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Descendants  
Now Playing

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# The Banks Still Want a Waiver

By GRETCHEN MORGENSEN

HOW should banks atone for those foreclosure abuses — all the robo-signing and shoddy recordkeeping that jettisoned so many people from their homes?

It has been four months since a deal to remedy this mess was floated. Not much has happened since — at least not publicly.

Last week, banking executives and state attorneys general met in Washington to try to settle their differences. At issue was how much banks should pay, and how and to whom, to make this all go away. The initial terms, which emerged in March, were said to carry a \$20 billion price tag.

But here is a crucial question: to what extent would such a settlement protect banks from future liability? Will the attorneys general strike a deal that effectively prevents them from bringing new, unrelated lawsuits against the banks?

If the releases in any settlement are broad, there will be joy in Bankville. If they are narrow, the banks will probably face more litigation, something they would rather avoid.

A looming issue relates to the potential liability stemming from the Mortgage Electronic Registry Systems, or MERS. This company, owned by the major banks, was set up in the mid-1990s by the Mortgage Bankers Association, Fannie Mae and Freddie Mac. Its goal was to expedite the home loan process.

By eliminating the need to record changes in property ownership in local land records, MERS ramped up profits for lenders. In 2007, MERS calculated that it had saved the industry \$1 billion over 10 years. An estimated 60 percent of all home loans were registered to MERS.

*65 million mortgages*  
But the MERS machine started to sputter during the foreclosure crisis. Lawyers challenged MERS's ability to bring foreclosure proceedings because the system does not technically own the security or note underlying properties, as required. While some courts have not objected to MERS's foreclosing in place of banks, others have.

New York courts, for instance, have been increasingly hostile to MERS. In a February 2011 opinion, Robert E. Grossman, a federal judge on in Long Island, wrote: "This court does not accept the argument that because MERS may be involved with 50 percent of all residential mortgages in the country, that is reason enough for this court to turn a blind eye to the fact that this process does not comply with the law."

Equally troubling for MERS is the fact that its officials have filed questionable documents with courts attesting to ownership of the notes and other significant matters.

These practices have consequences, as described by R. K. Arnold, MERS's former president, in a 2006 deposition. "We are heavily at risk as far as, you know, having to follow the rules of the court and enforcing our rules that our members must go by," he said. "We also have jeopardy as far as if we were to fail in the foreclosure realm."

David Pelligrinelli, president of AFX Title, a title search company, said MERS contributed to the problem of thousands of mortgages lacking a complete ownership chain.

"You can't go back and redocument all these things, because some of the companies aren't around anymore," he said. "Even if they are, the charters for these companies don't allow for backdating of assignments."

How MERS and its bank owners will fare with the attorneys general is unclear. The early term sheet for the possible settlement said only this: "Issues relating to the use and performance of MERS are reserved for further discussion." Those further discussions may be taking place now. It's a good bet that the banks want a comprehensive release from liability relating to MERS.

Officials at the nation's top four banks declined to comment on the private talks. A spokeswoman for MERS said it was not participating in the discussions and could not speculate on them.

Lawyers who have examined this issue say it would be unprecedented to grant a broad release from liability to the banks that own MERS from claims that have not been investigated.

WHILE some states are scrutinizing MERS, most have declined to investigate its operations. That might seem surprising, given the apparent conflicts of interest in its business. Employees of law firms representing banks in foreclosures, for instance, are also officers of MERS. They can assign mortgages even though they represent a party with an interest in the outcome.

A broad release would vastly diminish the possibility of an in-depth investigation. Such a release

might also make it harder for borrowers to argue that MERS has no right, or standing, to foreclose on them. The United States Trustee has supported this view in a number of recent cases, but exempting banks from future lawsuits on this issue would send a message that questioning MERS's standing is of no interest to top state officials.

And if the banks are insulated from future state lawsuits, responsibility for any abusive acts by MERS would be pushed onto law firms that did the system's work. With few assets, these law firms are virtually judgment-proof. The unit of MERS that held title to the mortgages also has few assets and was set up in such a way that lawsuits against it would probably reap little for plaintiffs.

MERS has begun to clean up its practices and paperwork. Officials are furiously assigning mortgages out of MERS's name and into the banks' names. One borrower in Pierce County, Wash., combed through records from April 1, 2011, to July 18, and found 1,956 assignments of deeds of trust executed from MERS to banks that service the loans or trustees that oversee mortgage pools.

Sure, the issues surrounding MERS seem mind-numbing. Some officials might want to wash their hands of the whole thing in a settlement. But at least one legal professional is offering to educate attorneys general — at no cost. She is April Charney, a lawyer at Jacksonville Area Legal Aid in Florida and one of the first to question MERS's standing in foreclosures.

"You need lawyers in each state to be legal consultants to the A.G.'s so they're on equal footing with the huge industry they are up against," she said. "It would be an honor to consult on these highly complex, layered and nuanced state-based legal issues. Call it pro bono with bells on."

It would be telling if no one takes her up on that offer.