



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Jim Ryan
ATTORNEY GENERAL

May 6, 1997

FILE NO. 97-008

TORT LIABILITY:
Recorder's Access to Mortgage
Electronic Registration System

Honorable Gary W. Pack
State's Attorney, McHenry County
2200 North Seminary Avenue
Woodstock, Illinois 60098

Dear Mr. Pack:

I have your letter wherein you inquire regarding the potential liability of a county recorder who permits or assists persons to obtain access to the Mortgage Electronic Registration System (hereinafter referred to as "MERS") from equipment located in the recorder's office. For the reasons hereinafter stated, it is my opinion that the recorder and the county would ordinarily be immune from liability in connection with any cause of action resulting from their provision of access to MERS.

According to the information you have provided, MERS is being initiated by Mortgage Electronic Registration System, Inc., a private, for-profit corporation owned by members of the real

Honorable Gary W. Pack - 2.

estate finance industry. The MERS loan registration system is expected to become operational in the spring of 1997. A loan which is registered with MERS will be assigned a mortgage identification number. The mortgage in favor of the lender will be executed and recorded in public land records, and then an assignment will be recorded naming MERS as mortgagee of record. MERS will then track the servicing rights and beneficial ownership electronically, eliminating the need for recording subsequent assignments of the mortgage in public land records when mortgage rights are traded. MERS has made a commitment to provide access to its system to county recorders and to the public generally.

When operational, a person searching the records of a county recorder will find only the record of a recorded mortgage and the assignment of that mortgage to MERS. In order to learn the identity of the beneficial owner(s) and the servicer(s) of the mortgage, however, the person will need to access the MERS system, referencing the mortgage identification number. As currently contemplated, such access from the recorder's office will be by telephone to a toll free number. As you suggest, a recorder might variously assist the person by locating the mortgage identification number, by placing the telephone call or simply by making a telephone available for the person's use. Your concern is whether the recorder or the county will incur

Honorable Gary W. Pack - 3.

liability if erroneous information is disseminated through the MERS system.

Sections 2-107 and 2-210 of the Local Governmental and Governmental Employees Tort Immunity Act (hereinafter referred to as the "Tort Immunity Act") (745 ILCS 10/2-107, 2-210 (West 1995 Supp.)) provide, respectively:

"A local public entity is not liable for injury caused by any action of its employees that is libelous or slanderous or for the provision of information either orally, in writing, by computer or any other electronic transmission, or in a book or other form of library material."

"A public employee acting in the scope of his employment is not liable for an injury caused by his negligent misrepresentation or the provision of information either orally, in writing, by computer or any other electronic transmission, or in a book or other form of library material."

Further, section 2-204 of the Tort Immunity Act (745 ILCS 10/2-204 (West 1994)) provides:

"Except as otherwise provided by statute, a public employee, as such and acting within the scope of his employment, is not liable for an injury caused by the act or omission of another person."

Sections 2-107 and 2-210 were recently amended to refer specifically to the provision of information by computer or other electronic transmission. (Public Act 89-100, effective July 7, 1995.) For purposes of the Tort Immunity Act, the recorder is an

Honorable Gary W. Pack - 4.

employee (745 ILCS 10/1-202 (West 1994)) and the county is a local public entity (745 ILCS 10/1-206 (West 1994)).

The plain language of sections 2-107 and 2-210 grants the recorder and the county immunity from liability for negligence in providing information in writing, orally or by electronic transmission. This will, in my opinion, extend to assisting individuals in looking up mortgage identification numbers and providing access to telephone or computer equipment in connection with the MERS system.


Moreover, section 2-204 plainly grants the recorder immunity from liability for the act or omission of another person. It is my opinion that this provision will protect the recorder from liability for any error by a lender in providing a mortgage identification number, by an individual in copying or keying in a number or by MERS personnel in providing information. The recorder has no control over the acts or omissions of any of these persons or entities.

You have also inquired whether a notice pursuant to Public Act 89-630, effective January 1, 1997, may be required in connection with MERS. Public Act 89-630 amends the Consumer Fraud and Deceptive Business Practices Act (815 ILCS 505/1 et seq. (West 1994)) to require that a person offering to sell access to or copies of public records pertaining to a consumer must give notice that such records are available free or at nominal cost from governmental agencies. It appears, however,

Honorable Gary W. Pack - 5.

that most or all of the information which MERS contemplates collecting, storing and providing will not be available from public records. Once a loan is assigned to and registered with MERS, that assignment may be the last evidence appearing in the public record, as subsequent changes in beneficial ownership and servicing rights are not required to be recorded. Therefore, Public Act 89-630 will not generally be applicable to the information offered by MERS.

Sincerely,


JAMES E. RYAN
ATTORNEY GENERAL