

REAL PROPERTY LAW SECTION
Respectfully submits the following position on:

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Residential Funding Company, LLC v. Saurman

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The Real Property Law Section is not the State Bar of Michigan itself, but rather a Section which members of the State Bar choose voluntarily to join, based on common professional interest.

The position expressed is that of the Real Property Law Section only and is not the position of the State Bar of Michigan.

To date, the State Bar does not have a position on this matter.

The total membership of the Real Property Law Section is 3,184.

The position was adopted an electronic discussion and vote. The number of members in the decision-making body is 18. The number who voted in favor to this position was 18. The number who voted opposed to this position was 0.

Report on Public Policy Position

Name of section:

Real Property Law Section

Contact person:

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Regarding:

Residential Funding Company, LLC v Saurman, Application for Leave to Appeal

Date position was adopted:

June 30, 2011

Process used to take the ideological position:

Position adopted after an electronic discussion and vote.

Number of members in the decision-making body:

18

Number who voted in favor and opposed to the position:

18 Voted for position

0 Voted against position

0 Abstained from vote

0 Did not vote

Explanation of the position, including any recommended amendments:

Issue: In Residential Funding Company, LLC v Saurman, ____ Mich App ____, Docket No. 290248 (April 21, 2011), the Court of Appeals reversed decisions of the circuit and district courts and held that Mortgage Electronic Registration System, Inc. (MERS) could not foreclose by advertisement mortgages in which the borrower/mortgagors had agreed that MERS, solely as nominee for the lender, could foreclose. In these appeals from eviction actions brought in the district courts following foreclosure and expiration of the redemption period, the Court of Appeals held that MERS did not have the statutory right or authority to foreclose by advertisement because it was not: (1) the owner of the indebtedness; (2) someone with an interest in the indebtedness secured by the mortgage; or (3) the servicing agent of the mortgagee as required by MCL 600.3204(1)(d). As a result, the Court of Appeals found the foreclosure sales void ab initio. The plaintiff/lenders have applied to the Supreme Court for leave to appeal.

Position: Apart from the direct argument on the interpretation of the statute, an issue on which there is no real direct authority, the Court of Appeals decision raises a host of other issues: it does not by its terms limit the time within which a defaulting borrower may challenge a foreclosure by MERS as mortgagee and nominee of the lender.

The decision therefore invalidates tens of thousands of MERS foreclosure sales and, in turn, subsequent sales. It permits action by the prior owners of the foreclosed properties to void the foreclosures and the subsequent sales and evict the current owners or purchasers, without a clear limit as to when those actions may be brought. The decision thereby creates uncertainty for some unknown time as to the title and ownership of real estate, inability to insure title, and corresponding effects on the value and usefulness of property subject to those issues. The opinion does not explain or explore the question of why the foreclosure should be treated as void rather than voidable or the distinction in Michigan cases between the two. As a result, it also does not explore the issue of harm to the borrower who has concededly defaulted, or, on the other hand, the effect of invalidating foreclosure sales where the effect of a full credit bid by MERS was to free the defaulting borrower of any claim for a deficiency. By declaring the foreclosures void, the opinion does not address those lines of cases that address the effect of the expiration of the redemption period on title and the standing of the borrower after the expiration of the redemption period. In addition, the Court of Appeals opinion says that its holding is necessary to protect the borrower from the possibility of a double recovery by MERS as mortgagee and by a lender as noteholder who claims not to have been bound by the foreclosure. As the statutes do not answer that question clearly in the context and terms presented by this case, to provide real certainty, the Supreme Court should address that issue directly if it reverses the decision of the Court of Appeals. Although these issues may be further afield, the holding that the foreclosure sales were void raises other possible practical issues, including the payment of transfer taxes and whether they may be recovered, and the effect on borrowers whose property may now be foreclosed a second time with whatever credit consequences may follow.