

Consumer Track

Mortgage Meltdown
from Both the Lenders'
and Borrowers' Perspectives

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Selected Cases of Interest Concerning MERS - Standing and Power to Assign

This outline is not intended to provide a comprehensive listing of all cases across the country, but rather a representative sampling of the cases in each jurisdiction concerning MERS standing to bring foreclosure actions and the validity of its assignments of notes and mortgages.

<u>State</u>	<u>Case Citation</u>	<u>Holding</u>
Alabama	<i>In re Frank</i> , 2011 WL 846125 (Bankr. N.D. Ala. March 8, 2011)	Court recognized the process where a mortgage is assigned to MERS as "assignee" for the lender, and the assignment of the mortgage by MERS to the current holder of the Note (in this case Wells Fargo) was effective to make Wells Fargo the holder of both the note and the mortgage.
	<i>Crum v. LaSalle Bank, N.A.</i> , 55 So.3d 266 (Ala. Civ. App. 2009)	MERS had the authority to assign the mortgage to an assignee, who obtained the right to foreclose on that mortgage through the assignment.
Alaska	No reported cases of note	
Arizona	<i>Diessner v. MERS</i> , 618 F. Supp.2d 1184 (D. Ariz. 2009).	MERS is entitled to bring foreclosure proceeding despite the fact they are not the holder of the note
Arkansas	<i>MERS v. Southwest Homes of Ark.</i> , 301 S.W.3d 1 (Ark. 2009)	Because MERS was at most the mere agent of the lender, it held no property interest and was not a necessary party to a foreclosure proceeding and could not set aside a judgment granting a foreclosure.
	<i>Coley v. Accredited Home Lenders, Inc.</i> , 2011 WL 1193072 (E.D. Ark. 2011) <i>MERS v. Gabler</i> , Circuit Court of Garland County, No. 2004-17-II (Sept. 21, 2005).	MERS had the authority to assign note and mortgage from its principal to another entity. MERS has standing to bring a foreclosure action.
California	<i>Gomes v. Countrywide Home Loans, Inc.</i> , 121 Cal.Rptr.3d 819 (Cal. App. 4 Dist. 2011)	MERS has the authority to initiate foreclosure proceedings despite the fact it does not own the note secured by the deed of trust.
	<i>Coburn v. Bank of New York Mellon, N.A.</i> , 2011 WL 1103470 (E.D. Cal. 2011)	MERS has authority to assign mortgage to another entity, giving the assignee power to initiate foreclosure proceedings.
	<i>Chilton v. Federal Nat. Mortg. Ass'n</i> , 2009 WL 5197869 (E.D. Cal. 2009).	MERS had authority to initiate non-judicial foreclosure despite not being in possession or owner of promissory note.

Colorado	<i>In re Smith</i> , 366 B.R. 149 (Bankr. D. Colo. 2007)	Defendant was real party in interest to Deed of Trust, where it held a note endorsed in blank and MERS held the deed of trust as "nominee" for holder of the note.
	<i>In re Roberts</i> , 367 B.R. 677 (Bankr. D. Colo. 2007)	Court found that it is clear from the face of the Deed of Trust that, "MERS was empowered to act on behalf of whoever was the equitable owner of the rights in the Deed of Trust." Court also found that the Deed of Trust grants MERS the authority to exercise all of the substantive rights of the owner of the note.
Connecticut	<i>MERS v. Ventura</i> , 2006 WL 1230265 (Conn. Super. Ct. 2006);	Court held that MERS was the proper party to bring foreclosure action.
Delaware	<i>Savage v. U.S. Nat'l Bank Ass'n</i> , 19 A.3d 302 (Del. 2011)	Failure by MERS or USNB to provide notice to debtors that MERS had assigned the mortgage to USNB was not a defense to USNB's foreclosure action.
Florida	<i>Taylor v. Deutsche Bank Nat. Trust Co.</i> , 44 So.3d 618 (Fla. App. 5 Dist.)	MERS had power to transfer rights of both the note and the mortgage to third party under rights granted to it as nominee for holder of the note and mortgage.
Georgia	<i>Morgan v. Ocwen Loan Servicing, LLC</i> , ___ F. Supp. 2d, 2011 WL 2650194 (N.D. Ga. 2011)	Mortgage granted in favor of MERS, where note was in the name of the lender, was not void under Georgia law. However, questions remained as to whether Ocwen was the holder of the note and had the authority to foreclose on the debt.
Hawaii	No reported cases of note	
Idaho	<i>In re Wilhelm</i> , 407 B.R. 392 (Bankr. D. Idaho 2009)	MERS lacked authority to assign promissory notes, and thus lenders who sought relief from stay lacked standing because they could not demonstrate that the notes had been properly assigned to them.
Illinois	<i>MERS v. Barnes</i> , 940 N.E.2d 118 (Ill. App. 1 Dist. 2010)	MERS has standing to bring a foreclosure action, even though not the beneficial owner of the note.

Indiana	Citimortgage, Inc. v. Barabas, 950 N.E.2d 12 (Ind. App. 2011)	MERS, as nothing more than nominee for mortgage holder, lacked interest in property sufficient to require that it be served notice of foreclosure lawsuit.
Iowa	No reported cases of note	
Kansas	<i>MERS v. Graham</i> , 229 P.3d 420 (Kan. App. 2010)	MERS did not have standing to foreclose on mortgage because it had no interest in the underlying promissory note and had not shown that it had an agency relationship with Countrywide (who held the note) or was authorized to act on Countrywide's behalf.
	<i>Landmark Nat. Bank v. Kesler</i> , 216 P.3d 158 (Kan. 2009)	Court refused to set aside default judgment in foreclosure action. The Court rejected MERS argument that it was entitled to notice of the foreclosure action as the recorded mortgage holder because MERS did not have any tangible interest in the mortgage and suffered no harm as a result of the foreclosure.
	<i>Renkemeyer v. MERS</i> , 2010 WL 3878582 (D. Kan. 2010)	MERS has an interest in the mortgage sufficient to establish that it was a necessary party to quiet title action and should be joined pursuant to Fed. R. Civ. P. 19.
	<i>In re Martinez</i> , 444 B.R. 192 (Bankr. D. Kan. 2011)	Countrywide had the ability to enforce mortgage held by MERS on the theory that MERS was an agent of Countrywide. In addition, the Court held the note and mortgage were not "split" so as to render the mortgage unenforceable.
	<i>In re Martinez</i> , ___ B.R. ___, 2011 WL 1519877 (Bankr. D. Kan. 2011)	Holder of promissory note, as defined by the Kansas Uniform Commercial Code, is entitled to enforce that note, even if it is not the beneficial owner.
Kentucky	No reported cases of note	
Louisiana	<i>First Nat. Bank, USA v. DDS Const., LLC</i> , ___ So.3d ___, 2011 WL 2694627 (La. App. 5 Cir. 2011)	Assignment of mortgage by MERS was sufficient to give assignee power to enforce mortgage.

Maine	<i>MERS v. Saunders</i> , 2 A.3d 289 (Maine 2010)	Because MERS had no interest in the note secured by the mortgage, it lacked standing to bring a foreclosure action. However, the court allowed the bank that held the note and was MERS' principal to be substituted as the proper party.
Maryland	No reported cases of note	
Massachusetts	<i>Aliberti v. GMAC Mortgage, LLC</i> , 2011 WL 1595442 (D. Mass. 2011)	Court held that assignment from MERS validly conveyed title to mortgage to assignee.
	<i>In re Huggins</i> , 357 B.R. 180 (Bankr. D. Mass. 2006)	Court held that MERS, as nominee for note holder, had standing to seek relief from stay
	<i>Adamson v. MERS</i> , 2011 WL 1136462 (Mass. Super. Ct. 2011)	Court held that MERS had authority to foreclose in its own name, even though it was not the owner of the note
Michigan	<i>Residential Funding Co. v. Saurman</i> , ___ Mich. App. ___, 2011 WL 1516819 (2011)	MERS does not have the authority to foreclose by advertisement in Michigan, but instead must proceed through a judicial foreclosure
	<i>Kuttkuhn v. Quicken Loans, Inc.</i> , 2011 WL 1575371 (E. D. Mich. 2011)	Court held that MERS has standing to initiate foreclosure proceedings
Minnesota	<i>Jackson v. MERS</i> , 770 NW 2nd 487 (Minn. 2009)	Assignment of note to a party that does not hold the title to the mortgage does not deprive the holder of the mortgage (in this case MERS) from performing a non-judicial foreclosure.
	<i>Deutsche Bank Trust Co. Americas v. Souza</i> , 2010 WL 3958671 (Minn. App. 2010)	MERS was not required to produce note in order to perform non-judicial foreclosure.
	<i>In re Sena</i> , 2006 WL 2729544 (Minn. App. 2006)	MERS has standing to foreclose on property.
Mississippi	No reported cases of note	
Missouri	<i>In re Tucker</i> , 441 B.R. 638 (Bankr. W.D. Mo. 2010)	Because MERS held a deed of trust as "nominee" (or "agent") for the original lender and each subsequent holder of the note secured by the deed of trust, later assignee of the note had the authority to foreclose on the deed of trust through MERS.

Mers v. Bellistri , 2010 WL 2720802 (E.D. Mo. 2010)

Court held that MERS, as recorded owner of bare legal title to deed of trust, had standing to foreclose on the deed of trust and was entitled to notice of any redemption rights.

Bellistri v. Ocwen , 284 S.W.3d 619 (Mo. App. 2009)

MERS' attempt to assign note to Ocwen was ineffective because MERS held only an interest in the deed of trust and there was no evidence that the holder of the note granted MERS authority to transfer or assign the note. In addition, the attempted assignment of the deed of trust separate from the note ha no "force" under Missouri law. Therefore, Ocwen had no interest in the note or deed of trust and lacked standing.

Montana	No reported cases of note	
Nebraska	No reported cases of note	
Nevada	<i>Lasao v. Stearns Lending Co.</i> , 2011 WL 3273923 (D. Nev. 2011)	MERS has the authority to make valid assignments and transfers of a deed of trust.
	<i>Miller v. Skogg</i> , 2011 WL 2976757 (D. Nev. 2011)	MERS has standing to implement non judicial foreclosure proceedings under Nevada law
New Hampshire	No reported cases of note	
New Jersey	<i>Bank of New York v. Raftogianis</i> , 13 A.3d 435 (N.J. Super. Ch. 2010)	Granting of note in favor of lender and mortgage in favor of MERS did not create a "split" in the note and mortgage that affected the enforceability of either paper.
	<i>First Horizon Home Loan Corp. v. Brown</i> , 2010 WL 1426714 (N.J. Super. A.D. 2010)	Lender had standing to initiate foreclosure action in its own name, even though it had previously assigned its rights to MERS.
New Mexico	No reported cases of note	
New York	<i>Deutsche Bank Nat. Trust Co. v. Pietranico</i> , ___ N.Y.S.2d ___, 2011 WL 3198834 (N.Y. Sup. 2011)	MERS had aulthority to assign the mortgage to third party, giving the assignee standing to bring foreclosure action.
	<i>Mortgage Elec. Registration Sys., Inc. v Coakle</i> , 41 A.D.3d 674 (N.Y. 2007)	Where MERS was the holder of both the note and the mortgage on the date of foreclosure, MERS had standing to bring foreclosure action.

	<i>Aurora Loan Services, LLC v. Weisblum</i> , 85 A.D.3d 95 (N.Y.A.D. 2 Dept. 2011)	MERS assignment of mortgage did not afford assignee standing to bring foreclosure proceeding where MERS was not the holder of the underlying note, and thus was unable to assign note as well.
	<i>MERS v. Bastian</i> , 824 N.Y.S.2d 764 (N.Y. Sup. 2006)	Because holder of the underlying note had not assigned it to MERS, MERS lacked standing to bring foreclosure action
North Carolina	No reported cases of note	
North Dakota	<i>Bray v. Bank of America</i> , 2011 WL 30307 (D.N.D. 2011)	Because MERS was the record holder of the mortgage, and was in possession of the original note, which was endorsed in blank, MERS had standing to foreclose on the plaintiff's property.
Ohio	<i>MERS v. Vascik</i> , 2010 WL 3820494 (Ohio App. 6 Dist. 2010)	To bring a foreclosure action, foreclosing party must show that it is the current holder of the note and the mortgage, and that defendant is in default. Because MERS held both the note and the mortgage on the petition date, it had standing. Once MERS assigned its interest, it was proper to substitute the assignee in place of MERS as the plaintiff.
	<i>Deutsche Bank Natl. Trust Co. v. Traxler</i> , 2010 WL 3294292 (Ohio App. 9 Dist. 2010)	MERS had the authority to assign the mortgage to a third party, giving that party standing to enforce the note.
	<i>MERS v. Mosley</i> , 2010 WL 2541245 (Ohio App. 8 Dist. 2010)	MERS had authority to foreclose on mortgage, even though it was not the beneficial owner of the mortgage, because it was the holder of both the mortgage and the note.
Oklahoma	No reported cases of note	
Oregon	<i>Beyer v. Bank of America</i> , 2011 WL 3359938 (D. Or. 2011)	Separation of deed of trust from promissory note does not render the deed of trust null and void. Court also found that MERS is a proper beneficiary under a deed of trust, and as such has the authority to transfer the deed of trust to a third party.
	<i>Hooker v. Northwest Trustee Services, Inc.</i> , 2011 WL 2119103 (D. Or. 2011)	Court found MERS was not the beneficiary under the deed of trust, and as such had no authority to assign the deed of trust.

Angelini v. Bank of America ,
2011 WL 2433485 (D. Or. 2011)

While Oregon law does not prohibit an arrangement whereby an agent appears as lienholder for the benefit of the lender and the lender's successors and assigns, if foreclosure by sale is pursued, Oregon law does require that all prior unrecorded assignments must be filed in connection with the foreclosure.

Pennsylvania	<i>Mortgage Electronic Registration Systems, Inc. v. Ralich</i> , 982 A.2d 77 (Pa. Super. 2009)	MERS has standing to bring foreclosure action in its own name as nominee for the lender.
Rhode Island	No reported cases of note	
South Carolina	No reported cases of note	
South Dakota	No reported cases of note	
Tennessee	No reported cases of note	
Texas	<i>Wigginton v. Bank of New York Mellon</i> , 2011 WL 2669071 (N.D. Tex. 2011) <i>Allen v. Chase Home Finance, LLC</i> , 2011 WL 2683192 (E.D. Tex. 2011)	MERS has the right to foreclose and sell property. MERS is a mortgagee under Texas law, and as such has the authority to appoint a servicing agent and to foreclose - regardless of whether MERS is the true owner of the underlying promissory note.
Utah	<i>Commonwealth Property Advocates, LLC v. Mortgage Electronic Registration System, Inc.</i> ___ P.3d ___, 2011 WL 2714429 Utah App. 2011)	Even in the face of securitization, the provisions of the Deed of Trust continue to grant MERS the authority to initiate foreclosure proceedings, appoint a trustee, and to foreclose and sell the property.
Vermont	No reported cases of note	
Virginia	<i>In re Burnett</i> , ___ B.R. ___, 2011 WL 2214667 (Bankr. W.D. Va. 2011)	MERS has the authority to enforce a deed of trust through foreclosure and has the authority to appoint a substitute trustee.
Washington	<i>Rhodes v. HSBC Bank USA N.A.</i> , 2011 WL 3159100 (W. D. Wash. 2011)	MERS had the authority to act as a beneficiary under a Deed of Trust where such authority was explicitly granted by plaintiff upon execution of the instrument.
West Virginia	No reported cases of note	

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Wisconsin	<i>Countrywide Home Loans Servicing LP v. Rohlf</i> , 2010 WL 4630328 (Wis. App. 2010)	MERS had the authority to assign the mortgage to third party, giving the assignee the authority to foreclose on the property.
Wyoming	<i>In re Martinez</i> , 2011 WL 996705 (Bankr. D. Wyo. 2011)	MERS had the authority to assign a mortgage on behalf of the original lender to a third party (Ocwen), giving that third party proper standing to bring a motion for relief from stay.
	<i>In re Relka</i> , 2009 WL 5149262 (Bankr. D. Wyo. 2009)	MERS had the authority to assign a mortgage to a third party.

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Rule 3001. Proof of Claim

1 * * * * *

2 (c) SUPPORTING INFORMATION.

3 (1) *Claim Based on a Writing.* When a claim, or
4 an interest in property of the debtor securing the claim, is
5 based on a writing, the original or a duplicate shall be filed
6 with the proof of claim. If the writing has been lost or
7 destroyed, a statement of the circumstances of the loss or
8 destruction shall be filed with the claim.

9 (2) *Additional Requirements in an Individual*
10 *Debtor Case; Sanctions for Failure to Comply.* In a case in
11 which the debtor is an individual:

12 (A) If, in addition to its principal amount, a
13 claim includes interest, fees, expenses, or other charges
14 incurred before the petition was filed, an itemized statement
15 of the interest, fees, expenses, or charges shall be filed with
16 the proof of claim.

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17 (B) If a security interest is claimed in the
18 debtor's property, a statement of the amount necessary to cure
19 any default as of the date of the petition shall be filed with the
20 proof of claim.

21 (C) If a security interest is claimed in property
22 that is the debtor's principal residence, the attachment prescribed
23 by the appropriate Official Form shall be filed with the proof of
24 claim. If an escrow account has been established in connection
25 with the claim, an escrow account statement prepared as of the
26 date the petition was filed and in a form consistent with
27 applicable nonbankruptcy law shall be filed with the attachment
28 to the proof of claim.

29 (D) If the holder of a claim fails to provide
30 any information required by this subdivision (c), the court
31 may, after notice and hearing, take either or both of the
32 following actions:

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33 (i) preclude the holder from presenting
 34 the omitted information, in any form, as evidence in any
 35 contested matter or adversary proceeding in the case, unless
 36 the court determines that the failure was substantially justified
 37 or is harmless; or

38 (ii) award other appropriate relief,
 39 including reasonable expenses and attorney’s fees caused by
 40 the failure.

41 * * * * *

COMMITTEE NOTE

Subdivision (c). Subdivision (c) is amended to prescribe with greater specificity the supporting information required to accompany certain proofs of claim and, in cases in which the debtor is an individual, the consequences of failing to provide the required information.

Existing subdivision (c) is redesignated as (c)(1).

Subdivision (c)(2) is added to require additional information to accompany proofs of claim filed in cases in which the debtor is an individual. When the holder of a claim seeks to recover – in addition to the principal amount of a debt – interest, fees, expenses, or other charges, the proof of claim must be accompanied by a statement

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itemizing these additional amounts with sufficient specificity to make clear the basis for the claimed amount.

If a claim is secured by a security interest in the property of the debtor and the debtor defaulted on the claim prior to the filing of the petition, the proof of claim must be accompanied by a statement of the amount required to cure the prepetition default.

If the claim is secured by a security interest in the debtor's principal residence, the proof of claim must be accompanied by the attachment prescribed by the appropriate Official Form. In that attachment, the holder of the claim must provide the information required by subparagraphs (A) and (B) of this paragraph (2). In addition, if an escrow account has been established in connection with the claim, an escrow account statement showing the account balance, and any amount owed, as of the date the petition was filed must be submitted in accordance with subparagraph (C). The statement must be prepared in a form consistent with the requirements of nonbankruptcy law. *See, e.g.*, 12 U.S.C. § 2601 *et seq.* (Real Estate Settlement Procedure Act). Thus the holder of the claim may provide the escrow account statement using the same form it uses outside of bankruptcy for this purpose.

Subparagraph (D) of subdivision (c)(2) sets forth sanctions that the court may impose on a creditor in an individual debtor case that fails to provide information required by subdivision (c). Failure to provide the required information does not itself constitute a ground for disallowance of a claim. *See* § 502(b) of the Code. But when an objection to the allowance of a claim is made or other litigation arises concerning the status or treatment of a claim, if the holder of that claim has not complied with the requirements of this subdivision, the court may preclude it from presenting as evidence any of the omitted information, unless the failure to comply with this subdivision was substantially justified or harmless. The court retains discretion to

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allow an amendment to a proof of claim under appropriate circumstances or to impose a sanction different from or in addition to the preclusion of the introduction of evidence.

Changes Made After Publication

Subdivision (c)(1). The requirement that the last account statement sent to the debtor be filed with the proof of claim was deleted.

Subdivision (c)(2). In subparagraph (C), a provision was added requiring the use of the appropriate Official Form for the attachment filed by a holder of a claim secured by a security interest in a debtor's principal residence.

In subdivision (c)(2)(D), the clause "the holder shall be precluded" was deleted, and the provision was revised to state that "the court may, after notice and hearing, take either or both" of the specified actions.

Committee Note. In the discussion of subdivision (c)(2), the term "security interest" was added to the sentence that discusses the required filing of a statement of the amount necessary to cure a prepetition default.

The discussion of subdivision (c)(2)(D) was expanded to clarify that failure to provide required documentation, by itself, is not a ground for disallowance of a claim and that the court has several options in responding to a creditor's failure to provide information required by subdivision (c).

Other changes. Stylistic changes were made to the rule and the Committee Note.

Rule 3002.1. Notice Relating to Claims Secured by Security Interest in the Debtor's Principal Residence

1 (a) IN GENERAL. This rule applies in a chapter
2 13 case to claims that are (1) secured by a security interest in
3 the debtor's principal residence, and (2) provided for under
4 § 1322(b)(5) of the Code in the debtor's plan.

5 (b) NOTICE OF PAYMENT CHANGES. The
6 holder of the claim shall file and serve on the debtor, debtor's
7 counsel, and the trustee a notice of any change in the payment
8 amount, including any change that results from an interest
9 rate or escrow account adjustment, no later than 21 days
10 before a payment in the new amount is due.

11 (c) NOTICE OF FEES, EXPENSES, AND
12 CHARGES. The holder of the claim shall file and serve on
13 the debtor, debtor's counsel, and the trustee a notice itemizing
14 all fees, expenses, or charges (1) that were incurred in
15 connection with the claim after the bankruptcy case was filed.

PROPOSED (Effective 12/1/11 if no action)

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16 and (2) that the holder asserts are recoverable against the
17 debtor or against the debtor's principal residence. The notice
18 shall be served within 180 days after the date on which the
19 fees, expenses, or charges are incurred.

20 (d) FORM AND CONTENT. A notice filed and
21 served under subdivision (b) or (c) of this rule shall be
22 prepared as prescribed by the appropriate Official Form, and
23 filed as a supplement to the holder's proof of claim. The
24 notice is not subject to Rule 3001(f).

25 (e) DETERMINATION OF FEES, EXPENSES,
26 OR CHARGES. On motion of the debtor or trustee filed
27 within one year after service of a notice under subdivision (c)
28 of this rule, the court shall, after notice and hearing,
29 determine whether payment of any claimed fee, expense, or
30 charge is required by the underlying agreement and
31 applicable nonbankruptcy law to cure a default or maintain
32 payments in accordance with § 1322(b)(5) of the Code.

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33 (f) NOTICE OF FINAL CURE PAYMENT.

34 Within 30 days after the debtor completes all payments under
35 the plan, the trustee shall file and serve on the holder of the
36 claim, the debtor, and debtor's counsel a notice stating that
37 the debtor has paid in full the amount required to cure any
38 default on the claim. The notice shall also inform the holder
39 of its obligation to file and serve a response under subdivision
40 (g). If the debtor contends that final cure payment has been
41 made and all plan payments have been completed, and the
42 trustee does not timely file and serve the notice required by
43 this subdivision, the debtor may file and serve the notice.

44 (g) RESPONSE TO NOTICE OF FINAL CURE
45 PAYMENT. Within 21 days after service of the notice under
46 subdivision (f) of this rule, the holder shall file and serve on
47 the debtor, debtor's counsel, and the trustee a statement
48 indicating (1) whether it agrees that the debtor has paid in full
49 the amount required to cure the default on the claim, and (2)

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50 whether the debtor is otherwise current on all payments
51 consistent with § 1322(b)(5) of the Code. The statement shall
52 itemize the required cure or postpetition amounts, if any, that
53 the holder contends remain unpaid as of the date of the
54 statement. The statement shall be filed as a supplement to the
55 holder's proof of claim and is not subject to Rule 3001(f).

56 (h) DETERMINATION OF FINAL CURE AND
57 PAYMENT. On motion of the debtor or trustee filed within
58 21 days after service of the statement under subdivision (g) of
59 this rule, the court shall, after notice and hearing, determine
60 whether the debtor has cured the default and paid all required
61 postpetition amounts.

62 (i) FAILURE TO NOTIFY. If the holder of a claim
63 fails to provide any information as required by subdivision
64 (b), (c), or (g) of this rule, the court may, after notice and
65 hearing, take either or both of the following actions:

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- 66 (1) preclude the holder from presenting the
67 omitted information, in any form, as evidence in any
68 contested matter or adversary proceeding in the case, unless
69 the court determines that the failure was substantially justified
70 or is harmless; or
- 71 (2) award other appropriate relief, including
72 reasonable expenses and attorney's fees caused by the failure.

COMMITTEE NOTE

This rule is new. It is added to aid in the implementation of § 1322(b)(5), which permits a chapter 13 debtor to cure a default and maintain payments on a home mortgage over the course of the debtor's plan. It applies regardless of whether the trustee or the debtor is the disbursing agent for postpetition mortgage payments.

In order to be able to fulfill the obligations of § 1322(b)(5), a debtor and the trustee have to be informed of the exact amount needed to cure any prepetition arrearage, *see* Rule 3001(c)(2), and the amount of the postpetition payment obligations. If the latter amount changes over time, due to the adjustment of the interest rate, escrow account adjustments, or the assessment of fees, expenses, or other charges, notice of any change in payment amount needs to be conveyed to the debtor and trustee. Timely notice of these changes will permit the debtor or trustee to challenge the validity of any such charges, if appropriate, and to adjust postpetition mortgage payments to cover any undisputed claimed adjustment. Compliance with the notice provision of the rule should also eliminate any concern on the

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part of the holder of the claim that informing a debtor of a change in postpetition payment obligations might violate the automatic stay.

Subdivision (a). Subdivision (a) specifies that this rule applies only in a chapter 13 case to claims secured by a security interest in the debtor's principal residence.

Subdivision (b). Subdivision (b) requires the holder of a claim to notify the debtor, debtor's counsel, and the trustee of any postpetition change in the mortgage payment amount at least 21 days before the new payment amount is due.

Subdivision (c). Subdivision (c) requires an itemized notice to be given, within 180 days of incurrence, of any postpetition fees, expenses, or charges that the holder of the claim asserts are recoverable from the debtor or against the debtor's principal residence. This might include, for example, inspection fees, late charges, or attorney's fees.

Subdivision (d). Subdivision (d) provides the method of giving the notice under subdivisions (b) and (c). In both instances, the holder of the claim must give notice of the change as prescribed by the appropriate Official Form. In addition to serving the debtor, debtor's counsel, and the trustee, the holder of the claim must also file the notice on the claims register in the case as a supplement to its proof of claim. Rule 3001(f) does not apply to any notice given under subdivision (b) or (c), and therefore the notice will not constitute prima facie evidence of the validity and amount of the payment change or of the fee, expense, or charge.

Subdivision (e). Subdivision (e) permits the debtor or trustee, within a year after service of a notice under subdivision (c), to seek a determination by the court as to whether the fees, expenses, or charges set forth in the notice are required by the underlying

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agreement or applicable nonbankruptcy law to cure a default or maintain payments.

Subdivision (f). Subdivision (f) requires the trustee to issue a notice to the holder of the claim, the debtor, and the debtor's attorney within 30 days after completion of payments under the plan. The notice must (1) indicate that all amounts required to cure a default on a claim secured by the debtor's principal residence have been paid, and (2) direct the holder to comply with subdivision (g). If the trustee fails to file this notice within the required time, this subdivision also permits the debtor to file and serve the notice on the trustee and the holder of the claim.

Subdivision (g). Subdivision (g) governs the response of the holder of the claim to the trustee's or debtor's notice under subdivision (f). Within 21 days after service of notice of the final cure payment, the holder of the claim must file and serve a statement indicating whether the prepetition default has been fully cured and also whether the debtor is current on all payments in accordance with § 1322(b)(5) of the Code. If the holder of the claim contends that all cure payments have not been made or that the debtor is not current on other payments required by § 1322(b)(5), the response must itemize all amounts, other than regular future installment payments, that the holder contends are due.

Subdivision (h). Subdivision (h) provides a procedure for the judicial resolution of any disputes that may arise about payment of a claim secured by the debtor's principal residence. Within 21 days after the service of the statement under (g), the trustee or debtor may move for a determination by the court of whether any default has been cured and whether any other non-current obligations remain outstanding.

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Subdivision (i). Subdivision (i) specifies sanctions that may be imposed if the holder of a claim fails to provide any of the information as required by subdivisions (b), (c), or (g).

If, after the chapter 13 debtor has completed payments under the plan and the case has been closed, the holder of a claim secured by the debtor's principal residence seeks to recover amounts that should have been but were not disclosed under this rule, the debtor may move to have the case reopened in order to seek sanctions against the holder of the claim under subdivision (i).

Changes Made After Publication

Subdivision (a). As part of organizational changes intended to make the rule shorter and clearer, a new subdivision (a) was inserted that specifies the applicability of the rule. Other subdivision designations were changed accordingly.

Subdivision (b). The timing of the notice of payment change, addressed in subdivision (a) of the published rule, was changed from 30 to 21 days before payment must be made in the new amount.

Subdivision (d). The provisions of the published rule prescribing the procedure for providing notice of payment changes and of fees, expenses, and charges were moved to subdivision (d).

Subdivision (e). As part of the organizational revision of the rule, the provision governing the resolution of disputes over claimed fees, expenses, or charges was moved to this subdivision.

Subdivision (f). The triggering event for the filing of the notice of final cure payment was changed to the debtor's completion of all payments required under the plan. A sentence was added

United States Bankruptcy Court
Western District of Missouri

Rule 3094-1 is amended to read:

Rule 3094-1. Payments on Real Property

A. Assumed Leases. The debtor shall pay directly to the lessor all payments scheduled in a lease for that portion of the obligation which comes due after the order for relief. The debtor shall pay directly to the lessor all payments required to cure a pre-petition arrearage.

B. Assumed Contracts for Deed. The debtor shall pay directly to the holder of the contract for deed all payments scheduled in the contract for that portion of the obligation which comes due after the order for relief. The debtor shall pay directly to the holder of the contract for deed all payments required to cure a pre-petition arrearage.

C. Residential and Non-residential Mortgages.

1. Unmodified Payments on a note secured by real estate when the debtor is current on the date of petition. When the debtor has no past due payments or charges due to the holder of the claim mortgagee other than the regular payment due in the month of filing or conversion, the debtor may make the post-petition payments directly to the holder of the claim mortgagee. If a debtor who has no past due payments or charges due to the holder of the claim mortgagee other than the regular payment due in the month of filing or conversion nevertheless decides to pay the post-petition payments to the claimant through the Chapter 13 trustee as part of the plan payment, Rule 3094-1.C.2 applies.

2. Unmodified Payments on a note secured by real estate when the debtor is delinquent on the date of petition.

a. For cases filed or converted on or after October 1, 2008, if a debtor is delinquent on the date of the petition on a note secured by real estate, the debtor shall make the post-petition payments to the holder of the claim mortgagee through the Chapter 13 trustee as part of the Chapter 13 plan payment unless the court orders otherwise. For purposes of Rule 3094-1, delinquent (or not current) means there are past due payments or charges due to the holder of the claim mortgagee other than the regular contractual payment due in the month of filing or conversion

b. The trustee shall load into the trustee's database the monthly payment set out in the plan for the post-petition monthly payments.

i. The post-petition monthly payment set out in the plan shall include all amounts which the debtor is required to pay for the escrow of taxes, insurance and any other charges allowed to be escrowed under the terms

of the note and/or the deed of trust. If the Addendum to Proof of Claim for Real Estate Claim has a different Total Current Monthly Payment from the figure provided for it in the plan, the Total Current Monthly Payment listed in the addendum will be loaded into the trustee's database. See Rule 3094-1.C.2.e.

ii. If the holder of the claim mortgagee asserts that the post-petition mortgage payment set out in the plan is incorrect and it does not provide its asserted figure in its Addendum to Proof of Claim, it either shall

(I). Object to the confirmation of the plan; or

(II). File a "Notice of Payment Change." See Local Rule 3094-1 C. 3.b.

iii. If the debtor asserts that the figure for the Total Current Monthly Payment provided in the Addendum to Proof of Claim is incorrect, the debtor shall object to the proof of claim.

c. In order to synchronize the debtor's Chapter 13 plan payments with the post-petition, on-going mortgage payments and not adversely affect other claimants who are being paid Equal Monthly Amounts through the Chapter 13 trustee,

i. The Chapter 13 trustee shall set the trustee's database so that the first post-petition mortgage payment to be paid by the trustee comes due in the second month following the month in which the petition is filed (or in the case of a conversion from another chapter, the second month following the month in which the order of conversion is entered).

ii. In addition, the Chapter 13 trustee shall set up a separate payee record for the mortgage payment, as set out in the plan, which came due in the month following the month in which the petition is filed or in which the order of conversion is entered, plus a late fee equal to 5% of the monthly mortgage payment listed in the plan, unless otherwise ordered by the court. This payee record shall be known as the Initial Post-petition Arrearage; the holder of the claim mortgagee shall not file a separate proof of claim for the Initial Post-petition Arrearage .

(I). The trustee shall not populate the payee record for the Initial Post-petition Arrearage for distribution until the proof of claim is filed.

(II). This Initial Post-petition Arrearage claim shall be paid pro rata as funds are available with secured and priority claims for which the plan provides no Equal Monthly Amount.

(III). If the debtor or holder of the claim mortgagee disagrees with the payee record set by the trustee for the Initial Post-petition Arrearage and

asserts that it inaccurately reflects the amount due to the holder of the claim mortgage including appropriate late fee, they must file an objection to this “claim” within 30 days of the initial date of confirmation of the plan.

iii. It is presumed for purposes of administering real estate mortgages through the Chapter 13 trustee that the mortgage payment for the month in which the petition is filed is delinquent on the date of filing the Chapter 13 petition (or the date of conversion from another chapter) and, if in fact, that payment is delinquent, the holder of the claim mortgage shall include that delinquency in the pre-petition arrearage portion of its proof of claim.

(I). If the presumption is incorrect and the monthly payment has not yet come due on the date of filing or date of conversion, the holder of the claim mortgage or the debtor must object to the Initial Post-petition Arrearage claim record as set by the trustee.

(II). If the objection is sustained, the court shall enter an order directing the trustee to add another month plus late fee to the Initial Post-petition Arrearage claim record.

d. The debtor shall cure the pre-petition arrearage owed to the holder of the claim mortgage through the Chapter 13 trustee as part of the plan payment. The trustee shall populate the pre-petition arrearage payee record with the amount listed on the proof of claim, if any. If the plan provides for no interest on the pre-petition arrearage, or if the plan provides for interest on the entire amount, but the holder of the claim mortgage is entitled to interest only on part of the pre-petition arrearage claim, the holder of the claim mortgage or the debtor shall obtain a court order which directs the trustee what portion, if any, is to receive interest and what portion is to receive no interest. The order also shall specify the rate of interest to be paid on any portion being paid interest.

e. The holder of the claim’s mortgage’s proof of claim shall have an addendum which conforms to the “Addendum to Proof of Claim For Real Estate Claims” on the court’s website.

f. The Chapter 13 trustee shall release full monthly payments to the holder of the claim mortgages for their on-going post-petition mortgage payments and shall not release a partial payment to a holder of the claim mortgage unless it is the final payment disbursed because of a conversion or dismissal. Local Rule 3084-1L.

g. If the Chapter 13 debtor’s plan payments are current and the Chapter 13 trustee holds a plan payment in the ordinary course of the trustee’s business which results in the trustee not releasing a post-petition mortgage payment to the holder of the claim mortgage, that month’s mortgage payment shall be deemed current and the holder of the claim mortgage shall not charge a late fee for that “missed”

payment. For purposes of this rule, the debtor's plan payment is current if the trustee posts it to his database on or before the last business day of the month in which it is due

h. Upon the completion of the Chapter 13 plan, the Chapter 13 trustee shall file a "Notice of Completion" with the bankruptcy court. Absent a timely objection to that notice and an order otherwise, the debtor's real estate mortgages shall be deemed current, including all fees and costs but excluding any pending yearly escrow charges which were incurred or assessed during the year of debtor's discharge, as of the date the last payment was made from the Chapter 13 trustee. If there are additional fees and costs due, the holder of the claim mortgage shall also file a "Notice of Fees and Costs Incurred" at the same time it files an objection to the "Notice of Completion."

3. Changes and charges.

a Rule 3094-1.C.3 applies to all cases on or after October 1, 2008, regardless of when the initial Chapter 13 plan is filed.

b. If the loan documents provide for payment changes, including those due to interest rate adjustments or escrow account adjustments:

i. No later than ~~30~~ 21 days prior to any payment change the holder of the claim mortgage or the holder of the claim's mortgage's authorized agent shall file with the court and serve on the debtor, the debtor's counsel, and the Chapter 13 trustee a "Notice of Payment Change."

ii. The "Notice of Payment Change" shall include the new payment amount, the date the new payment takes effect, and a brief description of the reason for the payment change.

iii. No later than 21 days after service of the "Notice of Payment Change," the debtor, the Chapter 13 trustee, the United States Trustee, or any party in interest may file a response to the "Notice of Payment Change." If no such response is filed, the debtor is deemed to have accepted the payment change and the payment change will go into effect on the date provided in the "Notice of Payment Change."

iv. The Chapter 13 trustee shall not change the payment amount in the trustee's database unless such "Notice of Payment Change" is filed with the court unless otherwise ordered by the court.

v. If the "Notice of Payment Change" is filed less than ~~30~~ 21 days prior to the date of the change and requires the monthly payment to increase, the trustee shall set the new payment to commence as soon as is practicable and the holder of the claim mortgage shall file a separate proof of claim for the difference between the old payment amount and the new payment

amount for any months in which the old payment amount was remitted and shall not charge a late fee due to the late notification.

c. If the holder of the claim mortgagee or the mortgagee's authorized agent whose collateral has been retained by the debtor incurs post-petition attorney's fees, costs, or other charges such as property inspection fees, post-petition late charges or other items payable by the debtor under the terms of the loan documents, ~~the holder of the claim mortgagee or the mortgagee's authorized agent~~ shall either:

i. Fully disclose any additional post petition fees, costs or other charges in their motion.

(I). If no response is filed to the additional fees, costs, or other charges set out in the motion, the debtor shall be deemed to have accepted that the charge is owed, reasonable and non-dischargeable.

(II). The Chapter 13 trustee shall not pay the additional post petition fees, costs or other charges in the motion unless the Court's order specifically provides for the trustee to pay them and specifically provides the amount to be paid. Or,

ii. Alternatively, the holder of the claim mortgagee or the mortgagee's authorized agent shall file with the court and serve the debtor, the debtor's counsel, and the Chapter 13 trustee a "Notice of Fees, Expenses and Charges and Costs Incurred" no later than 180 days after such fees or costs are incurred on a form which conforms to the form on the court's website. (It is unnecessary for the holder of the claim mortgagee or the mortgagee's authorized agent to serve the Chapter 13 trustee with a paper copy as the trustee shall receive a copy electronically. If the debtor's attorney receives service electronically, it is unnecessary for her to be served with a paper copy as well.) The notice shall be filed as a supplement to the holder of the claim's proof of claim.

(F). ~~The mortgagee or the mortgagee's authorized agent shall not file more than two such notices per year:~~

~~(H)(I). Failure of the holder of the claim mortgagee or the mortgagee's authorized agent to file and serve the "Notice of Fees, Expenses and Charges and Costs Incurred" within 180 days after such fees or costs are incurred shall be deemed a waiver of such fees or costs.~~

(II). On motion of the debtor or the trustee filed within one year after service of a "Notice of Fees, Expenses and Charges" the court shall, after notice and hearing, determine whether payment of any claimed fee, expense, or charge is required by the underlying agreement and applicable non-bankruptcy law to cure a default or maintain payments in accordance

with § 1322(b)(5).

(H). ~~No later than 21 days after service of the “Notice of Fee and Costs Incurred,” the debtor, the Chapter 13 trustee, the United States Trustee, or any party in interest may file a response to the “Notice of Fees and Costs Incurred.” If no such response is filed, the debtor shall be deemed to have accepted that the charge is owed, reasonable and non-dischargeable and the Chapter 13 trustee shall release the claim for payment as funds are available for that class of claimant.~~

d. Once the fees, costs or charges have been deemed as accepted, owed, reasonable and non-dischargeable by the debtor or otherwise ordered by the Court, the Chapter 13 trustee shall load the total amount allowed into the Chapter 13 trustee’s database for payment and, absent other order of the court, it shall be paid pro rata as funds are available with secured and priority claims for which no Equal Monthly Amount is provided, unless payments is otherwise provided for by Order of the Court.

e. ~~If authorized pursuant to the applicable debtor’s response to a “Notice of Payment Change,” order of the Court, or to a “Notice of Fees, Expenses and Charges and Costs Incurred” or if the debtor does not respond timely to any such notice, the Chapter 13 trustee is authorized to increase the Chapter 13 plan payment without the necessity of the debtor filing a modified plan in order for the plan to comply with §§1322(a)(1) and 1322(d). The trustee shall send a notice to the debtor of such payment change and shall provide the court with a proposed wage order reflecting such change in plan payment.~~

4. Unmodified Payments on a note secured by real estate when the debtor originally paid the holder of the claim mortgagee directly and modifies a previously confirmed plan to have the Chapter 13 trustee pay on-going post-petition payments from the Chapter 13 plan payments.

a. On or after October 1, 2008, if the debtor modifies a previously confirmed Chapter 13 plan which provided for the Chapter 13 debtor to pay the on-going post-petition payments directly to a holder of the claim mortgagee to have the Chapter 13 trustee pay all or some part of the on-going post-petition payments from the Chapter 13 plan payments, the amended Chapter 13 plan must spell out with specificity the name, address and account number (pursuant to Fed. R. Bankr. P. 9037) of the creditor to whom the payments are to be paid; the date on which the Chapter 13 trustee is to commence making the on-going post-petition payments; the treatment of the post-petition delinquency, including the gap between the date when the debtor modified the plan and the date on which the Chapter 13 trustee is to commence making the mortgage payment, if any.

b. The claimant must file a separate proof of claim for any post-petition delinquency, including the gap between the date when the Chapter 13 debtor modified the Chapter 13 plan and the date on which the Chapter 13 trustee is to

commence making the mortgage payment, if any.

5. Unmodified Payments on a note secured by real estate when the debtor originally filed the case under another chapter of Title 11 and paid the holder of the claim mortgagee directly, but the on-going post-petition payments are delinquent at the time of conversion to Chapter 13.

a. For cases converted on or after October 1, 2008, if the debtor originally filed the case under another chapter and at the time of conversion to Chapter 13 the post-petition payments are delinquent, the debtor shall make the post-petition payments to the holder of the claim mortgagee through the Chapter 13 trustee as part of the Chapter 13 plan payment., unless the court orders otherwise.

b. The Chapter 13 plan must spell out with specificity the name, address and account number (pursuant to Fed. R. Bankr. P. 9037) of the creditor to whom the payments are to be paid; the date on which the Chapter 13 trustee is to commence making the on-going post-conversion payments; the treatment of the post-petition delinquency, including the gap between the date when the debtor filed the petition and converted to Chapter 13; and the treatment of the pre-petition arrearage.

c. The claimant must file a separate proof of claim for any post-petition, pre-conversion delinquency, including the gap between the date when the Chapter 13 debtor filed for protection under Title 11 and converted to Chapter 13 and the date upon which the Chapter 13 trustee is to commence making the post-conversion mortgage payment, if any.

6. Modified Payment on a note secured by real estate. If the debtor proposes to modify a note secured by real estate, the debtor shall make all payments to the holder of the claim mortgagee through the Chapter 13 trustee as part of the Chapter 13 plan payment. The Chapter 13 trustee shall distribute payment to the holder of the claim mortgagee pursuant to the terms of the confirmed plan. The Chapter 13 trustee shall not distribute payments to the holder of the claim mortgagee until a proof of claim is filed.

7. Chapter 13 Trustee Payments to Holder of the Claim Mortgagees.

a. The Chapter 13 trustee shall release payments to the entity specified in the filed and allowed proof of claim.

b. Unless the court orders otherwise, the Chapter 13 trustee shall not change the payee unless an assignment or transfer of claim is filed with the court.

8. Notice of Final Cure Payment.

a. Within 30 days after the debtor completes all payments under the plan, the Chapter 13 trustee shall file and serve on the holder of the claim, the debtor, and debtor's counsel a notice stating that the debtor has paid in full the amount required to cure any default on the claim. If the debtor contends that the final

cure payment has been made and all plan payment have been completed, and the Chapter 13 trustee does not timely file and serve the “Notice of Final Cure Payment”, the debtor may file and serve the notice.

b. Within 21 days after the service of the “Notice of Final Cure Payment”, the holder of the claim shall file and serve on the debtor, debtor’s counsel, and the Chapter 13 trustee a statement indicating:

i. Whether the holder of the claim agrees that the debtor had paid in full the amount required to cure the default on the claim, and

ii. Whether the debtor is otherwise current on all payments consistent with § 1322(b)(5).

c. The statement shall itemize the required cure or post-petition amounts, if any, that the holder of the claim contends remain unpaid as of the date of the statement. The statement shall be filed as a supplement to the holder of the claim’s proof of claim and is not subject to Fed. R. Bankr. P. 3001(f).

d. On motion of the debtor or Chapter 13 trustee filed within 21 days after service of the statement discussed in subsection (C)(8)(b), the court shall, after notice and hearing, determine whether the debtor has cured the default and paid all required post-petition amounts.

e. If the holder of the claim fails to file a “Notice of Payment Change”, a “Notice of Fees, Expenses and Charges”, or a statement as discussed in subsection (C)(8)(b), the court may, after notice and hearing, take either or both of the following actions:

i. Preclude the holder of the claim from presenting the omitted information, in any form, as evidence in any contested matter or adversary proceeding in the case, unless the court determines that the failure was substantially justified or is harmless.

ii. Award other appropriate relief, including reasonable expenses and attorney’s fees caused by the failure.

MORTGAGE FORECLOSURE CASES**1. Judgment of Foreclosure-Attorney Fees and Expenses of Foreclosure.**

(a) Default judgment upon a petition seeking unliquidated damages will not be granted absent proof of compliance with the notice requirement of Supreme Court Rule 118(d) (2010 Kan. Ct. Rules Annot. 205.)

(b) A default judgment in excess of the amount of the petition's demand for judgment in violation of K.S.A. 2010 Supp. 60-254(c) will be vacated or considered voidable to the extent of the excess.

(c) When any proposed journal entry includes judgment for attorney fees and/or the mortgagee's costs or expenses of the foreclosure proceeding the fees, costs, and expenses shall be supported by the record. This support may be provided by affidavit, establishing (1) the mortgagee's entitlement to and (2) the amount, reasonableness and basis of, each such item. The decree shall state the total amount of the judgment.

2. Confirmation of Sheriff's Sale.

(a) A motion to confirm a Sheriff's sale shall be accompanied by a copy of the signed **Sheriff's Return of Sale** in the form attached to this rule, an **Itemization of Judgment** in the form attached to this rule, and a proposed order.

(b) A motion to confirm a Sheriff's sale that will not satisfy the full amount of the judgment requires the moving party to demonstrate the adequacy of the sale bid. Available appraisals, affidavits or other evidence demonstrating the value of the

property shall be submitted to assist the Court in determining that the fair value has been obtained.

3. Redemption.

(a) If a decree of foreclosure or other order determines the owner's period of redemption to be less than twelve (12) months, it shall state the reason which shall be supported by the record.

(b) Any motion to shorten or extinguish the period of redemption of the defendant owner pursuant to K.S.A. 60-2414(a) shall be set for hearing with not less than 21 days notice to all parties and proof of service. The facts on which the motion relies must be supported by the record which in the Court's discretion may be provided by Affidavit.

(c) The defendant owner or assignee may redeem for the amount paid by the then current holder of the Certificate of Purchase including expenses incurred in accordance with K.S.A. 60-2414(a) and K.S.A. 60-2414(d) which expenses are evidenced by vouchers or receipts filed in the office of the Clerk of the District Court in accordance with K.S.A. 60-2414(d) and are entered on the appearance docket of the case. The holder of the certificate or a creditor who has redeemed prior to a defendant owner or assignor, shall be entitled to interest in accordance with K.S.A. 16-204(e)(1), as amended, on the net amount paid to redeem the property.

4. Bankruptcy.

(a) Under federal bankruptcy law, a petition filed under of 11 U.S.C. §§ 301, 302 or 303 operates as a stay of actions against property of the bankruptcy estate, property of the debtor, or against the debtor. 11 U.S.C. § 362(a). Thus, when a party to

a foreclosure action in this Court files for bankruptcy protection, the party shall, as soon as possible, but no later than ten (10) days thereafter, file with this Court and all parties to the litigation in this Court a copy of the party's Notice of Bankruptcy Filing in the relevant case in this Court. The party prosecuting the foreclosure action shall file the Notice of Bankruptcy Filing with this Court, within a reasonable time after receipt of the notice from the bankruptcy court, if the debtor fails to do.

(b) (1) If a party prosecuting an action for foreclosure obtains relief from the automatic stay, that party shall notify this Court by filing a Notice of Right to Proceed and attach thereto a copy of the bankruptcy court order granting relief from the automatic stay; or

(2) In the alternative, the party prosecuting the foreclosure action in this Court shall file a Notice of Right to Proceed with an Affidavit attached explaining the basis of its right to proceed as to debtor/defendant(s) and/or any other defendant(s).

5. Jurisdiction.

(a) Any decree of foreclosure shall state for each named party defendant, whether they have been served with summons and process, if so, when and how, and whether each has answered or otherwise pled.

(b) If the Court does not have personal jurisdiction over a party defendant, or if a personal judgment against the mortgagor is not otherwise available, and if the Court has jurisdiction over the mortgage contract, the note, and/or the property, the Court may enter an in rem, judgment in such case, but no judgment will be entered against the party over whom the Court does not have in personam jurisdiction.

6. Writ of Assistance.

Upon the filing of an Application for Writ of Assistance, the court may, in its discretion, grant the Writ upon a showing that the applicant is entitled to possession. That required showing may be made either by (1) showing that the applicant is the current holder of the Certificate of Purchase and any applicable Period of Redemption has run, or in the alternative (2) the presentation of a recorded Sheriff's Deed to the applicant as grantee. The Writ of Assistance shall be in the form attached to this rule.

IN THE DISTRICT COURT OF JOHNSON COUNTY, KANSAS

Plaintiff,

v.

Defendant.

Case No. _____
Division No. _____

Plaintiff hereby submits, by and through its counsel of record, pursuant to local rule, the following Itemization of Judgment in support of the Motion to Confirm the Sale.

ITEMIZATION OF JUDGMENT

Property Address:			
Description	Judgment	Costs	Total
Judgment (Principal)			
Judgment (Interest)			
Judgment (Escrow)			
Judgment (Title Search)			
Judgment (Late Charges)			
Judgment (Attorney Fees)			
Judgment (Property Maintenance)			
Filing Fee			
Process Service Fee			
Publication Notice of Suit			
Publication Notice of Sale			
Taxes			
Surcharge			
Sheriff's Fee			
Other Charges (specify)			
Total Debt			
Plaintiff's Bid			
Deficiency	Yes <input type="checkbox"/>	No <input type="checkbox"/>	
			Amount or Waived <input type="checkbox"/>
Total Judgment			

By _____
Counsel for Plaintiff

A Snapshot of A Foreclosure and Bankruptcy Cases from State Court

by David W. Hauber¹
Johnson County, Kansas District Court Judge

State trial judges, like many creditors, are involuntary participants in the federal bankruptcy court system. But because we are required to proceed against the non-debtor and after the automatic stay is lifted, I offer a few decisions where our courts have faced bankruptcy filings and to provide a little background of what typically occurs.

SOME STATISTICS AND BACKGROUND ON JOHNSON COUNTY FORECLOSURES

There are six civil divisions in the Johnson County District Court system that handle foreclosures. In 2010, there were 2,428 mortgage foreclosure cases. Foreclosure cases constitute 33% of all civil cases handled by our civil judges. Each division carries roughly 400 cases. Of that number, 1,473 or 60% are resolved by default or summary judgment. [Thus far in 2011, there were 1,263 foreclosure cases filed through August 10, 2011.] The bulk of all cases are either dismissed or settled. No cases are tried. At best, disputed issues may include the amount obtained at sale, whether the bids are fair, and whether a deficiency judgment should be granted. Suffice it to say, foreclosure cases are rarely interrupted except in the case of a default or agreed dismissal. In this regard, bankruptcy filings contribute to the likelihood that a case will be resolved, particularly if the debtor has any potential deficiency judgment erased by a discharge and the creditor is pursuing the balance of the case *in rem*, against the property only.

Primarily because foreclosure cases represent a rather high volume of default judgments, and because our supreme court rules protect defaulting defendants from judgments that add or specify additional damages that are not reflected in the petition before judgment, an additional hearing must be held to justify the additional damages. Our local rule on foreclosures, Johnson

¹ This year, I am serving as the administrative judge over the civil divisions.

County District Court Local Rule 34, seeks to identify the principal areas where issues may arise by focusing on what actually happens and the areas where most defendant homeowners, or even commercial debtors, may want to be heard. This loosely includes two areas that impact the bottom line for debtors. The first is the amount of the judgment, and the second is how much is owed after court-ordered sale of the property

The first phase of our local rule addresses the default judgment. In the past, journal entries of default judgment were routinely signed without a motion to seek any additional costs or damages that were sought over the costs and damages claimed in the petition. Under our current rule, an affidavit must be submitted to justify the additional damages alleged. As a result of the self-imposed moratorium by some mortgage companies, particularly after the robo-signing debacle, it has become more common during status conferences to hear that the plaintiff was not willing to go forth with the foreclosure until instructed by the client. Now, we often hearing that counsel is awaiting “the affidavit” required under our rule to explain and justify additional costs for the default judgment. Essentially, this is required by Kansas Supreme Court Rule 118(d).

The second phase of any foreclosure is the order of sale. Typically, debtors get 90 days from the date of sale to redeem, at which the debtor, even one emerging from bankruptcy, can attempt to buy back the property from the holder of the certificate of purchase at the sheriff’s sale. For some, this has value, particularly when some companies offer to buy such redemption rights if they perceive that there is equity or value in a property beyond the default judgment amount. In this phase, additionally, there may be an attempt to reduce or eliminate such redemption rights pursuant to K.S.A. 60-2414(a), which requires notice to the defendant owner and all parties at least 21 days before reducing or extinguishing such rights.

Finally, the third phase is the confirmation of the sheriff’s sale. Here, our local rule

requires submission of an Itemization of Judgment form that requires a listing of all charges compromising the judgment. Of particular importance is whether the lender is seeking a deficiency judgment or waiving the same. If a deficiency judgment is sought, it too must be justified by available appraisals, affidavits or other evidence demonstrating that the value sought for confirmation represents the “fair value” of the property as required by K.S.A. 60-2415(b). If not, the court can order another sale.

With this overview, I will now address some areas where practitioners may encounter problems in addressing a foreclosure case. Obviously, the biggest concern is the filing of the bankruptcy case.

The Automatic Stay

As most practitioners know, the fastest way to put the brakes on a state foreclosure action is to file a bankruptcy petition.

1. A temporary but often unsatisfactory reprieve.

I note one extreme case in my research, which included a marginal solo practitioner who learned her bankruptcy practice “on the fly,” and used the automatic staying power as a marketing device for clients demanding immediate relief. *See In re Burton*, 442 B.R. 421, 457-60 (Bankr. W.D.N.C. 2009) (a scathing opinion that reviews more than a dozen cases where improper fee practices, violations of bankruptcy laws, local court rules and the rules of professional conduct are laid out).

As noted, *Burton's* practice is focused upon blocking mortgage foreclosures and vehicle repossessions by filing the borrower in bankruptcy. The ability to stay collection actions by filing bankruptcy is a central tool of the bankruptcy system. If the bankruptcy case itself is meritorious, there is nothing improper about filing to avert foreclosure.

Most of *Burton's* Chapter 13 clients lacked the financial ability to make mortgage payments going forward, much less to cure the mortgage arrearage. Her Chapter 13 debtors, like Peete, McDougle and the Silvas were, at best, marginal prospects and, at

worst, hopeless cases.

Filing such cases are neither to the advantage of the debtor nor the lender. While the borrower gains a few more months in the home, he soon loses possession and is out the costs of the case. Further, the extended time comes at the cost of the lender who generally is not paid during the bankruptcy period, and who thereafter must bear the costs of reinstating foreclosure. In the end, it is only counsel (who makes a living by these fruitless exercises) who profits from untenable cases.

Filing bankruptcy cases to delay or avoid foreclosure violates the *Carolin* good faith standard and is a sanctionable act under Bankruptcy Rule 9011. *In re Weiss*, 111 F.3d 1159 (4th Cir.1997); *In re Gordon*, 2008 WL 2901583 (Bankr. D. Md. 2008).

Id. at 457 (internal footnote omitted).

2. Overreaching to apply the automatic stay to guarantors.

In cases where individual guarantors are left behind in the state collection action, but their business entity is put into bankruptcy, an attempt to claim that the pending bankruptcy case should influence the remaining action against the guarantors through “related jurisdiction” is ordinarily not successful.

The mere argument, then, by Guarantors, that this case creates a nexus of “related to jurisdiction,” Doc. 56 at 6, does not translate into any impact to the debtor in bankruptcy absent some factual basis that is not apparent in the record. As this Court observed at oral argument, if this action were truly a “related to” proceeding, the Court would have expected *some* action by either the bankruptcy court or the Debtor to stay these proceedings. Instead, it is apparent that the Debtor in Possession’s First Amended Disclosure Statement, *supra*, reflects not even a contingent claim by the Guarantors against the debtor which could result from a judgment in this action. *See* Ex. Q, at 16-22.

The test for whether a civil proceeding is related to a case under title 11 is whether the outcome of the proceeding could conceivably have any effect on the bankruptcy estate. *Dogpatch Prop., Inc. v. Dogpatch U.S.A., Inc. (In re Dogpatch, U.S.A., Inc.)*, 810 F.2d 782, 786 (8th Cir.1987). In other words, if the outcome of the civil proceeding could alter the debtor’s rights, liabilities, options, or freedom of action and in any way impacts upon the handling and administration of the bankruptcy estate, the action is related. *Id.*

In re Floors & More, Inc., 2007 WL 3541524, *3 (Bankr. D. Neb., Nov. 13, 2007).

More recently, Judge Lungstrum remanded a collection action to Johnson County District Court which involved a bankrupt museum. In that regard, he allowed the collection action to proceed against non-debtor defendants, a trust, and a limited

partnership, which had pledged assets on a loan for the museum; they had pledged their own assets and could not show how enforcing the loan against them would impact the debtor and rejected any “related to” jurisdiction. *Orman v. Hollywood Motion Picture & Television Museum*, 2009 WL 2914054 *2 (D. Kan., Sept. 8, 2009) (citing *Personette*, 204 B.R. at 774).

Likewise, the Guarantors have not demonstrated how allowing the guaranty action to proceed could, in any way, impact the debtor. Under § 1141(d) of the Bankruptcy Code, “confirmation of a plan . . . discharges *the debtor* from any debt that arose before the date of such confirmation . . .” and it does not impact other debts. A guaranty is an other debt because it is a financial accommodation that allows extension of a loan by the lender to a corporate debtor. It provides *secondary* liability on the loan based on the validity of the debtor’s collateral agreements. *Missouri Farmers Ass’n, Inc. v. Wolfe Bros. Farm*, 681 S.W.2d 15, 19 n.6 (Mo. Ct. App. 1984). In other words, enforcing the guaranty ensures that the debt will be paid even if the debt is discharged in bankruptcy. *Mercantile Bank*, 77 S.W.3d at 96-97 (noting that by signing absolute guaranty, the guarantors assumed liability for debtor unaffected by bankruptcy action).

Under § 524(e) of the Bankruptcy Code, “discharge of a debt of the debtor *does not affect the liability of any other entity on, or the property of any other entity for, such debt.*” (Emphasis added.) The liability of a guarantor, therefore, is not affected by the discharge of the principal obligor. *Landsing Diversified Properties-II v. Abel (In re Western Real Estate Fund)*, 922 F.2d 592, 601 (10th Cir. 1990); *In re Sunflower Racing, Inc.*, 226 B.R. 673, 693 (D. Kan. 1998). Non-debtors, therefore, may not take advantage of a debtor's discharge. See *In re Western Real Estate Fund*, 922 F.2d at 601-02. It follows, then, that mere confirmation of a plan or delays in payment also would not affect a guarantor’s liability.

The general rule is that a bankruptcy court has no jurisdiction to resolve disputes between guarantors and a bank. In *Schumacher v. White*, 429 B.R. 400, 406 (E.D.N.Y. 2010), a seller of stock sued the guarantor under a stock purchase agreement in state court. *Id.* at 402. The guarantor filed a third-party complaint against a bankruptcy debtor for indemnification, who in turn removed the same to federal court, and requested referral to the bankruptcy court. *Id.* at 402-03. The seller objected that the bankruptcy court had no jurisdiction over his lawsuit. *Id.* at 404. The district court agreed:

A court of bankruptcy has no power to entertain collateral disputes between third parties that do not involve the bankrupt or its property, nor may it exercise jurisdiction over a private controversy which does not relate to matters pertaining to bankruptcy.

Id. at 406 (quoting *In re Paso Del Norte Oil Co.*, 755 F.2d 421, 424 (5th Cir. 1985); see also *First State Bank & Trust Co. v. Sand Springs State Bank*, 528 F.2d 350, 353 (10th Cir.1976).

For the foregoing reasons, the Court rejects any suggestion that this action is

“related to” the pending bankruptcy of the debtor or that it should be stayed.

The PrivateBank v. Widmer Shoppes II, L.P., et al., 2010 WL 4024060, *11-12 (D. Kan., Oct. 14, 2010).

3. Relief from stay decisions are summary decisions, not on the merits

In many cases, creditors who return from bankruptcy court after receiving relief from stay do not have a decision on the merits of their right to proceed with foreclosure, but such a process may preclude consumer claims over debt collection as a result of the bankruptcy process.

In *CitiMortgage v. Wollaston*, 2011 WL 2619216 (D. Kan., June 1, 2011), the debtor sought to make a Fair Debt Collections Practice Act (“FDCPA”) claim (and a MERS mortgage/note splitting argument) in the return to state court after the bankruptcy court granted relief from the stay to proceed with an *in rem* judgment. This raises issues about the bankruptcy process itself.

Viewing the counterclaim plainly, it asserts a violation of the FDCPA because CitiMortgage has attempted to collect a debt without having proper standing to assert the same and because it is not a holder in due course. *See* ¶¶ 5-13 of Counterclaim. These allegations are to be asserted in the foreclosure petition. *Id.* Additionally, defendant asserts representations made in the bankruptcy court constitute a violation. ¶¶ 14-15 of Counterclaim. Theoretically, a mortgage that is already in default when obtained by the servicer could expose the servicer to FDCPA liability. *Price v. America’s Servicing Company*, 403 B.R. 775, 791 (E.D. Ark. 2009).

The Court will allow defendant’s opposition brief at this point if only to address the merits of an issue that is bound to be repeated. Essentially, after invoking the protective processes of the federal bankruptcy court, where defendant had ample opportunities to raise any objection or even adversary action to dispute the issues she now asserts here, *See In re Martinez*, – B.R.–, 2011 WL 1519877, *4 (Bankr. D. Kan. April 20, 2011) (reconsideration of adversary proceeding over standing of loan servicer to seek relief from stay), defendant now asserts misrepresentations in the bankruptcy proceeding constitute and FDCPA violation.

The Court concludes that any conduct of CitiMortgage in the bankruptcy court, whether it is to proceed to press a claim or state an amount of any claim, fails to state a claim upon which relief can be granted. Very simply, Congress did not intend collection activities under the FDCPA to include those situation where court processes already

protect debtors from harassment.

In this case however, the question is not whether the FDCPA and the Bankruptcy Code can co-exist in a vacuum; rather, the question is whether filing a proof of claim on a prescribed debt (an action permitted by the Bankruptcy Code) can potentially constitute a violation of the FDCPA. This Court finds it cannot.

First, and as this Court has already noted, the Bankruptcy Code and applicable jurisprudence allow a creditor to file a proof of claim on a debt even though it may be later determined to be “unenforceable.” One of the reasons Bankruptcy Courts have deemed a debt to be unenforceable is because the debt is determined to be time-barred or prescribed. This Court is wary of any ruling that impinges on a creditor's right to follow the procedural provisions of the Bankruptcy Code.

Second, the purpose of the FDCPA itself is not furthered by its application in this instance. “Debtors in bankruptcy proceedings do not need protection from abusive collection methods that are covered under the FDCPA because the claims process is highly regulated and court controlled.”^{FN21} While the FDCPA's purpose is to protect unsophisticated consumers from unscrupulous debt collectors, that purpose is not implicated when a debtor is instead protected by the court system and its officers.^{FN22} As a related point, this Court also fails to see how the purpose of the Bankruptcy Code and Rules, which is to “secure the just, speedy, and inexpensive determination of every case and proceeding” is furthered by allowing a debtor to proceed with an FDCPA claim against a creditor whose only action is to file a proof of claim under the procedures set out in the Code.

B-Real, LLC v. Rogers, 405 B.R. 428, 432 (M.D. La. 2009).

It is significant that plaintiff's own listing of defendant as a claimant, and intent to reaffirm that debt and make payments, establishes a colorable right of CitiMortgage to proceed with a foreclosure action and it also establishes that relief from stay that precludes any deficiency judgment against defendant eliminates her own “injury” at this point. Standing is a component of subject matter jurisdiction, which any party, or the court on its own motion, may raise at any time. *Vorhees v. Baltazar*, 283 Kan. 389, 397, 153 P.3d 1227 (2007).

Thus, when CitiMortgage sought relief from stay and obtained only *in rem* relief, it is evident that no wrongful conduct can be associated with the same. *In re Jacques*, 416 B.R. 63, 80-81 (E.D.N.Y. 2009) (“It is simply not wrongful conduct prohibited by the FDCPA to file a proof of claim as authorized by the Bankruptcy Code.... It is not viewed as an effort to collect a debt from the debtor, who enjoys the protection of the automatic stay.”)

Orders that grant stay relief are final for purposes of appeal. *Eddleman v. U.S. Dep't of Labor*, 923 F.2d 782, 784-85 (10th Cir. 1991). Defendant's discharge from bankruptcy is now final. She cannot be liable for any damage associated with a mortgage transaction in which CitiMortgage is entitled to demonstrate, on the merits, that it has the right to foreclose on the property.

While a debtor challenges a secured creditor's standing, she may do so by filing an appropriate adversary proceeding. *In re Miller*, 2011 WL 1807015, *2 (10th Cir. BAP, May 12, 2011) (debtor attacked bank's standing and urged court to deny relief from stay and to proceed with adversary proceeding). Requests for relief from stay are intended to be summary proceedings which merely determine whether a movant has a colorable claim or a facially valid security interest. *Id.* (citing *In re Utah Aircraft Alliance*, 342 B.R. 327, 332 (10th Cir. 2006)). The automatic stay is a temporary injunction which terminates as to the debtor upon motion of an affected party or upon the granting or denial of a discharge. 11 U.S.C. § 362(c)(1)(a)(2). An otherwise valid lien, unless avoided or set aside during the bankruptcy, survives discharge and may be enforced *in rem* against the collateral. *Johnson v. Home State Bank*, 501 U.S. 78, 111 S. Ct. 2150, 2153 (1991) (explaining that a discharge extinguishes only the personal liability of the debtor and that a creditor's right to foreclose on the mortgage survives the bankruptcy).

Additionally, because defendant cannot owe any debt now as a result of the final bankruptcy court decree and the discharge injunction, 11 U.S.C. § 105(a), there can be no debt collected upon an *in rem* action.

Having noted that no debt is being pursued or capable of being pursued, does not preclude defendant from contesting plaintiff's secured creditor status.

The court writes only to make the point that in terminating the automatic stay as to the trustee's interest, the court has made no determination as to whether Capital One actually has the right to foreclose. The purpose of the automatic stay is to maintain the status quo until the rights of the creditor, the debtor, and the estate can be sorted out. In the context of a reorganization case, that sorting out will generally take place in the bankruptcy court. But in a chapter 7 case in which the trustee is not attempting to sell or otherwise administer the property, any sorting out of the creditor's right to enforce a lien against property of the debtor is properly addressed in most instances to the state courts. Accordingly, nothing in this opinion should be read as precluding the debtor from challenging, before the appropriate state court, Capital One's standing to enforce the deed of trust.

In re Najafian, 2010 WL 1840300, *3 (Bankr. E. D. Va., May 5, 2010).

Because defendant alleges that she cannot be liable for any debt and, as a matter of law is not liable for any debt in this action, Count I of the Counterclaim fails to state a claim upon which relief can be granted and any conduct of plaintiff in the bankruptcy court likewise precludes such liability. Plaintiff's motion to dismiss Count I of the Counterclaim is sustained.

Id. at *4-5.

The MERS Issue and Standing

Finally, both represented and unrepresented clients have now become aware of issues related to whether mortgage companies have standing to foreclose on property. Some *pro se* defendants, with little understanding of the issues that arise in this process, believe that because they do not recognize the plaintiff as a party they dealt with when they received their loan, the plaintiff is not entitled to foreclose. They do a little research and, if MERS is involved, attack it as having no standing.

Many of these issues occurred in *CitiMortgage v. Wollaston*, 2011 WL 2661054 (Kan. Dist. Ct. July 8, 2011), in which the debtor returned from bankruptcy to attack CitiMortgage's right to proceed, even though the debtor listed it in her bankruptcy filings as a secured creditor. The argument principally relied upon was the Supreme Court's decision in *Landmark National Bank v. Kesler*, 289 Kan. 528, 216 P.3d 158 (2009), where the Court held that MERS was a mere straw man with no standing to contest a default judgment of which it was not notified and where the court held that MERS was not entitled to contest its absence from the foreclosure process.

Wollaston argues that CitiMortgage cannot enforce the mortgage securing the above-referenced note because the mortgage and underlying note were "bifurcated" or assumed by different entities. Citing, *Landmark National Bank v. Kesler*, 289 Kan. 528, 216 P.3d 158 (2009), she argues:

The language contained in the Mortgage purports to cause a security interest to be granted to MERS, rather than to the Lender Bank of Blue Valley. The security interest to MERS as "nominee" for lender failed to create an agency relationship between MERS and the lender, thereby bifurcating the Mortgage from the promissory note. As such, the purported Mortgage assigned from MERS and now held by CitiMortgage is held by a different party than the current holder of the Note which is Bank of Blue Valley. This issue is determinative of whether CitiMortgage holds a valid mortgage and was entitled to foreclose upon the property.

(Wollaston Mtn. for Summary Judgment p.4)

In *Landmark*, our Supreme Court affirmed a district court's denial of a nominee's (MERS) motion to set aside a first mortgagee's default judgment. Before the district court, MERS argued that it was a necessary party to the action. Nonetheless, the court found

that MERS had no legal interest in the subject property.

Citing *Thompson v. Meyers*, 211 Kan. 26, 30, 505 P.2d 680 (1973), the *Landmark* Court found that the term “nominee” is subject to various definitions. Analyzing the term, the court stated:

In common parlance the word ‘nominee’ has more than one meaning. Much depends on the frame of reference in which it is used. In Webster’s Third New International Dictionary, unabridged, one of the definitions given is ‘a person named as the recipient in an annuity or grant.’ We view a ‘nominee,’ as the term was used by the parties here, not simply in the sense of a straw man or limited agent ..., but in the larger sense of a person designated by them to purchase the real estate, who would possess all the rights given a buyer ...

The legal status of a nominee, then, depends on the context of the relationship of the nominee to its principal. Various courts have interpreted the relationship of MERS and the lender as an agency relationship. See *In re Sheridan*, 2009 WL 631355, at *4 (Bankr. D. Idaho March 12, 2009) (MERS “acts not on its own account. Its capacity is representative.); *Mortgage Elec. Registration System, Inc. v. Southwest*, 301 S.W.3d 1, 2009 WL 723182 (March 19, 2009) (“MERS, by the terms of the deed of trust, and its own stated purposes, was the lender’s agent”); (Sup.2006) (unpublished opinion (“A nominee of the owner of a note and mortgage may not effectively assign the note and mortgage to another for want of an ownership interest in said note and mortgage by the nominee.”) [Emphasis added.]

Id. at 539.

Significantly, in *Landmark*, MERS failed to provide evidence demonstrating or defining its relationship to the lender. The *Landmark* Court emphasized that, “[c]ounsel for MERS explicitly declined to demonstrate to the trial court a tangible interest in the mortgage ... [And] [c]ounsel for MERS made no attempt to show any injury to MERS resulting from the lack of service; in fact, counsel insisted that it did not have to show a financial or property interest.” *Id.* at 541. “[C]ounsel for MERS insisted that no evidence of a financial or property interest was necessary and its argument rested solely on its identity as the mortgagee on the mortgage document ...” *Id.* Because, in *Landmark*, counsel for MERS expressly refused to present evidence demonstrating its relationship to the lender, *Landmark* is factually distinguishable from the instant case.

Conversely, here, CitiMortgage asserts that MERS was BBV’s agent and that the “agency relationship defeats Borrower’s argument that the Note and Mortgage were split at inception.” (Plaintiff’s Memorandum in Opposition to Summary Judgment p. 22). For support, CitiMortgage cites *In re Martinez*, ___ B.R. ___, 2011 WL 1519877 * 6 (Bankr. D. Kan. April 20, 2011) (severance of a note and mortgage can only occur “absent an agency relationship” between the holder of the mortgage and the holder of the note). CitiMortgage argues that no bifurcation occurred because MERS was an agent for BBV

and each successive note holder. CitiMortgage argues that the agency relationship between Bank of Blue Valley and MERS was expressly created, as the mortgage document provides that MERS holds the mortgage as nominee for Bank of Blue Valley and its successors and assigns. CitiMortgage further argues that the agency relationship is clear from the recitation of both general and specific functions which MERS is authorized to perform. CitiMortgage also emphasizes that MERS' membership agreement with Bank of Blue Valley requires that the member must cause MERS to appear in the public record as mortgagee and that MERS must comply with “the instructions of the holder of the mortgage loan promissory notes and in particular instructions from the beneficial owner of the note.”

Because CitiMortgage asserts that an agency relationship existed, and attempts to prove the relationship, the blatant refusal to provide evidence of the agency relationship between MERS and the lender that precluded such a determination in the *Landmark* case is absent here. However, Wollaston argues that no agency relationship was created and that the language which CitiMortgage cites, i.e., that MERS “holds only legal title” solely “as nominee for Lender and Lender's successors and assigns,” is insufficient to create an agency relationship. Wollaston also argues that Citi-Mortgage cannot prove that MERS was an agent for ABN AMRO Mortgage Group and/ or Freddie Mac.

In *Professional Lens Plan, Inc. v. Polaris Leasing Corp.*, 238 Kan. 384, 710 P.2d 1297 (1985), the court defined agency as follows:

An agency has been defined as a contract, either express or implied, by which one of the parties confides to the other the management of some business to be transacted in his name, or on his account, and by which that other assumes to do the business and to render an account of it.

Id. at 390.

“The law recognizes two distinct types of agencies, one actual and the other ostensible or apparent. The authority of an actual agent may be either express or implied. [Citations omitted.]” *Id.*

An express agency is created if the principal delegates authority to the agent by words that expressly authorize the agent to do a delegable act. It is an implied agency if it appears from the statements and conduct of the parties and other relevant circumstances that the intention was to give the agent such an appearance of authority that when the agency was exercised it would lead others to rely on the person's acts as being authorized by the principal. An ostensible or apparent agency may exist if a principal has intentionally or negligently induced and permitted third persons to believe a person or entity is his or her agent even though no authority, either express or implied, has been actually conferred upon the agent. *Id.* at 390-91. *See also, Smith v. Printup*, 254 Kan. 315, 339, 866 P.2d 985 (1993); *Kansas City Heartland Const. Co. v. Maggie Jones Southport Café, Inc.*, 250 Kan. 32, 36-37, 824 P.2d 926 (1992); *Barbara Oil Co. v. Kansas Gas Supply Corp.*, 250 Kan. 438-49, 827 P.2d 24 (1992); *Gardner v. Rensmeyer*, 221 Kan. 23,

26-27, 557 P.2d 1258 (1976); *Greep v. Bruns*, 160 Kan. 48, 54-55, 159 P.2d 803 (1945); *Shawnee State Bank v. North Olathe Industrial Park, Inc.*, 228 Kan. 231, 237, 613 P.2d 1342 (1980).

Similarly, in *Mohr v. State Bank of Stanley*, 241 Kan. 42, 46, 734 P.2d 1071 (1987), the Court stated:

To determine whether the record establishes an agency by agreement it must be examined to ascertain if the party sought to be charged as principal has delegated authority to the alleged agent by words which expressly authorize the agent to do the delegated act. If there is evidence of that character, the authority of the agent is express. If no express authorization is found, then the evidence must be considered to determine whether the alleged agent possesses implied powers. The test utilized by this court to determine if the alleged agent possesses implied powers is whether, from the facts and circumstances of the particular case, it appears there was an implied intention to create an agency; in which event, the relation may be held to exist, notwithstanding either a denial by the alleged principal, or whether the parties understood it to be an agency. [Citations omitted.]

Significantly, “[w]hat constitutes agency and whether there is competent evidence reasonably tending to prove the relationship is a question of law.” *Barbara Oil Co. v. Kansas Gas Supply Corp.*, 250 Kan. at 446. Although what constitutes agency is a question of law, resolution of conflicting evidence which might establish its existence is for the finder-of-fact. *Aetna Casualty and Surety Co. v. Hepler State Bank*, 6 Kan. App.2d 543, 548, 630 P.2d 721 (1981). In determining whether there is an agency relationship, the weight to be given evidence and the resolution of evidentiary conflicts are functions of the trier-of-facts. If the existence of an agency is disputed, its existence or nonexistence is a question of fact for the jury [trier-of-facts]. *CIT Financial Services, Inc. v. Gott*, 5 Kan. App.2d 224, 229-30, 615 P.2d 774, rev. denied 228 Kan. 806 (1980); *Town Center Shopping Ctr. v. Premier Mortgage Funding, Inc.*, 37 Kan. App.2d 1, 6, 148 P.3d 565 (2006).

In the instant case, Wollaston filed her motion for summary judgment before discovery was complete. Accordingly, at that time, little evidence was available. Both because the evidence was undeveloped, and because there is a genuine issue of material fact as to the existence of an agency relationship between BBV and MERS, Wollaston's motion for summary judgment is denied.

C

Vernon's Annotated Missouri Statutes [Currentness](#)

Title XXIV. Business and Financial Institutions

☞ [Chapter 362. Banks and Trust Companies \(Refs & Annos\)](#)

→ **362.413. Reproduction of records--admissible in evidence**

1. Anything in the law to the contrary notwithstanding, every bank and every trust company organized under the laws of this state and every national banking association and every other bank incorporated under the laws of the United States having its place of business in this state may cause any and all records, memorandum, writings, entries, prints, representations or combinations thereof, of any act, transaction, occurrence, or event kept or recorded by such corporation to be recorded, copied, or reproduced by any photographic, photostatic, microfilm, microcard, miniature photographic, optical disk imaging, or other comparable or different process which accurately reproduces or forms a durable medium for so reproducing the original, and may thereafter cause the originals to be destroyed. Such reproductions shall be deemed to be an original record for all purposes and shall be admissible in evidence in all courts and administrative agencies whether the original is in existence or not. Any enlargement or facsimile of such reproduction, when certified by the president, any vice president, the cashier or secretary, and authenticated by the seal of such corporation, shall be received as prima facie evidence with like effect as such reproduction. The introduction of a reproduced record, or of an enlargement or facsimile of a reproduced record shall be a sufficient substitute for the original.

2. Any records or copies of records that would be admissible under [section 490.250, RSMo](#), and [sections 490.660 to 490.690, RSMo](#), shall be admissible as a business record, subject to other substantive or procedural objections, in any court in this state upon the affidavit of the person who would otherwise provide the prerequisites of [section 490.250, RSMo](#), and [sections 490.660 to 490.690, RSMo](#), that the records attached to the affidavit were kept as required by [section 490.680, RSMo](#).

3. No party shall be permitted to offer such business records into evidence pursuant to this section unless all other parties to the action have been served with copies of such records and such affidavit at least seven days prior to the day upon which trial of the cause commences.

4. The affidavit permitted by this section may be in form and content substantially as follows:

THE STATE OF

COUNTY OF

AFFIDAVIT

Before me, the undersigned authority, personally appeared
, who, being by me duly sworn, deposed as follows:

My name is, I am of sound mind, capable of making this affidavit, and personally acquainted with the facts herein stated:

I am the custodian of the records of Attached hereto are pages of records from These pages of records are kept by in the regular course of business, and it was the regular course of business of for an em-

ployee or representative of with knowledge of the act, event, condition, opinion, or diagnosis recorded to make the record or to transmit information thereof to be included in such record; and the record was made at or near the time of the act, event, condition, opinion or diagnosis. The records attached hereto are the original, exact duplicates of the original, or, accurate reproductions of the original records as permitted by subsection 1 of section 362.413, RSMo.

Affiant

In witness whereof I have hereunto subscribed my name and affixed my official seal this day of, ...



(Signed)

(Seal)

5. Upon compliance with this section, the affiant shall not be required to appear in person before a court to certify and authenticate such documents.

CREDIT(S)

(L.1963, p. 455, § 1. Amended by L.1971, S.B. No. 163, p. 84, § 2; [L.1995, S.B. No. 178, § A](#); [L.1998, S.B. No. 792, § A](#).)

HISTORICAL AND STATUTORY NOTES

1997 Main Volume

The 1995 amendment inserted “optical disk imaging” in the first sentence.

2011 Electronic Update

1998 Legislation

L.1998, S.B. No. 792, § A, inserted the subsec. 1 designation; in subsection 1, substituted “the law” for “section 362.410” after “Anything in” and “be a sufficient substitute for” for “not preclude admission of” near the end of the subsection; and inserted subsections 2 to 5.

1997 Main Volume

Title of Act:

An Act providing that anything in [§§ 362.410](#) and 363.690, RSMo 1959, to the contrary notwithstanding, every bank and every trust company organized under the laws of this state and every national banking association and every other bank incorporated under the laws of the United States having its place of business in this state shall have power to cause any and all records, memorandum, writings, entries, prints, representations or combinations thereof kept or recorded by such corporation to be recorded, copied, or reproduced by any process which accurately reproduces or forms a durable medium for so reproducing the original, and shall have power thereafter to cause the originals to be destroyed, and providing that such reproductions shall be deemed an original for all purposes and shall be admissible in evidence whether the original is in existence or not, and providing when an enlargement or facsimile of such reproduction shall be admissible in evidence and providing that such introductions shall not preclude admission of the original. L.1963, p. 455.

RESEARCH REFERENCES

2011 Electronic Update

Treatises and Practice Aids

[4 MO Practice Series § 473.543](#), Settlements, Contents--Vouchers for Disbursement.

[7 MO Practice Series § 25:108](#), Affidavit--Records Kept in Regular Course of Business.

[23 MO Practice Series § 1001.1](#), Missouri Practice.

[23 MO Practice Series § 1002.1](#), Missouri Practice.

[23 MO Practice Series § 1003.1](#), Missouri Practice.


[23 MO Practice Series § 902.10](#), Missouri Practice: Presumptions Created by Law.

[5B MO Practice Series § 1371](#), Vouchers.


NOTES OF DECISIONS

In general [1](#)
Identification of copy [2](#)

[1](#). In general

Admission in evidence of enlarged reproductions of bank's microfilm copies of six checks signed by defendant was not error notwithstanding failure to account for original documents. [State v. Holmes \(Sup. 1967\) 419 S.W.2d 15](#). [Criminal Law](#)  [398\(1\)](#)

[2](#). Identification of copy

Bank official's identification of exhibit as copy of bank ledger sheet was sufficient, under statute, to permit introduction of such exhibit. [State v. Baity \(App. 1973\) 494 S.W.2d 425](#). [Criminal Law](#)  [444.9](#)

V. A. M. S. 362.413, MO ST 362.413

Statutes are current with emergency legislation approved through July 14, 2011, of the 2011 First Regular Session of the 96th General Assembly. Constitution is current through the November 2, 2010 General Election.

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END OF DOCUMENT