

Merrimack Valley

housingreport

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MERS and Robo-Signers

By Richard P. Howe Jr.

My colleague from the Essex South Registry of Deeds, John O’Brien, has gained national attention for his pro-consumer crusade against lenders who have cut numerous corners in their lending and foreclosure practices. O’Brien’s biggest targets have been Mortgage Electronic Registration System Inc., better known as MERS, and “robo-signers,” individual employees of national lenders who signed false names to mortgage documents.

MERS came into existence in the late 1990s in response to the chaos in the mortgage industry that followed the collapse of the housing bubble of the early 1990s. Here is how MERS works: what we commonly refer to as a mortgage is really two transactions. The first is a contract between the borrower and the lender that is memorialized by the promissory note. The second is the mortgage by which the borrower conveys an interest in the property to the lender. That interest is

the right to foreclose on the property if the borrower fails to repay the note in accordance with its terms.

The promissory note produced by these transactions is routinely transferred among lenders and investors. Traditionally, when such a transfer is made, the rule is that “the mortgage follows the note” and so a document called an “assignment of mortgage” is recorded at the registry of deeds whereby the original lender assigns the mortgage to the new holder of the note. MERS was created to hold onto the mortgage for the benefit of whichever entity held the note, thereby eliminating the need to record an assignment.

Register O’Brien maintains that this arrangement was an illegal scheme to avoid paying recording fees for the assignments. Near the end of July, Attorney General Martha Coakley announced that her office will investigate whether MERS failed to pay required

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Deeds, Mortgages, Foreclosures and Orders of Notice Recorded

July 2010 and July 2011 compared

| | Haverhill | | Lawrence | | Lowell | | Methuen | |
|-------------------|-----------|---------|----------|---------|---------|---------|---------|---------|
| | July-10 | July-11 | July-10 | July-11 | July-10 | July-11 | July-10 | July-11 |
| Deeds | 92 | 99 | 72 | 79 | 111 | 123 | 67 | 80 |
| Mortgages | 163 | 128 | 98 | 93 | 178 | 156 | 124 | 108 |
| Foreclosure Deeds | 20 | 10 | 33 | 8 | 30 | 20 | 18 | 2 |
| Orders of Notice | 16 | 13 | 20 | 22 | 27 | 20 | 20 | 12 |

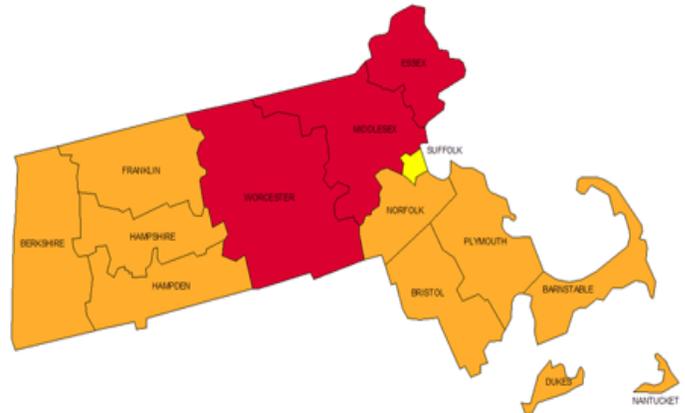
Local Radon Levels and the Federal Radon Action Plan

By Emily Vidrine

On June 20, 2011 the government publicly announced the 2011 Federal Radon Action Plan. The action plan is a partnership between several government departments and agencies. The action plan was developed in response to increasing evidence that radon poses a significant health threat. Radon is the second leading cause of lung cancer after smoking, amounting to an estimated 21,000 lung cancer deaths each year in the U.S. The action plan aims to create awareness about the value of radon testing, encourage and enable mitigation of radon issues, and build demand for services from the radon services industry. The entire action plan can be viewed and downloaded from the EPA web site at www.epa.gov/radon.

Radon is a naturally occurring radioactive gas that is produced as uranium decays in the earth's soil. It is undetectable to the human eye and has no smell or taste. It typically enters buildings through cracks in the foundation and other openings close to the ground. Radon can concentrate in indoor air at different rates depending on the structure of the building and the general air flow. It is a common belief that radon only concentrates in basements of buildings and lower levels of buildings, but recent studies on Radon in multifamily buildings have revealed that radon can and does travel up to higher levels of buildings through elevator shafts, stairwells, and other pathways. Furthermore, when Radon is present on one floor of a building, it often concentrates in each unit differently. Radon levels can also change over time as buildings settle, or as renovations or construction change the structure. Currently, the only way to determine the level of radon in every unit of a building is to test each one separately. The greatest potential risk of exposure to radon is in our homes, where we spend most of our time.

Certain geographical areas have higher naturally occurring radon levels than others, as can be seen below on the Radon Heat Map.¹



The red areas indicate higher estimated average indoor radon levels (4 pCi/L or higher), orange indicates medium levels (2-4 pCi/L), and yellow indicates low levels (2 pCi/L or less). In Massachusetts, the estimated indoor levels are high in the Middlesex, Essex, and Worcester counties. However, the EPA recommends testing of all homes regardless of estimated geographic radon levels, since radon concentration is different for every building. Radon test kits can typically be purchased at local hardware and home improvement stores for about \$15, and results to the tests can be obtained for about \$10. The EPA recommends fixing homes that have radon levels higher than 2 pCi/L since there is no known safe level of exposure. 

For more information on radon testing, state laws related to radon, and radon remediation, contact:

MA Department of Health
Radiation Control Program
Website: <http://www.mass.gov/dph/rcp>
529 Main Street, Charlestown, MA, 02129
Toll-free: 1-800-RADON95 [723-6695]
Phone: (413) 586-7525 x1185

1. <http://www.epa.gov/radon/states/massachusetts.html>

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fees and also “impaired the integrity” of the recording process by failing to record necessary documents.

A recent decision by the US Bankruptcy Court in Worcester, *In re Marron* (Case No. 10-45395-MSH) addressed the MERS issue. In *Marron*, the bankruptcy trustee opposed a lender’s Motion for Relief from Automatic Stay in order to foreclose a mortgage. The trustee argued that the proposed foreclosure was defective, questioning the legal authority of MERS to hold and assign mortgages. The court rejected that argument, stating that in Massachusetts, “courts have generally held that MERS may both foreclose and assign mortgages held in its name” because Massachusetts does not strictly follow the “mortgage follows the note” rule adhered to by many other states. (Wide variations in property law from state to state help explain why this area of the law defies a coherent nationwide analysis). Massachusetts case law treats a MERS-like separation of the note holder and the mortgagee as a type of trust relationship, with the mortgagee holding only bare legal title for the benefit of the note holder. It’s almost as if MERS used Massachusetts law as a model when establishing itself. Its structure may run afoul of the law in other states, but it would appear to be consistent with existing case law in the Commonwealth. At a minimum, the case against MERS for not recording assignments of mortgages is infinitely more complex than has been portrayed in the media thus far.

As for the robo-signer issue, at first glance it would appear to be a black and white instance of corporate wrong doing but, if anything, it leads to an even more complex legal analysis than the MERS issue. The

term “robo-signer” has come to mean a class of employees of some major national lenders who routinely signed the name of some other employee, one who had been formally authorized by the corporate lender to sign on behalf of the corporate lender, to real estate documents. While some have characterized this as forgery or fraud, it is more of an issue of authority or agency. In all of these cases, the intent of the person who affixed pen to paper is relevant, no matter what name was signed to the document. To establish forgery or fraud requires some kind of intent to defraud, a state of mind that would seem not to exist in these scenarios. In other words, the mere act of signing the name of another is not automatically forgery or fraud.

The signature analysis becomes even more complex because a corporation is involved. While an individual who signs on a corporate behalf must be authorized by the corporation to do so, the lack of such express authorization does not automatically void a transaction consummated by an unauthorized corporate agent. The doctrine of ratification, for instance, allows a corporation to retroactively grant authority to an agent for a previously performed unauthorized act. As in other areas, much of the analysis turns on the intent of the actors. If the intent is to defraud, then there’s a problem. If the intent is to bypass an employer’s bureaucratic logjam and undertake a foreclosure that in all other respects is completely warranted and legitimate, then there may not be a problem with the legality of the foreclosure. Whatever the case, it is beneficial that this issue is being pushed so aggressively by Register O’Brien, because until the matter is ultimately decided by the Massachusetts Supreme Judicial Court, it remains in the orbit of speculation. █

SAVE THE DATE!!!

Friday, October 28, 2011

City of Lowell, Keys to Ending Homelessness Conference 5: Criminal Justice Reentry Strategies
 Keynote Speaker: Philip Mangano, President & CEO, American Roundtable to Abolish Homelessness
 Holiday Inn, Tewksbury Massachusetts

For more information or to register, please contact Linda King at 978.446.7200 x 1428 or at LKing@lowellma.gov

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To begin receiving this monthly e-publications, please e-mail David Turcotte at David_Turcotte@uml.edu

Looking to Showcase Your Vacancy or Looking to Move?

Community Teamwork Inc. (CTI) developed a new website designed to help landlords showcase their vacancies, and tenants to easily find them. This free service is offered throughout the Merrimack Valley and the North Shore. Go to www.nearlistings.org or contact Avi Glaser at aglaser@comteam.org for more info.

The Merrimack Valley Housing Report Thanks its Major Sponsors:

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