

Banking and Finance Law Daily Wrap Up, MORTGAGES—Conn. Sup. Ct.: MERS’ constitutional challenges to Connecticut’s fee system for recording mortgage documents rejected, (Feb. 19, 2016)

By [Thomas G. Wolfe, J.D.](#)

Despite federal and state constitutional challenges by MERSCORP Holdings, Inc., and Mortgage Electronic Registration Systems, Inc. (collectively MERS) to Connecticut’s statutory system for recording fees in which a nominee operating a national electronic database to monitor residential mortgage loans is required to pay fees approximately three times higher than other conventional mortgagees, the Supreme Court of Connecticut has upheld the constitutionality of the pertinent Connecticut laws. Notably, the Connecticut Bankers Association filed an amicus brief in the case ([MERSCORP Holdings, Inc. v. Malloy](#), to be officially released Feb. 23, 2016, Palmer, R.).

MERS system. As observed by the court’s opinion, MERS operates a national electronic registration system that tracks any changes in the ownership and servicing rights of MERS-registered loans between MERS members—including in-state and out-of-state mortgage lenders, servicers, and public finance institutions. Designed to save time and costs associated with the recording of subsequent mortgage assignments in public land records, the recording of a mortgage with MERS as a mortgage nominee “essentially creates a placeholder” for the electronic MERS system in the public land records, which allows the electronic MERS system and public records systems to operate together. MERS remains as the mortgagee of record in the public records “until the mortgage either is released or assigned to a nonmember of MERS.”

Connecticut law. The court pointed out that, in 2013, Connecticut amended its statutes governing recording fees for real estate records. Moreover, the parties to the litigation agreed that the Connecticut legislature “crafted the statutory language with MERS specifically in mind.” Although the 2013 statutory amendments do not refer to MERS by name, the parties agreed that MERS is the only entity that qualifies as “a nominee of a mortgagee” under the statutory language.

The court recognized that the “net effect of the amendments to §7-34a(a) is to collect from a nominee of a mortgagee, namely, MERS, substantially more for the filing of deeds, assignments, and other documents in the land records than from any other filer.” In addition, the court observed that the 2013 amendments also shifted how the recording fees on MERS-related transactions were to be allocated. Indeed, the parties agreed that the Connecticut legislature’s amendments were adopted “at least in part as a revenue enhancing measure to help balance the state budget.” At the same time, the parties also agreed that “the recording fees at issue will be collected from the borrowers at closing and not paid by MERS itself.”

MERS lawsuit. As a result of the increased recording fees directed toward mortgage nominees, MERS brought an action against Connecticut’s governor, attorney general, treasurer, state librarian, and state public records administrator. MERS sought injunctive and declaratory relief, alleging that Connecticut’s two-tiered statutory recording fee system violated provisions of the federal and state constitutions as well as civil rights laws.

User fees or taxes? MERS contended that the recording fees constituted “user fees” because they are “paid in exchange for a discrete service of benefit” to the filer in the system. In contrast the Connecticut state defendants contended that the recording fees were more aligned with taxes because “the statute was enacted primarily to raise revenues for the state and its municipalities.” Ultimately, the court viewed the recording fees as a “hybrid” of taxes and user fees and conducted its analysis of the constitutional issues accordingly.

Connecticut laws upheld. In rejecting MERS’ challenges and upholding the constitutionality of the Connecticut laws governing recording fees for a nominee operating a national electronic database to track mortgage loans, Connecticut’s high court determined that:

- even though nominees such as MERS are charged higher recording fees than other mortgagees under the statutory scheme, this did not violate the equal protection guarantees of the state and federal constitutions because the distinctions set forth in the Connecticut laws (Conn. Gen. Statutes §7-34a(a) and §49-10(h)) are “rationally related to legitimate public interests”;
- the Connecticut laws (Conn. Gen. Statutes §7-34a(a) and §49-10(h)) did not violate the dormant commerce clause of the U.S. Constitution because they are not discriminatory on their face, do not place an undue burden on the secondary mortgage market, and do not result in a “tangible detriment” to the MERS business model.

Final disposition. The Connecticut Supreme Court affirmed the trial court’s summary judgment for the Connecticut defendants on all counts of MERS’ complaint.

The case is [No. SC 19376](#).