

**Another Nail in the MERS Coffin:
Arkansas Court Rules That MERS Was Not A Necessary Party To A Foreclosure Action In
Which MERS Served As Lender's Nominee On The Senior Deed Of Trust**

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On March 19, 2009, the Supreme Court of Arkansas determined that Mortgage Electronic Registration Systems, Inc. ("MERS") was not a necessary party to a foreclosure action involving the foreclosure of a junior mortgage, where MERS was not the true beneficiary of the senior deed of trust nor was specifically authorized by the lender to act on the lender's behalf in the foreclosure proceedings. *Mortgage Electronic Registration Systems, Inc. v. Southwest Homes of Arkansas*, -- S.W.3d --, 2009 Ark. 152, 2009 WL 723182 (Mar. 19, 2009). Coming in on the heels of *Landmark National Bank v. Kesler*, 40 Kan. App. 2d 325, 192 P.3d 177 (2008) (also finding that MERS was not a necessary party to a foreclosure action), *Mortgage Electronic Registration Systems, Inc. v. Southwest Homes of Arkansas* places MERS on unstable ground in mortgage foreclosure actions.

In 2003, Jason Lindsey and Julie Lindsey entered into a deed of trust on a one-acre lot in Benton County, Arkansas, to secure a promissory note from Pulaski Mortgage. The deed of trust listed Pulaski Mortgage as the lender, Jason and Julie Lindsey as the borrowers, James C. Ernst as the trustee, and MERS as the beneficiary "acting 'solely as nominee for Lender,' and 'Lender's successors and assigns.'" In 2006, Jason and Julie Lindsey granted a mortgage on the same property to secure a second promissory note from Southwest Homes of Arkansas ("Southwest Homes"). In 2007, Southwest Homes filed a Petition for Foreclosure in Rem against the Lindseys under the mortgage and listed the Lindseys, the Benton County Tax Collector and "Mortgage Electronic Registration System, Inc. (Pulaski Mortgage Company)" as respondents. Southwest Homes served Pulaski Mortgage, but did not serve MERS. A decree of foreclosure was entered in April 2007, and the property was auctioned to Southwest Homes. The sale was approved in May 2007. In 2008, MERS learned of the foreclosure and moved for relief. The circuit court denied MERS's motion, and MERS appealed.

MERS argued that it held legal title to the property and therefore was a necessary party to any action regarding title to the property. Although the deed of trust indicated that MERS held legal title and was the beneficiary and nominee of the lender, it also provided that all payments were to be made to the lender, that the lender would make decisions on late payments, and that the lender

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held all rights to foreclosure. The borrowers never made payments to MERS and MERS did not service the loan in any way. MERS simply provided electronic tracking of ownership interests in residential real property security interests. Still, MERS asserted that it held bare legal title because it held the authority, as an agent of the lender, to exercise the rights of the lender, regardless of who the lender may be under the MERS electronic registration.²

The court found that MERS did not hold legal title under the deed of trust and therefore was not a necessary party to the foreclosure action initiated by Southwest Homes. In its decision, the court described the relationship between parties to a deed of trust – the borrower, who conveys legal title to the trustee; the lender, who is the beneficiary of the deed of trust and holds the indebtedness secured by the deed of trust; and the trustee, who takes legal title and whose duties are limited to undertaking foreclosure upon default and reconveying the deed of trust upon satisfaction of the underlying debt. Because MERS was not the trustee under the deed of trust, the deed of trust did not convey legal title to MERS. Also, MERS was not the beneficiary of the deed of trust, although so designated in the deed of trust, because it did not receive the payments on the underlying debt.

Chief Justice Jim Hannah authored the opinion. Justice Danielson authored a concurring opinion, in which Justices Imber and Wills joined. Justice Danielson’s concurring opinion discusses the Kansas Appellate Court opinion in *Landmark National Bank v. Kesler*.

² The court specifically rejected this argument, stating “We specifically reject the notion that MERS may act on its own, independent of the direction of the specific lender who holds the repayment interest in the security instrument at the time MERS purports to act.”