



## TN Supreme Court Decision

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On December 11, 2015, the Tennessee Supreme Court issued its opinion in *Mortg. Elec. Registration Sys. v. Ditto*, holding that MERS does not have an interest in property that is protected by due process, and therefore is not entitled to notice of a tax sale. *See* \_\_\_\_ S.W.3d \_\_\_\_, No. E2012-02292-SC-R3-CV, 2015 WL 8488909 (Tenn. Dec. 11, 2015). MERS initiated the lawsuit to attempt to set aside the tax sale of a property in Chattanooga encumbered by a deed of trust in favor of MERS, as nominee for the lender and its successors and assigns.

After the homeowners failed to pay their 2006 property taxes, a delinquent tax suit was filed against them by the county. The homeowners received notice of the tax sale via mail, and the county attempted to serve notice on the lender, but no attempt was made to give notice to MERS. The tax sale was held in 2010, and subsequently confirmed a year later. In 2012, MERS filed its petition against the tax sale purchaser, asserting that the tax sale was void *ab initio* because the county did not give notice of the tax sale to MERS, which was a violation of its due process rights in the property.

In its decision, the Tennessee Supreme Court undertook an extensive analysis of the MERS System. After reviewing case law from around the country, the Court found that “the lender’s agreement to appoint MERS as its agent ***does not endow MERS with the lender’s property interest or for that matter any independent property interest whatsoever.*** The note owner is the actual beneficiary, i.e., the party that benefits from the security interest by its entitlement to payments on the promissory note, secured by the deed of trust,” *id.* at \*21 (emphasis added), despite the fact



that Accordingly, the Court held that MERS holds no independent property interest that is protected by due process, is not entitled to notice of a tax sale, and affirmed the dismissal of MERS's complaint. *Id.* at \*22.

Given the number of deeds of trust in Tennessee with MERS named as nominee or agent for the lender or its assigns, this case could have had a great impact on any lender servicing a MERS deed of trust in Tennessee (that has not been assigned out of MERS). This is because, under *Ditto*, the county must only send notice to the record noteholder on the deed of trust, who is often not the noteholder at the time of the tax sale. Therefore, unless an assignment was recorded to the current noteholder, notice would go to a party that no longer has any connection to the loan.

However, the Tennessee General Assembly addressed much of this concern by amending the relevant statute. As of July 1, 2015, for the purposes of notices of tax sales, the class of persons now entitled, by statute, to a notice of a tax sale includes “a person or entity named as nominee or agent of the owner of the obligation that is secured by the deed or a deed of trust and that is identifiable from information provided in the deed or a deed of trust, which shall include a mailing address or post office box of the nominee or agent.” Tenn. Code Ann. § 67-5-2502(c)(1)(B) (2015). As such, going forward, lenders should be receiving notices of tax sales throughout Tennessee, even if MERS is the named nominee in the deed of trust.

Nevertheless, lenders must remain vigilant, as it is possible that they hold loans on properties lost to tax sales prior to July 1, 2015. If the deed of trust had not been assigned from MERS as of that date, legal options related to lack of notice may be limited in light of *Ditto*.

