

**IN THE  
SUPREME COURT OF APPEALS OF WEST VIRGINIA**

No. 14-0776

THE STATE OF WEST VIRGINIA EX REL.  
U.S. BANK NATIONAL ASSOCIATION, ET AL., *Petitioners*,

v.

THE HONORABLE WARREN R. MCGRAW,  
JUDGE OF THE CIRCUIT COURT OF WYOMING COUNTY, WEST VIRGINIA  
and WYOMING COUNTY, WEST VIRGINIA, *Respondents*.

**PETITION FOR A WRIT OF PROHIBITION  
AND  
MEMORANDUM OF LAW IN SUPPORT OF THE PETITION**

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### **QUESTION PRESENTED**

Did the Circuit Court exceed its power and clearly err by permitting Wyoming County to proceed with a putative class action lawsuit where: (1) the West Virginia Legislature decided not to grant a right of action for the statutory violations alleged; (2) the County seeks relief that would invalidate security instruments entered into between private parties, void past foreclosures, and cause substantial adverse impacts on borrowers, lenders and others across West Virginia; and (3) Petitioners would be prejudiced without immediate review?

### **STATEMENT OF THE CASE**

On March 27, 2012, Wyoming County (“Plaintiff” or “the County”) filed a lawsuit against Petitioners in the Circuit Court of Wyoming County on behalf of itself and all other similarly situated West Virginia counties. Plaintiff’s Class Action Complaint (“Complaint”), *County of Wyoming, West Virginia v. U.S. Bank National Association, et al.*, Civil Action No. 12-C-57 (attached at Appendix “App.” 8-36). The County alleges that: (1) West Virginia land records statutes require creation and recordation of assignments of deeds of trust in land records when interests in secured notes are transferred; and (2) deeds of trust designating Mortgage Electronic Registration Systems, Inc. (“MERS”) as beneficiary violate West Virginia law. Complaint ¶¶ 14-20, 36-59. Ultimately, the County seeks to generate recording fee revenue (for older transactions and those in the future) by obtaining some sort of order that will force Petitioners to abandon the use of nominees and instead to create and record deed of trust assignments every time an interest in a loan is transferred. The County sued Petitioners, who are named solely in their role as trustees for residential mortgage-backed securitization trusts which are the current noteholders of previously-originated loans.

The County seeks extraordinary relief that could have a devastating effect on lenders, borrowers, and other interested parties in West Virginia. First, it asks the Circuit Court to rule

that the County property recording system is mandatory for anyone who has an interest in real property in this State. Second, it seeks a declaration that when MERS is designated as beneficiary of deeds of trust, the instrument is ineffective so the promissory notes of tens of thousands of loans secured by the instruments are effectively unsecured. *Id.* ¶¶ 76-84. Third, the County seeks a related declaration that Petitioners do not have a right to foreclose on properties when the deed of trust designates MERS as beneficiary. *Id.* ¶¶ 85-91.

Petitioners moved to dismiss the lawsuit. Defendants' Motion To Dismiss Plaintiffs' Complaint (attached as App. 37-76). On July 22, 2014, Judge Warren R. McGraw issued a brief order denying the motion based on his findings of fact and conclusions of law. Order Denying Defendants' Motion To Dismiss ("Order") (attached as App. 4-7).

The Circuit Court first held that Wyoming County could file a lawsuit to "enforce" the land record statute even though the Legislature never authorized anyone to sue in that capacity. The Circuit Court stated, without citation to authority, that "Plaintiff does have a cause of action" and the lawsuit was "not inconsistent with West Virginia law" because Plaintiff has "calculable economic harm" and "West Virginia has invested its counties with the duty to maintain accurate records regarding the recording of property interests." Order at 3 (App. 6).

The Court then found that the County had stated a claim in contending that the County recording system required private parties to record assignments of deeds of trust, holding that the County might "prove that the Defendant was in fact required" to do so. *Id.* The ruling improperly converted a legal question as to a duty to record – on which there is no authority requiring recordation – into a factual inquiry. The Court further held that relief would be "appropriate to protect the system and to compensate the Wyoming County clerk." *Id.* at 3-4 (App. 6-7).

As explained below, the Circuit Court's Order contravenes West Virginia law. It gave to the Counties a remedy that the Legislature chose not to provide; it suggests there is a duty to record land documents where the law is clear there is not; and it allows the suit to proceed despite other infirmities. If left undisturbed, the Order also threatens to cause substantial adverse impacts statewide, including on the availability and cost of mortgage credit for West Virginia borrowers and unsettling agreements that borrowers and lenders made to secure loans for repayment. The Circuit Court's error is of such an unusual nature and magnitude that a writ of prohibition is necessary and appropriate.

Accordingly, Petitioners U.S. Bank, National Association, Bank of America, N.A., The Bank of New York Mellon, Deutsche Bank National Trust Company, as Trustee of Any Specific Residential Mortgage-Backed Securitization Trusts at Issue, and JPMorgan Chase Bank, N.A. petition this Honorable Court for a writ of prohibition against the Honorable Warren R. McGraw, in his official capacity as Judge of the Circuit Court of Wyoming County, West Virginia, directing him to vacate his order of July 22, 2014, in the case of *County of Wyoming, W.V. v. U.S. Bank National Association, et al.*, Civil Action No. 12-C-57. This petition is filed pursuant to Article VIII, § 3, of the Constitution of West Virginia, granting the Supreme Court of Appeals original jurisdiction in prohibition, W. Va. Code § 53-1-2, and Rule 16 of the Rules of this Court.

### **SUMMARY OF ARGUMENT**

The Circuit Court permitted Respondent Wyoming County to proceed with a lawsuit not permitted by the Legislature that seeks to interfere with private contracts in which borrowers and lenders granted a security interest in real property to secure repayment of residential loans. For three reasons, this Court should grant the Petition, review the Circuit Court's Order, and issue an order directing the Circuit Court to grant Petitioners' Motion to Dismiss:

First, the Circuit Court committed multiple clear errors of law. Most fundamentally, the Circuit Court created a right of action in favor of Wyoming County where the West Virginia Legislature decided not to grant one. As demonstrated below, the Legislature has repeatedly authorized lawsuits to enforce various land recording statutes, but it chose not to grant a right of action to enforce the statutes the County has invoked. The Circuit Court should not have allowed this lawsuit to proceed in the face of a legislative decision to the contrary.

Even if Wyoming County could sue, the Circuit Court erred in refusing to recognize that the Defendants were under no duty to record assignments of the deeds of trust. This Court has stated that the Legislature passed the land records statutes to protect creditors, and allow them a mechanism to give notice of secured interests if they choose to record a document, *not* to protect counties or “to compensate” them as the Circuit Court incorrectly assumed. The Circuit Court further erred by endorsing the County’s suggestion that designating MERS as beneficiary is “false” and somehow renders the promissory note unsecured, as nothing in West Virginia law prohibits a mortgagee from serving as a nominee on behalf of a loan owner. To the contrary, West Virginia law has long recognized that a note and a deed of trust are two separate instruments, and that ownership of one does not require ownership of the other. The Court should grant the Petition to enforce the decisions that the Legislature made and correct the Circuit Court’s errors.

Second, if left unreviewed the Order threatens far-reaching negative repercussions. The Circuit Court has endorsed a lawsuit that will generate uncertainty about real property rights and how private parties are supposed to treat the permissive land recording system. Wyoming County even claims that promissory notes are unsecured and completed foreclosures should be invalidated, which, if true, would essentially void contractual remedies granted to lenders and

subsequent note holders by borrowers when loans were made. The suit could inadvertently harm the State and its residents by questioning property rights and leading to increased litigation. Promptly resolving these issues now would eliminate the confusion and uncertainty engendered by the Order.

Third: the County is already seeking voluminous discovery from Petitioners on a state-wide basis, covering an indefinite, unlimited time period. If the Order is not reviewed now, Petitioners are likely to expend considerable resources in response that they could not recover on a successful direct appeal at some later date.

Counties and county officials have filed many similar cases across the country based on substantially similar recording statutes, and courts have dismissed *eighteen* of them already.<sup>1</sup> West Virginia law requires the same result here, and so this Court should intervene to correct the Circuit Court's clear error and dismiss this case.

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<sup>1</sup> *Christian County v. Mortg. Elec. Registration Sys., Inc.*, 515 F. App'x 451 (6th Cir. 2013); *El Paso County, Texas v. Bank of New York Mellon*, 2013 WL 285705 (W.D. Tex. Jan. 22, 2013), *aff'd*, 557 F. App'x 383 (5th Cir. 2014); *Welborn v. Bank of New York Mellon*, 2013 WL 149707, at \*5 (M.D. La. Jan. 14, 2013), *aff'd*, 557 F. App'x 383 (5th Cir. 2014); *Fuller v. Mortg. Elec. Registration Sys., Inc.*, 888 F. Supp. 2d 1257, 1271 (M.D. Fla. 2012); *Cleveland County, Oklahoma v. MERSCORP, Inc.*, No. CJ-2011-1727 (Okla. Dist. Ct. Apr. 24, 2013); *Union County, Ill. v. MERSCORP, Inc.*, 735 F.3d 730, 734 (7th Cir. 2013) (it is "clear that recording is not mandatory"); *Brown v. Mortg. Elec. Registration Sys., Inc.*, 738 F.3d 926 (8th Cir. 2013); *Macon County, Ill. v. MERSCORP, Inc.*, 742 F.3d 711 (7th Cir. 2014); *County of Ramsey, Minn. v. MERSCORP Holdings, Inc.*, 962 F. Supp. 2d 1082 (D. Minn. 2013); *Bristol County, Mass. v. MERSCORP, Inc.*, 2013 WL 6064026 (Mass. Super. Nov. 15, 2013)(three cases); *Boyd County, Ky. v. MERSCORP, Inc.*, 985 F. Supp. 2d 823 (E.D. Ky. Nov. 25, 2013); *Lonoke County, Ark. v. MERSCORP, Inc.*, No. 12-156 (Ark. Cir. Ct. Nov. 25, 2013); *Plymouth County, Iowa v. MERSCORP, Inc.*, 886 F. Supp. 2d 1114, 1123 (N.D. Iowa 2012); *Jackson County, Missouri v. MERSCORP, Inc.*, 915 F. Supp. 2d 1064, 1071 (W.D. Mo. 2013); *Guilford County v. Lender Processing Servs., Inc.*, 2013 WL 2387708 (N.C. Super. May 29, 2013); *Town of Johnston, Rhode Island v. MERSCORP, Inc.*, 950 F. Supp. 2d 379 (D.R.I. 2013).

## STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioners respectfully request oral argument under Revised Rules of Appellate Procedure 19 and 20, because this Petition involves assignments of error in the application of settled law, and because it involves issues of fundamental public importance. Petitioners believe that issuance of a memorandum decision is appropriate in this matter.

### ARGUMENT

It is well-established under West Virginia law that a writ of prohibition is an appropriate vehicle to obtain review of court orders that exceed the court's jurisdiction or cases where Courts have otherwise exceeded their legitimate powers. *See, e.g., Horkulic v. Galloway*, 665 S.E.2d 284, 292 (W. Va. 2008). With respect to writs of prohibition in cases not involving a challenge to jurisdiction, the Court considers five factors:

(1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression.

*Id.* at 292-93; *see Hinkle v. Black*, 262 S.E.2d 744, 745 (W. Va. 1979) (Court also considers "the over-all economy of effort and money among the litigants, lawyers and courts" and cases "where there is a high probability that the trial will be completely reversed if the error is not corrected in advance.").

This Court gives "substantial weight" to the existence of a clear error of law in deciding whether to grant a writ of prohibition, and a petitioner need not satisfy all five factors to obtain a writ. *Horkulic*, 665 S.E.2d at 292-93. Here, the Circuit Court's multiple clear errors of law, the important practical problems that the Order could cause, and the prejudice to Petitioners if the lawsuit continues all militate strongly in favor of granting the Petition.

**I. THE COURT SHOULD ISSUE A WRIT OF PROHIBITION BECAUSE THE CIRCUIT COURT COMMITTED MULTIPLE CLEAR ERRORS OF LAW.**

This Court should grant a writ of prohibition because the Order is “clearly erroneous as a matter of law,” *Horkulic*, 665 S.E.2d at 292-93, for at least three reasons: the Circuit Court improperly granted a remedy to the County which the Legislature declined to provide; mistakenly concluded that West Virginia law requires assignments of security interests despite no statutory requirement; and apparently believed that MERS cannot serve as beneficiary under deeds of trust when West Virginia law says otherwise. Each error provides an independent ground to grant this Petition.

**A. The Circuit Court Granted The County A Right Of Action That The West Virginia Legislature Chose Not To Provide.**

Most fundamentally, the Circuit Court erred by exceeding its authority and circumventing the Legislature because it permitted the County a right of action to enforce land records statutes that the West Virginia Legislature did not authorize.

The County alleged that Petitioners’ failure to record deed of trust assignments violated W. VA. CODE §§ 40-1-8, 40-1-9, 36-1-1, 36-1-3, 39-1-11, and 59-1-10. Complaint ¶¶ 17-20. The Legislature, however, did not create a right of action authorizing a lawsuit if assignments of security instruments are not recorded. This Court should intervene because the Circuit Court cannot usurp the role of the legislature, providing the County with authority to sue where the Legislature decided not to do so.

Section 40-1-8 is captioned “Effect of recording certain contracts as to creditors and purchasers; memorandum of lease may be recorded,” and provides that any written contract conveying an interest in real estate “shall, from the time it is duly admitted to record, be, as against creditors and purchasers, as valid as if the contract were a deed conveying the estate or

interest embraced in the contract.” *Id.* Nowhere does it allow a county to file suit if a person failed to record an assignment. In fact, it contains no remedy provisions at all.

Nor does section 40-1-9 authorize a right of action. Instead, it states that instruments “conveying real estate shall be void, as to creditors, and subsequent purchasers for valuable consideration without notice” if not recorded. *Id.* It addresses the legal effect of recording, as between a creditor and subsequent purchaser. Again, it does not authorize a county to file a damages lawsuit claiming that assignment should have been recorded.<sup>2</sup>

*No provision* of West Virginia’s land records statutes allows a county to file a lawsuit seeking damages and other relief with respect to recordation of documents. The omission is notable, because the Legislature has passed many Code provisions that *do* create express remedies for various land records matters, including:

- W. VA. CODE § 38-12-10: A person entitled to a release of lien may file “proceedings . . . at the cost of the lienholder” to compel the lienholder to release the lien;
- W. VA. CODE § 38-1-10: The grantor of a deed of trust may recover a trustee bond “if . . . the failure of the trustee to give such bond be made to appear to the satisfaction of such court or judge, by affidavits or otherwise”;
- W. VA. CODE § 38-3-9: A party may enforce a judgment lien in a court of equity; and
- W. VA. CODE § 38-16-403: “A person who is the purported debtor or obligor or who owns real or personal property . . . may complete and file with the clerk of the circuit court a verified motion” for the release of a lien alleged to be fraudulent.

The Legislature knows how to create causes of action for alleged violation of land records statutes – but chose *not* to create any for failure to record assignments of deeds of trust.

The Circuit Court’s Order should be reviewed and reversed because it impermissibly grants the

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<sup>2</sup> Other statutes the County cited in its Complaint do not contain any right of action either. Sections 36-1-1 and 36-1-3 require that estates of “inheritance or freehold” and contracts for sale or lease of land be made in writing, and section 39-1-1 describes the process by which documents are recorded. No enforcement provision appears. Section 59-1-10 describes fees a clerk may charge for recording certain documents, and it also lacks a right of action.

County a remedy that the Legislature chose not to provide. *Fucillo v. Kerner ex rel. J.B.*, 744 S.E.2d 305, 312 (W. Va. 2013) (one statute allowed a lawsuit, but “the statute upon which the respondents base their action . . . does not contain any legislative directive for recovery of funds”); *Durham v. Jenkins*, 735 S.E.2d 266, 269 (W. Va. 2012) (rejecting private right of action; refusing “to read into § 19-20-20 something which simply is not there”).<sup>3</sup>

The Circuit Court further erred in assuming that the Legislature enacted land records statutes to generate filing fee revenue for counties. To the contrary, this Court has held that the Legislature enacted the statutes to benefit *private parties* – purchasers and creditors – who have a security interest in real property:

The purpose of the statute [W. VA. CODE § 40-1-9] is to protect a *bona fide purchaser of land* against creditors of the grantor, and against other persons to whom the grantor might have undertaken to execute title papers pertaining to the land embraced in the recorded instrument.

*Wolfe v. Alpizar*, 637 S.E.2d 623, 627 (W. Va. 2006) (emphasis added).<sup>4</sup> Wyoming County occupies a ministerial role and merely accepts documents for the benefit of private parties who chose to file documents. As one commentator has explained:

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<sup>3</sup> See also *A.C.M., Inc. v. Daimler Trucks North America, LLC*, 2009 WL 899454, at \*8 (S.D.W. Va. Mar. 31, 2009) (“by explicitly providing a cause of action for damages in favor of new motor vehicle dealers . . . the legislature intentionally neglected to provide such a cause of action in favor of others, including consumers”); *Hill v. Stowers*, 680 S.E.2d 66, 74 (W. Va. 2009) (rejecting private cause of action; “the West Virginia Code reveals a comprehensive and detailed procedure” for this purpose, and provides no “indication that the Legislature contemplated any other mechanism”); *Arbaugh v. Board of Educ., County of Pendleton*, 591 S.E.2d 235, 241 (W. Va. 2003) (“we do not see that a private cause of action would meaningfully further the purposes of the article so as to find that such was intended by the Legislature”).

<sup>4</sup> See also *Bank of Marlinton v. McLaughlin*, 1 S.E.2d 251, 253 (W. Va. 1939) (statute “affords protection to creditors against an alienee of the grantor under an unrecorded deed, deed of trust or contract executed by him.”); *Daniel v. Stevens*, 394 S.E.2d 79, 84 (W. Va. 1990) (recording statute “protect[s] third parties by providing notice of the existing interest in the collateral to subsequent potential creditors of and purchasers from the debtor”); *Farrar v. Young*,

[E]ach recording system is much like a library of title-related documents. These documents include all of the instruments which have been employed in prior legal transactions affecting the land, and which someone has taken the trouble to “record,” or add to the library’s collection.... This system is frugal in its expenditure of public funds and personnel. *The government employees’ only tasks are to receive, copy, index, and return the documents and to maintain the collection.*

E. Chase & J. Forrester, PROPERTY LAW: CASES, MATERIALS, AND QUESTIONS 639 (2d ed. 2010)

(emphasis added). The Circuit Court improperly extended the scope of the statutes to protect the County when the Legislature passed them to protect private parties only.<sup>5</sup>

Courts around the country have regularly dismissed these suits because state legislatures also did not create private rights of actions for counties to enforce land records statutes:

- *Christian County, Ky.*, 515 F. App’x at 456: “[T]he Clerks have no private right of action to sue Defendants for any alleged violation of Kentucky’s recording requirements.”
- *Boyd County, Ky.*, 985 F. Supp. 2d at 829: Kentucky law “allows for a private right of action only for persons the General Assembly sought to protect – in the case of the recording statutes, persons with interests in land,” not “counties or county clerks.”
- *Fuller (Fla.)*, 888 F. Supp. 2d at 1270-71: Florida law “provides [no] statutory mechanism for Plaintiff to recover unfiled assignment fees.”
- *Cleveland County, Okla.*, at ¶ 5: “[T]here is no private right of action” because Oklahoma statutes “have the purpose of providing notice to the world of asserted interests in property and do not convey a cause of action other than to those with a direct interest in the property.”
- *El Paso County, Tex.*, 2013 WL 285705, at \*3 n.3: “[T]he Texas recording statutes provide no private right of action for Plaintiffs in this case.”

The same result is required under West Virginia law. As this Court has admonished:

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230 S.E.2d 261, 265 (W. Va. 1976) (recording statutes provide relief only to “purchasers for value without notice”).

<sup>5</sup> *Yourtree v. Hubbard*, 474 S.E.2d 613, 618 (W. Va. 1996) (“[B]ecause the plaintiff’s decedent is not within the class of persons that the . . . statute was designed to protect, the statute does not create a private cause of action for the plaintiff”); *Parsons v. Appalachian Elec. Power Co.*, 176 S.E. 862, 865 (W. Va. 1934) (“[T]hose invoking [statute] must be within the class of persons that it is intended to embrace.”).

Where, as here, civil liability for a statutory violation would represent an abrupt and sweeping departure from the general common law rule of nonliability, we would expect that if the legislature . . . intended to impose civil liability it would expressly so provide.

*Arbaugh*, 591 S.E.2d at 241.

The Circuit Court nevertheless stated that “Plaintiff does have a cause of action upon which it may bring this action” because the County “is facing injury in the form of lost revenue and pursuant to West Virginia law the Plaintiff may protect its interest.” Order at 3 (App. 6). But the existence of an alleged *injury* has no bearing on whether the Legislature created a *right of action* to enforce a statute. Rather, the County can file suit only if a statute grants a judicial remedy in favor of the County or the Legislature passed the statute to protect the County (*Appalachian Regional Healthcare, Inc. v. Health & Human Res.*, 752 S.E.2d 419, 425-26 (W. Va. 2013)), and as demonstrated above neither is true here.

In sum, the West Virginia Legislature did not provide a right of action for counties to sue about land records statutes – and the Circuit Court is not entitled to unilaterally expand the statutes’ reach. The Court should grant the Petition and direct dismissal of the Complaint to enforce the Legislature’s choices in this area and to reaffirm that West Virginia courts are bound by decisions made by the Legislative branch.<sup>6</sup>

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<sup>6</sup> That the County had claims for unjust enrichment, declaratory and injunctive relief does not change the result because all its claims are based on alleged statutory violations. Complaint ¶¶ 17-20, 30, 33, 55, 69, 79, 88. When a statute contains no private enforcement provision, a plaintiff may not file derivative claims based on violations of the statute. *Arbaugh*, 591 S.E.2d at 239-41 (derivative claims would disrupt the “entire legislative scheme”); *A & E Supply Co., Inc. v. Nationwide Mut. Fire Ins. Co.*, 798 F.2d 669, 678 (4th Cir. 1986) (courts should not engage in “creation of venturesome torts at common law” when statutes provide no right of action).

**B. The Circuit Court Erred Because West Virginia Law Does Not Require Recording of Assignments.**

The Circuit Court committed further error by apparently concluding that note holders must create and record assignments of deeds of trust when they transfer interests in promissory notes. West Virginia law does not remotely support that conclusion.

The County alleged that Petitioners had a duty to record assignments of deeds of trust under W. VA. CODE §§ 40-1-8 and 40-1-9. That assertion is facially wrong because the Code says that these sections do not apply to deed of trust assignments:

The provisions of *sections eight, nine, ten, thirteen, fourteen and fifteen* of this article *shall have no application to the transfer or assignment of any interest created by a trust deed or mortgage.*

W. VA. CODE § 40-1-16 (emphasis added). For this reason alone, the Circuit Court committed clear legal error.

Nor does anything in the plain language of the statutes evidence a duty to record. Section 40-1-8 provides:

Any contract in writing made in respect to real estate . . . shall, from the time it is duly admitted to record, be, as against creditors and purchasers, as valid as if the contract were a deed conveying the estate or interest embraced in the contract.

Simply put, this section does not require a person to record anything. Rather, it provides that, if a person makes a contract concerning real estate and chooses to record it, the contract gains priority as to subsequent creditors “as if it were a deed.” *Citizens' Nat'l Bank of Connellsville v. Harrison-Doddridge Coal & Coke Co.*, 109 S.E. 892, 895 (W. Va. 1921).

Likewise, Section 40-1-9 does not support the County's argument. It provides that instruments “conveying real estate shall be void, as to creditors, and subsequent purchasers for valuable consideration without notice” if not recorded “in the county wherein the property” lies. As the County recognizes, this statute establishes the proper place to record a document (the

county where the property is located) if a party wants to give notice of its interest. Complaint ¶ 17. The statute also establishes the legal consequence of not recording – potential loss of priority to a bona fide purchaser or lien creditor who records first. But the statute contains no mandate that a person record an instrument if she chooses not to do so.

The County’s legal theory also ignores that West Virginia’s land records system is entirely permissive. As this Court held more than 130 years ago in rejecting an argument that all land sale contracts must be recorded, the Legislature’s “omission to require the recordation of every contract was not accidental.” *Pack v. Hansbarger*, 17 W. Va. 313 (1880). And the failure to record a document does not, as the County contends, somehow render the document ineffective. To the contrary, under West Virginia law a deed of trust remains fully valid even if it is not recorded.<sup>7</sup>

The Circuit Court refused to dismiss the case because the County might “prove that the Defendant was in fact required to use the Wyoming County Clerk to record the mortgage assignments at issue in this matter.” Order at 3 (App. 6). That was clear error, because the issue before the Circuit Court was not whether Petitioners could “prove” a fact. Rather, the argument that Petitioners presented was that the West Virginia statutes do not mandate recording *as a matter of law* – and as shown above they do not.

Again, counties in other states have tried similar arguments, and *eleven courts* have rejected them because, as in West Virginia, state laws imposed no duty to record:

- *Union County, Ill.*, 735 F.3d at 733: “The land recording system exists to provide notice of ownership of real property, or of possession of a lien, such as a mortgage, on such

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<sup>7</sup> *Jones v. Wolfe*, 509 S.E. 2d 894, 896 (W. Va. 1998) (“The law in this State is rather clear that a deed takes effect from its actual or constructive delivery. Recording of the deed is not critical and acknowledgment is not essential to its validity.”); *McElwain v. Wells*, 322 S.E.2d 482, 485 (W. Va. 1984) (“Even an unrecorded deed is good against a grantor and his heirs.”); *Morgan v. Snodgrass*, 38 S.E. 695, 697 (W. Va. 1901) (unrecorded deed is valid).

property . . . . Recording is optional.” . . . “[T]he purpose of recordation has never been understood to be to supplement property taxes by making every landowner, mortgagee, etc. pay a fee for a service he doesn’t want. The purpose is to protect the property owner or mortgage holder” from competing claims.

- *Brown (Ark.)*, 738 F.3d at 934: Arkansas’ statutes “do not require assignments to be recorded”; “the purpose of recording is to give notice to subsequent purchasers.”
- *Plymouth County, Iowa*, 886 F. Supp. 2d at 1123: “[N]one of the statutes upon which the County relies imposes a requirement on a party assigning a mortgage or receiving such an assignment to record the assignment.”
- *Bristol County, Mass.*, 2013 WL 6064026, at \*2: “Massachusetts law does not require the recordation of mortgage assignments.”
- *County of Ramsey, Minn.*, 962 F. Supp. 2d at 1087: “[T]he ‘shall be recorded’ language informs where the mortgage should be recorded if the mortgagee wants to avoid the consequence – loss of priority – of not recording the conveyance.”
- *Jackson County, Mo.*, 915 F. Supp. 2d at 1071 “[U]nder Missouri law, there is no duty to record deeds of trust or other assignments.”
- *Guilford County, N.C.*, 2013 WL 2387708, at \*7: “North Carolina law does not require an assignment of a mortgage or deed of trust to be recorded in order to be effective.”
- *Town of Johnston, R.I.*, 950 F. Supp. 2d at 380: “Rhode Island law does not require that all mortgages and mortgage assignments be recorded.”
- *Macon County, Ill.*, 742 F.3d at 713: “The land recording system exists merely to provide notice . . . for the benefit of the owner or the lien holder. Recording is therefore optional.”
- *Lonoke County, Ark.*, No. 12-156, at 1: “Based on current Arkansas law, consistent with the decisions of the Arkansas Supreme Court, there is no duty to record assignments in the State of Arkansas.”
- *Fuller (Fla.)*, 888 F. Supp. 2d at 1275: Unjust enrichment claim dismissed because where Florida recording statutes imposed “no legal duty to file mortgage assignments,” plaintiff county clerk did not and could not “allege that he provided a benefit to” defendant.

A twelfth case, brought by a *qui tam* relator on behalf of Nevada counties, was dismissed as “legally frivolous.” *Bates v. MERS*, 2011 WL 1304486, at \*3 (D. Nev. Mar. 30, 2011), *aff’d*, 493 F. App’x 872 (9th Cir. 2012):

Recordation of an interest in land simply serves to perfect one's interest in real property by putting the world at large on constructive notice of the claimed interest; but recordation is not required to validate one's interest. *Every law student studying for the bar exam understands this better than he cares to. . . . If Defendants do not wish to record assignments of loans or deeds of trust, they need not do so. A party may choose to avoid the filing fee and hassle of recording an assignment if it would rather bear the risk that its interest in the property will not be protected from a potential subsequent bona fide purchaser under the applicable recording statute.*

*Id.* (emphasis added).

Like these states, West Virginia law imposes no duty to record assignments. The Court should review and correct the Circuit Court's legal error by granting this Petition.

**C. The Court Erred Because Borrowers Can Designate MERS As Beneficiary Under West Virginia Law.**

Finally, the Circuit Court committed clear legal error by holding that if Plaintiff proves that "Defendants have been circumventing West Virginia law by using a private recording system[,]" . . . "relief would be appropriate to protect the recording system and to compensate" Plaintiff. Order at 3-4 (App. 6-7). The "private recording system" is MERS, and because designation of MERS as beneficiary of a deed of trust complies with West Virginia law, no claim for relief was stated.

Borrowers and lenders designate MERS on security instruments to serve as the beneficiary of record, as nominee for the lender and the lender's successors and assigns. Complaint ¶ 41. Legal title to the deed of trust is recorded in MERS' name in local land records, and a recording fee is paid. *Id.* When the note secured by the deed of trust is sold to another MERS member, MERS remains beneficiary of record as the nominee for the successor lender. *Id.* Because MERS remains beneficiary, transfer of the note does not result in assignment of the deed of trust, and thus there is no deed of trust assignment to record.

This arrangement complies fully with West Virginia law, under which a mortgagee of record may be an entity, such as MERS, other than the person to whom the borrower owes the secured debt.<sup>8</sup> And West Virginia law has long recognized that a note and a deed of trust are two separate instruments, and that ownership of one does not require ownership of the other.<sup>9</sup>

West Virginia law is not unique: courts across the country have held that MERS can serve as mortgagee or beneficiary of a security instrument, as nominee for the lender and lender's successors and assigns.<sup>10</sup> Thus, a deed of trust need not be assigned, and no assignment need be recorded, when the secured debt is transferred.<sup>11</sup> Use of MERS as beneficiary is not improper and does not "sever" a note from a deed of trust.

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<sup>8</sup> *McFadden v. Fed. Nat'l Mortg. Ass'n*, 525 F. App'x 223, 231-32 (4th Cir. 2013) ("[N]aming MERS as the beneficiary was valid"); *Wittenberg v. First Indep. Mortg. Co.*, 2011 WL 1357483, at \*13 (N.D.W. Va. Apr. 11, 2011) ("Prior to assignment, MERS (as nominee for Lender and Lender's successors and assigns) had the right to foreclose . . . pursuant to the DOT.") (internal quotation omitted); *Horvath v. Bank of New York, N.A.*, 641 F.3d 617, 620 (4th Cir. 2011) ("[T]he deed of trust named MERS as the beneficiary.").

<sup>9</sup> *Bank of Connellsville*, 109 S.E. at 895 ("[A]n assignment of a mortgage carries the legal title, while an assignment of the note or bond secured by it does not."); *Moore v. Hamilton*, 155 S.E.2d 877, 882 (W. Va. 1967). Indeed, W. VA. CODE § 38-1-3 specifically contemplates that the trustee may be a separate entity from the creditor of the secured debt: "The trustee in any trust deed given as security shall, whenever required by any creditor secured or any surety indemnified by the deed, or the assignee or personal representative of any such creditor or surety, . . . sell the property conveyed by the deed").

<sup>10</sup> *See, e.g., Trent v. MERS, Inc.*, 288 F. App'x 571, 572 (11th Cir. 2008); *Commonwealth Prop. Advocates, LLC v. MERS*, 680 F.3d 1194, 1205 (10th Cir. 2011); *Residential Funding Co., L.L.C. v. Saurman*, 805 N.W.2d 183, 183-84 (Mich. 2011); *Jackson v. MERS, Inc.*, 770 N.W.2d 487, 490-91 (Minn. 2009); *MERS v. Barnes*, 940 N.E.2d 118, 124 (Ill. App. Ct. 2010); *MERS v. Mosley*, 2010 WL 2541245 (Ohio Ct. App. June 24, 2010); *MERS v. Azize*, 965 So. 2d 151 (Fla. Dist. Ct. App. 2007); *U.S. Bank, N.A. v. Flynn*, 897 N.Y.S.2d 855, 857 (N.Y. Sup. Ct. 2010); *In re Tucker*, 441 B.R. 638, 645 (Bankr. W.D. Mo. 2010); *RMS Residential Props., LLC v. Miller*, 32 A.3d 307, 317 (Conn. 2011); *Larota-Florez v. Goldman Sachs Mortg. Co.*, 719 F. Supp. 2d 636 (E.D. Va. 2010), *aff'd*, 441 F. App'x 202 (4th Cir. 2011).

<sup>11</sup> *See, e.g., Stein v. Chase Home Fin., LLC*, 662 F.3d 976, 980 (8th Cir. 2011) ("[A] mortgagee of record does not lose legal title when the mortgagee transfers interests in the promissory note"); *Bristol County*, 2013 WL 6064026, at \*2 (when a promissory note is transferred, "MERS remains as the mortgagee" and "there has been no change as to who holds

The Circuit Court's Order is especially erroneous because the County seeks to regulate the terms of the security agreements between borrowers and lenders. Under West Virginia law, however, a litigant may not challenge an agreement unless it is a party to the agreement, or demonstrates that it is an intended beneficiary of that agreement.<sup>12</sup> Here, the County is not a party to any of the private residential deeds of trust at issue in this case. And it is not an intended beneficiary of the security instruments – the documents are executed to protect the lender and subsequent noteholders if the borrower defaults. West Virginia law thus bars the County from seeking to invalidate the deeds of trust.

The Circuit Court ignored these settled legal principles, and permitted the County to continue pursuing legal claims that contravene West Virginia law and seek to interfere with the contractual terms of the deed of trust. The Court should grant the Petition and correct these clear and serious legal errors.

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legal title.”); *Town of Johnston*, 950 F. Supp. 2d at 381, 382 (“Whenever a *note* is sold . . . MERS remains as the *mortgagee* of record.”) (emphasis added); *Culhane v. Aurora Loan Servs.*, 708 F.3d 282, 287 (1st Cir. 2013) (“When a note is sold by one MERS member to another, the sale is memorialized in the MERS database, and MERS remains the mortgagee of record.”); *Jackson*, 770 N.W.2d at 490 (“[W]hen the member transfers an interest in a mortgage loan to another MERS member, MERS privately tracks the assignment within its system but remains the mortgagee of record . . . eliminating the need to prepare and record assignments when trading loans.”); *In re Trierweiler*, 484 B.R. 783, 795 (10th Cir. B.A.P. 2012), *aff'd*, 2014 WL 2958788 (10th Cir. July 2, 2014) (“The mortgage-follows-the-note rule gave [the recipient of the note] an equitable assignment of the Mortgage.”).

<sup>12</sup> *Robinson v. Cabell Huntington Hosp., Inc.*, 498 S.E.2d 27, 32-33 (W. Va. 1997) (plaintiffs could not bring suit against doctor's liability insurer because “it is necessary that plaintiff demonstrate that the contracting parties intended to confer a benefit upon the plaintiff by their contract”); *Bowyer v. Hi-Lad, Inc.*, 609 S.E.2d 895, 917 (W. Va. 2004) (“[I]t is a well-established rule that a litigant may assert only his own legal rights and interests and cannot rest a claim to relief on the legal rights or interests of third parties.”).

**II. THIS COURT SHOULD INDEPENDENTLY GRANT A WRIT OF PROHIBITION TO PREVENT POTENTIAL NEGATIVE IMPACTS ON RESIDENTIAL LENDING AND PROPERTY RIGHTS IN WEST VIRGINIA.**

In addition to the clear errors of law committed by the Circuit Court, this Court should separately grant a writ of prohibition because the Order raises “new and important problems” concerning mortgage lending and property rights in this State which prudence dictates should be addressed sooner rather than later. *Horkulic*, 665 S.E.2d at 293.

When a lender makes a residential loan to a borrower, the borrower and lender virtually always enter into a deed of trust under which the borrower grants a security interest in her property so that the lender (or subsequent noteholder) may foreclose if the borrower defaults on her payment obligations. Here, the County seeks declarations that if a noteholder transfers a note and does not create and record an assignment of the corresponding security instrument, (1) promissory notes are unsecured debt; and (2) the noteholder could not foreclose under the security instruments. By refusing to dismiss the Complaint, the Circuit Court failed to quash this attempt to overturn the contractual agreements between borrowers and lenders. If left undisturbed, the Order threatens to generate uncertainty about property rights and increase litigation in this State. The Court should review and reverse the Order to forestall these negative consequences.

First, the County’s requested relief, if ultimately granted, has the potential to invalidate thousands of deeds of trust, vitiating the parties’ private agreements and rendering the corresponding notes unsecured such that noteholders would have no collateral from which to recover the unpaid debts of defaulting borrowers. Needless to say, that state of affairs could discourage lenders from making residential loans to West Virginia borrowers – or could drive up interest rates to untenably high levels.

The requested declaration invalidating foreclosures likewise could significantly destabilize the housing market. For example, if the Circuit Court could later invalidate foreclosures involving MERS loans, title insurers might refuse to insure title to foreclosed properties, purchasers could be reluctant to purchase foreclosed properties, and persons who acquired foreclosed properties may not be able to sell them.

The Order also could cause a flood of litigation. If lenders cannot foreclose to obtain repayment of defaulted loans, their most direct remedy would be to file lawsuits for breach of promissory notes and seek to recover judgments by attachment of the borrower's assets, land or personal property. This type of process (or other alternative forms of relief) would not only tax the resources of the judicial system but would be cumbersome, expensive and time-consuming – something which the power of sale granted in the security instrument is designed to avoid.<sup>13</sup>

### **III. THE COURT SHOULD GRANT THE PETITION BECAUSE THE ORDER WILL PREJUDICE PETITIONERS IF NOT REVIEWED NOW.**

Finally, the Court should grant the Petition because Petitioners “will be damaged or prejudiced in a way that is not correctable on appeal.” *Horkulic*, 665 S.E.2d at 292. As a putative statewide class action, this case could involve extensive and burdensome discovery. If the writ is not granted, litigating this case will create significant burdens for the parties and the Circuit Court.

The County has already served discovery on Petitioners, seeking a wide array of information about MERS, each Defendant, servicers who service mortgage loans, and residential mortgage-backed securitized trusts. The interrogatories, requests for production, and requests for

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<sup>13</sup> By preventing foreclosure of property when *borrowers* signed deeds of trust designating MERS as beneficiary, the Order could provide an improper benefit to borrowers, contrary to the rule that “no man shall be permitted to profit by his own wrong.” *State v. Phoenix Mut. Life Ins. Co.*, 170 S.E. 909, 911 (W. Va. 1933).

admission (App. 210-245) seek large quantities of material about loans and foreclosure actions across the State. For instance, the County's requests could require Defendants to –

- inspect potentially thousands of loan files and associated land records to determine whether mortgage assignments were recorded for certain transactions (RFA 1, Interrogatory 1)
- examine foreclosure complaints filed around the State to determine what averments they contained or did not contain (RFA 2 & 3, Interrogatories 2, 3, 6, 7)
- scrutinize the contents of securitization agreements from around the country that happen to include any West Virginia loans to determine what requirements they did or did not contain (RFA 4, Interrogatory 4)

The broad discovery requests also seek numerous documents, including –

- documents about the MERS System and recording documents in land records, including manuals, policies or procedures for using the MERS system, and documents discussing Petitioners' decision to become a member of MERS years earlier (RFP 1, RFP 15)
- information about MERS certifying officers, including a request for “[a]ll lists or directories of MERS certifying officers who have in *any way* been involved in changes of beneficial ownership interests” (RFP 9) (emphasis added)
- reports or compilations of information about MERS loans, including information about MERS loans on West Virginia properties that have been securitized in trusts where Petitioners acts as trustee (RFP 2)
- documents analyzing the benefits of the MERS System (RFP 4, RFP 5, RFP 7)

The discovery is not only inappropriately broad in its scope, but the requests are not limited to Wyoming County, and seek information about loans statewide even though no class has been certified. Compounding the overly expansive scope, the requests contain no reasonable time limitations.

The County's discovery requests will require Petitioners, and likely the Circuit Court, to devote significant time, money, and resources to management of discovery. If the Order is not

reversed until after a final judgment, the efforts of the parties and the Circuit Court will have been expended unnecessarily and cannot be recovered.

**CONCLUSION**

For these reasons, Petitioners respectfully request that the Court grant the Petition for Writ of Prohibition and direct the Circuit Court to enter an order vacating its July 22, 2014 Order and granting Petitioners' Motion to Dismiss.

Dated: August 11, 2014

Respectfully submitted,

**[signature blocks on following page]**

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**IN THE  
SUPREME COURT OF APPEALS OF WEST VIRGINIA**

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No. \_\_\_\_\_

THE STATE OF WEST VIRGINIA EX REL.  
U.S. BANK NATIONAL ASSOCIATION, ET AL., *Petitioners*,

v.

THE HONORABLE WARREN R. MCCRAW,  
JUDGE OF THE CIRCUIT COURT OF WYOMING COUNTY, WEST VIRGINIA  
and WYOMING COUNTY, WEST VIRGINIA, *Respondents*.

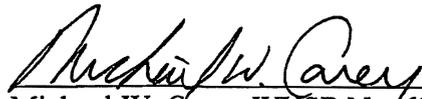
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**VERIFICATION**

STATE OF WEST VIRGINIA;

COUNTY OF KANAWHA, to wit:

I, Michael W. Carey, counsel of record for Petitioners Bank of America, N.A. and The Bank of New York Mellon, first duly sworn, depose and say that, pursuant to West Virginia Code § 53-1-3, I am familiar with the facts underlying this "Petition for a Writ of Prohibition," and that the facts set forth therein are true and correct to the best of my knowledge, information and belief.



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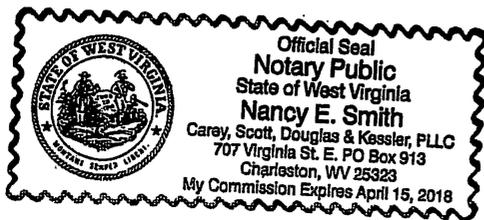
STATE OF WEST VIRGINIA,

COUNTY OF KANAWHA, To-Wit:

Taken, subscribed and sworn to before the undersigned authority, in the county aforesaid this 11<sup>th</sup> day of August, 2014.

My commission expires April 15, 2018.

(Seal)



  
Nancy E. Smith, Notary Public

**IN THE  
SUPREME COURT OF APPEALS OF WEST VIRGINIA**

\_\_\_\_\_  
No. \_\_\_\_\_

“Circuit Court No. 12-C-57 (Wyoming County Circuit Court)”  
\_\_\_\_\_

THE STATE OF WEST VIRGINIA EX REL.  
U.S. BANK NATIONAL ASSOCIATION, ET AL., *Petitioners*,

v.

THE HONORABLE WARREN R. MCCRAW,  
JUDGE OF THE CIRCUIT COURT OF WYOMING COUNTY, WEST VIRGINIA  
and WYOMING COUNTY, WEST VIRGINIA, *Respondents*.

\_\_\_\_\_  
**MEMORANDUM LISTING PARTIES UPON WHOM  
THE RULE TO SHOW CAUSE IS TO BE SERVED, IF GRANTED**

Comes now the Petitioner, by counsel, and states that the following parties should be served with a copy of the Rule to Show Cause, should same be granted by this Court:

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