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I.

MERS AND MORTGAGE SETTLEMENT

II.

**HIGH INCOME DEBTORS, EXPENSES AND RETENTION
OF LUXURY ITEMS**

III.

SELECTED CHAPTER 13 CASES OF INTEREST

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Statutes and Rules

Fair Debt Collection Practices Act

11 U.S.C. 1325(a)(3)

11 U.S.C. 1325(a)(4)

11 U.S.C. §1325

§1322(b)(5)

§541(5)(a)

11 U.S.C. § 707(b)(2)(B)(iii)(I). 6, 2013) 11 U.S.C. § 1325(b)(1)-(3)

§ 707(b)(2)(A)(iii)(1)

RICO statute 18 U.S.C. Sec. 1964(c)

Fed R. Civ. P. 9(b)

Fed. R. Civ. P. 9(b) requirements

Tex. Bus. and Commerce Code Anno., Sec. 3.301 et seq.

Section 12.002 of the Civil Practice and Remedies Code

2004 Bankruptcy Abuse Prevention and Consumer Protection Act

1 U.S.C. §1325(b)

§ 1325(b)(2)-(3)

ARTICLE I. MERS AND MORTGAGE SETTLEMENT

**Robert B. Wilson
November 20, 2014**

A. Introduction

The Planning Committee requested that I talk on three separate and distinct issues:

- 1. MERS Settlement In Texas**
- 2. High Income Debtors and Luxury Items**
- 3. Current Issues in Chapters 13 and 7**

The initial reaction to the request to include MERS litigation in the agenda was that not much would be found in the Texas bankruptcy world on this subject. This knee jerk reaction was incorrect. There are cases in every Texas judicial district involving bankruptcy adversary or contested cases where MERS is a party or where a case involving MERS followed the bankruptcy case. Most are fact and state law specific and it is difficult to find coherent threads to tie the cases together other than MERS generally wins.

B. Background of MERS

The Mortgage Electronic Registration System (MERS) is a company that was created by the mortgage banking system. MERSCORP Holdings, Inc. is a privately held corporation that owns MERS systems and all other MERS products. MERS maintains a data base that tracks mortgages for its members as they are transferred from bank to bank. By it tracking loan transfers electronically, MERS eliminates the long standing practice that the debtor must record an assignment with the county recorder every time the loan is sold from one bank to another. In the MERS system, MERS becomes the mortgagee of record for the members by assignment of the member's interest to MERS. MERS is listed as the grantee in the official records maintained at the county register of deeds office. The lenders retain the promissory note as well as the servicing rights to the mortgage. The lender can sell these interests to investors without recording the transaction in the public records.¹

The operative document defining MERS and its function is the mortgage or the trust. The MERS mortgage is generally a uniform form and the provisions are fairly consistent. A typical provision says that "borrower understands and agrees that MERS holds only legal

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¹Mortgage Electronic Registration System, Inc. v. Nebraska Department of Banking and Finance, 704 N.W.2d 785 (Neb. 2005).

title to the interest granted by borrower by this security instrument, but, if necessary to comply with law and custom, MERS (as nominee for lender, and lender's successors and assignees) has the right to exercise any and all of those interests, including, but not limited to the right to foreclose and sell the property; and to take any action required of lender, including, but not limited to releasing and canceling the security instrument.”²

There have now been dozens of lawsuits filed against MERS in a number of different states. These fall into several different categories. One, cities and counties pursuing MERS alleging it was unjust enriched because it did not pay local recording fees. MERS has successfully defended itself against these challenges in at least six different states. The other lawsuits have been filed by foreclosed homeowners alleging fraud and title claims, and MERS has generally been winning those cases as well.

C. Synopsis of MERS Cases in Texas:

1. Bankruptcy and Federal District Court Cases:

Dallas County v. MERSCORP, 2 F.Supp. 3d 938 (D.C. N.D. Tex. 2014)

This was a highly publicized case. Northern District of Texas Judge O'Connor granted a summary judgment for defendant, MERS, et al. It involved Dallas, Harris, and Brazoria Counties' allegations that the action of MERS violated Texas Local Government Code §192.007(a) in that it deprived the counties of recording fees and corrupted its real property records. Dallas and the other Texas counties also asserted claims for unjust enrichment, negligence, fraudulent misrepresentation, gross negligence, fraud and conspiracy. The District Court in its opinion overruled all of the allegations and granted summary judgment for the defendants, MERS, et al.

MERS argued unsuccessfully that the Texas Statutes granted the counties a private right of action. The counties were barred from seeking declaratory relief. The Court further cited Fifth Circuit decisions ruling which stated that §192.007 does not impose upon a lender a duty to record the assignment or deed of trust. *Hudson v. J.P. Morgan Chase N.A.*, 2013 WL5306786 at 2 (5th Cir. Sept. 23, 2013). Addressing the decision in *Nueces County v. MERSCORP*, 2013 WL3353938 (S.D. Tex. July 3, 2013) the court noted that this was simply another court view upon a motion to dismiss. The court rejected the counties interpretation that the statute requires the recordation of interim instruments such as assignments and deeds of trust.

This case is currently on appeal with the Fifth Circuit Court of Appeals.

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²Norton Bankruptcy Law Adviser, Mortgage Electronic Registration System, Inc., A Survey of Cases Discussing MERS Authority to Act, Hogy and Williams, Aug. 2010.