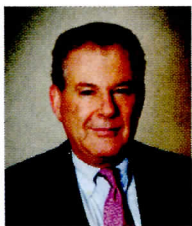


# How Should Real Estate Records Work In The 21st Century?

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Today's system to track ownership of real estate and mortgages represents a quaint waste of time, money and effort. Worse, it has created major substantive issues standing in the way of real estate transactions — foreclosures — that must occur for our national real estate markets to correct themselves.

Under today's law and practice, anyone acquiring or transferring an interest in real estate, including a mortgage loan, must comply with specific and technical recording rules, varying among thousands of separate local recording offices. When a lender assigns a mortgage, the lender should record an assignment of that mortgage, again under the same rules.

Though it may sound simple, the process offers opportunities for error throughout. Today's foreclosure crisis shows that lenders have seized those opportunities.

Assignments were not recorded properly. Documents were defective. Promissory notes were lost. The loan traveled from place to place to place, but the assignments didn't quite match. Net result: mortgage borrowers in abject default have been able to assert entirely "technical" defenses based on failure to comply with a process that turned out to be much more stringent than market participants ever expected. In some cases, those defenses didn't merely delay the inevitable — they derailed a process that should have been a train on a track.

Must it all be this complicated and difficult? Not really. Investors in stocks and bonds can transfer their interests without technical difficulties. They don't need to go to separate registry offices for every corporation. They don't need to prepare intricate error-prone transfer documents whose requirements vary with each corporation. The process to transfer stocks and bonds is far more streamlined than the process to transfer real property and mortgage loans.

The 21st century seems a good time to rethink how we track ownership of real estate and mortgage loans. True, some of our thousands of recording offices are becoming somewhat "electronic," but do we really need thousands of recording offices? Couldn't all the land records for an entire state — or even an entire country — all reside on a single website? And why can't transfers take place through some secure mechanism on the same website, just like paying bills on a bank's website?

Not long ago, major mortgage lenders created Mortgage Electronic Registration Systems (MERS), a system to track mortgages and servicing rights. Lenders would still originate mortgages through the traditional recording system, but MERS would become the record owner of all mortgages. Any future mortgage transfers would take place only through the MERS website.

MERS was a great step in the direction proposed above. I had

a fantasy that eventually MERS would spread from mortgage registration to property registration ("PERS"?), eventually moving all property transfers in the United States to a single website or maybe two. Of course, today's foreclosure crisis has pushed MERS in a more defensive direction, thanks to the ability of "public interest" lawyers to raise a panoply of technical defenses about MERS's role and paperwork deficiencies resulting from decades of sloppy practices in a market where it was assumed that default, enforcement and foreclosure were just hypothetical legal issues for the lawyers.

The travails of MERS may suggest that one should hesitate to move quickly toward a web-based system of land records. But those travails will work themselves out — they must. When they do, we should consider modernizing how we handle real estate transfers.

One can always come up with plenty of arguments against any form of change in anything. Those arguments always start with preservation of jobs; fears of the unknown; and concerns about transitional complexities, fraud and technological failures.

One can work through these issues, if one wants to do it. Our existing system makes about as much sense as using quill pens to write deeds. It needs to change. Today's web technology offers a totally appropriate platform for land records.

Land records are all about information — organized and made accessible. That's exactly what websites handle well. A move from paper land records to a single website would probably first require rethinking the data structure and logic of the land records, creating a consistent and unambiguous method to identify real property that works for computerized recordkeeping.

Transactions could, over time, move from the "old" system to the "new," through a process like the transition of UCC filings in 2001. At the same time, the UCC eliminated the archaic requirement for signatures on filings. Neither of these changes produced any serious problems, although one could certainly have predicted them.

Still, any serious change in our system of land records would create the risk of trouble, and hence we should move slowly and carefully and start small, then expand and combine, taking into account risks and lessons learned along the way.

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