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February 10, 2015

Edward Buttrey, Chairman
Montana Senate Business, Labor and Economic Affairs Committee
Montana State Senate
PO Box 200500
Helena, MT 59620-0500

RE: Senate Bill 162

Dear Chairman Buttrey,

I write in support of SB 162. This bill closes a loophole in Montana law that is currently exploited by members of the Mortgage Electronic Registration Systems, Inc. (MERS). The loophole allows MERS to avoid payment of county recording fees, depriving Montana counties an important source of funding and undermines the accuracy and reliability of Montana's land title records.

My interest in SB 162 stems from the economic catastrophe that is commonly known as "the housing bubble". I was a general contractor in Flathead County, specializing in residential construction of high-end and multi-family developments. I worked in this industry for 25 years, until 2008 when the real estate market collapsed and destroyed my business. My wife, Joyce Mitchell, was a real estate broker for 20 years in Flathead County and although her business survived the "bubble", her volume of sales dropped 90% from 2007 through 2009. What happened to us also happened across the entire country. MERS caused this economic destruction, and I hope to help make sure, at least in Montana, that it never happens again.

Explanation

Montana requires lenders to record mortgages and deeds of trust pursuant to Montana Code Annotated (MCA) §70-21-202. Yet, MERS members violate this statute routinely, without ever recording transfers of mortgage interests with any County Clerk and Recorder. As the Ninth Circuit Court of Appeals recognized just last summer, it is the express purpose of MERS to avoid compliance with the mandatory recording statute. "The obvious advantage of the MERS system is that it allows residential lenders to avoid the bother and expense of recording every change of ownership of promissory notes." *In re Mortg. Elec. Registration Sys., Inc.*, 754 F.3d 772, 777 (9th Cir. 2014).

Meanwhile, in Montana, the system of recordation is supposed to be funded by these statutorily prescribed recording and filing fees paid by users of the land title recording system, such as mortgage lenders, MCA § 7-4-2637. Those fees are expressly designated, by the Montana Legislature, for funding and maintaining the recording system, MCA § 7-4-2637(3).

MERS members violate the public policy of the state of Montana by failing to record proper documentation of subsequent transactions as the loan passed from entity to entity, and by failing to file appropriate filing fees that would have been due if such mandatory recording had occurred.

The Problem

How does MERS get away with it? To understand the problem, it is necessary to understand how MERS functions.

Most U.S. counties track changes in ownership of land, including mortgages and deed of trust, by maintaining records indexed through the names of grantors and grantees. 14 Richard R. Powell, *Powell on Real Property* § 82.03[2][b] (Michael Allen Wolf ed., 2011). Montana follows this same set of procedures. See Title 7, ch. 4, pt. 26 and Title 70, ch.21, pts. 1, 2 and 3, Mont. Code Ann. These grantor-grantee indexes allow individuals and businesses contemplating the purchase or financing of land to investigate – or hire a title insurer to investigate – whether a seller or mortgagor actually owns the land being offered for sale or mortgage. Powell on Real Property § 82.03[2][b].

Communities traditionally have elected their county recorders or registers of deed; these elections provide an important democratic check and balance in the preservation of property rights. A public, enduring, authoritative, and transparent record of all land ownership provides a vital information infrastructure that has proven indispensable in facilitating not only mortgage finance, but virtually all forms of commerce. See Gary A Jeffress & Lynn C. Holstein, *An International Survey of Real Property Transaction Recording Costs and some Characteristics: A Preliminary Evaluation*, 5 URISA J 53, 53 (1993) (suggesting recording systems are a “precondition ... of an efficient land market”). County land title records are the oldest and most stable metric tracking the “American dream” of family homeownership. William Dollarhide, Foreword to. E. Wade Hone, *Land & Property Research in the United States*, at xi (1997).

That, however, at least for most mortgages and deeds of trust has now changed.

In the mid-1990s, some mortgage bankers decided they no longer wanted to pay recording fees for assigning mortgages. Securitization – a process of pooling many mortgages into a trust and selling income from the trust to investors on Wall Street – drove this decision. Securitization, also sometimes called “structured finance,” usually required several successive mortgage assignments to different companies. To avoid the hassle and expense of paying county recording fees, these mortgage bankers formed a plan to create a single shell company that would pretend to own all the mortgages in the country. According to the plan, the mortgage bankers would never have to record assignments again because the same company would always “own” all the

mortgages. They incorporated the shell company in Delaware and called it Mortgage Electronic Registration Systems, Inc. – MERS.

Christopher L. Peterson, *Two faces: Demystifying the Mortgage Electronic Registration System's Land Title Theory*, 53 Wm. & Mary L. Rev. 111, 116 (2011). "Under the MERS System, the lender owns the home loan borrower's (or mortgagor's) promissory note. MERS, as the "nominee" of the lender and of any assignee of the lender, is designated in the deed of trust (or mortgage) as the "beneficiary" (or mortgagee) under the deed of trust." *In re Mortg. Elec. Registration Sys., Inc.*, 754 F.3d 772, 777 (9th Cir. 2014). "MERS rather than the lender or lender's assignee is recorded as the beneficiary under the deed of trust in the recording system of the county where the property is located." *Id.* This reform was imposed by the private mortgage banking industry "[e]ven though not a single state legislature or appellate court [has ever] authorized this change in real property recording." *Two faces*, 53 Wm. & Mary L. Rev. at 116.

The results have not been good. Now fifty to sixty percent of the nation's residential mortgages are recorded in the name of MERS Inc., rather than the bank, trust, or company that actually has a meaningful economic interest in the repayment of the debt. *Id.* Thus, "[f]or the first time in the nation's history, there is no longer an authoritative, public record of who owns land in each county." *Id.* While the MERS system may benefit its members by enabling them to sell, transfer, and assign mortgages amongst themselves without the burden of documenting their transactions on paper or in the public records, this system has essentially privatized mortgage records while undermining the value of county public records. No longer can homeowners in Montana visit the county Clerk & Recorder, review the public records, and learn the identity of who actually owns their mortgages. Doing so only leads to the discovery that MERS holds their security instrument for an unnamed lender. And the public cannot access the MERS system; it is for its members only. "The resulting paucity of information has caused significant confusion for banks, borrowers, and courts." *Citimortgage, Inc. v. Barabas*, 975 N.E.2nd 805, 809 (Ind. 2012) reh'g denied (Jan. 28, 2013).

"Further, because the identities of the actual owners of the notes and beneficiaries of the deed of trust are not public knowledge, renegotiation of mortgage loans processed through the MERS System is very difficult, often impossible." *In re Mortg. Elec. Registration Sys., Inc.*, 754 F.3d 772, 777 (9th Cir. 2014). Thus, homeowners who need to work with their lenders to avoid foreclosure, landowners who wish to implement changes in land use or to undertake development, and county planning & zoning officials who need to otherwise seek cooperation from the holder of the security interest, are unable to figure out who has the actual authority to work with them.

Finally, again, MERS allows its members to avoid paying county recording fees. County clerks & recorders deserve payment of recording fees for assignments avoided through the use of documents containing false statements. Recording of these documents caused a reduction in the revenue that county governments would have collected from mortgage financiers to maintain their land title records for the benefit of both the public – and MERS members. But while they benefit from Montana's land title recording system, MERS members do not wish to participate in or pay for maintaining that system. Indeed, MERS has regularly used projections of this reduction in costs to MERS members in its sales pitches and marketing material. *Two Faces*, 53

Wm. & Mary L. Rev. at 147. Studies done by accountants to financially justify the creation of MERS expressly show just how the use of MERS would cause a reduction in fees paid to counties. *Id.*

In Montana, again, recording trust indentures is not “optional.” Statute requires it:

Transfers of property in trust for the benefit of creditors and transfers or liens on property by way of mortgage or abstract of such document are required to be recorded in the cases specified in Title 31, chapter 2, on the special relation of debtor and creditor and Title 71 on mortgages, respectively.

MONT. CODE ANN. § 70-21-202.

Meanwhile, in Montana, the system of such recordation is funded by statutorily prescribed recording and filing fees, Mont. Code Ann. § 7-4-2637. Those fees are expressly designated by the Montana Legislature for maintaining the recording system:

- (a) Of the fees collected under subsection (1):(i) \$1 must be deposited in the records preservation fund, provided for in 7-4-2635;(ii) 25 cents must be deposited in the county land information account provided for in 7-6-2230;(iii) 75 cents must be transmitted each month to the department of revenue in the manner prescribed by the department of revenue for deposit in the Montana land information account created in 90-1-409; and (iv) the remainder must be deposited as provided for in 7-4-2511.
- (b) The fees collected under subsection (2) must be deposited in the records preservation fund provided for in 7-4-2635.

MONT. CODE ANN. §7-4-2637 (3). MERS members thwart this funding design by failing to record proper documentation of subsequent transactions as the loan passed from entity to entity, and by failing to file appropriate filing fees that would have been due if such mandatory recording had occurred.

THE SOLUTION

The loophole that allows MERS to avoid Montana law exists in Mont. Code Ann. § 71-1-207. It currently reads:

- (1) Mortgages of real property **may** be acknowledged or proved, certified, and recorded in the same manner and with the same effect as grants of real property.
- (2) An assignment of a real estate mortgage **may** be recorded in the same manner as a real estate mortgage, and the record operates as legal notice to the mortgagor and all persons subsequently deriving title to the mortgage from the assignor as well as to all other persons, including subsequent purchasers, encumbrancers, mortgagees, or other lienholders. An assignment must contain the assignee’s post-office address at the

assignee's place of residence and may not be recorded or filed unless it contains the post-office address.

(Emphasis added.) MERS interprets the work "may" to mean that it need not comply with the language in § 70-21-202 that reads: "are required to be recorded." (Emphasis added.) SB 162 is designed to close this loophole.

After the proposed change the statute would read:

- (1) Mortgages of real property ~~may~~ **must** be acknowledged or proved, certified, and recorded in the same manner and with the same effect as grants of real property.
- (2) An assignment of a real estate mortgage ~~may~~ **must** be recorded in the same manner as a real estate mortgage, and the record operates as legal notice to the mortgagor and all persons subsequently deriving title to the mortgage from the assignor as well as to all other persons, including subsequent purchases, encumbrancers, mortgagees, or other lienholders. An assignment must contain the assignee's post-office address at the assignee's place of residence and may not be recorded or filed unless it contains the post-office address.

Thus SB 162 would restore the requirement that all document like deeds of trust, mortgages and assignments of security interests, that affect title to real property, must be recorded with the county clerk & recorder. This would likewise restore the integrity of the land title recording system. At the same time, it would reinstate an important means of funding the vitally important role played by the clerk & recorder in ensuring accurate and reliable land title records in Montana.

CONCLUSION

Accordingly, I urge the Committee to move SB 162 to the full Senate with a "DO PASS" recommendation.

Thank you for your service in the Legislature, and for taking the time to consider my perspective.

Sincerely,



Dan Mitchell

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71-1-207. Recording of mortgages and assignments. (1)

Mortgages of real property may be acknowledged or proved, certified, and recorded in the same manner and with the same effect as grants of real property.

(2) An assignment of a real estate mortgage may be recorded in the same manner as a real estate mortgage, and the record operates as legal notice to the mortgagor and all persons subsequently deriving title to the mortgage from the assignor as well as to all other persons, including subsequent purchasers, encumbrancers, mortgagees, or other lienholders. An assignment must contain the assignee's post-office address at the assignee's place of residence and may not be recorded or filed unless it contains the post-office address.

History: (1)En. Sec. 3844, Civ. C. 1895; re-en. Sec. 5751, Rev. C. 1907; re-en. Sec. 8266, R.C.M. 1921; Cal. Civ. C. Sec. 2952; re-en. Sec. 8266, R.C.M. 1935; Sec. 52-205, R.C.M. 1947; (2)En. Sec. 3823, Civ. C. 1895; re-en. Sec. 5744, Rev. C. 1907; re-en. Sec. 8259, R.C.M. 1921; Cal. Civ. C. Sec. 2934; amd. Sec. 1, Ch. 14, L. 1925; amd. Sec. 1, Ch. 159, L. 1935; re-en. Sec. 8259, R.C.M. 1935; amd. Sec. 11-131, Ch. 264, L. 1963; Sec. 52-114, R.C.M. 1947; R.C.M. 1947, 52-114, 52-205; amd. Sec. 2240, Ch. 56, L. 2009.

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70-21-202. Certain transfers in trust -- mortgages -- when to be recorded. Transfers of property in trust for the benefit of creditors and transfers or liens on property by way of mortgage or abstract of such document are required to be recorded in the cases specified in Title 31, chapter 2, on the special relation of debtor and creditor and Title 71 on mortgages, respectively.

History: En. Sec. 1575, Civ. C. 1895; re-en. Sec. 4648, Rev. C. 1907; re-en. Sec. 6895, R.C.M. 1921; Cal. Civ. C. Sec. 1164; Field Civ. C. Sec. 511; re-en. Sec. 6895, R.C.M. 1935; amd. Sec. 4, Ch. 218, L. 1971; R.C.M. 1947, 73-107.

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31-2-215. Recording assignment and filing inventory. An assignment for the benefit of creditors must be recorded and the inventory required by [31-2-213](#) must be filed with the county clerk of the county in which the assignor resided at the date of the assignment or, if the assignor did not reside in this state at that time, with the clerk of the county in which the assignor's principal place of business was situated or, if the assignor did not have a residence or place of business in this state, with the clerk of the county in which the principal part of the assigned property was situated at the time of the assignment.

History: En. Sec. 4524, Civ. C. 1895; re-en. Sec. 6150, Rev. C. 1907; re-en. Sec. 8626, R.C.M. 1921; Cal. Civ. C. Sec. 3463; Based on Field Civ. C. Sec. 1938; re-en. Sec. 8626, R.C.M. 1935; R.C.M. 1947, 18-315; amd. Sec. 994, Ch. 56, L. 2009.

Provided by Montana Legislative Services



Montana using mortgage settlement funds to battle foreclosure

MAY 27, 2013 6:30 AM • BY MARTIN KIDSTON

When Montana received nearly \$6 million from a \$25 billion national settlement with the nation's five largest banks – a result of their shady mortgage practices – the state tucked away its share of the funding to help homeowners address the threat of foreclosure.

Fifteen months later, the Office of Consumer Protection in the Montana Attorney General's Office says the program, known as Save My Montana Home, is working well, even if it's not yet widely known and foreclosure notices continue at an even pace.

"We deal with situations all the time, but our number of successes keeps going up," said Chuck Munson, assistant attorney general in the Office of Consumer Protection. "These successes come out of a pretty dark place. We're hoping to have a living document out in the next few weeks that has a list of our family success stories."

In early 2012, Gov. Steve Bullock, serving as Montana's attorney general at the time, joined 49 other states in the landmark \$25 billion settlement with Bank of America, JP Morgan Chase & Co., Citibank, Wells Fargo and GMAC.

It was the second largest settlement ever reached outside the 1998 deal made with tobacco companies, and it gave states an opportunity to establish programs for struggling homeowners who'd borrowed from one of the five banks.

"A lot of states in the country have had budget shortfalls – they're operating in the red – and the money they received from the settlement got folded back into their budget," Munson said. "But in Montana, we ended up forwarding our money – almost all of it – for use on direct services to help struggling homeowners."

Montana received \$5.8 million in the mortgage settlement. The state directed much of its funding to help the Attorney General's Office conduct foreclosure mitigation and partner with housing counselors across the state.

The funding also provides direct help through the Montana Legal Services Association, as well as NeighborWorks Montana. Homeowners who are underwater on their mortgage are eligible for refinancing under the current program.

"Counseling was happening before we funded it, so what we did is beef it up," Munson said. "There are new counselors now where there used to not be. Hopefully, it's a self-perpetuating system. It's a three-year program, and we're in the beginning of year two."

Munson said calls to the Attorney General's Office for help fighting foreclosure haven't slowed. While Montana never saw the housing crisis rise to levels seen in Phoenix, Ariz., or Fort Lauderdale, Fla., it remains steady.

Families, he said, are still losing their homes, and the Office of Consumer Protection, now under the command of Attorney General Tim Fox, is still working to help borrowers.

"After the investigation in the fall of 2010 that led to the settlement, our complaints went from almost nothing to a spike, and our spike has been consistent ever since," Munson said. "We have busier weeks than others, but it's been steady – in the many hundreds overall."

Munson said the office receives several calls a week from homeowners looking for help. On one particular day, he said, the office was swamped with 39 calls.

In one case, a family faced foreclosure after missing just three payments. In another case, a Flathead Valley homeowner hadn't received any foreclosure notice, even after missing 49 monthly payments.

Munson said the cases represent two extremes, one where a bank is fast to foreclose and another where it hasn't acted at all.

"It's hard to predict when an entity is going to file a notice required to move forward with a foreclosure," Munson said. "The main issue is that people aren't being dealt with at the banks in a way that's understandable to them. A lot of times, they get conflicting information."

Paul Polzin, a research associate with the Bureau of Business and Economic Research at the University of Montana, said housing prices in Missoula County increased just .06 percent from the third to fourth quarter in 2012, much less than the national average.

From the fourth quarter of 2011 to the fourth quarter of 2012, prices jumped just 2.3 percent – less than the national average of 5.5 percent.

While home prices are slowly rebounding in Montana, Polzin said, the state escaped the worst of the housing crisis. Still, the impacts brought by foreclosures and a sluggish economy linger.

"Back when I looked at foreclosure rates in 2008 and 2009, Montana had a lower foreclosure rate than some of the ground zero states like Arizona and Nevada," he said. "Flathead, Gallatin and Ravalli counties were hit probably harder by the housing downturn, because there were so many second homes and recreation homes."

According to RealyTrac.com, Montana currently has 936 active foreclosures among 3,817 homes for sale. It's a small number compared to even Idaho, which has 4,336 active foreclosures.

Flathead has 173 foreclosures, followed by 135 in Gallatin and 101 in Ravalli – the three leading Montana counties. Missoula has 76 active foreclosures, according to the website.

"A home is the biggest asset people have in America, by and large," Munson said. "There's so much more involved when you're talking about a home. It's not all economics, and the emotional stakes are high. So I feel strongly about saving homes."

Munson couldn't say how many homes the state program has saved to this point, but he said the numbers indicate that funding received in the settlement has helped. He said the Attorney General's Office plans to release a list of success stories in the next few weeks, giving insight to the program's success.

"There are some cases that don't have a favorable outcome, and in those cases, we demand a humane exit for those families," Munson said. "We treat each complaint as a potential violation of the law or the settlement. We work to get the foreclosure postponed long enough to review the complaint."

Fred Carl, a retired Missoula broker, believes many current foreclosures are illegal. He cites case law in other states and refers to a system known as the Mortgage Electronic Registration System to make his argument.

The MERS system was set up by banks, he said, to separate the deed from the note. But to foreclose, Carl argues, the deed and the note must be together.

He's hoping his argument gains traction in Montana and leads to new legislation or a Montana Supreme Court ruling on the issue.

"The 'uninformed public' needs a more complete picture of what took place with regard to the housing bubble," Carl said. "If they know the cause, the illegal foreclosures, the heartache, and the severe damage both mentally and financially that has been fostered on thousands of families here in Montana and across the country, then individuals and the general public, will be better equipped to deal with the illegal actions being committed."