Dist. 2008).

[50] *Wilhelm*, 407 B.R. at 395. One reason original lenders rarely initiate foreclosures is that present day mortgage loans are regularly traded on the secondary mortgage market. *See State of Local Real Estate in*

that the lender's interest was somehow transferred to it prior to foreclosing.[51] This section discusses whether MERS maintains the authority to transfer the relevant interest in the note to allow the plaintiff to foreclose.

MERS was created in the early to mid 1990s to modernize the secondary mortgage market.[52] One of its initial purposes was to reduce recording costs for assignments as the prevalence of trading mortgage notes increased.[53] Prior to its inception, an assignment of mortgage had to be recorded each time the note secured by the mortgage traded hands.[54] Under the MERS procedure, MERS is generally named in the mortgage as "mortgagee (as nominee for lender and lender's successors and

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Atlanta, 111th Cong. (Nov. 2, 2009) (testimony of Professor Frank S. Alexander before the Domestic Policy Subcommittee of the House Oversight and Government Reform Committee). Through securitization, the loans are routinely bundled and interest in these mortgage-backed securities is sold to investors. *See*, *e.g.*, Becky Yerak, *More Houses Return to Lender; Mortgage Owners Increasingly Stuck with Foreclosed Homes They Can't Move at Auction*, CHI. TRIB., Aug. 21, 2008. As a legal matter, the loans are generally placed into a trust in which investors may purchase certificates representing their investment. *See* U.S. Bank v. Knight, No. 08 CH 33133 (Ill. Cir. Ct. Cook County Dec. 1, 2009) (discussing the details of one such trust, the Pooling and Servicing Agreement dated as of April 1, 2007 for the Home Equity Asset Trust 2007-03 Home Equity Pass-Through Certificates, Series 2007-03, in relation to a motion to dismiss) (available in court file and copy on file with author). But the "dizzying series of transactions," Morgenson, *The Mortgage Machine Backfires*, *supra* note 8, in which these loans were involved sometimes calls into question who maintains the final right to collect on the loan and foreclose the loan's security. Morgenson, *Dog Ate Your Mortgage*, *supra* note 8.

[51] Elvin v. Wuchetich, 326 Ill. 285, 288 (1927) ("It was essential to the plaintiff's right to recover that at the commencement of the suit he had the legal title to the notes secured by the chattel mortgage.").

[52] *See* Phyllis K. Slesinger & Daniel McLaughlin, *Mortgage Electronic Registration System*, 31 IDAHO L. REV. 805 (1995) (early law review article arguing in favor of creating MERS). For a brief history of the Mortgage Bankers Association of America's InterAgency Technology Task Force, which published the "white paper" proposing an electronic system for tracking residential mortgages that ultimately led to the development of MERS, see *id.* at 807-10. MERS currently operates as a subsidiary corporation to MERSCORP, Inc. *Cervantes v. Countrywide Home Loans, Inc.*, 2009 U.S. Dist LEXIS 87997, *31 (D. Ariz. 2009) (unreported). It maintains an office in Reston, Virginia, a suburb of Washington, D.C., has a staff of forty-four employees, and is owned by some of the nation's largest banks. McIntire, *Murky Middleman*, *supra* note 1. It functions almost exclusively as an electronic repository for mortgage loans. *See Morgenson*, *The Mortgage Machine Backfires*, *supra* note 8 (quoting an expert on mortgage securities as saying: "MERS is basically an electronic phone book for mortgages"). According to its website: "[MERS'] mission is to register every mortgage loan in the United States on the MERS system." http:www.mersinc.org/about (last visited Mar. 14, 2010).

[53] *See* Slesinger & McLaughlin, *supra* note 52, at 811. *See also* John Handley, *Lenders Heed Call to Broaden America's Homeownership Base*, CHI. TRIB., Oct. 29, 1995 (discussing the announcement of MERS' launch in the mid-1990s).

[54] Slesinger & McLaughlin, *supra* note 52, at 809-10.

assigns),"[55] with the underlying notion that recording the mortgage then establishes MERS as the nominal mortgagee of record—allowing the lender to freely transfer the note without having to record a corresponding assignment of mortgage.[56] If the borrower-mortgagor defaults on its obligations under the note, MERS can execute an assignment of the mortgage to the entity currently owning interest in the note,[57] thereby allowing that entity to foreclose.[58]

MERS' supporters argue that its system incorporates technological advances into outdated mortgage transfer procedures, reduces costs for banks and lenders in the business of making residential home loans (allowing them to offer more loans to consumers than they otherwise could), and provides greater efficiency for transferring loans on the secondary mortgage market.[59] Its detractors argue that it deprives county clerks of needed recording fees,[60] impedes borrowers-mortgagors in knowing who owns their debt and/or services their mortgage, and generally decreases transparency in the

[55] MERS Mortgage, *supra* note 18, p. 1. Under the originally proposed MERS procedure, a borrower-mortgagor would execute a note and mortgage to the lender, and the lender would then assign the mortgage to MERS (as nominee for lender and its successors and assigns). *See* Slesinger & McLaughlin, *supra* note 52, at 808. The process was eventually adapted to allow the mortgage itself to name MERS as mortgagee (as nominee for lender and its successors and assigns)—thereby relieving the lender of the step of assigning the mortgage to MERS. Christopher L. Peterson, *Predatory Structured Finance*, 28 CARDOZO L. REV. 2185, 2212 (2007).

[56] *See id.* at 2211. *See also* Mortgage Electronic Registration Systems, Inc. v. Nebraska Dept. of Banking & *Fin.*, 270 Neb. 529, 533, 704 N.W.2d 784, 787 (Neb. 2005).

[57] MERS can also execute a release of the mortgage in the event the mortgagor satisfies the debt secured by the mortgage. *See* Slesinger & McLaughlin, *supra* note 52, at 814.

[58] *Id.* In some circumstances, MERS also forecloses in its own name, although it claims to only do so when the note is indorsed in blank and in possession of a MERS' officer, and it takes precautions against actually taking title to the property itself. *Membership Rules*, *supra* note 19, R. 8, §§ 1(a), 2(d). *See also supra* note 19.

[59] *See* MERSCORP, Inc. v. Romaine, 8 N.Y.3d 90, 100, 2006 N.Y. LEXIS 3699 (N.Y. 2006) (Ciparick, J. concurring). *See also* Slesinger & McLaughlin, *supra* note 51, at 816; Peterson, *Predatory Structured Finance*, *supra* note 55, at 2188; McIntire, *Murky Middleman*, *supra* note 1; Handley, *Lenders Heed Call*, *supra* note 53.

[60] *See* Peterson, *Predatory Structured Finance*, *supra* note 55, at 2212 (calling lenders' attempts to circumnavigate recording fees through the MERS process a "tax evasion tool.").

secondary mortgage market.[61] In addition to these policy critiques, multiple courts across the country have heard legal challenges to MERS,[62] including challenges to its powers regarding the note.[63]

In an opinion relating to MERS' effect on federal jurisdiction, the United States Court of Appeals for the Seventh Circuit stated: "[MERS] is a nominee only, holding title to the mortgage but not the note."[64] Decisions from other jurisdictions have also questioned MERS' legal relationship to the note.[65] For example, in *In re Wilhelm*,[66] MERS brought motions for relief from automatic bankruptcy stays[67] in multiple proceedings before the United States Bankruptcy Court for the District of Idaho. The bankruptcy court denied the motions on the grounds that MERS failed to establish an interest in the underlying notes, specifically finding: "These deeds [of trust[68]] do not state that MERS is authorized to transfer the promissory notes."[69]

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[61] *Romaine*, 8 N.Y.3d at 100, 2006 N.Y. LEXIS 3699 (N.Y. 2006) (Ciparick, J. concurring)

[62] *See generally* Landmark Nat'l Bank v. Kesler, 216 P.3d 158 (Kan. 2009); Mortgage Electronic Registration Systems, Inc. v. Southwest Homes of Arkansas, 2009 Ark. 152 (2009); Bellistri v. Ocwen Loan Servicing, LLC, 284 W.W.3d 619 (Mo. App. 2009); In re Wilhelm, 407 B.R. 392 (Idaho Bankr. 2009); In re Sheridan, 2009 Bankr. LEXIS 552 (Idaho Bankr. 2009) (unreported); Saxon Mortgage Services, Inc. v. Hillery, 2008 U.S. Dist. LEXIS 100056 (N.D. Cal. 2008) (unreported); LaSalle Bank v. Lamy, 2006 N.Y. Misc. LEXIS 2127 (N.Y. Sup. Ct. 2006) (unreported); Gemini Services Inc. v. Mortgage Electronic Registration Systems, Inc., 350 B.R. 74 (S.D. Ohio Bankr. 2006); In re Vargas, 396 B.R. 511 (C.D. Cal. Bankr. 2008); MERSCORP v. Romaine, 861 N.E.2d 81, 2006 N.Y. LEXIS 3699 (N.Y. 2006) (concurring and dissenting opinions).

[63] *Wilhelm*, 407 B.R. at 405; *Bellistri*, 284 W.W.3d at 624; *Hillery*, 2008 U.S. Dist. LEXIS 100056 at *16; *Lamy*, 2006 N.Y. Misc. LEXIS 2127 at *2127.

[64] Mortgage Electronic Registration Systems, Inc. v. Estrella, 390 F.3d 522, 525 (7th Cir. 2004). Seventh Circuit decisions are not binding on state courts in Illinois, *see* Bowman v. American River Transportation Co., 217 Ill.2d 75, 91-92 (2005), and the Seventh Circuit cited no support for its proposition, but to the extent that the statement makes intuitive sense, a state court could consider it persuasive.

[65] *See supra* note 63.

[66] 407 B.R. 392 (Idaho Bankr. 2009).

[67] The filing of a bankruptcy petition under chapters seven, eleven, twelve, or thirteen of the United States Bankruptcy Code generally effects an automatic stay against all attempts to collect a debt, including state foreclosure proceedings. *See* 11 U.S.C. § 362.

[68] For this article's purpose, deeds of trust and mortgages are substantially the same. Each serves the same essential purpose: securing a debt with real property. Under a deed of trust, some third party acts as trustee and holds title to the property until the debtor satisfies his or her obligation. *Q & A*, N.Y. TIMES, June 9, 1996 (citing Michael Schlesinger, an attorney in New York, explaining the difference between a mortgage and a deed of trust). This trustee is generally empowered to sell the property to satisfy the debt without

Similarly, in *Saxon Mortgage Services, Inc. v. Hillery*,[70] Saxon Mortgage Services, Incorporated ("Saxon"), sought a declaratory ruling from the United States District Court for the Northern District of California that a mortgagor was not entitled under the Truth in Lending Act to rescind a loan for which Saxon was the alleged assignee. The district court dismissed the action on the grounds that Saxon failed to establish standing, because the only evidence it provided to demonstrate its right to enforce the note was an assignment by MERS, who the court concluded was never "given authority by [the original lender] to enforce the note."[71]

As noted above, MERS is named in the standard MERS mortgage as nominee for the lender and the lender's successors and assigns.[72] Black's Law Dictionary defines a nominee as "[a] person designated to act in place of another, usu[ally] in a very limited way," and "[a] party who holds bare legal title for the benefit of others or who receives and distributes funds for the benefit of others."[73] In *Young v. Chicago Federal Savings and Loan*,[74] the Illinois Appellate Court recognized the validity of nominees acting on behalf of the mortgagee, but only where the nominee maintained authority to enforce the note via assignment.[75] The opinion did not specifically relate to a nominee's authority to

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court involvement if the lender demonstrates that the debtor has defaulted under the terms of the trust deed. *Id.* These differences do not affect the instant determination concerning whether a provision in a mortgage or deed of trust defining MERS as nominee for the lender and the lender's successors and assigns could confer authority to assign the note.

[69] 407 B.R. at 397.

[70] 2008 U.S. Dist. LEXIS 100056 (N.D. Cal. 2008) (unreported).

[71] *Id.* at *16.

[72] MERS Mortgage, *supra* note 18, p. 1. *See also supra* note 55 and accompanying text.

[73] BLACK'S LAW DICTIONARY 477 (Bryan A. Garner ed. in chief 2d Pocket Edition 2001). *Landmark Nat'l Bank*, 216 P.3d at 166.

[74] 180 Ill. App. 3d 280, 284-85 (1st Dist. 1989).

[75] *Id.* at 284-85. In *Young*, a plaintiff sought to enforce a mortgage note assigned to her as nominee for a third party. The appellate court upheld the trial court's grant of summary judgment on the basis that the plaintiff maintained a valid assignment, and "[h]er status as nominee does not affect the fact that she is assignee." *Id.* at 285.

transfer an instrument, and it did not specifically address whether a nominee named for the mortgagee in a mortgage bears any powers in relation to the note thereby secured.[76]

By its own terms, the language in a MERS mortgage relating to MERS' powers only applies to the "Security Instrument," reading:

> Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in ***this Security Instrument***, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender including, but not limited to, releasing and canceling this Security Instrument.[77]

This language alone does not explicitly confer any authority on MERS to assign the note,[78] and a court should arguably not infer additional powers beyond those expressly granted by the instrument creating the relationship[79]—especially if it accepts the

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[76] *See generally id.* For Illinois case law supporting the proposition that terms contained in a mortgage cannot apply to the note without corresponding language in the note itself, see *infra* note 77.

[77] MERS Mortgage, *supra* note 18, p. 3 (emphasis added). *See also Wilhelm*, 407 B.R. at 397. Even if the standard MERS language did not apply exclusively to the mortgage by its own terms, "the Illinois Supreme Court [has] held that mortgages and notes are separate undertakings and that any provision in the mortgage not found in the note itself has no effect on the note." 2140 Lincoln Park West v. Am. Nat'l Bank & Trust Co. of Chicago, 88 Ill. App. 3d 660, 662 (1st Dist. 1980) (discussing Oswianza v. Wengler & Mandell, 358 Ill. 302 (1934)). *See also* Conerty v. Richsteig, 379 Ill. 360, 366 (1942) ("Any further or additional obligations in the mortgage, not contained in the note, relate solely to the security pledged and not to the obligation of the maker of the note, which is the only evidence of his liability."). As a general matter, notes secured by MERS mortgages do not contain provisions relating to MERS. *See*, *e.g.*, TCIF REO v. Allen, No. 07 CH 36243 (Am. Comp., Ex. B., filed Sept. 30, 2009) (Note) (available in court file and copy on file with author).

[78] *Id.* at 404. ("Movants seem to presume that the assignments, standing alone, entitle them to enforce the underlying notes. Such a presumption is unfounded, however, because Movants have not established MERS's authority to transfer the notes at issue. As noted above, the relevant deeds of trust name MERS as the 'nominal beneficiary' for the lender. Further, MERS is granted authority to foreclose if required by 'custom or law.' But what this language does not do – either expressly or by implication – is authorize MERS to transfer the promissory notes at issue.").

[79] A court can infer an agency relationship based on the conduct of the parties even where an agreement between the parties expressly disavows such a relationship. Oliveira-Brooks v. Remax Int'l, Inc., 372 Ill. App. 3d 127, 134 (1st Dist. 2007) ("[T]he declaration of the parties is not controlling where the conduct of the parties demonstrates the existence of an agency relationship."). A court could therefore also presumably expand the agency powers conferred by an express agreement where the conduct of the parties indicated an expanded agency role. But industry insiders seem to recognize that MERS is "basically an electronic phonebook for mortgages." *See* McIntire, *supra* note 1. None of MERS' practices outlined in its procedures would seem to indicate that its members wish to empower the organization to trade loans on their behalf without their express involvement. *See generally Membership Rules*, *supra* note 19. MERS

definition of nominee as a "limited" agent.[80] Moreover, even if the mortgage were construed to create an agency relationship sufficient to enable MERS to assign the note on behalf of the lender, at least one court, the United States Bankruptcy Court for the Central District of California, has questioned whether such an agency relationship could extend to successors and assigns without a separate document creating successive agency relationships between MERS and those parties.[81]

Additionally, the proposition that MERS has no authority relating to the note actually conforms to the original idea behind MERS: to allow lenders to freely transfer notes without having to record an assignment of mortgage for every transfer.[82] MERS' sole purported purpose is to "serv[e] as the mortgagee of record in the appropriate public records,"[83] and its own procedures recognize that it does not act as the holder of the note.[84] MERS itself has described its function as "immobiliz[ing] the mortgage lien

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records the transfers its members make; it does not negotiate the transfers itself. *Id.* Therefore, the conduct of the parties arguably fails to indicate any expanded agency role.

[80] *Landmark Nat'l Bank*, 216 P.3d at 166 ("This definition suggests that a nominee possesses few or no legally enforceable rights beyond those of a principal whom the nominee serves.").

[81] *Vargas*, 396 B.R. at 517 ("[I]f [the original lender] transferred the note, MERS is no longer an authorized agent of the holder unless it has a separate agency contract with the new [ ] principal."). Under MERS' procedures, if a mortgage loan is transferred to a non-MERS member, it generally requires deactivation of the loan from the MERS system, *Membership Rules*, *supra* note 19, R. 2, § 4(a)—meaning that if MERS follows its own procedures, any action taken on behalf of a successor and assign will often necessarily be on behalf of a MERS member. Therefore, the contract that MERS members presumably sign with MERS could likely stand as the type of separate agency contract contemplated in *Vargas*, but no such contract is generally put before the court in a standard foreclosure action.

[82] *See* Peterson, *Predatory Structured Finance*, *supra* note 55, at 2211.

[83] *Membership Rules*, *supra* note 19, R. 2, § 5(a),

[84] *Id.*, R. 2, § 6 ("MERS shall at all times comply with the instructions of the holder of mortgage loan promissory notes."). In July 2001, a senior vice president for MERS reported that the organization was considering beginning to hold notes on behalf of its members, but no final decision to do so had been made. Discussion with William C. Hultman, Senior Vice President, MERS, in Philadelphia, PA (July 13, 2001), *cited in* Dale A. Whitman, *Chinese Mortgage Law: An American Perspective*, 15 COLUM J. ASIAN L. 35, 61 n.76 (2001). Such an undertaking would ultimately expose MERS to significantly increased risk of liability. *Whitman, Chinese Mortgage Law*, 15 COLUM. J. ASIAN L. 35, 61 n.76. As late as 2007, commentators reported that MERS still did not handle notes for its members. Peterson, *Predatory Structured Finance*, *supra* note 55, at 2211 n.163 (citing *Whitman*, *Chinese Mortgage Law*, 15 COLUM J. ASIAN L. 35, 61 n.76).

while transfers of the promissory notes and servicing rights continue to occur."[85] Therefore, the MERS system never seemed to envision the use of an assignment of the note by MERS to evidence a plaintiff's right to enforce the note; it only seemed to envision MERS' ability to assign the mortgage as necessary pursuant to the needs of a party already entitled to enforce the note.

IMPACT

According to the arguments discussed above, MERS maintains no authority to assign the note in a standard mortgage foreclosure action.[86] Consequently, if an assignment of the mortgage and note by MERS to a mortgage foreclosure plaintiff cannot validly transfer the original lender's interest in the note to the plaintiff, the plaintiff cannot premise its right to enforce the note on the MERS assignment, which— because the mortgage follows the note but the note does not follow the mortgage[87]—necessarily means that the plaintiff cannot foreclose the note's security without demonstrating its right to enforce the note in some other way. This section explains the practical impact of these arguments to a standard mortgage foreclosure case.

If a court refused to accept that MERS maintains authority to assign the note in a mortgage foreclosure action, such a decision should not necessarily defeat a plaintiff's right to foreclose. As outlined above, a plaintiff in a mortgage foreclosure action obtains the right to enforce the note in two primary ways: (1) through proper assignment under

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[85] *Nebraska Dept. of Banking & Fin.*, 270 Neb. at 533, 704 N.W.2d at 787. In *Nebraska Dept. of Banking & Fin.*, the Supreme Court of Nebraska held that MERS was not a banker under the state's Mortgage Bankers Registration and Licensing Act based in part on MERS' description of itself as "merely *track*[*ing*] the ownership of the lien." 270 Neb. at 534, 704 N.W.2d at 787 (emphasis added).

[86] *See supra* notes 64-85 and accompanying text.

[87] Elvin v. Wuchetich, 326 Ill. 285, 288 (1927); Moore v. Lewis, 51 Ill. App. 3d 388, 391-92 (1st Dist. 1977); Commercial Products Corp. v. Briegel, 101 Ill. App. 2d 156, 163 (3rd Dist. 1968).

Illinois law; and (2) through negotiation under the UCC.[88] These two methods of transferring interest in the note essentially create three different legal statuses by which a plaintiff can enforce the note: (1) as an assignee of the original lender's interest in the note;[89] (2) as a holder of the note;[90] or (3) as a nonholder in possession of the note with the rights of a holder.[91] And each disparate status requires the plaintiff to present different materials to demonstrate its right to enforce.

Consider the following scenario. Defendant-mortgagor executes a note payable to Bank A and a mortgage to MERS (as nominee for Bank A and Bank A's successors and assigns) to secure the note. Bank A subsequently sells the note to Trust B for value, transfers possession of the note to Trust B (i.e. delivers the note to Trust B for the purpose of entitling Trust B to enforce it), but never indorses the note—neither specially to Trust B nor in blank. Defendant-mortgagor defaults under the terms of the note, and Trust B files a complaint to foreclose attaching the mortgage and note executed to Bank A. At prove-up, it additionally tenders an assignment of the mortgage and note executed by MERS (as nominee for lender and lender's successors and assigns) to Trust B.

In the situation described, Trust B is in possession of an unindorsed note that Bank A delivered to Trust B for the purpose of giving Trust B the right to enforce. Assuming the assignment of the note by MERS is ineffective because MERS has no authority relating to the note, the plaintiff is still entitled to enforce the note as a nonholder in possession with the rights of a holder under the UCC.[92] But it has not

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[88] *See supra* notes 34-48 and accompanying text.
[89] Strosberg v. Brauvin Realty Services, Inc., 295 Ill. App. 3d 17, 30 (1st Dist. 1998); Williams v. Frederick, 289 Ill. App. 410 (3rd Dist. 1937).
[90] 810 ILCS 5/3-301. *See also* In re Wilhelm, 407 B.R. 392, 401-02 (D. Idaho Bankr. 2009).
[91] 810 ILCS 5/3-301. *See also Wilhelm*, 407 B.R. at 401-02.
[92] *See* 810 ILCS 5/3-301. *See also* 407 B.R. at 401-02.

presented material to the court supporting its status. To demonstrate its status as nonholder in possession with the rights of a holder, it must establish possession of the note and describe the transaction through which it obtained its interest.[93]

Arguably, a court can infer a plaintiff's possession of the note by the fact that it attached a copy of the note to its complaint.[94] But unless the plaintiff alleged facts in its complaint describing how it acquired its interest, and unless those facts are either admitted by the defendant-mortgagor or deemed admitted by the defendant-mortgagor's failure to answer,[95] the court has no basis to support a finding that the plaintiff is entitled

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[93] *See* 810 ILCS 5/3-203 cmt. 2.

[94] Absent the plaintiff presenting either the original note or an affidavit alleging its possession of the original note, courts have no basis to find that the plaintiff is actually in possession of the note other than an inference based on its attachment of a copy to its complaint, because most of the major foreclosure firms—at least in Cook County—do not include in their form complaint a specific allegation that the plaintiff is in possession. *See*, *e.g.*, Deutsche v. Blair, No. 09 CH 09535 (1st Am. Comp. filed Dec. 1, 2009) (example of the form complaint used by Freedman, Anselmo, Lindberg & Rappe) (available in court file and copy on file with author); Citimortgage v. Thompson, 09 CH 30661 (Comp. filed Aug. 28, 2009) (example of the form complaint used by Hauselman, Rappin & Olswang) (available in court file and copy on file with author); Bank of NY Mellon v. Jackson, 09 CH 25687 (Comp. filed July 27, 2009) (example of the form complaint used by Noonan & Lieberman) (available in court file and copy on file with author); JP Morgan v. Hecker, No. 09 CH 21075 (Comp. filed June 30, 2009) (example of the form complaint used by Heavner, Scott, Beyers & Mihlar) (available in court file and copy on file with author); Wells Fargo v. Asenov, No. 09 CH 19253 (Comp. filed June 16, 2009) (example of the form complaint used by Pierce & Associates) (available in court file and copy on file with author); JP Morgan v. Rygielski, 09 CH 13335 (Comp. filed Mar. 25, 2009) (example of the form complaint used by Fisher & Shapiro) (available in court file and copy on file with author); Countrywide v. Stankiewicz, No. 09 CH 12193 (Comp. filed Mar. 18, 2009) (example of the form complaint used by Codilis & Associates) (available in court file and copy on file with author); Aurora Loan Services v. Dyer, No. 09 CH 05265 (Comp. filed Feb. 5, 2009) (example of the form complaint used by Dutton & Dutton) (available in court file and copy on file with author). The model complaint outlined in the IMFL does not specifically include language that the plaintiff is in possession of the note, but it does require the plaintiff to plead the capacity in which it brings the action. 735 ILCS 5/15-1504(a)(3)(N). Presumably, the legislature's provision of a form complaint should not abrogate Illinois' fact pleading requirements, *see* 735 ILCS 5/2-601, and—inasmuch as possession of the note is a fact necessary to establish a plaintiff's ability to enforce the note—a complaint to foreclose mortgage should arguably include such a statement.

[95] This article does not address the issue of whether a court could challenge MERS' ability to assign the note *sua sponte* or in a default scenario. Illinois courts have long recognized standing as an affirmative defense which a plaintiff need not plead or prove, *see*, *e.g.*, Wexler v. The Wirtz Corp., 211 Ill.2d 18, 22 (2004), and the Illinois Appellate Court has specifically applied the state's standing doctrine to a plaintiff's capacity to bring a mortgage foreclosure action. *See* Eckel v. Bynum, 240 Ill. App. 3d 867, 874 (1st Dist. 1992). In this author's opinion, however, the proposition that capacity in a mortgage foreclosure action is an affirmative defense which a plaintiff need not plead or prove contradicts the legislative requirements of the Illinois Mortgage Foreclosure Law. *See* 735 ILCS 5/15-1504(a)(3)(N). The IMFL specifically requires plaintiffs in a mortgage foreclosure action to plead the capacity in which they bring the foreclosure. *Id.*

to enforce the note as a nonholder in possession with the rights of a holder. The fact that the court has no basis to support a finding that the plaintiff is entitled to enforce the note, however, does not necessarily mean that the plaintiff is actually not entitled to enforce the note. It simply means that the plaintiff must present additional materials before the court may enter judgment.

Based on the law outlined above, the requirements for a plaintiff to establish its capacity to foreclose can be summarized as follows. If the plaintiff claims to be an assignee of the note, it must present an assignment that manifests the parties' intent to assign the note at the time the assignor transferred its interest and that describes the subject matter of the assignment with sufficient particularity.[96] Because oral assignments are allowed under Illinois law,[97] an affidavit describing an oral assignment would also presumably suffice.

If the plaintiff claims to be the holder of the note, it must demonstrate that the note is indorsed—either specially to the plaintiff or in blank—and that the plaintiff is in possession of the note.[98] The note's indorsement will presumably be clear from the copy attached to the plaintiff's complaint. Thus, assuming the plaintiff establishes that it is in

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Furthermore, it specifically allows courts to enter default judgments in accordance with the Illinois Code of Civil Procedure, 735 ILCS 5/15-1506(c), and the Illinois Code of Civil Procedure specifically provides courts with the discretion to require evidence of a complaint's allegations prior to the entry of a default judgment, 735 ILCS 5/2-1301(d). Therefore, the legislature has, at least arguably, specifically created mortgage foreclosure procedures that allow courts in Illinois to require additional evidence of a plaintiff's capacity even where a defendant does not appear, answer, or raise the issue as an affirmative defense—a proposition that would conform to many court's general practice of requiring plaintiffs to provide assignments prior to the entry of a default judgment of foreclosure, *see supra* note 16 and accompanying text.

[96] Young v. Chicago Federal Savings and Loan, 180 Ill. App. 3d 280, 283 (1st Dist. 1989); Klehm v. Grecian Chalet Ltd., 164 Ill. App. 3d 610, 616-17 (1st Dist. 1987).

[97] Strosberg v. Brauvin Realty Services, Inc., 295 Ill. App. 3d 17, 30 (1st Dist. 1998).

[98] *See supra* notes 37-44 and accompanying text.

possession of the note in some way,[99] the indorsement alone should suffice to demonstrate the plaintiff's right to enforce.

If the plaintiff claims to be a nonholder in possession with the rights of a holder, meaning that the plaintiff is in possession of an unindorsed note that was delivered to it with the intent that it be entitled to enforce the note, the plaintiff must demonstrate its possession of the note and the details surrounding the underlying transaction through which it acquired its right to enforce.[100] The plaintiff could presumably accomplish this with an affidavit describing the transaction through which it obtained the note. If the plaintiff was a member of MERS or otherwise contracted with MERS for information regarding the loan's history, MERS could probably even execute such an affidavit as the plaintiff's agent for the purpose of tracking the debt's ownership,[101] which—unlike assigning the note—would seem to be a function fitting MERS' original design.[102]

CONCLUSION

As mortgage foreclosure filings rise, scrutiny of mortgage foreclosure practices rises with it, and such scrutiny yields understandable questions concerning the role of MERS, a corporation created by the banking industry to help aid the secondary mortgage market, in a standard mortgage foreclosure action.[103] In Illinois, an assignment of the

[99] As noted above, many plaintiffs—at least in Cook County—do not routinely plead in their complaints the fact that they are in possession of the note, but a plaintiff's possession of the note can arguably be inferred by its attachment to the complaint. *See supra* note 94 and accompanying text.
[100] *See supra* notes 45-48 and accompanying text.
[101] Best practice may dictate that such an affidavit attach a printout of the relevant portions of the electronic registry to comply with Illinois Supreme Court Rule 191, which requires affidavits to attach all records upon which the affiant relies in making its averments. Ill. Sup. Ct. R. 191(a). By its own terms, Rule 191 only applies to affidavits submitted in connection with motions for summary judgments, motions for involuntary dismissal, and motions to contest personal jurisdiction, *id.*, but including the information on affidavits for all motions may serve to alleviate some of the confusion and mystery surrounding the MERS system.
[102] *See supra* notes 52-58, 81-85 and accompanying text.
[103] *See supra* notes 52-58 and accompanying text.

mortgage alone is a nullity; the mortgage automatically follows the debt it secures.[104] MERS arguably maintains no authority to transfer the note or debt underlying the mortgage, and MERS itself does not appear to contend that it does[105]—although plaintiffs seem to routinely rely on MERS assignments of the mortgage and note to establish their capacity.[106] To the extent that MERS only maintains authority to assign the mortgage, not the note, an assignment of the mortgage and the note by MERS is arguably meaningless in terms of establishing a given plaintiff's capacity to foreclose.[107]

If a plaintiff cannot rely on a MERS assignment to establish its capacity, it must otherwise demonstrate the manner through which it obtained its right to enforce the note, whether based on an assignment of the note, an indorsement of the note, or some other means[108]—which, assuming that the majority of plaintiffs are not randomly filing complaints to foreclose mortgages on notes they are not entitled to enforce, it generally should be able to do. Arguably, rather than prompting suspicion by relying on the murky nature of MERS[109] to shortcut the process of enforcing their legal rights, plaintiffs seeking to foreclose mortgages to which they are entitled should bring clarity to the situation by properly demonstrating their legal interest in the underlying note and reserving the use of MERS for the main purpose it was originally intended: assigning

[104] Elvin v. Wuchetich, 326 Ill. 285, 288 (1927); Moore v. Lewis, 51 Ill. App. 3d 388, 391-92 (1st Dist. 1977); Commercial Products Corp. v. Briegel, 101 Ill. App. 2d 156, 163 (3rd Dist. 1968).
[105] *See supra* notes 81-85 and accompanying text.
[106] *See supra* note 17 and accompanying text.
[107] *See* In re Wilhelm, 407 B.R. 392, 405 (D. Idaho Bankr. 2009); Saxon Mortgage Services, Inc. v. Hillery, 2008 U.S. Dist. LEXIS 100056, *16 (N.D. Cal. 2008) (unreported). *See also Elvin*, 326 Ill. at 288; *Moore v. Lewis*, 51 Ill. App. 3d at 391-92; *Commercial Products Corp.*, 101 Ill. App. 2d at 163.
[108] *See supra* notes 28-48 and accompanying text.
[109] McIntire, *supra* note 1.

mortgages for recording purposes to parties already entitled to enforce the notes secured by those mortgages.[110]

[110] *See supra* notes 52-58, 81-85 and accompanying text.