When Transaction Costs and Property Rights Collide:  
The Case of the Mortgage Electronic Registration System (MERS)  

Natalya Vinokurova, The Wharton School, University of Pennsylvania

This paper analyzes the fragility of the property rights regime in the United States, using the case of the Mortgage Electronic Registration System (MERS). Mortgage lenders created MERS in the mid-1990s to reduce the transaction costs associated with recording the ownership of mortgage rights. The creation of MERS followed decades of attempts to reform the system for recording land ownership in the U.S. Prior attempts to reform the recording system followed two paths: attempts at legislative change and private workarounds developed by the members of the real estate industry. Both were triggered by growth in the volume of records driven by a combination of population growth and the developments in secondary markets for mortgages. The legislative attempts centered on attempts to emulate the land registration system adopted in Australia—an exercise that proved futile after 100 years of experiments. The private workarounds which included the development of title abstracting and title insurance faced setbacks associated with the crashes in the development of secondary markets.

Like the reformers who preceded them, MERS founders were motivated by the inefficiency and costliness of the existing system. MERS founders motivated their efforts to eliminate paperwork from the recording of mortgage loan ownership transfers by an analogy to the Depository Trust Corporation (DTC), a private company that digitized the trade clearance on U.S. stock exchanges in the 1970s. MERS deviated from DTC’s model in three important ways. One, MERS founders did not see the need for new legislation to legitimate MERS; two, MERS did not immobilize the paperwork associated with the mortgages the ownership of which it tracked, and, three, MERS entered litigation on behalf of the mortgage rights’ owners. These three decisions undermined the legitimacy of MERS and put into question the most successful reform of the U.S. property rights regime to date.