

Alabama

**Assignment by MERS Upheld**

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Lawsuits challenging the validity of mortgage assignments and foreclosures by MERS are steadily rising, and the results are mixed. Alabama, a nonjudicial foreclosure state, is among the latest states to address the matter.

On August 6, 2010, the Alabama Supreme Court denied a request by a borrower to review a 2009 decision by the Alabama Court of Civil Appeals (this state’s mid-level appellate court), which held that an assignment of a mortgage by MERS is valid. The holding in this case is extremely important with regard to the enforceability and assignability of mortgages that name a nominee, such as MERS, for the lender.

*Crum v. LaSalle Bank* was a post-foreclosure ejectment case. The underlying facts were undisputed. MERS, as nominee for a national mortgage servicer, assigned the mortgage to LaSalle after Crum defaulted. LaSalle then initiated foreclosure proceedings and conducted a nonjudicial foreclosure sale.

When Crum failed to vacate the property after the foreclosure, LaSalle filed an ejectment complaint in the trial court seeking possession of the real property. Crum did not deny that the mortgage was in default, but instead sought to impugn the validity of LaSalle’s title by contending that MERS, as merely a nominee for the lender, did not own the underlying debt, and was thus not entitled to the money secured by the mortgage. Therefore, Crum contended, the assignment by MERS failed to transfer to LaSalle the obligation secured by the mortgage, rendering the foreclosure invalid. This argument was based on Crum’s interpretation of Ala. Code § 35 10 12, which states that the power to sell may be exercised only by a person who becomes

entitled to the money secured by the mortgage. The trial court disagreed with Crum and entered summary judgment in favor of LaSalle.

On appeal, the Alabama Court of Civil Appeals noted the common law rule that a transfer of a mortgage also transfers the obligation the mortgage secures, unless the parties to the transfer agree otherwise or such transfer is precluded by an applicable provision of the Uniform Commercial Code. The appellate court accordingly affirmed the trial court’s judgment, holding that MERS was expressly acknowledged by the borrower in the mortgage instrument itself as not only having any or all of the lender’s interests in the property, but also as having the power to take any action required of the lender under the mortgage. These authorized actions included assigning the mortgage to a third party. Thus, the assignment to LaSalle was valid and vested LaSalle with the power of sale.

*Editor’s Note: The case discussed here was handled by the mortgage litigation group of the author’s law firm.*