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Property Title Trouble in Non-Judicial Foreclosure States: The *Ibanez* Time Bomb?

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I. INTRODUCTION

The economic crisis gripping the United States began when large numbers of homeowners defaulted on poorly underwritten subprime mortgage loans. Demand from Wall Street seduced mortgage lenders, brokers, and other players to churn out mortgage loans in extraordinary numbers. Through securitization, the process of utilizing mortgage loans to back investment instruments, Wall Street funded subprime originations in excess of $480 billion in each of the peak years—2005 and 2006. At the same time, low interest rates, inflated home values, easy credit, toxic loan products, negligible regulation, and corporate risk tolerance led to the downfall of this house of cards, the subprime mortgage market.

Without a ready source of cash and the resulting massive volume of subprime originations, the havoc might have been contained. Securitization not only stoked the fire; the parties to these deals often handled and transferred the legally important documents that secure the resulting investments—the loan notes and mortgages—in a

[1] Assistant Professor of Law, Albany Law School. First, I thank Kathleen Engel, Deanne Loonin, and Geoff Walsh for reviewing this article and providing invaluable input. The following professors and practicing attorneys knowledgeable of the foreclosure law in the five states highlighted in this article generously shared their expertise: Professor Frank Alexander (GA), Clinical Instructor Roger Bertling (MA), Maeve Elise Brown (CA), Geoffrey Giles (NV), Elizabeth Letcher (CA), Beverly Parker (AZ), Lori Wilson (AZ), and Noah Zinner (CA). Beth Barton, a title insurance attorney, provided important insights regarding title insurance issues and Massachusetts foreclosure law. My colleagues at Albany Law School offered helpful suggestions and critical feedback, especially James Gathii and Ira Bloom. Finally, I had the pleasure of working with three law students who assisted with the research: Mark Apostolos, Gina Caprotti, and John Forbush. Kathleen Carroll created the informative charts that track the seriously delinquent rates in five states. Any mistakes or errors are my own.

careless and, at times, fraudulent manner. The consequences of this behavior are now becoming evident. All over the country, courts are scrutinizing whether the parties initiating foreclosures against homeowners have the right to take this action when authority to enforce the note and mortgage is absent. Without this right, foreclosure sales can be reversed.

The concern about authority to foreclose is most acute in the majority of states where foreclosures occur with little or no judicial oversight, such as Massachusetts. Due to the decision in *U.S. Bank N.A. v. Ibanez*, in which the Supreme Judicial Court voided two foreclosure sales where the foreclosing parties did not hold the mortgage, Massachusetts is the focal jurisdiction where an important conflict is unfolding.[2] On one side of the contest resides the integrity of the courts, the law, and property recordation systems, as well as, the related public policy in favor of strict compliance with non-judicial foreclosure procedures designed to ensure that only the proper parties ousts homeowners from their homes. The securitization industry, including the trustee banks who must answer to the investors and who claim the right to foreclose, present their contrary views that: these rules are technical, substantial compliance is sufficient, court rulings unnecessarily endanger clear title, and, most worrisome of all, homeowners might get a free lunch (*i.e.*, a free home).

This article explores the extent to which the *Ibanez* and *Bevilacqua* rulings should influence the courts in other non-judicial foreclosure states and the likelihood that clear title to foreclosed properties is jeopardized by shoddy or fraudulent handling of notes and mortgages. In particular, I selected Arizona, California, Georgia, and Nevada to compare

[2] U.S. Bank Nat. Ass'n. v. Ibanez, 458 Mass. 637, 941 N.E.2d 40 (Mass. 2011). In a subsequent ruling, the court applied these principles in the context of a whether a *bona fide* purchaser can receive title through a void foreclosure sale. Bevilacqua v. Rodriguez, 460 Mass. 762, 955 N.E.2d 884 (Mass. 2011).

to Massachusetts because they permit non-judicial foreclosures and are experiencing high seriously delinquent rates. I conclude that *Ibanez* will have little effect in Arizona but should be influential in the other states, to varying degrees. As a result, property title trouble is likely in Georgia and Nevada, and to a lesser extent in California.

To examine these questions, the article proceeds as follows. Part II chronicles the nature and scope of the document conveyance problem. Part III provides an overview of securitization, focusing on the parties through whom the mortgage loans travel. The legal rules governing the transfer of loan notes and mortgages are outlined in Part IV. That section also discusses when and why potential errors, even in the absence of fraud, can occur. Part V enumerates relevant distinctions between the foreclosure proceedings in judicial and non-judicial states with an emphasis on the reasons why title to foreclosed properties is more certain in judicial foreclosure states. The *Ibanez* and *Bevilacqua* decisions, other related decisions, and the Massachusetts statutory rules permitting non-judicial foreclosure are detailed in Part VI.

In Part VII, I report upon the relevant foreclosure law of Arizona, California, Georgia, and Nevada on the issues of: authority to foreclose and the effect of a defective foreclosure on purchasers generally and on *bona fide* purchasers in particular. At the end of each review, I opine upon the likelihood that the *Ibanez* ruling should influence the courts in other states and the potential for challenges to title of property held by purchasers. Finally, the article addresses the potential consequences of reversing foreclosure sales and responds to the securitization industry's worry about homeowners getting free houses.

II. THE SCOPE OF THE PROBLEM

When signs of a looming foreclosure catastrophe in the subprime mortgage market began to emerge in the beginning of 2007, the percentage of all outstanding residential mortgage loans in the nation ninety days or more delinquent or in foreclosure stood at 2.23% (or almost 980,000 loans). This percentage rose dramatically to its peak of 9.67% (or almost 4.3 million loans) by the end of 2009.[3] As of the second quarter of 2011, those numbers remain shockingly high: 7.85% of all residential mortgage loans are seriously delinquent, *i.e.*, almost 3.5 million loans.[4]

As more and more homes went into foreclosure, the effects of this disaster triggered a broader financial crisis.[5] As of the beginning of 2011, over twenty-six million Americans had no jobs, could not find full-time work, or had given up looking for work.[6] Almost four million families had lost their homes to foreclosure. Nearly $11 trillion in household wealth had vanished, including retirement accounts and life savings.[7]

As the financial catastrophe heads into its fifth year, its origins and consequences remain popular topics of analysis. Well-documented causes include the collapse of the housing bubble fueled by low interest rates, easy credit, negligible regulation, and toxic mortgages.[8] Securitization stimulated the conditions leading to the collapse due to the

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[3] Mortgage Bankers Association, National Delinquency Survey, Q1 2007, Q4 2009. This data is derived from the "seriously delinquent" columns. "Seriously delinquent includes mortgage loans that are ninety days or more delinquent or are in foreclosure.

[4] Mortgage Bankers Association, National Delinquency Survey, Q2 2011 at 4.

[5] KATHLEEN C. ENGEL & PATRICIA A. MCCOY, THE SUBPRIME VIRUS: RECKLESS CREDIT, REGULATORY FAILURE, AND NEXT STEPS 142-148 (2011) [hereinafter Engel & McCoy].

[6] FIN. CRISIS INQUIRY COMM'N, THE FINANCIAL CRISIS INQUIRY REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON THE CAUSES OF THE FINANCIAL AND ECONOMIC CRISIS IN THE UNITED STATES, xv (2011) [hereinafter FCIC Final Report], *available at* http://www.gpo.gov/fdsys/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf (last visited Aug. 31, 2011).

[7] *Id.*

[8] *Id.* at xvi. More specifically, the Commission found: widespread failures in financial regulation and supervision by key federal agencies; failures of corporate governance and heightened risk-taking; excessively leveraged financial institutions and high consumer debt-loads; deterioration of mortgage-

enormous volume of money it pumped into the production of subprime mortgage loans, its failure to accurately police the quality of the underlying mortgage loans, and its inability to accurately assess the ensuing heightened risks.[9]

The capital to fund most residential mortgages in the United States is created by securitization. The securitization story germane to this article began in earnest in 1994 when private label securitizations of subprime mortgage loans increased dramatically.[10] In that year, $11.05 billion of these loans were securitized. By 2005 and 2006, the height of the subprime mortgage market, $507.65 and $483.05 billion of subprime residential mortgage loans, respectively, found their way into securitizations.[11] For all residential mortgage securitizations, the average rate of securitization was just over 64% between 2000 and 2007.[12] The dollar volume of the mortgages securitized for the same period

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lending standards; loosening of due diligence standards applied in the securitization process; the re-packaging and sale of questionable mortgage-backed securities into collateralized debt obligations and the sale of credit default swaps to hedge against the collapse of the securities; failures of the credit rating agencies; and an unprepared government that responded inconsistently to the crisis. *Id.* at xviii-xxvii (summary). See also *FDIC Oversight: Examining and Evaluating the Role of the Regulator during the Financial Crisis and Today: Hearing before the Subcommittee on Financial Institutions and Consumer Credit of the House Fin. Servs. Comm.* May 26, 2011, 5-12 (testimony of Sheila C. Bair)(identifying the roots of the financial crisis—excessive reliance on debt and financial leverage, misaligned incentives in financial markets, failures and gaps in financial regulation, and erosion of market discipline due to "too big to fail"), available at http://financialservices.house.gov/UploadedFiles/052611bair.pdf (last visited Sept. 7, 2011).

[9] Engel & McCoy, *supra* note 5 at ch. 3. *See generally* Kurt Eggert, *The Great Collapse: How Securitization Caused the Subprime Meltdown*, 41 CONN. L. REV. 1257 (2009).

[10] In private label securitizations, private parties issue the securities. By contrast, in agency securitizations, Ginnie Mae, Fannie Mae, Freddie Mac, or the Federal Home Loan Banks issue the securities. Inside Mortgage Finance, The 2008 Mortgage Market Statistical Annual, Vol. I, Glossary.
When referring to "securitizations" in this article, I refer to private label securitizations. Concerns similar to those discussed in this article regarding the handling of mortgage loans have arisen in the context of agency securitizations. See Federal Housing Finance Agency, Office of Inspector General, FHFA's Oversight of Fannie Mae's Default-Related Legal Services Audit Report AUD-2011-004 12-16 (2011), *available at* http://www.fhfaoig.gov/Content/Files/AUD-2011-004.pdf (last visited Feb. 12, 2012) (discussing complaints related to the handling of mortgage loan documents and the filing of false pleadings and affidavits by law firms representing Fannie Mae).

[11] *Inside Mortgage Finance*, 1 THE 2008 MORTGAGE MARKET STATISTICAL ANNUAL, 2008, at 3.

[12] *Inside Mortgage Finance*, 2 THE 2011 MORTGAGE MARKET STATISTICAL ANNUAL, 2011, at 3-4 (comparing the total dollar volume of securitizations to the total dollar volume of originations). The average rate is much higher for the years following the commencement of the crisis (2008-2010) —83% of virtually all residential mortgages were securitized, likely due to the lack of capital from other sources. *Id.*

exceeded $14.166 trillion.[13] This data clearly shows the enormous amount of money flowing into the origination of mortgage loans from investors.

In a typical private mortgage loan securitization, each mortgage loan is sold, assigned, or otherwise transferred to a trust through a series of steps and parties, starting with the lender and ending with the trustee.[14] The trustee hires a servicer to collect on the loans, maintain the payment records, and select foreclosure attorneys in the event of defaults. A document custodian usually stores the notes and mortgages on the trustee's behalf.[15]

Applicable state law and the terms of the transaction contracts govern the travel route and the documentation necessary to legally transfer the mortgage loans from one party to the next.[16] The sloppiness and outright fraud exhibited by parties to the securitization deals contributed to a breakdown in the transfer of the mortgage loans from one entity to the next along the route, resulting in serious concerns about who possesses the authority to foreclose, in the event of a homeowner default. This behavior is documented in federal and state court decisions, the findings of one state attorney general investigation, studies by law professors, news reports, Congressional testimony, and shareholder lawsuits. What follows is a sample of that evidence.

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[13] *Id.* (totaling the "MBS issuance" for each year).

[14] American Securitization Forum, Transfer and Assignment of Residential Mortgage Loans in the Secondary Mortgage Market 7-8 (2020), *available at* http://www.americansecuritization.com/uploadedFiles/ASF_White_Paper_11_16_10.pdf (last visited Feb. 12, 2012). Unless otherwise noted, the phrase "mortgage loan" refers to both the loan note and the mortgage. Section IV details the legal significance of each of these instruments and their relationship to each other.

[15] Adam J. Levitin & Tara Twomey, *Mortgage Servicing*, 28 YALE J. ON REG. 1, 13-14 (2011).

[16] Section III below describes securitization in more detail. Section IV discusses the applicable state law requirements governing the transfer of mortgage loans. Section VI and VII chronicles the similarities and differences in state law conveyancing and foreclosure laws.

A. Inadequate Documentation

The federal courts in Ohio were among the first to question standing in numerous foreclosure actions when plaintiffs could not produce relevant documents demonstrating they possessed the right to enforce the mortgage loans at the time of filing the action.[17] Since then, state courts have highlighted plaintiffs' failure to properly transfer notes and mortgages in foreclosure cases involving securitized mortgage loans.[18]

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[17] *E.g.*, *In re* Foreclosure Cases, Nos. 1:07CV2282, 07CV2532, 07CV2560, 07CV2602, 072631, 07CV2638, 07CV2681, 07Cv2695, 07CV2920, 07CV2930, 07CV2950, 07CV3000, 07CV3029, 2007 WL 3232430, at *3 n. 3 (N.D. Ohio Oct. 31, 2007) (dismissing fourteen foreclosure actions without prejudice; noting that the financial institutions involved exhibited the attitude that since they had been following certain practices for so long, unchallenged, that the practice equated with legal compliance). *See also In re* Foreclosure Cases, 521 F. Supp. 2d 650 (S.D. Ohio 2007) (finding that the plaintiffs failed to produce the loan notes, mortgages, and applicable assignments in order to show they had standing at the time they filed their lawsuits; affording the plaintiffs additional time to comply). These cases were filed in federal court on the basis of diversity jurisdiction.

[18] *E.g.*, U.S. Bank Nat. Ass'n. v. Ibanez, 458 Mass. 637, 941 N.E.2d 40 (Mass. 2011) (describing two different securitization transactions; finding that the trust agreements did not contain attached schedules showing that the specific mortgage loans were part of the deal and mortgages were not assigned to the plaintiff trustee banks); Davenport v. HSBC Bank USA, 275 Mich. App. 344, 739 N.W.2d 383 (Mich. Ct. App 2007) (reversing summary judgment against the homeowner seeking to void the sale and holding the sale void as HSBC Bank did not own the indebtedness at the time it foreclosed; Note—that the mortgage loan was securitized is only evident when reviewing the caption of the case in the brief filed in the appeal, see Plaintiff-Appellant's Brief on Appeal, 2006 WL 6364462); Deutsche Bank Nat'l Trust Co., v. Mitchell, 27 A.3d 1229 (N.J. Super. Ct. App. Div. 2011) (vacating the sheriff's sale and remanding due to lack of evidence that the plaintiff possessed the loan note at the time of filing the foreclosure action); Bank of New York v. Silverberg, 86 A.D.3d 274, 926 N.Y.S.2d 532 (N.Y. App. Div. 2011) (reversing the lower court's refusal to dismiss the foreclosure complaint where the assignee only obtained the mortgage from MERS and not the note); HSBC Bank USA, Nat. Ass'n. v. Miller, 889 N.Y.S.2d 430, 432-33 (N.Y. Sup. Ct. 2009) (dismissing the foreclosure because the plaintiff failed to show that the note was transferred to it before filing the foreclosure action); *In re* Adams, 693 S.E.2d 705 (N.C. Ct. App. 2010) (ruling the evidence of transfer of the note to the trustee bank insufficient); Wells Fargo Bank Nat. Ass'n. v. Lupori, 8 A.3d 919, 921-22 (Pa. Super. Ct. 2010) (reversing the trial court's order denying the homeowner's petition to strike the default judgment against them and setting aside the sheriff's sale because the bank offered no evidence to show the mortgage had been assigned to it); U.S. Bank Nat. Ass'n. v. Kimball, 27A.3d 1087, 1092-93 (Vt. 2011) (affirming summary judgment to the mortgagor when the bank failed to prove that it was the holder of the note). *See also* Fed. Nat'l Mortgage Ass'n v. Bradbury, __A.3d__, 2011 WL 6057999 *1-2, 4 (Me. Dec. 6, 2011) (affirming the trial court's finding that Fannie Mae submitted an affidavit in support of a foreclosure complaint in bad faith due, in part, to the affiant's lack of knowledge as to accuracy of the attached documents and that the affiant had signed thousands of such affidavits each month; affirming the trial court's award of over $23,000 in attorney fees to the homeowner); Anderson v. Burson,__A.3d__, 2011 WL 6347885 *2-4 (Md. Dec. 20, 2011) (noting that mortgagors often lose or misplace mortgage documents and fail to properly transfer loan notes but affirming the ruling that the substituted trustee may enforce the note because the homeowner conceded the proffered version of the transfer history).

In bankruptcy courts, judges regularly are confronted with consumer challenges to creditor standing to be paid or requests to lift automatic stays where mortgage documents were not properly transferred.[19] For example, a decision from the bankruptcy court in New Jersey recounted the testimony of a Bank of America witness that "it was customary for Countrywide [the lender] to maintain possession of the original note and related loan documents" in loan transactions it originated.[20] This statement cast doubt on the validity of foreclosures of mortgage loans issued by the largest subprime originator in the United States.[21] In response, the rating agency, Moody's, issued a short report attempting to dispel concern that the failure to indorse loan notes, assign the mortgages, and physically deliver them to the trustee in securitizations was systematic in Countrywide deals.[22]

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[19] *E.g.,* Veal v. American Home Mortgage Servicing, Inc. (*In re* Veal), 450 B.R. 897 (B.A.P. 9th Cir. 2011) (reversing the bankruptcy court and denying the securitization trustee's motion to lift stay because it could not show that it or its agent had actual possession of the note); *In re* Weisband, 427 B.R. 13, 16 (Bankr. D. Ariz. 2010) (describing the lack of evidence demonstrating how the note and deed of trust were conveyed from the lender to the sponsor under the "Flow Interim Servicing Agreement" and then to the depositor under a "Mortgage Loan Sale and Assignment Agreement" and then to the trust under the "Trust Agreement"; noting further that the Schedule purporting to list the mortgage loans transferred to the trust was blank); *In re* Salazar, 448 B.R. 814 (Bankr. S.D. Cal. 2011) (ruling that trustee bank failed to record the deed of trust assignment before foreclosing which was fatal to its standing to pursue a motion to lift the stay); *In re* Schwartz, 366 B.R. 265 (Bankr. D. Mass. 2007) (denying motion to lift the stay where the trustee bank commenced foreclosure but could not show it was the assignee of the mortgage or held the note at the time it commenced the foreclosure). *See also* Memorandum in Support of Sanctions, *In re* Nuer, No. 08-14106 (REG) (Bankr. S.D.N.Y. Jan. 4, 2010) (U.S. Trustee' Memorandum in Support of Sanctions Against J.P. Morgan Chase Bank for filing false documents which show that Chase, as mortgagee, assigned the mortgage to Deutsche Bank, as trustee for a Long Beach securitization trust while claiming in its motion to lift stay that it is only the servicer; no showing of assignments along the securitization chain*), available at* http://online.wsj.com/public/resources/documents/NuerStatement0402.pdf (last visited 9/2/11)

[20] Kemp v. Countrywide Home Loans, Inc. (*In re* Kemp), 440 B.R. 624, 628 (Bankr. D.N.J. 2010) (holding that the note was never transferred to the trust pursuant to the securitization documents; referring to transcript of testimony of Linda DeMartini at 47-49, on file with author). Bank of America purchased Countrywide in early 2008 which is why Ms. DeMartini was a Bank of America employee when she testified. *Bank of America to Acquire Countrywide* MSNBC.COM Jan. 11, 2008, http://www.msnbc.msn.com/id/22606833/ns/business-real_estate/t/bank-america-acquire-countrywide (last visited Aug. 23 2011).

[21] *Inside Mortgage Finance*, 1 THE 2008 MORTGAGE MARKET STATISTICAL ANNUAL, 2008, at 41-59 (showing Countrywide as the number one residential mortgage loan originator for the years 2004-2007 and either number one or within the top four from 1993 to 2003).

[22] *Weekly Credit Outlook*, MOODY'S INVESTORS SERVICE (Moody's), Jan. 10, 2011, at 37-38 *available at* http://www.institutionalinvestorchina.com/arfy/uploads/soft/110127/1_0734402621.pdf (last visited July 22, 2011)(finding that a "majority" of mortgage loans contained in a "sample" of Countrywide securitization deals was properly delivered to the trustee but failing to state whether the sample was random

Nevertheless, Bank of America shareholders became alarmed enough to sue the company in New York state court. In their complaint, the shareholders sought damages from the company's directors due to alleged breaches of their fiduciary duty and for gross mismanagement by concealing information about defects in the recording of mortgages from the public.[23]

The San Francisco Office of Assesssor-Recorder funded an analysis of mortgage loans to determine the nature and extent of documentation problems in transactions that resulted in foreclosure in the city and county between January 2009 and October 2011.[24] Astonishingly, the Office identified apparent violations of California law in 84% of the loans.[25] Related to the careless handling of assignments of deeds of trust, the Office found: in 27% of the subject loans, evidence suggested that the original or prior owner of the mortgage loan may not have signed the assignment and instead it was signed by an employee of another entity; 11% of the time, the assignee signed as the assignor; and, in 6% of the files, two or more conflicting assignments were recorded, making it impossible for either to be legally valid.[26]

Legal scholars provide additional evidence of the slipshod handling of the notes and mortgages. For example, Professor Levitin examined a small sample of foreclosure

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and reviewing only the initial trustee certifications, not the final versions; reporting that the initial certifications in the securitization that included the Kemp loan showed that 9.6% of the loans were not properly delivered to the trustee).

[23] Complaint, O'Hare v. Moynihan, No. 11103729 (N.Y. Sup. Ct., N.Y. County Mar. 28, 2011).

[24] The City and County of San Francisco Office of the Assessor-Recorder, Foreclosure in California: A Crisis of Compliance (2012) [hereafter SF Assessor Report], http://www.sfassessor.org/modules/showdocument.aspx?documentid=1018 (last visited Feb. 20, 2012). The Office randomly selected 382 residential mortgage loan transactions. *Id.* at 18. It hired Aequitas Compliance Solutions, Inc., a mortgage regulatory compliance consulting firm, to conduct the file review and report the findings.

[25] *Id.* at 1.

[26] *Id.* at 6-7. Deeds of trust are the most common security agreements used in California in residential transactions. They are three-party instruments in which the trustor (borrower) conditionally conveys title to a third party trustee who holds it as security for the debt owed to the beneficiary (lender). See Section VII, *infra.*

complaints filed in Allegheny County, Pennsylvania in May 2010 and found that the loan note was not filed with the complaint in over 60% of the cases.[27] "Failure to attach the note appears to be routine practice for some of the foreclosure mill law firms, including two that handle all of Bank of America's foreclosures."[28] He concluded that those foreclosure complaints were facially defective.

A study conducted by Professor Porter into mortgage creditor filings in bankruptcy courts provides additional insight into paperwork glitches. She reviewed the proofs of claims filed by the purported mortgage loan holders and their agents when seeking to establish their right to payment under the loan notes in consumer bankruptcies.[29] Mortgage creditors must file a proof of claim in a Chapter 13 bankruptcy if they wish to receive payments from the bankruptcy estate for arrearages.[30] The Bankruptcy Rules of Procedure require such creditors to provide a copy of the writing evidencing the claim, *i.e.*, the loan note, and evidence of the creditor's security interest in property of the debtor if perfected, *i.e.*, the mortgage or deed of trust.[31]

These mandates represent two fundamental public policies embodied in the Bankruptcy Code: "ensur[ing] the accuracy and legality of the claim…and that any

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[27] *Robo-Signing, Chain of Title, Loss Mitigation, and Other Issues in Mortgage Servicing: Hearing Before the Subcomm. on Housing and Community Opportunity of the House Fin. Servs. Comm.*, 111th Cong. 18 (2010) (statement of Adam J. Levitin, Associate Professor of Law, Georgetown University Law Center) 18 [hereinafter Levitin Testimony], *available at* http://financialservices.house.gov/Media/file/hearings/111/Levitin111810.pdf.

[28] *Id.*

[29] Katherine Porter, *Misbehavior and Mistake in Bankruptcy Mortgage Claims*, 87 TEX. L. REV. 121, 146 (2008). The principal investigators, Professor Porter and Tara Twomey, compiled data from 1,733 Chapter 13 bankruptcy cases filed by homeowners in forty-four judicial districts in twenty-three states and the District of Columbia. They drew the sample only from jurisdictions where the applicable state law permits non-judicial foreclosure of homeowners' principal residences. *Id.* at 141-142.

[30] *See* Official Bankruptcy Form B 10 (2010), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/BK_Forms_Official_2010/B_010_0410.pdf (last visited Sept. 12, 2011). "Creditor" includes the person or entity to whom the debtor owes money or property. *Id.*

[31] Fed. R. Bankr. Pro. 3001(c), (d).

payments on mortgage claims are made in accordance with the Bankruptcy Code." Despite these obligations, Professor Porter found that 41.1% of the proofs of claims she reviewed did not include the loan note. Moreover, the mortgage or deed of trust was not attached to about 20% of these proofs of claim.[32] This evidence does not conclusively show that the parties filing the defective proofs of claims had no right to payment nor does it prove that that these parties could never produce these documents. At a minimum, though, these findings support claims of sloppiness in the handling of important legal documents by lenders and/or their agents and transferees.

As Professor Whitman posits: "While delivery of the note might seem a simple matter of compliance, experience during the past several years has shown that, probably in countless thousands of cases, promissory notes were never delivered to secondary market investors or securitizers, and, in many cases, cannot presently be located at all."[33] He described efforts to "fix" these oversights to include the execution of lost note affidavits because those affidavits are perjured in "many cases."[34] This brings us to the more serious problem of fraud.

B. Fraud and "Robo-Signing"

[32] Porter, *supra* note 29 at 146.
[33] Dale A. Whitman, *How Negotiability Has Fouled up the Secondary Mortgage Market, and What to Do About It*, 37 PEPP. L. REV. 737, 758 (2010). *See also* Tamar Frankel, *Securitization: The Conflict Between Personal and Market Law (Contract and Property)*, 18 ANN. REV. BANKING L. 197, 205 (1999) (noting that the servicer of the loan portfolio often is the loan originator and payee on the notes; in practice, lenders retain the notes and do not indorse them).
[34] *Id.* at 761. See also Levitin Testimony, *supra* note 27, at 14-15 (observing that the large number of lost note affidavits filed in foreclosure cases are not based upon personal knowledge of the affiants and opining that the lack of personal knowledge occurs because the affiants do not know or fail to determine if the trustee bank actually possesses the notes and mortgages).

Sloppiness was not the only complication. Fraud and what became known as "robo-signing" were prevalent as foreclosures mounted. An investigation by the Florida Attorney General identified significant fraud and forgery in the handling and transfer of loan notes and mortgages in Florida.[35] The proof included documents showing: forged signatures on mortgages and on "indorsements" of notes; falsifications of dates on mortgage assignments; bogus grantees and grantors listed on mortgage assignments; lack of knowledge of bank employees who signed transfers of notes and mortgages; and, lack of authority to transfer notes and mortgages.[36] Moreover, the investigators discovered that the agents or attorneys for the foreclosing parties recorded many of these defective documents and relied upon them in court.

Similar practices by Lender Processing Services, Inc. (LPS) became the subject of a lawsuit filed by the Nevada Attorney General in December 2011.[37] LPS promoted itself as the "the nation's leading provider of mortgage processing services, settlement services, and default solutions," with a clientele that included a majority of the country's fifty largest banks.[38] The crux of the case revolves around the company or its subsidiaries' alleged practice of forging signatures on mortgage assignments and

[35] Office of the Attorney General of the State of Florida, Economic Crimes Division, "Unfair, Deceptive and Unconscionable Acts in Foreclosure Cases: Presentation to the Florida Association of Court Clerks and Controllers" (2010), http://southfloridalawblog.com/wp-content/uploads/2011/01/46278738-Florida-Attorney-General-Fraudclosure-Report-Unfair-Deceptive-and-Unconscionable-Acts-in-Foreclosure-Cases.pdf (last visited Aug. 8, 2011).
[36] *Id.* at 27-35 (highlighting the example of Linda Green whose signature appears on "hundreds of thousands" of mortgage assignments and who is listed as an officer of dozens of banks and mortgage companies; presenting documents in which her signature was forged on many documents). I use the spelling of the word "indorsement" as it appears in the Uniform Commercial Code, Article 3.
[37] Complaint, State of Nevada v. Lender Processing Servs., Inc., Case No. A-11-653289-B (Clark County Dist. Ct., Nev. Dec. 15, 2011).
[38] *Id.* at ¶ 26. The complaint further alleges that the majority of the top twenty servicers were using LPS' foreclosure processing computer software. ¶ 29.

substitutions of trustee, improperly executing assignments on behalf of defunct entities, and false assertions in affidavits about authority to foreclose.[39]

The San Francisco Assessor-Recorder's Office also uncovered evidence of fraud in the study discussed above. For example, it found reason to suspect that the execution of the substitution of trustee was unauthorized in 28% of the sampled loan files.[40] In 59% of the subject loans, one or more of the recorded foreclosure documents were back-dated.[41]

Evidence that documents purporting to transfer mortgage loans and other affidavits filed in foreclosure cases were suspect sparked national attention in the fall of 2010 when the "robo-signing" scandal broke. One court defined "robo-signing narrowly: "A 'robo-signer' is a person who quickly signs hundreds or thousands of foreclosure documents in a month, despite swearing that he or she has personally reviewed the mortgage documents and has not done so."[42] In common parlance, the term came to include a variety of questionable or illegal behavior, like that reported by the Florida

[39] *Id.* at ¶¶ 34-650, 98-103. The fraud also extended to the notarization process, assertions about whether the homeowner was delinquent, and statements to the public and investors. ¶¶ 68-84, 104-114. A Reuters reporter noted evidence of forgeries and alterations apparent on documents transferring notes and mortgage offered in court by Wells Fargo & Co. and reported that a federal investigation of Lender Processing Services was ongoing. Scot J. Paltrow, *The watchdogs that didn't bark,* Reuters Special Report (Dec. 22, 2011), *available at* http://www.reuters.com/article/2011/12/22/us-foreclosures-idUSTRE7BL0MC20111222 (last visited Jan. 27, 2012); Scot J. Paltrow, *Lender Processing Services, Foreclosure Giant, Faces Growing Legal Trouble,* Huff Post Business (Dec. 6, 2010; updated May 25, 2011), *available at* http://www.huffingtonpost.com/2010/12/06/lender-processing-services-legal-woes_n_792663.html (last visited Jan. 27, 2012). .

[40] SF Assessor Report, *supra* note 24, at 10.

[41] *Id.* at 12.

[42] OneWest Bank, F.S.B. v. Drayton, 29 Misc.3d 1021, 1022-23, 910 N.Y.S.2d 857, 859-69 (N.Y. Sup. Ct. 2010) (dismissing the foreclosure action without prejudice when the plaintiff could not demonstrate that its agent had authority to assign the mortgage and note). In this case, Ms. Johnson-Seck claimed in her deposition to be a vice president of two different banks and of MERS at the same time and signed about 750 documents a week, including lost note affidavits, affidavits of debt, assignments, and "anything related to a bankruptcy." She also testified that she did not read each document. *Id.* at 1030-31, 910 N.Y.S.2d at 865.

Attorney General. Following these revelations, the major mortgage servicers froze foreclosures proceedings in many states and undertook internal reviews.[43]

In response to evidence of fraud and robo-signing, federal banking agencies conducted an evaluation of mortgage servicers.[44] The Office of the Comptroller of the Currency and the Office of Thrift Supervision signed consent orders with several banks due to unsafe and unsound practices related to residential mortgage loan servicing and foreclosure processing.[45] A few months later, Acting Comptroller of the Currency, John Walsh, announced an independent review process to "identify borrowers who suffered

[43] Federal Deposit Insurance Corporation, *Regulatory Actions Related to Foreclosure Activities by Large Servicers and Practical Implications for Community Banks*, SUPERVISORY INSIGHTS, May 2011, at 2, *available at* http://www.fdic.gov/regulations/examinations/supervisory/insights/sise11/SI_SE2011.pdf (last visited Aug. 8, 2011).

[44] FEDERAL RESERVE SYSTEM, OFFICE OF THE COMPTROLLER OF THE CURRENCY, OFFICE OF THRIFT SUPERVISION, INTERAGENCY REVIEW OF FORECLOSURE POLICIES AND PRACTICES, (April 2011), *available at* http://www.occ.treas.gov/news-issuances/news-releases/2011/nr-occ-2011-47a.pdf (last visited July 22, 2011). These agencies focused on fourteen servicers that represented more than two-thirds of the servicing industry and about 36.7 million mortgages of the 54 million first –lien mortgages outstanding on December 31, 2010. *Id.* at 5. Overall, the examiners found: "[M]ost servicers had inadequate staffing levels and training programs throughout the foreclosure-processing function and that a large percentage of the staff lacked sufficient training in their positions.." FEDERAL RESERVE SYSTEM at 7. More specifically, however, examiners generally found that loan notes appeared to be properly indorsed and mortgages properly assigned, with some exceptions, and that the servicers generally had possession and control over these documents. *Id.* at 8-9. However, the bank reviewers did not sample actual foreclosure flings to determine any procedural defects due to the failure in chain of title of the notes and mortgages. Levitin Testimony, *supra* note 27 at 19. Moreover, the GAO noted that banking agency regulatory officials reported that "examiners did not always verify…whether documentation included a record of all previous mortgage transfers from loan origination to foreclosure initiation, as may be required by some state law or contracts." United States Government Accountability Office, Mortgage Foreclosures: Documentation Problems Reveal Need for Ongoing Regulatory Oversight GAO -11- 433, 25, 29 (2011) [hereinafter GAO Report], *available at* http://www.gao.gov/new.items/d11433.pdf (observing that the banking agencies reviewed only about 200 files from each servicer).

[45] Press Release, Office of the Comptroller of the Currency, OCC Takes Enforcement Against Eight Servicers for Unsafe and Unsound Foreclosure Practices (April 13, 2011), http://www.occ.treas.gov/news-issuances/news-releases/2011/nr-occ-2011-47.html (last visited Sept. 23, 2011). The institutions named were: Bank of America, Citibank, HSBC, JPMorgan Chase, MetLife Bank, PNC, U.S. Bank, and Wells Fargo. The two service providers are Lender Processing Services (LPS) and its subsidiaries DocX, LLC, and LPD Default Solutions, Inc.; and MERSCORP and its wholly owned subsidiary, Mortgage Electronic Registration Systems, Inc. (MERS). On the same day, the Office of Thrift Supervision announced that it signed consent orders with four federal savings associations related to "critical weaknesses in processing home foreclosures." Press Release, Office of Thrift Supervision, OTS Takes Action to Correct Foreclosure Deficiencies (April 13, 2011), http://www.ots.treas.gov/?p=PressReleases&ContentRecord_id=4fe2bb15-be56-5d95-6c9c-dfd680b1c6a3&ContentType_id=4c12f337-b5b6-4c87-b45c-838958422bf3 (last visited Sept. 23, 2011). Those institutions were: Aurora Bank, EverBank, OneWest Bank and Sovereign Bank. All of these orders required particular action be taken" to remedy the widespread and significant deficiencies identified by the review." *Id.*

financial injury as a result of errors, misrepresentations, or other deficiencies in the foreclosure process."[46] Despite these actions, an American Banker article released in August 2011 noted that some of the largest servicers were still fabricating documents that should have been signed years ago and submitting them as evidence to support the trustee bank's authority to foreclose, even after the banking agency investigation conducted in late 2010 and early 2011.[47]

C. The Impact of Inadequate Documentation, Fraud, and Robo-Signing

Sheila Bair, before leaving her post as Chair of the Federal Deposit Insurance Corporation, testified before a Senate Committee and opined that flawed banking processes, including faulty transfers of loan documentation, "have potentially infected millions of foreclosures, and the damages to be assessed against these operations could be significant and take years to materialize."[48] Bair was not alone in her assessment. A bank analyst told a Washington Post reporter: "[T]here's a possible nightmare scenario here that no foreclosure is valid."[49] The Wall Street Journal quoted a former subprime

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[46] John Walsh, Acting Comptroller of the Currency, Remarks Before The American Banker Regulatory Symposium, Washington, D.C. 3, 5-6 (Sept. 19, 2011), available at http://www.occ.treas.gov/news-issuances/speeches/2011/pub-speech-2011-120.pdf (last visitied Sept. 23, 2011). Section VIII, *infra*, describes this homeowner review and claim process in more detail.

[47] Kate Berry, *Robo-Signing Redux: Servicers Still Fabricating Foreclosure Documents*, 176 AM. BANKER 1 (Aug. 31, 2011), *available at* 2011 WLNR 17279218.

[48] *Federal Deposit Insurance Corporation on Oversight of Dodd-Frank Implementation: Monitoring Systemic Risk and Promoting Financial Stability Hearing before the Senate Comm. on Banking, Housing, and Urban Affairs*, May 12, 2011, 23 (Testimony of Sheila C. Bair), *available at* http://banking.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=94d50f1a-75eb-4586-b025-76e44870816b (last visited Sept. 7, 2011).

[49] Brady Dennis & Ariana Eunjung Cha, *In foreclosure controversy, problems run deeper than flawed paperwork*, WASH. POST , Oct. 7, 2010 (quoting Nancy Bush, a banking analyst with NAB Research and noting the observation of Janet Tavakoli, founder and president of Tavakoli Structured Finance, a Chicago-

lender: "Am I surprised? Absolutely not. I knew this assignment problem was going to be an issue."[50] Other reporters focused on the human side of this equation by documenting the plights of homeowners fighting to save their homes.[51]

III. ABCs OF SECURITIZATION

Understanding the foreclosure crisis requires knowledge of the structure of mortgage-backed securitizations. Others have described securitization in great detail.[52] For purposes of this article, I focus on the goals of the transaction, the players, and the path along which the loan notes and mortgages should travel, highlighting why and how this journey never occurred, was interrupted, or never began.

At its most basic level, securitization is the process of utilizing mortgage loans to back investment instruments. Mortgage securitizations are extremely complex and involve a number of players. Nonetheless, the goals of the parties to any given securitization are relatively straightforward. First, lenders need capital to make mortgage

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based consulting firm, that when banks were creating mortgage-backed securities as fast as possible over the last decade, there was little time to assure the paperwork was in order).

[50] Nick Timiraos, *Banks Hit Hurdle to Foreclosure*, WALL ST. J., June 1, 2011 (quoting the former chief executive of subprime lender Ownit Mortgage Solutions).

[51] *E.g.*, Gretchen Morgenson, *How One Borrower Beat the Foreclosure Machine*, N.Y. TIMES, July 27, 2008, *available at* http://www.nytimes.com/2008/07/27/business/economy/27gret.html?pagewanted=all (recounting the six-year battle of 74-year-old Ms. Palmer to save her modest Atlanta, Georgia home from foreclosure when the trustee in the securitization involving her mortgage loan did not obtain the loan note until two months after it began foreclosure proceedings; describing a New York judge's dismissal of thirteen of fourteen cases decided since January of 2008 due to lack of proper documentation); Mitch Stacy, *Sliced, Diced Mortgages Buy Owners Time*, ORLANDO SENT., Feb. 18, 2009, at A2 (noting that Florida mortgagor defaulted on her payments, but requested that the bank show her the original mortgage paperwork, and the foreclosure proceedings stopped when the bank was unable to produce the loan note).

[52] *E.g.*, Kurt Eggert, *Held Up in Due Course: Predatory Lending, Securitization, and the Holder in Due Course Doctrine*, 35 CREIGHTON L. REV. 503, 548-49 (2002) (hereinafter "Eggert II"); Frankel, *supra* note 33; Kathleen C. Engel & Patricia A. McCoy, *Turning a Blind Eye: Wall Street Finance of Predatory Lending*, 75 FORDHAM L. REV. 2039 (2007).

loans and investors want to buy bonds backed by the loans.[53] Second, the deals are designed so that the claims and defenses that homeowners might have against their original lenders will not follow the documents as they travel to the trustees who holds the loans in trust for the investors.[54] Third, the transaction must include a true sale of the mortgage loans to protect investors against claims that the note and mortgages are assets of the estate of the original lender in a bankruptcy proceeding.[55] Fourth, the tax consequences are limited by the intended creation of real estate investment mortgage conduits.[56]

When mortgage loans are sold, they most often are packaged together in groups ("pools"), sold, and held in trust for the benefit of the investors according to the terms of the operative trust document.[57] This process begins with a mortgage lender that originates the loans and sells them to an investment bank or other entity, called an arranger, seller, sponsor, or underwriter.[58] Next, the sponsor sells the pool of loans to a special-purpose subsidiary, called the "depositor" that has no other assets or liabilities in order to separate the loans from the sponsor's assets and liabilities.[59] Then, the depositor

[53] Engel & McCoy, Subprime Virus, *supra* note 5, at 43.
[54] Eggert II, *supra* note 52 at 548-49; Kathleen C. Engel & Patricia A. McCoy, *Predatory Lending: What Does Wall Street Have to Do with It?*, 15 HOUSING POL'Y DEBATE 715, 724-725 (2004).
[55] Levitin & Twomey, *supra* note 15, at 13.
[56] *Id.* at 32-33.
[57] The trust agreement may be included in the pooling and servicing agreement ("PSA"). *See* Affidavit and Testimony of Professor Ira Mark Bloom at ¶ 7, U.S. Bank Nat. Ass'n. v. Congress, Case No. CV-2009-901113 (Cir. Ct. of Jefferson Cty., Alabama) (hereinafter "Bloom Testimony") (stating that he found the trust agreement in the PSA) (on file with author). When the securitization involves a public offering of securities, the deal's PSA usually is posted as part of or along with the Prospectus in the Edgar database on the website of the Securities and Exchange Commission. *See* Search the Next-Generation EDGAR System, http://www.sec.gov/edgar/searchedgar/webusers.htm (last visited Sept. 23, 2011).
[58] Levitin & Twomey, *supra* note 15, at 13. The sale agreement between these two parties is generally called a mortgage loan purchase and sale agreement. *Id.* at 13, n. 32.
[59] This transfer typically is governed by the PSA. *Id.* at 13, n. 33.

transfers the loans to a specially created, special-purpose vehicle ("SPV"), usually a trust that holds the loans for the benefit of the investors.[60]

The trustee of the trust (a bank) holds the mortgage loans on behalf of the trust and is entitled to the income from the payments made by the homeowners to pass along to the investors. The pooling and servicing agreement (PSA) normally identifies a document custodian to take physical possession of the loan notes and mortgages on behalf of the trustee and a servicer to collect the monthly payments from the homeowner and transfer those monies to the trustee.[61] As a result of the terms of these deals, the loan notes and mortgages in each pool should travel from the originating lender to the sponsor, thence to the depositor, and finally to the trust.

To illustrate, let us review a securitization of Countrywide Home Loans, Inc. loans pooled in 2005 into Mortgage Pass-Through Certificates, Series 2005-J9.[62] In this transaction, the Countrywide Home Loans, Inc. originated mortgage loans through its retail offices and acquired additional loans from correspondent lenders using Countrywide Home Loans' underwriting standards.[63] The Prospectus identified the seller as either Countrywide Home Loans, Inc. or "to-be-identified" entities established by Countywide Financial Corporation or one of its subsidiaries which, in turn, acquired those mortgage loans directly from Countrywide Home Loans, Inc. The depositor was CWALT, Inc., a limited purpose subsidiary of Countrywide Financial Corp. The Bank of New York took the role of the trustee. The master servicer was listed as Countrywide

[60] *Id.* at 13-14.
[61] *Id.* at 15. The remainder of the transaction is relevant primarily to the investors and is described by Levitin and Twomey in their article. *Id.* at 14.
[62] CWALT, Inc. Mortgage Pass-Through Certificates, Series 2005-J9 Supplement Prospectus, http://www.sec.gov/Archives/edgar/data/1269518/000112528205004023/0001125282-05-004023.txt (last visited Jan. 27, 2012).
[63] *Id.* at S-38.

Home Loans Servicing LP.[64] The deal documents did not list a specific document custodian, though the custodian's role is mentioned throughout.[65]

According to the Prospectus, the depositor was to purchase the pool of mortgage loans from the sellers pursuant to the PSA. The depositor should have assigned them to the trustee (or its custodian) for the benefit of the certificate holders (the investors).[66] In this deal, therefore, the mortgage loans were to move from the corresponding lender to the seller; from the seller to the depositor; and, from the depositor to the trustee (and its custodian and/or the servicer). If the loans followed this path, at least four entities handled (or mishandled) them.

As described above, mounting evidence shows that often the mortgage loans were not transferred according to the PSA or as required by state law. In those cases, the trustee would not possess the authority to foreclose in the event of default by a homeowner.

IV. THE POTENTIAL FOR ERROR IN THE TRANSFER OF NOTES AND MORTGAGES—LET US COUNT THE WAYS

A. The Legally Operative Documents Constituting a "Mortgage Loan"

A "mortgage loan" consists of two distinct documents: a note and a security agreement.[67] The loan note represents the legal obligation to repay money advanced by

[64] *Id.* at S-3-4.
[65] *Id.* at S-3-4, S-37.
[66] *Id.* at S15-16.
[67] Grant S. Nelson & Dale A. Whitman, 1 REAL ESTATE FINANCE LAW § 5.27 (4th ed. 2002) (hereinafter Nelson & Whitman).

the lender for use by the borrower.[68] In many states, a mortgage or deed of trust creates a security interest in the borrower's real property and permits the mortgagee or beneficiary to foreclose in the event of non-payment or a breach of other duties listed in the document.[69] The transfer of the note is governed by the Uniform Commercial Code and, possibly, the contract; whereas, the transfer of the mortgage generally is governed by the state law of conveyance and real property.[70]

B. Transferring the Note and Potential Problems

This section describes the legal infrastructure that governs the transfer of loan notes and mortgages and highlights the points at which transfers can fail. Notes can be transferred in one of three ways. First, if the note is a negotiable instrument, it can be "negotiated" according to the rules in Article 3 of the Uniform Commercial Code (UCC). Second, if the note is a negotiable instrument, the holder may transfer it by way of an assignment, rather than by negotiation, but its enforceability is determined by Article 3 rules and, possibly, the contract. Alternatively, the note could be sold pursuant to Article 9 of the UCC, regardless of whether it was a negotiable instrument.[71] Since mortgage

[68] The notes used in mortgage loan transactions usually are "promissory notes" as defined in the Uniform Commercial Code (UCC) § 9-102(a)(65) (" 'Promissory note' means an instrument that evidences a promise to pay a monetary obligation, does not evidence an order to pay, and does not contain an acknowledgment by a bank that the bank received for deposit a sum of money or funds.").
[69] 4 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 37.03 (Michael Allan Wolfe ed., LexisNexis Matthew Bender 2010) (hereinafter "4 Powell on Real Property"). In "title" states, the mortgage vests legal title in the mortgagee or beneficiary. In this section, I will use "mortgage" generically to include mortgages, deeds of trust, and security deeds.
[70] JOHN RAO, ET AL, FORECLOSURES: DEFENSES, WORKOUTS, AND MORTGAGE SERVICING § 4.4.4.1 (National Consumer Law Center 3d ed. 2010).
[71] Levitin Testimony, *supra* note 27 at 20-21.

loan securitizations attempt to transfer the notes in compliance with the UCC, I will review those rules and the ways in which non-compliance occurs.[72]

1. Article 3

The transfer of and the right to enforce "negotiable" loan notes are governed by several provisions of Article 3 of the UCC.[73] Under UCC § 3-104, a "negotiable instrument": 1) contains an unconditional promise to pay a fixed amount of money; [74] 2) is payable to bearer or to order at the time it is issued or first comes into possession of a holder; 3) is payable on demand or at a definite time;[75] and, 4) does not state any other undertaking or instruction by the promisor to do any action in addition to the payment of money. If any one of these conditions is not met, the loan note is not "negotiable" and its transfer does not qualify as a "negotiation."[76]

Negotiability is important for two reasons. First, Article 3 creates rights to enforce the note only if it is negotiable.[77] Second, a negotiable instrument that is transferred to a third party under certain circumstances and who takes the instrument for

[72] For example, in the securitization of Countrywide loans discussed in Section III, *supra*, the PSA states the following related to the transfer of the notes: "In addition, the depositor will deliver or cause to be delivered to the trustee (or to the custodian) for each mortgage loan the mortgage note endorsed without recourse in blank or to the order of the trustee, except that the depositor may deliver or cause to be delivered a lost note affidavit in lieu of any original mortgage note that has been lost…" CWALT, Inc. Mortgage Pass-Through Certificates, Series 2005-J9 Pooling and Servicing Agreement, *supra* note 57 at 43-44.

[73] This discussion relies upon the 1990 version of Article 3. This version is effective in all states except New York and those ten states that have adopted the 2002 version of Article 3. *See* UNIFORM LAW COMMISSION, http://www.nccusl.org/Default.aspx (follow "Category" drop down menu and select "Commercial and Financial Laws", click "Go" then select "UCC Article 3, Negotiable Instruments and Article 4, Bank Deposits (2002)" (last visited Sept. 9, 2011).

[74] This element is addressed more fully in UCC § 3-106.

[75] This element is addressed more fully in UCC § 3-108.

[76] The note maker (borrower) and the note payee (lender) could agree that Article 3 governs the transfer of a non-negotiable note. UCC § 3-104, Comment 2.

[77] UCC §§ 3-203(b); 3-301.

value, in good faith, without notice that it is overdue or that a party has a defense or claim in recoupment can become a "holder in due course."[78] Holder-in-due-course status creates a shield against certain claims and defenses that the obligor (the homeowner in the context of mortgage loans) could raise against the original payee (the lender).[79] In other words, the transferee of a loan note will be immune from many claims and defenses which the borrower could raise against the lender.[80]

As discussed in Section III, achieving this status is one of the goals of securitizaton. Here we explore negotiation as it is relevant to the pivotal question in a foreclosure—does the foreclosing party possess the right to enforce the note.[81] This issue relates to, but is not the same as, whether the one possessing the right to enforce the note acquired the protections of a holder-in-due-course. For this reason, I table the holder-in-due-course doctrine for the remainder of this article

Transfer of a negotiable note occurs either by way of "negotiation" or by some other form of transfer, such as, assignment or sale. If via negotiation, the transfer must include delivery of the note containing the indorsement of the current holder if the note is payable to an identified person.[82] If the instrument is payable to bearer, transfer by possession alone suffices.[83] By this process, the recipient becomes a "holder."[84]

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[78] UCC § 3-302(a).
[79] UCC § 3-305(a) and (b).
[80] If the note is not "negotiable," the assignee acquires all rights and is subject to all liabilities of the assignor upon the transfer. RESTATEMENT (SECOND) OF CONTRACTS § 336 (1981); Eggert II, *supra* note 52 at 613. Although the original parties to the note can agree that provisions of Art. 3 apply to determine their respective rights, the transferor of the note cannot amend or eliminate the rights of the original parties in an assignment document.
See UCC § 3-104(Comment 2,¶ 4).
[81] The relevant question is whether the party relying on the note has the right to enforce it, not which claims and defenses to payment on the note a homeowner could raise against that party.
[82] UCC § 3-201. *See also* UCC § 3-204(a) (defining indorsement as the signature that is made for the purpose of negotiating the instrument). The UCC uses the word "indorsement," not "endorsement."
[83] UCC § 3-201.
[84] UCC § 1-201(b)(21) (2001). All but ten states have adopted this version of Article 1.

If a negotiable instrument is not "negotiated," it can, nevertheless, be transferred by delivery for the purpose of giving the recipient the right to enforce it.[85] This often occurs through purchase and sale agreements in securitizations or via written assignments. A transfer that complies with § 3-203(a) vests in the transferee any right of the transferor to enforce the instrument.[86] The crucial element common to both negotiation and a mere transfer is possession of the instrument by the transferee.

The relevant consequence of becoming a "holder" or a transferee in possession of the note who has the rights of a holder (i.e., a "holder" transferred it to the non-holder) is that Article 3 bestows on that party the right to enforce the negotiable instrument.[87] In the event of a default, such a person can sue on the mortgage note.

The path to enforcing a loan note is filled with pitfalls. First, the loan note may not qualify as a negotiable instrument. If not, the Article 3 transfer rules and their result, the right to enforce the note, do not apply. In that case, the note and assignment documents themselves may create certain rights—or might not—and Article 9 may apply.

Second, if the note is negotiable, the foreclosing party may not have possession of the note and, hence, have no authority to enforce it.[88] Third, if the instrument requires an indorsement and there is a broken chain of indorsements or the note is not payable to the transferee, that party must account for possession of the instrument "by proving the transaction through which the transferee acquired it."[89] Such evidence may not be

[85] UCC § 3-203(a).
[86] UCC § 3-203(b).
[87] UCC § 3-301. In addition, Article 3 permits a person without possession to enforce a note where it has been lost, stolen, or destroyed provided certain conditions are met. UCC §§ 3-301(iii); 3-309.
[88] A person not in possession of the note may be entitled to enforce it only if the note was lost, stolen, or destroyed when in the person's possession. UCC § 3-309(a). In this situation, the person seeking to enforce the note must prove its terms and the person's right to enforce the note and provide adequate protection against loss to the borrower if a third party subsequently claims the right to enforce the note.
[89] UCC § 3-203 (Comment 2).

available. Fourth, the foreclosing party may not qualify to file a lost note affidavit if it cannot show that it had the right to enforce the note at the time it lost possession.[90]

Professor Mann contends that mortgage notes often are non-negotiable for a variety of reasons.[91] He concludes that there is no useful role for negotiability in the modern financial world.[92] If he is correct regarding notes used in mortgage transactions, the issue becomes what law governs the transfer of non-negotiable notes.

2. Article 9

This trail leads us to Article 9 of the UCC. Article 9 typically governs secured transactions.[93] The definition of a security interest appears in Article 1 and was expanded in 2001 to include "any interest of…a buyer of…a promissory note in a transaction that is subject to Article 9."[94] In forty-nine states, Article 9 covers the sale of promissory notes by relying upon this broader definition of a "security interest."[95] To sell promissory notes, the seller and buyer must enter into a signed agreement that provides a description of the promissory notes, the buyer must give value, and the seller must have rights in the

[90] UCC § 3-309. This statement is accurate under the 1990 version. The 2002 version permits enforcement of a lost, stolen, or destroyed instrument by a person who "directly or indirectly acquired ownership of the instrument from a person who was entitled to enforce the instrument when loss of possession occurred."
[91] Ronald J. Mann, *Searching for Negotiability in Payment and Credit Systems*, 44 UCLA L. REV. 951, 962-973 (1996). *See also*, Whitman, *supra* note 33 at 749-51 (observing that, at best, the negotiability of the notes used by the secondary market giants, Fannie Mae and Freddie Mac, is "uncertain").
[92] *Id.* at 1004-1005.
[93] UCC § 9-101.
[94] UCC § 1-201(b)(35).
[95] South Carolina has not adopted this expanded definition upon which Article 9 relies. REPORT OF THE PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE, APPLICATION OF THE UNIFORM COMMERCIAL CODE TO SELECTED ISSUES RELATING TO MORTGAGE NOTES 9 n. 31 (2011) [hereafter PEB Report].

property being transferred.[96] The result is that the buyer owns the notes and the right to enforce the sale agreement, both against the seller and against any third parties claiming an ownership right in the notes.[97] If the loan note qualifies as a negotiable instrument, however, the Article 9 buyer only can enforce the note under Article 3 if the note maker (the homeowner) defaults.[98]

Although the Article 9 process appears to provide smoother sailing for non-negotiable notes, carelessness occurred in the securitization context. For example, the PSA may fail to meet the section 9-203(b) prerequisites to enforceability. The court in *U.S. Bank Nat'l Ass'n v. Ibanez*, reviewed two PSAs to determine whether they contained effective assignments of the mortgages to the trustee banks.[99] In one of the consolidated cases, the sale agreement did not constitute an actual sale of the notes or assignment of the mortgages. Rather, it represented only a desire to sell. In both cases, the PSAs failed

[96] UCC § 9-203(b).

[97] UCC § 9-203(b) ("a security interest is enforceable against the debtor and third parties" if certain requirements are met). In contrast to Article 3 holder in due course status, an owner under Article 9 achieves no exemption from specified claims and defenses that the homeowner could raise against the lender. Securitization agreements normally require specified parties to "negotiate" the notes (assumed to be "negotiable"), most likely for the purpose of achieving holder-in-due-course status for the trustee. See, e.g., the Countrywide PSA quoted in note 65, supra.

[98] UCC § 9-308 (Comment 6) ("For example, if the obligation is evidenced by a negotiable note, then Article 3 dictates the person whom the maker must pay to discharge the note and any lien securing it. See Section 3-602."); § 3-203 (Comment 1) ([A] person who has an ownership right to an instrument might not be the person entitled to enforce the instrument."); § 3-602(a) ("[A] [negotiable] instrument is paid to the extent payment is made by or on behalf of a party obligated to pay the instrument, and to a person entitled to enforce the instrument."); § 3-301 (defining under what circumstances a person is entitled to enforce an instrument); § 9-607 (Comment 8) ("Of course, the secured party's rights derive from those of its debtor. Subsection (b) would not entitle the secured party to proceed with a foreclosure unless the mortgagor also were in default or the debtor (mortgagee) otherwise enjoyed the right to foreclose."). For additional support, *see* PEB REPORT, *supra* note95, at 4 & n.15, 8, 10 & nn.40-41, 11 & illus. 6, 7 & 8 (stating: "The concept of 'person entitled to enforce' a note is not synonymous with 'owner' of the note"; "The rules that determine whether a person is a person entitled to enforce a note do not require that person to be the owner of the note, and a change in ownership of a note does not necessarily bring about a concomitant change in the identity of the person entitled to enforce the note"). The Board illustrated these points through fact patterns and concluded that the identity of the person entitled to enforce a negotiable instrument is determined by Article 3, not Article 9.

[99] *Ibanez*, 458 Mass. at 649-50, 941 N.E.2d at 52.

to adequately describe the specific mortgage loans contained in the deal. As a result, the foreclosure sales by the trustee banks were not lawful,

C. Transferring the Mortgage and Potential Problems

Historically, the loan note and mortgage traveled together. When mortgage loans were securitized at an increasingly rapid pace, financial firms often deviated from this practice.

"The note and mortgage are inseparable; the former as essential, the latter as an incident. An assignment of the note carries the mortgage with it, while an assignment of the latter alone is a nullity."[100] Moreover, the Restatement (Third) Property (Mortgages) states that: "A mortgage may be enforced only by, or in behalf of, a person who is entitled to enforce the obligation the mortgage secures."[101] As a general rule, the party who possesses the right to enforce both the note and the mortgage may sue on the debt or foreclose on the security upon default by the borrower. If the note and mortgage are split between different parties, the assignee of only the mortgage holds a worthless piece of paper.[102]

State statutes have diverged from these common law principles. For example, statutes of frauds may mandate that transfers of interests in real property, including

[100] Carpenter v. Longan, 83 U.S. 271, 274-275 (1872); 4 POWELL ON REAL PROPERTY § 37.27[2]. When only the note is transferred, at minimum, an equity interest in the mortgage automatically follows. The transfer of the mortgage typically is completed upon the execution of a formal written assignment. *Id.* at §§ 37.27[2] and [3].
[101] RESTATEMENT (THIRD) OF PROPERTY (MORTGAGE) § 5.4(c).
[102] RESTATEMENT (THIRD) OF PROPERTY (MORTGAGE) § 5.4. cmt. e; 4 POWELL ON REAL PROPERTY § 32.27[1], [2].

mortgages and their assignments, be in writing.[103] States also may require the recordation of a mortgage assignment because it involves an interest in land before a party can foreclose.[104] As a result, the mortgage will not automatically follow the note, until these conditions are met.[105]

A controversial player utilized in many securitizations is the Mortgage Electronic Registration System (MERS). Other than a brief description of its role and the issues it has spawned related to mortgage assignments, a full discussion of MERS is beyond the scope of this article.[106]

Created by Mortgage Banker Association member companies in 1995, MERS operates a computer database on behalf of its members to track servicing and ownership rights in mortgages originated anywhere in the United States.[107] Members of MERS include mortgage loan originators and secondary market players who "pay membership dues and per-transaction fees to MERS in exchange for the right to use and access MERS records."[108] As of 2007, MERS was involved in the origination of about 60% of mortgage loans in the United States.[109]

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[103] 4 POWELL ON REAL PROPERTY § 37.27[1].
[104] *Id.* at § 37.27[1]; Ga. Code Ann. § 44-14-162(b)(requiring the assignment of the deed of trust to be recorded before the trustee sale).
[105] *E.g., In Re* Samuels, 415 B.R. 8, 20 (Bankr. D. Mass. 2009) (recognizing that the assignment of the mortgage must be in writing under Massachusetts law; merely holding the note is not sufficient to enforce the mortgage).
[106] For two articles describing MERS and its Achilles heel(s), *see* Christopher L. Peterson, *Foreclosure, Subprime Mortgage Lending, and the Mortgage Electronic Registration System*, 78 U. CIN. L. REV. 1359 (2010) (hereinafter "Peterson I"); Christopher L. Peterson, *Two Faces: Demystifying the Mortgage Electronic Registration System's Land Title Theory,* 53 WM. & MARY L. REV. 111(2011) (hereinafter Peterson II).
[107] Peterson I, *supra* at 1361, 1368, 1370. For a list of the charter members of MERS, see *id.* at 1370, n. 61.
[108] *Id.*
[109] *Id.* at 1362 (citing to Kate Berry, *Foreclosures Turn Up the Heat,* Am. Banker, July 10, 2007, at 1).

Beyond its record-keeping role, mortgage lenders often list MERS as either the nominee of the mortgagee or as the actual mortgagee or both.[110] Under these mantles of purported authority, MERS has foreclosed on properties in its own name and assigned mortgages and notes even though it rarely, if ever, possesses the right to enforce the loan note.[111] Courts are split on whether MERS can foreclose in its own name.[112] These challenges led the government-sponsored secondary mortgage market giants, Fannie Mae and Freddie Mac, to forbid MERS from initiating foreclosures on their behalf in its own name.[113] More importantly, courts are split on the question of whether MERS can transfer the authority to foreclose to an assignee.[114]

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[110] *Id.* at 1375.

[111] *Id.* at 1379.

[112] *Compare* Mortgage Elec. Registration Sys. v. Revoredo, 955 So. 2d 33 (Fla. Dist. Ct. App. 2007) (ruling that MERS has standing to foreclose in its name); Jackson v. Mortgage Elec. Registration Sys., 770 N.W.2d 487 (Minn. 2009) (same as *Revoredo*) *with* Landmark Nat'l Bank v. Kesler, 216 P.3d 158 (Kan. 2009) (finding no standing to intervene as a necessary party in a foreclosure case where it did not own the note and mortgage); Mortgage Elec. Registration Sys. v. Saunders, 2 A.3d 289 (Me. 2010) (deciding that MERS itself cannot foreclose because it is not a mortgagee under Maine law; distinguishing the holding in *Jackson v. Mortgage Elec. Registration Sys*. on the grounds that authority to foreclose in non-judicial foreclosure states, such as Minnesota, differs from the concept of standing that applies in judicial foreclosure states, such as Maine); LaSalle BankNat'l Ass'n v. Lamy, 12 Misc.3d 1191(A), 824 N.Y.S.2d 769 (N.Y. Sup. Ct. 2006) (stating that MERS does not have standing to foreclose because it does not own the note and mortgage).

[113] Fannie Mae Announcement SVC-2010-05, FANNIE MAE (Mar. 30, 2010), *available at* https://www.efanniemae.com/sf/guides/ssg/annltrs/pdf/2010/svc1005.pdf (last visited July 26, 2011); Fannie Mae Single Family Servicing Guide pt. VIII, ch. 1, § 105 (2010); Freddie Mac Bulletin Number 2011-5, FREDDIE MAC (Mar. 23, 2011) *available at* http://www.freddiemac.com/sell/guide/bulletins/pdf/bll1105.pdf (last visited July 26, 2011). For a discussion of the challenges to MERS's standing to foreclose and its standing in bankruptcy proceedings, *see* Rao, *supra* note 70, at § 4.6.2.

[114] *Compare In re* Tucker, 441 B.R. 638, 644-46 (Bankr. W.D. Mo. 2010) (holding, under the deed of trust, MERS holds legal title "as nominee for the Lender and the Lender's successors and assigns," which creates an agency relationship between MERS and the lender and its successors and permits MERS to assign the mortgage); Crum v. LaSalle Bank N.A., 55 So. 3d 266 (Ala. Ct. Civ. App. 2009) (deciding that, under the terms of the mortgage, MERS could transfer the rights of the lender to the assignee) *with In re* Agard, 444 B.R. 231, 246-53 (Bankr. E.D.N.Y. 2011) (opining that MERS, as nominee, did not have the authority to assign the mortgage); Bellistri v. Ocwen Loan Serv., LLC, 284 S.W.3d 619 (Mo. Ct. App. 2009) (holding that MERS could not transfer the note to Ocwen as it was held by another party at the time MERS assigned the deed of trust to Ocwen, rendering language in the deed of trust purporting to give MERS the authority to transfer the note ineffective); Bank of New York v. Silverberg, 926 N.Y.S.2d 532 (N.Y. App. Div. 2011) (finding that because MERS was never the lawful holder or assignee of the note, it could not assign the power to foreclose to the plaintiff). *See also* Peterson II, *supra* note 106, at 8-11 (arguing that MERS legally cannot be the mortgagee or beneficiary under a deed of trust because it had no property rights

The mere presence of MERS in a mortgage loan transaction increases the likelihood of legal challenges to the authority to foreclose. Delaware Attorney General Biden noted the confusion created by MERS in his suit against MERS alleging that its practices and lack of oversight of its private registry system amount to deceptive practices.[115]

D. New York Trust Law

The parties in many securitization deals chose to apply New York law to the creation and operation of trusts into which mortgage loans are to be transferred.[116] The trust agreement, which is often incorporated into the pooling and servicing instrument, contains a closing date by which the mortgage loans must be transferred to the trust and after which the trust is prohibited from accepting any additional assets into the trust.[117] Under New York trust law, an asset does not become trust property until the asset is delivered to the trustee.[118] When mortgage loans are transferred to the trustee after the

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related to the loan); Culhane v. Aurora Loan Servs. of Nebraska, No. 11-11098-WGY, 2011 WL 5925525 *14-16 (D. Mass. Nov. 28, 2011) (ruling that MERS is only a limited agent of the mortgagee and may assign the mortgage only upon the request of the mortgagee who also is the current holder of the note or its servicer and if this action is necessary to comply with law or custom.

[115] "MERS engaged and continues to engage in deceptive trade practices that sow confusion among homeowners, investors, and other stakeholders in the mortgage finance system, seriously damaging the integrity of the land records that are central to Delaware's real property system, and leading to improper foreclosure practices." Press Release, Delaware Attorney General, Biden: Private National Mortgage Registry Violates Delaware Law (Oct. 27, 2011), http://attorneygeneral.delaware.gov/media/releases/2011/law10-27.pdf.

[116] Levitin Testimony, *supra* note 27, at 22.

[117] Bloom Testimony, *supra* note 57. The trust agreement may permit exceptions to the cut-off date if an opinion of a designated attorney or firm states that the contribution to the trust will not cause adverse tax consequences. *Id.* at ¶ 10(C) and (D).

[118] "It has long been the law in New York that to subject an asset to the terms of a trust that has an independent trustee (rather than the grantor serving as sole trustee), a grantor must have the intent to make a present gift to the trust and must make sufficient delivery of the assets of the trust to the trustee.

closing date, the trustee cannot accept them. If the trustee violates this prohibition, its act of acceptance is void.[119] The legal result is that the trustee does not possess the right to enforce the loan note and the mortgage and should not be able to foreclose.[120]

V. JUDICIAL V. NON-JUDICIAL FORECLOSURE

This section provides a short comparison between the judicial and non-judicial foreclosure regimes common throughout the United States. Use of the non-judicial method prevails in slightly more than half of the states; whereas, a judicial process occurs

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WARREN'S HEATON ON SURROGATE'S COURT PRACTICE 13 App. 4-46 (Linda B. Hirschson et al. eds., 7th ed. 2006).

[119] N.Y. Est. Powers &Trusts §7-2.4.

[120] This issue is percolating through the courts. *E.g.*, Horace v. LaSalle Bank NA, No. CV 08-362 (Cir. Ct. Russell Cty., Ala. March 30, 2011)(Order) (granting a permanent injunction preventing LaSalle Bank from foreclosing and deciding, without discussion, that LaSalle Bank did not comply with the PSA and New York Law in attempting to obtain assignment of the homeowner's note and mortgage; U.S. Bank NA as Trustee v. Congress, Civil Action No. CV 09-901113 JSV (Cir. Ct. Jefferson Cty. Ala. Feb. 23, 2011) (Final Judgment) (refusing to apply New York law to decide whether the trustee bank could foreclose because the dispute before the court involved the mortgagor and assignee of the mortgagee to which Alabama law applies; finding that the trustee bank was the holder of the note at the time of foreclosure); Hendricks v. US Bank NA as Successor Trustee to Bank of America, Case No. 10-849-CH (Washtenaw Cty. Trial Ct., Mich., June 6, 2011) (Opinion and Order Denying in Part and Granting in Part Defendant's Motion for Summary Disposition and Granting Plaintiff's Motion for Summary Disposition) (holding that the note was not transferred to the trustee bank on or before the closing date and the note did not include all intervening indorsements as required by the PSA; only the original lender had the right to foreclose).

The outcome of this issue may depend on whether the homeowner has the right to enforce the PSA, at least in cases where the homeowner affirmatively sues to enforce it. *Compare* Correria v. Deutsche Bank Nat'l Trust Co. (*In re* Correria), 452 B.R. 319 (B.A.P. 1st Cir. 2011)(noting that the debtor filed an affirmative proceeding to challenge the validity of the transfer of the note and mortgage on the grounds that transfers occurred in violation of the PSA; ruling that debtor was not a party nor a third party beneficiary to the PSA); Wittenberg v. First Independent Mortgage Co., No. 3:10-CV-58, 2011 WL 1357483 (N.D.W. Va. April 11, 2011)(dismissing homeowner's breach of the PSA claim because she was not a party to the contract) *with* Schwartz v.Homeeq Serv. (*In re* Schwartz), Bankr. No. 06—42476-MSH, 2011 WL 3667494 (Bankr. D. Mass. Aug. 22, 2011) (ruling that, although the debtor filed an affirmative proceeding to set aside a pre-petition foreclosure sale, the defendants bore the burden of proving that it held the mortgage prior to the date that the first foreclosure sale notice was published; as such, the defendants introduced and relied upon the purchase and sale agreements and PSA which the court considered). *But cf.* Ware v. Deutsche Bank Nat'l Trust Co., No. 1100822, 2011 WL 2420031*6-7 (Ala. June 17, 2011) (rejecting former homeowner's use of the PSA in the eviction proceeding to rebut trustee bank's documentation supporting its right to foreclose because homeowner did not respond to the argument that she cannot enforce the PSA; finding that other relevant arguments were not raised below and were waived).

in the other states. The possibility of uncertainty in title to real property in non-judicial foreclosure states is much more likely for the reasons stated below.

Foreclosures usually occur when real property is sold to satisfy an unpaid debt or when the borrower breaches another obligation specified in the mortgage. Almost all mortgages or deeds of trust are foreclosed by judicial or non-judicial process in the United States.[121]

In the judicial foreclosure states, the mortgage holder must file an action in court and obtain a court decree authorizing a foreclosure sale. Generally, the party seeking to foreclose must establish its standing to do so. The plaintiff must show that there is a valid mortgage between the parties and that it is the holder of the mortgage or, otherwise, is a proper party with authority to foreclose.[122] The homeowner may respond to the lawsuit in a fashion similar to other civil cases and raise defenses to the foreclosure.[123] If the homeowner defaults or the plaintiff otherwise prevails, the court may enter a judgment of foreclosure and order the sale to proceed.[124] Once the judgment is final, the usual doctrines related to finality apply.[125] Because finality doctrines eliminate most or

[121] A form of judicial process called "strict foreclosure" is allowed in only two states, Connecticut and Vermont, and will not be discussed in this article. For a description of this type of foreclosure, *see* Rao, *supra* note 70, at § 4.2.4. A fourth procedure, "foreclosure by entry," is described in the discussion of Massachusetts law below in section VI.

[122] *Id.* at § 4.4.2. Rules of court or statutes may require the plaintiff to produce the note and mortgage and all assignments of them to support its claim of standing. *See, e.g.*, 4 POWELL ON REAL PROPERTY § 37.38[2] (reprinting a complaint form used in Illinois pursuant to Ill. Comp. Stat 5/15-1504 which includes factual allegations that support the plaintiff's capacity to bring the action and requires the plaintiff to attach a copy of the note and the mortgage).

[123] 4 POWELL ON REAL PROPERTY § 37.38[2].

[124] *Id.* at § 37.40.

[125] Nelson & Whitman, *supra* note 67, at § 7.18. Not all states treat a standing objection as equivalent to subject matter jurisdiction, a defect that cannot be waived. *Compare* Countrywide Home Loans, Inc. v. Delphone, 883 N.Y.S.2d 135 (N.Y. App. Div. 2009) (holding that standing is waived in a judicial foreclosure case unless raised in a motion to dismiss or in the answer) *with* Mortg. Elec. Registration Sys. v. Graham, 247 P.3d 223 (Kan. Ct. App. 2010 (ruling that standing is a component of subject matter jurisdiction and can be raised at any time). *See also* Rao, *supra* note 70, at § 4.4.2.2 (highlighting the differences between the standing doctrine in foreclosure cases filed federal and state courts). Where standing can be waived, the finality doctrines strongly protect the sanctity of title.

all defenses to the action, they also protect the rights of the purchaser at the sale and stabilize title.

In contrast, in non-judicial foreclosure states, lenders foreclose by exercising the power of sale included in the mortgage.[126] These foreclosures proceed with little or no judicial oversight. Following a default by the homeowner, the holder of the mortgage or the trustee named in a deed of trust must give notices according to the terms of the mortgage or deed of trust and applicable statutes in order to sell the home.[127] Required notices include notification of default, of acceleration, and of the sale. In addition to sending notice of the sale to the homeowner and others who have an interest in the real estate, nearly all states require some form of public advertisement of the sale through a newspaper or posting.[128]

Once the foreclosing entity has complied with these procedural mandates, it schedules the sale usually with an auctioneer that it hires. The sale may occur at the real estate or some other location permitted by law.[129] In order to stop this type of foreclosure, the burden is on the homeowner to seek an injunction and raise legal claims and defenses by initiating an affirmative action.[130] Alternatively, a qualified homeowner may file a petition forbankruptcy and obtain a stay of the foreclosure sale.[131]

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[126] John Rao & Geoff Walsh, *Foreclosing a Dream: State Laws Deprive Homeowners of Basic Protections* NAT'L CONSUMER LAW CENT, 6-8 (Feb. 2009), *available at* http://www.nclc.org/images/pdf/foreclosure_mortgage/state_laws/foreclosing-dream-report.pdf (last visited Sept. 21, 2011).
[127] 4 POWELL ON REAL PROPERTY § 37.42[4].
[128] *Id.*
[129] Molly F. Jacobson-Greany, *Setting Aside Nonjudicial Foreclosure Sales: Extending the Rule to Cover Both Intrinsic and Extrinsic Fraud or Unfairness*, 23 EMORY BANKR. DEV. J. 139, 147-150 (2006).
[130] Rao, *supra* note 70, at § 5.4. In this instance, court rules or state statutes may require the homeowner to post a bond or tender the arrearage or total amount due, a significant hurdle that may discourage or prevent some plaintiffs from pursuing an injunction.
[131] *Id.* at Ch. 9 (detailing the steps the debtor must take to file and the possible benefits afforded by the bankruptcy forum). *See also* Henry J. Sommer, *Consumer Bankruptcy Law and Practice Vol. I* ch. 6,

The power of sale process benefits lenders because it provides an inexpensive and quick remedy against defaulting homeowners. Such sales can be completed in twenty to one hundred twenty days, depending upon state law. On the other hand, the non-judicial foreclosure process is harsh in its treatment of homeowners because they lose their homes without judicial oversight.[132] Defects in title to foreclosed homes and the possibility of post-sale challenges are greater because finality doctrines, such as *res judicata,* do not apply.

VI. THE *IBANEZ* DECISION AND RELEVANT MASSACHUSETTS FORECLOSURE LAW

The recent decision of the Massachusetts Supreme Judicial Court in *U.S. Bank Nat'l Ass'n v. Ibanez*[133] creates the possibility of lingering title issues to real property acquired by either the foreclosing entity or by *bona fide* purchasers (BFP) following a residential foreclosure in non-judicial foreclosure states. The remainder of this article will address the potential impact of this ruling beyond the borders of Massachusetts by: analyzing the *Ibanez* decision and the Massachusetts statutes it interpreted and relied upon; describing the foreclosure regimes in four non-judicial foreclosure states facing high rates of delinquency and foreclosure; comparing those legal regimes to that of Massachusetts; and, discussing the likelihood that these sister states adopt the *Ibanez* holding and the potential affect on title to foreclosed real estate held in REO or sold to

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NAT'L CONSUMER LAW CENT. (9th ed. 2009) (discussing when and how bankruptcy provides the best solution for consumer debtors).

[132] Jacobson-Greany, *supra* note 129, at 150-151 (arguing for an expansion of the equitable grounds available to challenge a wrongful foreclosure).

[133] *Ibanez*, 458 Mass. 637, 941 N.E.2d 40.

third parties.[134] First, we turn to *Ibanez* and the related ruling in *Bevilacqua v. Rodruguez.*[135]

A. *U.S. Bank N.A. v. Ibanez*

Ibanez addressed whether the securitization trustee possessed the authority to foreclose at the time they initiated foreclosure.[136] The central issue was whether the foreclosures were lawful given that the trustees became holders of the mortgages through assignments made *after* the foreclosure sales.

The trustees bought the properties at the foreclosure sales they had arranged under Massachusetts law.[137] Following the sales, the trustees were unable to obtain title insurance because of questions about their right to foreclose.[138] To remedy this problem, the trustees filed actions in Land Court to quiet title and to establish title in fee simple.[139]

The court concluded that neither trustee possessed authority to foreclose at the time of they provided notices of sale because neither could show it held the mortgage,

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[134] A foreclosing party who purchases the subject property at its own sale for purposes of re-sale holds it as part of its "REO" (real-estate-owned) inventory.
[135] Bevilacqua v. Rodriguez, 460 Mass. 762, 955 N.E.2d 884 (Mass. 2011).
[136] U.S. Bank was the trustee in the securitization deal that was to include the Ibanez mortgage loan. Rose Mortgage, Inc. originated the loan. The mortgage allegedly passed from Rose Mortgage, Inc. to Option One Mortgage Corp., thence to Lehman Brothers Bank, thence to Lehman Brothers Holdings, Inc. (the seller), next to Structured Asset Securities Corporation (depositor) and, finally, to U.S. Bank. Wells Fargo Bank was the trustee in the securitization that included the Larace mortgage loan. The originator, Option One Mortgage Corp. purportedly passed the mortgage to Bank of America. The mortgage then allegedly traveled to Asset Backed Funding Corporation (depositor) and then to the trustee. *Ibanez*, 458 Mass. at 641, 941 N.E.2d at 46.
[137] MASS. GEN. LAWS ch. 183, § 21; MASS. GEN. LAWS ch. 244, § 14.
[138] U.S. Bank Nat'l Ass'n v. Ibanez, 2009 WL 3297551 at *1 (Mass. Land Ct. Oct. 14, 2009).
[139] *Ibanez*, 458 Mass. at 638-39, 941 N.E.2d at 44.

even though each had possession of the loan note.[140] In Massachusetts, the mortgage transfers legal title to secure the debt, rather than merely creating a lien. The mortgagor-homeowner retains equitable title in the home until the mortgage is retired.[141] Consequently, an assignment deed is required to convey the mortgagee's interest.[142]

The court applied the "familiar rule that 'one who sells under a power [of sale] must follow strictly its terms. If he fails to do so there is no valid execution of the power and the sale is wholly void.'"[143] In the context of the securitization of a pool of mortgage loans, the court noted that a PSA could suffice as an assignment of the security instrument so long as: 1) it actually assigned the mortgage (as opposed to expressing only an intent to do so); 2) it included a schedule that "clearly and specifically" identified each mortgage loan covered; and 3) the assignor itself held the mortgage prior to the transfer.[144]

Regarding the Ibanez mortgage loan, U.S. Bank submitted an unsigned "private placement memorandum" that did not constitute an actual assignment, failed to produce the schedule of mortgages loans covered by the agreement, and failed to show that the depositor, Structured Asset Securities Corporation, ever held the mortgage to be assigned to U.S. Bank. In the Larace case, Wells Fargo did produce a PSA that could be construed as an actual assignment but the loan schedule failed to identify the Larace mortgage.

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[140] The Land Court took as true, for purposes of the motion to vacate the judgment, that each note had been indorsed to Option One who, in turn, indorsed each in blank. The plaintiff then obtained possession of the notes before they initiated the foreclosure process. *Ibanez*, 2009 WL 3297551 *5.

[141] Faneuil Investors Grp., Ltd. P'ship. v. Bd. of Selectmen of Dennis, 75 Mass. App. Ct. 260, 264-265, 913 N.E.2d 908, 912 (Mass. App. Ct. 2009), *aff'd,* 458 Mass. 1, 933 N.E.2d 918 (2010) (discussing the differences between title theory and lien theory related to mortgages). *See also Ibanez*, 458 Mass. at 649, 941 N.E.2d at 51.

[142] *Ibanez*, 458 Mass. at 649, 941 N.E.2d at 51; 28 MAPRAC § 10.2(2)(f).

[143] *Ibanez*, 458 Mass. at 646, 941 N.E.2d at 49-50 (*quoting* Moore v. Dick, 187 Mass. 207, 211 (1905)).

[144] *Ibanez*, 458 Mass. at 651, 941 N.E.2d at 53. An assignment need not be in a recordable form nor recorded. "A foreclosing entity may provide a complete chain of assignments linking it to the record holder of the mortgage, or a single assignment from the record holder of the mortgage." *Id.*

Further, Wells Fargo could not show that the depositor, Asset Backed Funding Corporation, held the Larace mortgage that it purported to assign to Wells Fargo via the PSA.[145]

The trustees advanced three arguments, all of which the court rejected. They are worth noting here because they bear on the issue of the trustees' authority to foreclose. First, the trustees argued that they had the authority to foreclose because they held the loan note prior to initiating the foreclosures. The court rejected this claim stating: "In the absence of a valid written assignment of the mortgage…, the mortgage holder remains unchanged."[146] Merely having the status of an equitable beneficiary of a mortgage held by another is not sufficient.[147]

Second, the trustees contended that an assignment of a mortgage in blank, *i.e.*, no assignee listed, is an effective assignment of the mortgage. This occurred in the Larace transaction when Option One executed a blank assignment. The trustees later conceded, and the court confirmed, that an assignment that fails to list the assignee's name "conveys nothing and is void."[148]

Finally, the trustees maintained that their authority to foreclose could arise from post-sale assignments, relying on a Title Standard issued by the Real Estate Bar Association for Massachusetts. The court responded that post-sale assignments cannot

[145] *Ibanez*, 458 Mass. at 640-50, 941 N.E.2d at 52.
[146] *Ibanez*, 458 Mass. at 653, 941 N.E.2d at 54.
[147] *Id.* Relying upon this part of the *Ibanez* ruling, two federal judges in Massachusetts agreed that a note holder must first exercise its equitable right to obtain a written assignment or a court order of assignment in order to validly foreclose. *Culhane*,2011 WL 5925525 *8-9; Kiah v. Aurora Loan Servs., LLC., No. 10-40161-FDS, 2011 WL 841282 *4 n. 6 (D. Mass. March 4, 2011) (finding that Aurora Loan Services held the note, had the right to enforce it, and was the assignee of record of the mortgage).
[148] *Ibanez*, 458 Mass. at 651, 941 N.E.2d at 53.

cure the problem because an assignment of legal title "becomes effective with respect to the power of sale only on the date of transfer..."[149]

In its conclusion, the court applied its decision both retroactively and prospectively on the grounds that the ruling did not make any significant changes to the common law. "The legal principles and requirements we set forth are well established in our case law and our statutes. All that has changed is the plaintiffs' apparent failure to abide by those principles and requirements in the rush to sell mortgage-backed securities."[150]

Importantly, *Ibanez* did not address the effect of an invalid foreclosure upon a BFP, *i.e.,* a purchaser who takes title for value and without notice of any defects in the foreclosure, a concern raised by two justices in a concurrence.[151] The justices did face this issue in a subsequent case, *Bevilacqua v. Rodriguez.*[152]

Bevilacqua arose in the context of a purchaser of a foreclosed property who sued the mortgagor to clear title.[153] The facts showed that: the homeowner mortgaged his property on March 18, 2006; U.S. Bank recorded a foreclosure deed on June 29, 2005 transferring the property to U.S. Bank, as trustee of an identified securitization trust even though it did not receive the assignment of the mortgage until July 21, 2006; U.S. Bank as trustee then deeded the property to plaintiff on October 17, 2006. The court addressed

[149] *Ibanez*, 458 Mass. at 653-654, 941 N.E.2d at 54-55. However, the court noted that a post-sale confirmatory assignment of an earlier valid assignment made before the publication and sale may be effective. This situation arises when the earlier assignment bears some defect or is not in recordable form. "A confirmatory assignment, however, cannot confirm an assignment that was not validly made earlier or backdate an assignment being made for the first time." *Id.*
[150] *Ibanez*, 458 Mass. at 655, 941 N.E.2d at 55.
[151] *Ibanez*, 458 Mass. at 656, 941 N.E.2d at 56.
[152] *Bevilacqua*, 460 Mass. at 766-67, 955 N.E.2d at 888-89 (Mass. 2011).
[153] This particular cause of action was framed under the Massachusetts "try title" statute. MASS. GEN. LAWS ch. 244, §§ 1-5. Under this cause of action, the plaintiff must prove that it is in possession of the property and that it holds record title. *Bevilacqua*,460 Mass. at 767, 955 N.E.2d at 889.

whether the plaintiff had standing as the record holder of the deed to pursue a "try title" cause of action, finding he did not. Relying upon its decision in *Ibanez*, the court reasoned that the foreclosure sale was void because U.S. Bank was not the assignee of the mortgage at the time of the foreclosure. The plaintiff's title was defective because his grantor, U.S. Bank, could not pass effective title to him.[154]

The plaintiff also argued that he acquired BFP status. Consequently, he acquired good title from U.S. Bank. In rejecting this claim, the court recognized the rule in Massachusetts that the purchaser must have no actual or constructive knowledge of a defect in the exercise of the power of sale.[155] It found that the plaintiff had record notice of the defect because the assignment of the mortgage to U.S. Bank occurred after the foreclosure deed was recorded—the exact situation addressed in *Ibanez.* Finally, the foreclosure sale was void, not merely voidable, in which case the purchaser cannot acquire good title.[156]

B. Massachusetts Foreclosure Law Relied Upon by the Court

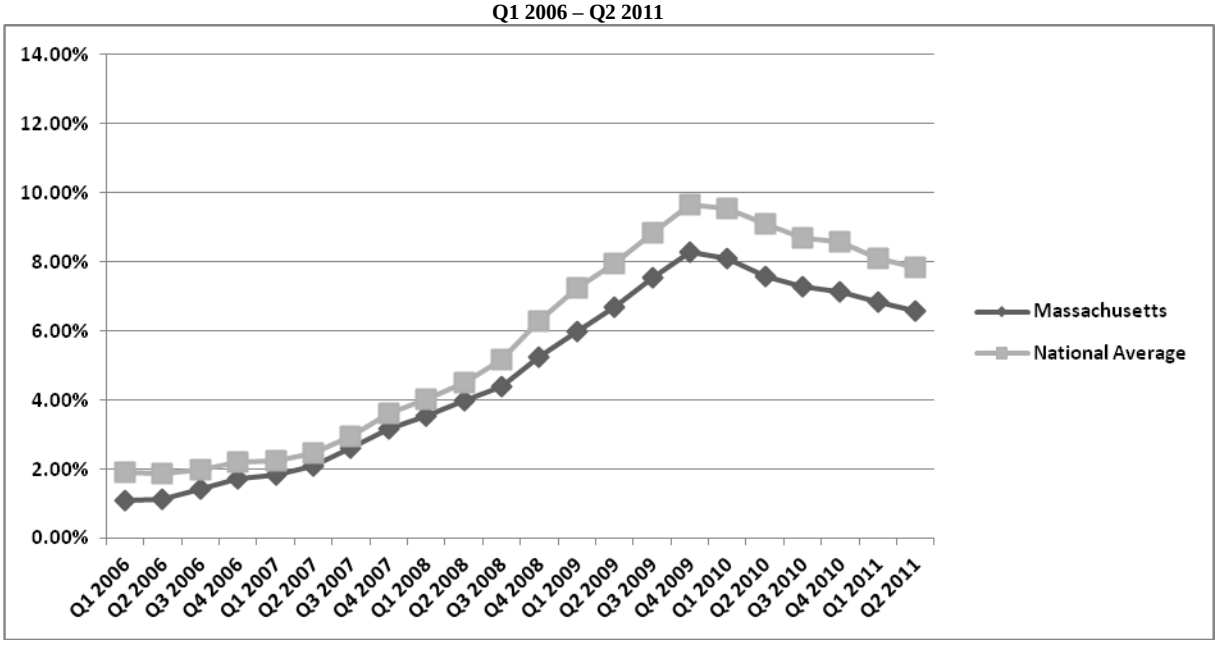
1. Introduction

Massachusetts is experiencing the foreclosure crisis to a similar degree as the nation as a whole. Figure 1 compares the seriously delinquent rates for all types of residential mortgage loans in Massachusetts to that of the national rates from 2005 to the

[154] *Bevilacqua*, 460 Mass. at 772-74, 955 N.E.2d at 892-83.
[155] *Bevilacqua*, 460 Mass. at 777, 955 N.E.2d at 896.
[156] *Bevilacqua*, 460 Mass. at 778, 955 N.E.2d at 897.

present, as reported by the Mortgage Bankers Association.[157] As of the second quarter of 2011, 6.57% or 52,866 loans were seriously delinquent in Massachusetts.[158] Among the non-judicial foreclosure states, it ranked ninth.

FIGURE 1
PERCENTAGE OF MORTGAGE LOANS SERIOUSLY DELINQUENT
MASSACHUSETTS vs. NATIONAL
Q1 2006 – Q2 2011



Source: Mortgage Bankers Association National Delinquency Survey

In Massachusetts, the mortgage is the instrument used to secure a debt or other obligation by taking an interest in the obligor's real property.[159] The mortgage constitutes a transfer of legal title in the property. Legal title vests in the mortgagee while the mortgagor retains equitable title.[160] For this reason, Massachusetts is a title theory state.

[157] Mortgage Bankers Association, National Delinquency Survey, Q1 2005 to Q2 2011.
The Survey defines "seriously delinquent" to include the percent of loans with installments that are 90 days or more past due plus the percent of loans in foreclosure inventory as of the end of the quarter.
[158] Mortgage Bankers Association, National Delinquency Survey Q2 2011 at 4.
[159] 28 Mass. Prac., Real Estate §§ 9.1, 9.4.
[160] 458 Mass. at 649, 941 N.E.2d at 51; Faneuil Investors Group v. Board of Selectmen of Dennis, 458 Mass. 1, 6, 933 N.E.2d 918, 922 (2010) (affirming that Massachusetts embraces the title theory of

In *Ibanez*, the court relied upon several Massachusetts statutes that address: 1) who has authority to foreclose; and, 2) the effect of a completed foreclosure sale if a party lacks the authority to foreclose. Below is a short summary of each relevant statute and related court decisions that will provide the basis of comparison with the other four states.

2. Authority to Foreclose

The Massachusetts foreclosure statute lists the parties that may perform the acts authorized by the power of sale clause in the mortgage, including, the mortgagee and any person acting in the name of the mortgagee.[161] Another provision requires the following language to be contained in the power of sale provision in the mortgage: "[U]pon any default in the performance or observance of the foregoing or other condition [listed in the mortgage], the mortgagee or his executors, administrators, successors or assigns may sell the mortgaged premises…"[162]

Read together, these statutes require that the foreclosing party be the mortgagee (or successor, assignee, or a person authorized by the power of sale) who may perform all of the acts permitted or required by the power of sale only upon "breach of a condition and without action."

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mortgages, *i.e.*, legal title to the mortgaged real property remains in the mortgagee until the mortgage is satisfied or foreclosed; citing to older cases establishing and applying this principle).

[161] MASS. GEN. LAWS ch. 244 , § 14. Other authorized persons include: a person authorized by the power of sale, an attorney duly authorized by a writing under seal, or the legal guardian or conservator of such mortgagee or person acting in the name of such mortgagee or person.

[162] MASS. GEN. LAWS ch. 183 § 21.

In addition, the foreclosing party must have possession of the loan note or have the right to enforce it.[163] The mortgage is incident to the note.[164] The transfer of only the note vests in the note-holder the right to obtain a conveyance of the mortgage but the mortgagee retains legal title in trust for the purchaser of the debt.[165] In other words, although the mortgage follows the note in Massachusetts, the note-holder only has a beneficial interest in the mortgage until a written assignment occurs.[166]

3. Effect of Defective Foreclosure

If the foreclosing party does not possess the authority to foreclose, the sale is void, at least where the purchaser is the foreclosing entity.[167] Judicial decisions require strict compliance with statutory and power of sale foreclosure mandates.[168]

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[163] Crowley v. Adams, 226 Mass. 582, 585, 116 N.E. 241, 242 (Mass. 1917) ("[P]ossession of the note was essential to an enforceable mortgage, without which neither mortgage could be effectively foreclosed…"); MASS. GEN. LAWS ch. 106, § 3-301; 28 ARTHUR L. ENO, ET AL., MASS. PRAC., REAL ESTATE LAW § 10.2 (4th ed. 2011). The Supreme Judicial Court will revisit this issue in Eaton v. Fed. Nat'l Mortg. Ass'n, 29 Mass. L. Rptr. 115 (Mass. Super. Ct. 2011) (granting preliminary injunction to stop eviction of former homeowner and analyzing statutory authority and the state court decisions that supports the rule that the one foreclosing must have the right to enforce the note, commonly via possession, and be the mortgagee or its assignee; distinguishing recent federal court decisions on this issue). At least one other federal judge applied this rule in a recent case. *Culhane*, 2011 WL 5925525 *12 (Young, J.). Other federal judges in Mssachusetts disagree. *E.g.*, Valerio v. U.S. Bank, N.A., 176 F. Supp. 2d 124, 128 (D. Mass. 2010) (denying motion for a temporary restraining order to prevent eviction following the foreclosure sale in a case removed to federal court when plaintiffs were unable to provide supporting law on the issue of whether the foreclosing party must have the right to enforce the note; finding that the relevant foreclosure statute, MASS. GEN. LAWS ch. 244, § 14, applies to mortgagees, not note holders) (Gorton, J.); Kelly v. Deutsche Bank Nat'l. Trust Co., 789 F. Supp. 2d 262 (D. Mass. 2011) (relying on *Valerio*) (Stearns, J.); McKenna v. Wells Fargo Bank, N.A., No. 10-10417-JLT, 2011 WL 1100160 (D. Mass. March 21, 2011) (relying on *Valerio*) (Tauro, J.).

[164] Gefen v. Paletz, 312 Mass. 48, 53, 43 N.E.2d 133, 137-38 (Mass. 1942).

[165] 14C HOWARD J. ALPERIN, MASS. PRAC., SUMMARY OF BASIC LAW § 15.126 (2010-2011).

[166] Kiah v. Aurora Loan Servs., LLC., No. 10-40161-FDS, 2011 WL 841282 *4 n. 6 (D. Mass. March 4, 2011) (noting that a note-holder must first exercise its equitable right to obtain a written assignment or a court order of assignment in order to validly foreclose); *Culhane*, 2011 WL 5925525 *8-9.

[167] *Id.* (relying upon MASS. GEN. LAWS ch. 244 , § 14 which states: "but no sale under such power shall be effectual to foreclose a mortgage, unless, previous to such sale, notice thereof has been published once in each of three successive weeks…"). The *Ibanez* court also relied upon several of its previous rulings to support this holding. *See, e.g.*, Moore v. Dick, 187 Mass. 207, 72 N.E. 967 (Mass. 1905) (voiding a sale because it was never valid in law and, hence, title to it never passed to the purchaser; distinguishing a sale

Prior to a foreclosure sale or before title is transferred to the purchaser, the mortgagor-homeowner may challenge a foreclosure proceeding by filing an independent action against the foreclosing party and other relevant parties in the superior court or land court, depending upon the relief sought.[169] The homeowner may request an injunction to prevent the sale pending a resolution of the challenge.[170]

Following a sale, the mortgagor-homeowner may defend herself against eviction when the purchaser brings a summary action for possession because title to the property is at issue.[171] Outside of the eviction context, the mortgagor-homeowner may file an affirmative action in either land court or superior court challenging the validity of the sale and contesting the resulting cloud on title.[172]

4. Effect of Defective Foreclosure on Bona Fide Purchasers

As discussed above, *Bevilacqua* confirmed an important principle under Massachusetts law. A purchaser who takes title without actual or constructive notice of a

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that is merely voidable, for example, one in which literal compliance with the legal prerequisites occurred but where equitable reasons exist to set it aside); Roche v. Farnsworth, 106 Mass. 509 (Mass. 1871) (voiding a sale due to a defect in the notice).

[168] *E.g., Ibanez*, 458 Mass. at 646-647, 941 N.E.2d at 49-50; Moore v. Dick, 187 Mass. 207, 72 N.E. 967 (requiring strict compliance; holding that if the foreclosing entity does not strictly comply with the terms of the power of sale, the sale is void). *See also* MASS. GEN. LAWS ch. 183, § 21 (requiring compliance before the foreclosing party may convey a proper deed to a purchaser which then forever bars the mortgagor from claiming any interest in the mortgaged premises).

[169] MASS. GEN. LAWS ch. 214, § 1(superior court); ch. 185, § 1(k) (land court). *See also* Adamson v. Mortg. Elec. Registration Sys., Inc., 28 Mass.L.Rptr. 153, (Mass. Super. 2011) (filing in superior court, the mortgagor-homeowner sought an injunction to prevent the foreclosing party from transferring the sale deed to the purchaser).

[170] 28 Eno, *supra* note 163, at § 10.2(2).

[171] *See, e.g.*, Bank of New York v. Bailey, 460 Mass. 327, 951 N.E.2d 331 (Mass. 2011) (ruling that the housing court has jurisdiction to consider the validity of the purchaser's title).; Novastar Mortgage, Inc. v. Saffran, 79 Mass. App. Ct. 1124, 948 N.E.2d 917 (Mass. App. Ct. 2011) (holding that the foreclosing party that bought the property at the sale has the burden to prove that it acquired title in strict accordance with the power of sale).

[172] *See, e.g.*, Lyons v. Mortgage Electronic Registration Systems, Inc., 2011 WL 61186 (Mass. Land Ct. Jan. 4, 2011).

defect in the sale and pays value, nonetheless, may face challenges to title when the foreclosing party cannot grant the purchaser good title.[173] Purchasers cannot acquire BFP status if the public records show the defect.[174]

Foreclosing parties may "correct" defects in their authority to foreclose after a completed sale either by re-foreclosing if they obtain the right to enforce the note and the mortgage or by utilizing Massachusetts' "foreclosure by entry" procedure.[175]

The relevant law of Arizona, California, Georgia, and Nevada is described in the next section. They all permit non-judicial foreclosures, though their laws vary. Massachusetts law provides the base-line against which these other states are compared. My goal is to assess the likelihood that the holdings in *Ibanez* and *Bevilacqua* should have traction in other non-judicial foreclosure states where the legal regimes are substantially similar. I selected Nevada, California, and Arizona because they are experiencing the highest seriously delinquent rates among the non-judicial foreclosure states, first, second and third, respectively. I selected Georgia because it is ranked fifth by this standard and it, like Massachusetts, is a title theory state.

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[173] *Bevilacqua*, 460 Mass. at 777, 955 N.E.2d at 896.

[174] *Id.* at 778, 955 N.E.2d at 897 (recognizing that the effect of recordation is to put the world on notice).

[175] This latter type of foreclosure is accomplished by the mortgagee "peaceably" entering onto the mortgaged premises, following a default, and declaring that entry is being made for the purpose of foreclosing on a mortgage. MASS. GEN. LAWS ch. 244, §§ 1, 2. The declaration must be made in the presence of two witnesses who sign a certificate swearing that they witnessed the entry. Alternatively, the mortgagor may sign a memorandum of entry confirming the entry. Once the certificate or memorandum is recorded, a three year period commences, during which time the mortgagor-homeowner may continue to live on the premises. Singh v. 207-211 Main Street, LLC., 78 Mass. App. Ct. 901, 902-03, 937 N.E.2d 977, 979-80 (2010). Upon the expiration of three years of uninterrupted peaceable possession, the mortgagee acquires title to the property. *Id.*; 28 MASS. PRAC., REAL ESTATE LAW § 10.12 (stating: "Commonly, a foreclosure by entry…is made at the time of a foreclosure sale, with a certificate of entry recorded immediately following the foreclosure deed and affidavit, so that any defect in a foreclosure sale becomes irrelevant after expiration of the three year right of redemption…."). However, the foreclosing party must be the mortgagee at the time of "entry." Bank of New York v. Bailey, 460 Mass. at 332, n. 10, 951 N.E.2d at 335, n. 10. Thus, a foreclosing party can resort to foreclosure by entry only after it acquires a valid assignment of the mortgage.

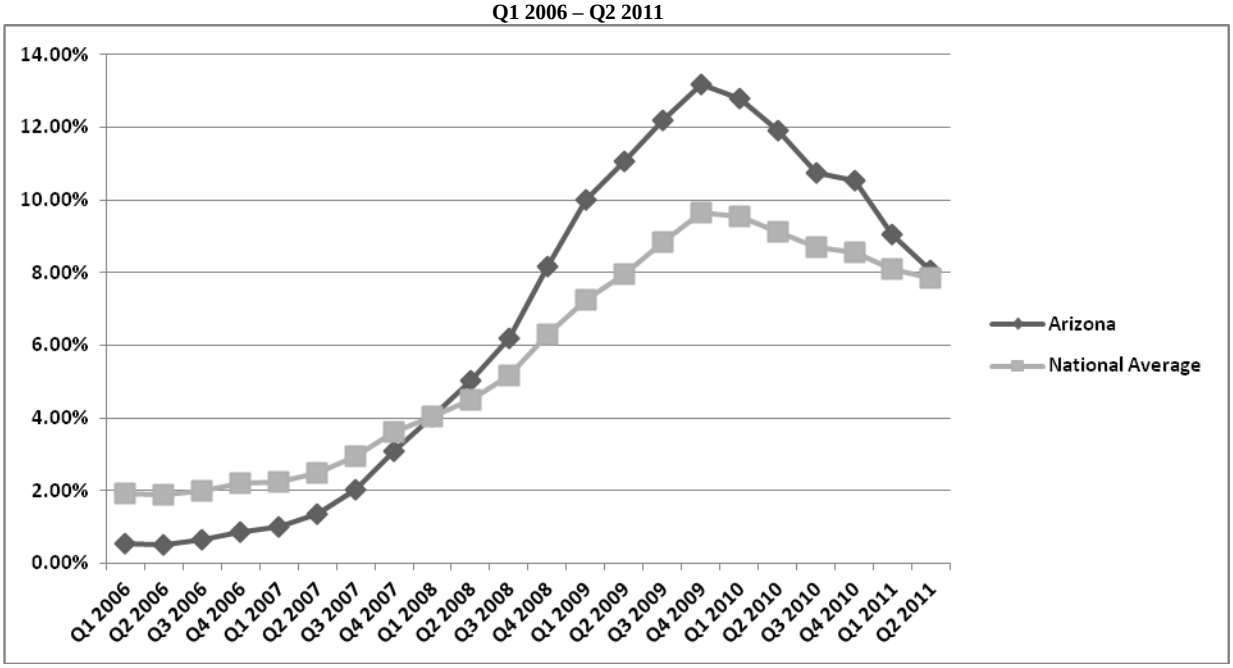
VII. COMPARISON OF THE FORECLOSURE REGIMES IN ARIZONA, CALIFORNIA, GEORGIA, AND NEVADA TO MASSACHUSETTS

A. Arizona

1. Introduction

Arizona's seriously delinquent foreclosure rate exceeded that of the nation as a whole leading up to and during the financial crisis. Figure 2 illustrates this comparison. As of the second quarter of 2011, 8.06% or 89,262 loans were seriously delinquent in Arizona.[176] Among the non-judicial foreclosure states, it ranked third.

FIGURE 2
PERCENTAGE OF MORTGAGE LOANS SERIOUSLY DELINQUENT
ARIZONA vs. NATIONAL
Q1 2006 – Q2 2011



Source: Mortgage Bankers Association National Delinquency Survey

[176] Mortgage Bankers Association, National Delinquency Survey, Q2 2011at 4.

The instrument predominantly used in Arizona to secure a debt or obligation is the deed of trust.[177] Unlike a mortgage, a deed of trust is a three party instrument in which the trustor (borrower) conditionally conveys title to a third party trustee who holds it as security for the debt owed to the beneficiary (lender).[178] A deed of trust vests in the trustee bare legal title sufficient only to permit it to convey the property at a non-judicial sale.[179] Nonetheless, under Arizona law, there is no significant difference between a mortgage "lien" and the trustee's "title."[180] For this reason, Arizona is a lien theory state.

2. Authority to Foreclose

A power of sale provision in the deed of trust allows the trustee (or its successor) or the beneficiary to exercise the power of sale clause permitting a private sale of the property upon default.[181] In the case of a substitution of the trustee by the beneficiary, the substitution must be acknowledged by all beneficiaries named in the deed of trust and recorded at the time of substitution. The beneficiary must give written notice of the substitution to the trustor.[182] The Arizona Supreme Court recently held that Arizona's recording statute does not require recordation of all assignments of deed of trust before the initiation of a foreclosure.[183]

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[177] Baxter Dunaway, 1 L. DISTRESSED REAL EST. § 9-4.1 (Clark 1991)); Kent E. Cammack, *et al.*, INS AND OUTS OF FORECLOSURE 1-11 (State Bar of Arizona 3d ed. 2010) (hereinafter Ins and Outs of Foreclosures). Mortgages exist in Arizona but must be foreclosed upon by judicial process. ARIZ. REV. STAT. § 33-721.
[178] ARIZ. REV. STAT. § 33-801 (defining "beneficiary," "trustee," and "trustor."
[179] Bisbee v. Security Nat'l Bank & Trust Co. of Norman, Oklahoma, 157 Ariz. 31, 34, 754 P.2d 1135, 1138 (Ariz. 1988)
[180] *Id.*; ARIZ. REV. STAT. § 33-805 ("[d]eeds of trust may be executed as security for the performance of a contract…").
[181] ARIZ. REV. STAT. §§ 33-807(A), 33-801(10).
[182] ARIZ. REV. STAT. § 33-804.
[183] Vasquez v. Saxon Mortgage, Inc. (*In Re* Vasquez), __P.3d __, 2011 WL 5599440 (Ariz. Nov. 18, 2011)(interpreting and applying Ariz. Rev. Stat. 33-411.01).

In Arizona, the mortgage (or deed of trust) follows the note.[184] However, in 1938, the Arizona Supreme Court ruled that an assignment of the deed of trust without the debt transfers no right upon the assignee.[185] Without mentioning the *Hill* decision and in apparent conflict with it, the intermediate appellate court recently suggested that the authority to foreclose depends upon the right to enforce the deed of trust.[186] Standards applicable to negotiable instruments found in Arizona's version of Article 3 of the UCC are irrelevant to a foreclosure sale conducted under a power of sale. This case is now pending before the Arizona Supreme Court.

3. Effect of Defective Foreclosure

Certain types of errors in the content of required notices do not invalidate the trustee sale.[187] Based upon the plain language of the statute, the provision should not bar a challenge to a foreclosure sale on the grounds that the trustee deed could not transfer title to the purchaser or that the beneficiary or trustee had no authority to foreclose because neither of these grounds is listed in that provision.

However, once the trustee issues a deed to the purchaser following a foreclosure sale, a presumption of compliance with the contract provisions in the deed of trust and

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[184] ARIZ. REV. STAT. § 33-817 ("The transfer of any contract or contracts secured by a deed of trust shall operate as a transfer of the security for the contract or contracts.").
[185] Hill v. Favour, 52 Ariz. 561, 84 P.2d 575, 578-79 (Ariz. 1938).
[186] Hogan v. Washington Mutual Bank, N.A., 227 Ariz. 561, 261 P.3d 445 (Ariz. Ct. App. Apr. 14, 2011), *review granted* (Nov. 29, 2011). Several federal courts do not require presentation of the note prior to a foreclosure or to a suit on the debt in cases not involving bankruptcy. *E.g.*, Mansour v. Cal-Western Reconveyance Corp., 618 F. Supp. 2d 1178 (D. Ariz. 2009) (relying on court decisions from California and Nevada) ()Campbell, J.); Diessner v. MERS, 618 F. Supp. 2d 1184 (D. Ariz. 2009) (citing to ARIZ. REV. STAT. § 33-807 which provides that the trustee of a deed of trust may foreclose pursuant to the power of sale or via a judicial action) (Sedwick, J.). On their face, these cases do not tackle the important question of why beneficiaries would not have to possess the note or the right to enforce it under Article 3 or 9 of the UCC before foreclosing on the underlying security.
[187] ARIZ. REV. STAT. § 33-808(E).

the statutory sections in "this chapter" relating to the exercise of the power of sale, including recording, mailing, and publishing of the notice of sale and the conduct of the sale arises.[188] The trustee's deed is not conclusive, unless the purchaser is a BFP.[189] This subsection does not mention other grounds to challenge a sale, such as lack of authority to foreclose.

In addition, section 33-811(C) instructs the trustor and certain specified parties to whom the trustee mailed a notice of the sale to bring an action seeking an injunction before 5:00 P.M. on the last business day *before* the scheduled sale[190] Failure to do so constitutes a waiver of all defenses and objections to the sale.[191] This provision places the trustor-homeowner on as extremely short leash—either raise objections before the sale or potentially lose all rights to attack the sale. Arizona state courts have not applied this provision in the context of an attack to a completed sale based upon lack of authority to foreclose and an allegedly void sale, at least in published decisions.[192]

4. Effect of Defective Foreclosure on Bona Fide Purchasers

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[188] ARIZ. REV. STAT. § 33-811(B).
[189] Silving v. Wells Fargo Bank, N.A., 800 F. Supp. 2d 1055, 1064 (D. Ariz. July 7, 2011) (making this distinction).
[190] ARIZ. REV. STAT. § 33-811(C).
[191] *Id.*
[192] In one unpublished memorandum opinion, the Arizona Court of Appeals applied § 33-811(C) strictly to affirm summary judgment against the homeowner who filed suit after the foreclosure sale to quiet title because, among other reasons, the trustee was not a successor in interest to the original trustee and did not possess authority to foreclose. Maher v. Bank One, N.A., No. 2 CA-CV 2008-0193, 2009 WL 2580100 (Ariz. Ct. App. Aug. 20, 2009) (discussing the enactment of § 33-811(C) in 2002 and its effect on the decision in *Patton)*. Two other unpublished Arizona appellate memorandum opinions applied § 33-811(C) to affirm dismissals of actions brought to challenge completed foreclosure sales, though not on the grounds of lack of authority to foreclose. Lovenberg v. Deutsche Bank Trust Co., American, 2011 WL 2236601 *2-3 (Ariz. Ct. App. June 7, 2011)(dismissing claim that the defendant breached a forbearance and modification agreement; noting that the trustee sale is intended to be final, regardless of any defect, absent actual knowledge by the purchaser); Luciano v. WMC Mortgage Corp., Nos. 1 CA-CV 08-0566, 1 CA-CV 08-0678, 2010 WL 1491952 (Ariz. Ct. App. April 13, 2010) (dismissing claim of lack of notice of the sale). It is noteworthy that, according to the Arizona Supreme Court Rules, a memorandum opinion is not regarded as precedent nor to be cited in any court except for limited purposes. ARIZ. REV. STAT. Sup. Ct. R. 111.

If the purchaser pays value without *actual* notice of non-compliance with the contract provisions in the deed of trust and the statutory requirements to foreclose, the trustee deed constitutes "conclusive evidence" of validity.[193] The trustee deed may not be conclusive where "the notice was insufficient because of fraud, misrepresentation, or concealment."[194] According to a federal district court, even if the trustor cannot undo the sale, she may seek damages for a wrongful foreclosure in certain circumstances.[195] In another case, a federal judge refused to dismiss a quiet title action against the bank acting as trustee for the securitized trust that purchased the house at the foreclosure sale.[196]

5. Ibanez Traction in Arizona

Based upon this understanding of Arizona law, the courts in Arizona are not likely to adopt *Ibanez* on the issue of whether the foreclosing party must hold a written

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[193] ARIZ. REV. STAT. § 33-811(B). As with a non-BFPs, this subsection does not mention other grounds to challenge a sale, such as lack of authority to foreclose.

The purchaser must be without actual notice, as opposed to constructive notice. Main I Ltd. P'ship v. Venture Capital Const. & Dev. Corp., 154 Ariz. 256, 259-60, 741 P.2d 1234, 1237-38 (Ariz. App. 1987) (holding that even the named beneficiary in a deed of trust who purchased at the sale may acquire BFP status where it had no record or actual notice that entities who were not parties to the deed of trust were sent the notice of sale one day late). The bankruptcy court in Arizona applied § 33-811(B) and refused to overturn a sale to a bona fide purchaser on the grounds that the initial bid was not properly available.

[194] *Main I Ltd*., 154 Ariz. at 260, 741 P.2d at 1238 (refusing to void a foreclosure sale on the grounds that the trustee mailed the notice of sale to certain entities that were not parties to the deed of trust one day late because the purchaser paid value and took without actual notice, even though it was the beneficiary; no evidence of fraud, misrepresentation, or concealment presented).

[195] Herring v. Countrywide Home Loans, Inc., No. CV 06-2622-PHX-PGR, 2007 WL 2051394 *5-6 (D. Ariz. July 13, 2007) (noting that Arizona state courts have not recognized this tort but, nonetheless, denying summary judgment to the defendant where plaintiff alleged not a notice violation but that she cured the default and complied with a repayment agreement). *See also* Schrock v. Fed. Nat'l Mortgage Ass'n., 2011 WL 3348227 *6-8, n. 7 (D. Ariz. Aug. 3, 2011) (discussing in detail the "draconian results" of the legislative foreclosure regime that favors recognizing the tort of wrongful foreclosure and stating the court "would welcome such guidance" from the state courts but, nevertheless, not certifying this question; ruling that the plaintiff pled the elements adequately).

[196] *Silving*, 800 F. Supp. 2d 1055, 1070.

assignment of the deed of trust before the sale. The *Vasquez* court said no, relying upon Ariz. Rev. Stat. § 33-817 which states that the deed of trust automatically follows the transfer of the note. The fact that Massachusetts is a title theory state distinguishes it from Arizona on this point.

The additional question of whether the foreclosing party must possess the right to enforce the note prior to recording the notice of sale is pending before Arizona's highest court in the *Hogan* case, as it is in Massachusetts in the *Eaton* case. Depending upon the outcome in those cases, the consequence of failing to possess the note may be significant to the right to foreclose.

Both Massachusetts and Arizona require strict compliance with the power of sale clause and with additional legal requirements. The court in *Ibanez* voided the sale. In Arizona, the Supreme Court agreed that notice defects, at the very least, void a sale.

However, section § 33-811(C) waives all defenses the trustor may have to the sale if she fails to file an action challenging the sale by 5:00 P.M. on the day prior to the sale. If this provision cuts off the rights of homeowners to challenge the authority to foreclose following the sale, the finality of title in Arizona is absolute. If this provision does not waive authority-to-foreclose defects that void a sale, other finality provisions in Arizona law, such as the effect of the execution of the trustee's deed to a BFP arguably eliminates only objections relating to non-compliance with notice provisions in the deed of trust and specific statutory provisions.[197] Challenging a sale as void on the grounds of lack of authority to foreclose may remain viable.

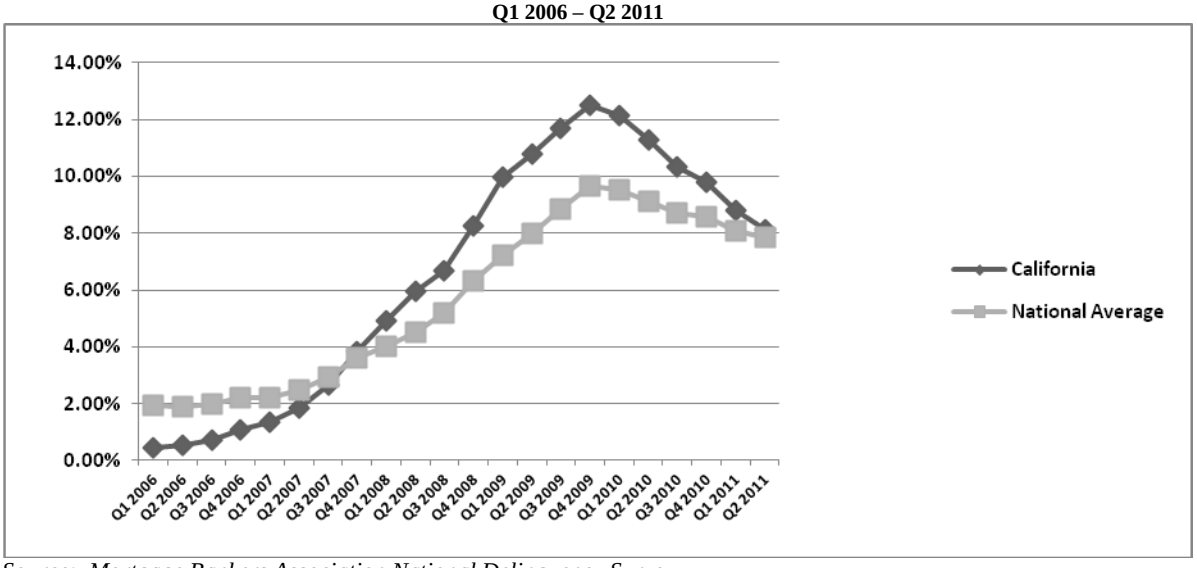
B. California

[197] ARIZ. REV. STAT. § 33-811(B).

1. Introduction

California's seriously delinquent foreclosure rate exceeded that of the nation as a whole from the first quarter of 2006 until the second quarter of 2011. Figure 3 illustrates this comparison. As of the second quarter of 2011, 8.11% or 462,714 loans were seriously delinquent in California.[198] Among the non-judicial foreclosure states, it ranks second.

FIGURE 3
PERCENTAGE OF MORTGAGE LOANS SERIOUSLY DELINQUENT
CALIFORNIA vs. NATIONAL
Q1 2006 – Q2 2011



Source: Mortgage Bankers Association National Delinquency Survey

The deed of trust is the preferred real property security device in California.[199] The California deed of trust involves three parties: the trustor, the trustee, and the

[198] Mortgage Bankers Association, National Delinquency Survey Q2 2011 at 4.
[199] Henry D. Miller and Marvin B. Starr, 4 CAL. REAL ESTATE § 10:1 (3d. ed. updated Oct. 2010) (hereafter Miller & Starr). The original distinctions between mortgages and deeds of trust no longer exist and these instruments are identical, for practical purposes. "[D]eeds of trust are not true trusts but are practically and substantially only mortgages with power of sale." *Id.* at § 10:2.

beneficiary who perform the same functions as in Arizona.[200] Despite transfer of nominal title to the real estate, California treats the deed of trust as a lien.[201]

2. Authority to Foreclose

California law requires the trustee or the beneficiary or their authorized agents to follow certain procedures in order to enforce a power of sale clause in a deed of trust.[202] Normally, however, the trustee conducts the "trustee" sale under its authority in the power of sale.[203] If the beneficiary appoints a new trustee, it must record the substitution.[204] Prior to any sale, a notice of the sale containing accurate information about the substituted trustee must be provided and recorded or the sale conducted by the substituted trustee is void.[205] If the beneficiary assigns its interest in the deed of trust, the assignment need not be recorded, although recordation operates as constructive notice to all persons.[206] If the assignee has reason to exercise the power of sale provision, the assignment must be recorded so that the assignee's right to instruct the trustee to sell appears in the public record.[207] Despite the plain language of the statute, the California

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[200] *Id.* at § 10:3.
[201] Monterey S. P. Partnership v. W.L. Bangham, Inc., 49 Cal. 3d 454, 460, 261 Cal. Rptr. 587 (Cal. 1989).
[202] CAL. CIV. CODE § 2924(a) (West 2011).
[203] CAL. CIV. CODE § 2934a(a)(1) (West 2011).
[204] CAL. CIV. CODE § 2934a(a)(1). If the substitution occurs after the recordation of the notice of default but prior to the recording of the notice of sale, the beneficiary or its authorized agent shall cause a copy of the substitution to be mailed, prior to, or concurrently with its recordation to the trustee then of record and to all persons to whom a copy of the notice of default would be required to be mailed by §2924b. An affidavit shall be attached to the substitution that notice has been given to those persons and in the manner required by this subdivision.
[205] CAL. CIV. CODE § 2934a(e).
[206] CAL. CIV. CODE § 2934.
[207] CAL. CIV. CODE §§ 2932.5, 2934 (West 2011); Miller & Starr, *supra* note 199, at § 10:39, text accompanying note 17. This provision applies when "a power to sell real property is given to a mortgagee, or *other encumbrancer*, in an instrument intended to secure the payment of money…" (emphasis added).

Court of Appeals recently held that this provision applies only to mortgages and not to deeds of trust.[208]

In California, the deed of trust follows the note.[209] Hence, an assignment or transfer of the note carries with it the deed of trust without the necessity of a written assignment.[210] An attempt to assign the deed of trust without the note has no effect.[211] The California Court of Appeals has squarely ruled that the deed of trust can only be foreclosed by the owner of the note.[212]

3. Effect of Defective Foreclosure

[208] Calvo v. HSBC Bank USA, N.A., 199 Cal.App.4th 118, 130 Cal.Rptr.3d 815 (Cal. Ct. App. 2011), *review denied* (Jan. 4, 2012). *Contra* Cruz v. Aurora Loan Serv. LLC (*In re* Cruz), 457 B.R.806 (Bankr. S.D. Cal. Aug. 11, 2011) (detailing the basis for the court's opinion that the state supreme court would likely rule that § 2932.5 applies equally to deeds of trust). This issue is pending before the California Court of Appeal of the First Appellate District. Haynes v. EMC Mortgage Corp., No. A 131023 (Cal. Ct. App. Appellant's Brief filed May 5, 2011).

[209] Coon v. Shry, 209 Cal. 612, 614-15, 289 P. 815 (1930).

[210] CAL. CIV. CODE § 2936 (addressing mortgages), § 1084; Cockerell v. Title Ins. & Trust Co., 42 Cal. 2d 284, 291, 267 P.2d 16, 20 (Cal. 1954) (applying this rule to deeds of trust); Miller & Starr, *supra* note 199, at § 10:38, text accompanying note 10.

[211] Domarad v. Fisher & Burke, Inc., 270 Cal. App.2d 543, 553-54, 76 Cal. Rptr. 529 (Cal. Ct. App. 1969).

[212] Santens v. Los Angeles Fin. Co., 91 Cal. App.2d 197, 201-02, 204 P.2d 619 (Cal. Ct. App. 1949) (resolving who had a superior interest in the property at issue—a judgment creditor who executed or the owner of the note and deed of trust and deciding in favor of the owner of the note and deed of trust because he acquired his rights before the judgment creditor). *See also Cockerell*, 42 Cal.2d at 291, 267 P.2d at 20(approving the holding in Santens that the deed of trust can only be foreclosed by the owner of the note). *Cf.* Fontenot v. Wells Fargo Bank, N.A., 198 Cal. App.4th 256 (Cal. Ct. App. 2011) (implicitly agreeing that the beneficiary must own the note to authorize the trustee to proceed with a foreclosure but ruling that MERS had the authority, as agent, to assign the note and the deed of trust). Federal courts sitting in California routinely require neither presentation nor possession of the note by the trustee or beneficiary prior to a foreclosure in cases not involving bankruptcy. *E.g.*, Sicairos v. NDEX West, L.L.C., No. 08cv2014-LAB, 2009 WL 385855 (S.D. Cal. Feb. 13, 2009) (relying on CAL. CIV. CODE § 2924 and Moeller v. Lien, 25 Cal. App. 4th 822, 830, 30 Cal. Rptr.2d 777 (1994) for the proposition that " '[t]he foreclosure process is commenced by the recording of a notice of default and election to sell by the trustee.'"); Wood v. Aegis Wholesale Corp., No. 1:09-CV-536-AWI-GSA, 2009 WL 1948844 (E.D. Cal. July 6, 2009) (relying on *Sicairos*, *Moeller*, and § 2924). A few dozen federal district court decisions cite to these case with little or no analysis. *E.g.*, Geren v. Deutsche Bank Nat., No. CV F 11-0938 LJO GSA, 2011 WL 3568913, *8 (E.D. Cal. Aug 12, 2011).

The state foreclosure scheme "provide[s] a comprehensive framework for the regulation of a non-judicial foreclosure sale pursuant to a power of sale contained in a deed of trust."[213]

> The purposes of this comprehensive scheme are threefold: (1) to provide the creditor/beneficiary with a quick, inexpensive and efficient remedy against a defaulting debtor/trustor; (2) to protect the debtor/trustor from wrongful loss of the property; and (3) to ensure that a properly conducted sale is final between the parties and conclusive as to a bona fide purchaser.[214]

Consistent with these principles, the foreclosing party must strictly comply with the statutory rules, otherwise the sale is invalid.[215] Nonetheless, once the trustee delivers the deed to the purchaser containing recitals of compliance with the requirements related to mailing, posting, and publication of the notice of default and the notice of sale, California law creates a presumption in favor of the purchaser.[216] This presumption is not absolute and can be overcome by the challenger.[217] Significantly, the presumption does not arise when the basis of the challenge relates to non-notice issues, such as, lack of authority to foreclose, agreements to postpone or cancel the sale while the parties are

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[213] *Moeller*, 25 Cal. App. 4th at 830, 30 Cal. Rptr. 2d at 782
[214] *Id.*
[215] *E.g.*, Bank of America v. La Jolla Group II, 129 Cal. App. 4th 706, 713-14, 28 Cal. Rptr. 3d 825, 830-31 (Cal. Ct. App. 2005)(holding the sale void where the beneficiary had no right to sell because the trustor was current on an agreement to cure); Miller v. Cote, 127 Cal. App. 3d 888, 894, 179 Cal. Rptr. 735 (Cal. Ct. App. 1982)(invalidating the sale).
[216] CAL. CIV. CODE § 2924(c).
[217] *Moeller*, 25 Cal. App. 4th at 831, 30 Cal. Rptr. 2d at 783.

negotiating a loan modification, or where the trustor is making payments under a repayment plan.[218]

The trustor-homeowner may file an action to cancel the deed and quiet title and/or allege wrongful foreclosure, seeking injunctive and declaratory relief.[219] Since this action is equitable in nature, the trustor-homeowner must offer to pay the secured debt, the amount delinquent and costs, or plead the conditions showing that tender is inequitable or the sale is void and not merely voidable.[220]

4. Effect of Defective Foreclosure on Bona Fide Purchasers

If the purchaser qualifies as a BFP, the recitals in the foreclosure deed constitute conclusive evidence of compliance.[221] This presumption does not arise until the trustee's

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[218] *E.g., La Jolla Group II*, 129 Cal. App. 4th at 713-14, 28 Cal. Rptr.3d at 830-31 (holding no presumption where the loan was current due to an agreement to cure; beneficiary had no right to foreclose under these circumstances; ruling that the § 2924(C) presumption arises only to notice requirements and not to every defect or inadequacy short of fraud); Melendez v. D & I Inv., Inc., 127 Cal. App. 4th 1238, 1255-56, 26 Cal. Rptr.3d 413, 428 (Cal. Ct. App. 2005) (ruling that the § 2924 presumption arises when the challenge to the sale relates to notice issues but not to other matters; finding, however, that repayment agreement was not orally modified and, consequently, there was no procedural irregularity in the sale process).

[219] *E.g., Melendez*, 127 Cal. App. 4th at 1247, 26 Cal. Rptr.3d at 421 (affirming the judgment that the plaintiffs could not prove their case rather than that the cause of action was not applicable). If the trustor files to enjoin the sale before the sale date, at least one court held that such a case is not appropriate. Gomes v. Countrywide Home Loans, Inc., 192 Cal. App. 4th 1149, 1157-58, 121 Cal. Rptr.3d 819, 825-27 (Cal. Ct. App. 2011), petition for cert. filed Aug. 11, 2011(affirming dismissal of cause of action filed before the sale based on the authority of the agent of the beneficiary to foreclose but suggesting that there may be a cause of action where the party recording the notice of default was not the beneficiary at that time, citing Ohlendorf v. American Home Mortgage, 2010 U.S. Dist. LEXIS 31098 (E.D. Cal. March 31, 2010)). The trustor-homeowner may sue for damages rather than a return of title. Munger v. Moore, 11 Cal. App.3d 1, 7, 89 Cal. Rptr. 323 (Cal. Ct. App. 1970).

[220] Miller & Starr, *supra* note 199, at § 10:212.

[221] CAL. CIV. CODE § 2924(C). In another section, the Legislature states that the lack of certain information related to the warning about losing the home, the need for prompt action, and the right to cure in the notice of default found in § 2924c((b)(1) shall not effect the validity of a sale in favor of a BFP. § 2924c(b)(2).

deed is delivered.[222] In order to achieve *bona fide* status, a purchaser must pay value in good faith and without actual or constructive notice of another's rights.[223] The element of constructive notice eliminates purchasers who fail or refuse to check the real property records and review the relevant recorded documents.[224] The conclusive presumption in this context is limited to irregularities related to notice, as with a non-BFP.[225] The California Supreme Court also recognizes fraud, rigging the bidding process, and other misbehavior as reasons to set aside a sale even if the trustee deed to a BFP is recorded. [226]

5. Ibanez Traction in California

Based upon this understanding of California law, the courts there may align themselves with *Ibanez* regarding one of two issues. First, if *Calvo* remains controlling precedent, deeds of trust automatically follow the note and need not be written (or recorded) in California, in contrast to Massachusetts. A beneficiary in California who possesses the right to enforce the note may enforce both instruments. If the California Supreme Court reverses the ruling embodied in *Calvo,* merely transferring the note will not be enough to grant the beneficiary or its assignee the right to foreclose unless the assignment is recorded. In this event, the law in California will produce a result akin to that in *Ibanez.*

[222] *Moeller*, 25 Cal. App. 4th at 832, 30 Cal. Rptr.2d at 783.
[223] *Melendez*, 127 Cal. App. 4th at 1251-52, 26 Cal. Rptr.3d at 424-25(rejecting argument that a purchaser cannot achieve BFP status if the purchaser is a speculator who frequents foreclosure sales and pays substantially less than the value of the property).
[224] *Id.* at 1252, 26 Cal. Rptr. 3d at 425(discussing the notice rationale and stating that the purchaser must make "reasonable inquiry").
[225] See cases and discussion in note 218, *supra*.
[226] Bank of Am. Nat. Trust & Sav. Ass'n v. Reidy, 15 Cal. 2d 243, 248, 101 P.2d 77 (1940) (involving alleged fraud in the bidding process).

The second issue addresses the consequences of failing to possess the right to foreclose. Both Massachusetts and California require strict compliance with the power of sale clause and with additional requirements set forth in law. The court in *Ibanez* voided the sale. In California, certain defects also will void a sale even as to a BFP.[227] For these reasons, title defects could be significant in California where the foreclosing party did not possess the right to enforce the note.[228]

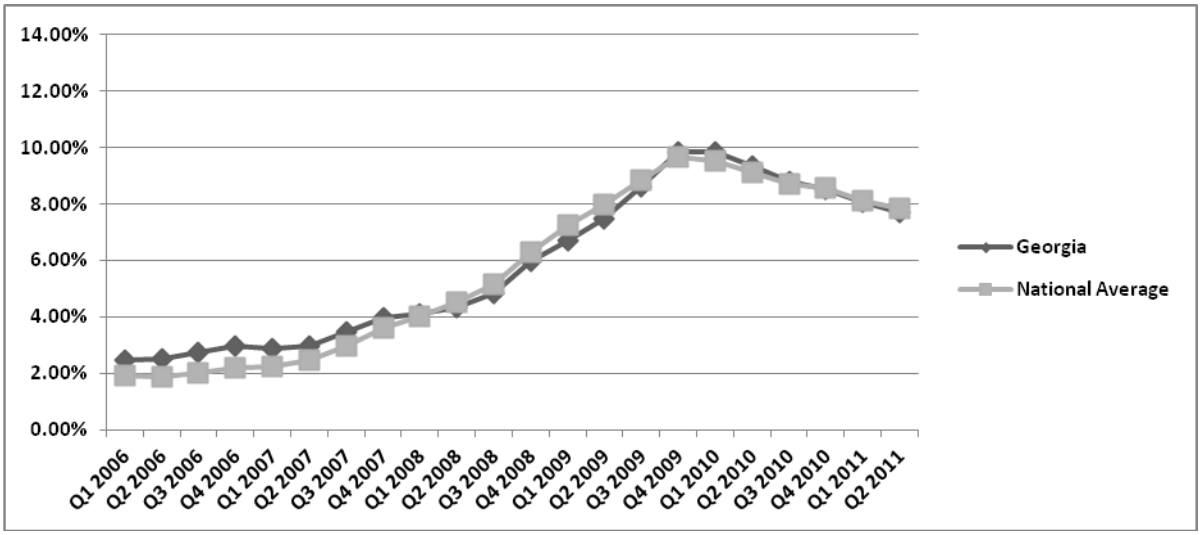
C. Georgia

1. Introduction

Georgia's seriously delinquent foreclosure rate essentially has tracked the national average since 2005, as shown in Figure 4. As of the second quarter of 2011, 7.70% or 124,125 loans were seriously delinquent in Georgia.[229] Among the non-judicial foreclosure states, it ranked fifth.

FIGURE 4
PERCENTAGE OF MORTGAGE LOANS SERIOUSLY DELINQUENT
GEORGIA vs. NATIONAL
Q1 2006 – Q2 2011

[227] *La Jolla Group II*, 129 Cal. App. 4th at 713-14, 28 Cal. Rptr.3d at 830-31 (voiding a sale to a BFP where the beneficiary had no right to sell).
[228] As a practical matter, challenges to title of property held by purchasers are less likely because loan notes are not recorded. If *Calvo* stands, assignments of deeds of trust will not be recorded either, making it difficult for homeowners to detect authority to foreclose defects before or after the sale.
[229] Mortgage Bankers Association, National Delinquency SurveyQ2 2011 at 4.



Source: Mortgage Bankers Association National Delinquency Survey

In Georgia, the most commonly used instrument to secure a real estate loan is the security deed.[230] Like the Massachusetts mortgage instrument, the security deed conveys title of the real property to secure the debt and requires the creditor to reconvey the property upon payment of the debt.[231] The uniform security deed used in Georgia by Fannie Mae and Freddie Mac labels the homeowner-grantor as the "borrower." The grantee is referred to as the "lender."[232]

2. Authority to Foreclose

[230] Frank S. Alexander, GEORGIA REAL ESTATE FINANCE AND FORECLOSURE LAW § 8:1 (2011-2012 ed.). Though Georgia has a legal history (pre-Civil War) and statutory framework that treated mortgages as liens, the dominant statutory framework and practice for almost 150 years has been that of a title theory state through the use of the security deed. *Id.* at § 1:5.

[231] GA. CODE ANN. § 44-14-60 (West 2011) (permitting the use of "security deeds" and stating: "[s]uch conveyance shall be held by the courts to be an absolute conveyance, with the right reserved by the grantor to have the property reconveyed to him upon the payment of the debt or debts intended to be secured agreeably to the terms of the contract, and shall not be held to be a mortgage). For a discussion of the historical reasons that spawned the birth of security deeds, see Frank S. Alexander, *supra* note 230, at § 1:5.

[232] GEORGIA--Single Family--Fannie Mae/Freddie Mac UNIFORM INSTRUMENT Form 3011, 1/01, *available at* http://www.freddiemac.com/uniform/pdf/3011.pdf (last visited 8/31/11).

Unless the instrument creating the power of sale specifies otherwise, only the grantee in a security deed or its assignee or successor may exercise the power of sale.[233] The security deed or the final assignment must be recorded before the foreclosure sale.[234] Transfers of security deeds must be in writing and may be endorsed on the original deed or by a separate document and shall be witnessed as required by deeds.[235]

Where a debt evidenced in a note is secured by a security deed, the secured creditor may sue on the debt or exercise the power of sale upon a default.[236] In this latter situation, Georgia's highest court unequivocally held that the holder of the security deed must establish that it also holds the note in order to foreclose.[237] On the issue of whether the security deed follows the note, Professor Alexander states in his treatise: "Since a security instrument is of little value without evidence of the obligation which it secures, security deeds are usually, but not invariably, transferred and assigned in tandem with the

[233] GA. CODE ANN. § 23-2-114 (West 2011). A personal representative, heir, legatee, or devisee of the grantee may also exercise the power of sale.

[234] GA. CODE ANN. § 44-14-162(b) (West 2011). The Georgia Legislature added this subsection in 2008 to ensure that a foreclosure be conducted by the current owner or holder of the mortgage, as reflected by public records. 2008 Georgia Laws Act 576 (S.B. 531). Stubbs v. Bank of America, __F. Supp. 2d __, 2012 WL 516972 (N.D. Ga. Feb. 16, 2012) (discussing the history of the recordation mandate and ruling that the homeowner's complaint, removed to federal court, adequately pled facts showing that the servicer inaccurately identified itself as the secured creditor in the sale notice and an assignment to actual secured creditor, Fannie Mae, was not recorded before the sale); Alexander, *supra* note 230, at § 5:3.

[235] GA. CODE ANN. § 44-14-64 (West 2011).

[236] Bowen v. Tucker Fed. Sav. & Loan Ass'n, 210 Ga. App. 764, 765, 438 S.E.2d 121, 122 (Ga. Ct. App. 1993).

[237] Weems v. Coker , 70 Ga. 746 (1883). *See also* Morgan v. Ocwen Loan Serv., LLC, 795 F. Supp. 2d 1370, 1376 (N.D. Ga. 2011) (relying upon *Weems v. Coker* to deny dismissal of claims for injunctive relief and wrongful foreclosure, among others). *But see* Final Report and Recommendation, Smith v. Saxon Mortgage, No. 1:09-CV-3375-WCO-JFK (N.D. Ga. Feb. 2, 2011), *aff'd per curiam*, 2011 WL 5375063 (11th Cir. Nov. 8, 2011) (unpublished) (relying upon GA. CODE ANN. § 44-14-64(b) (West 2011) and ruling that a transfer of the security deed also transfers the note); Jackman v. Hasty, No. 1:10-CV-2485-RWS, 2011 WL 854878 *4 (N.D. Ga. March 8, 2011) (relying on the fact that the homeowner provided no Georgia authority on this issue; holding that a foreclosure may proceed even if the holder of the security deed is unable to demonstrate possession of the note). See also the discussion in Alexander, *supra* note 230, at § 3:7.

transfer of the promissory notes which are secured."[238] It appears that Georgia courts have not expressly adopted the rule that the security instrument inevitably follows the note, likely because Georgia is a title theory state and assignments of security deed must be in writing and, as of 2008, recorded before the foreclosure sale.

3. Effect of Defective Foreclosure

The power of sale provision in a security deed "shall be strictly construed and…fairly exercised."[239] Where a foreclosing grantee or assignee under the security deed fails to comply with the statutory duty to provide notice of sale to the grantor-homeowner, the grantor-homeowner may either seek to set aside the foreclosure or sue for damages for the tort of wrongful foreclosure.[240] A claim of wrongful exercise of power of sale can arise when the grantee has no legal right to foreclose.[241] For example, if the purported assignment of a security deed is not a valid assignment, the purported assignee has no right to foreclose and the sale is null and void.[242] Similarly, according to

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[238] Alexander, *supra* note 230, at § 5:3. *See also id.* at § 3:7 (discussing the relevance of the RESTATEMENT (THIRD) OF PROPERTY (MORTGAGES) § 5.4 (1997) on the issue of the note and security deed travelling together but citing no Georgia cases that have adopted the Restatement).

[239] GA. CODE ANN. § 23-2-114.

[240] Moore v. Bank of Fitzgerald, 266 Ga. 190, 465 S.E.2d 445 (1996); Calhoun First Nat. Bank v. Dickens, 264 Ga. 285, 286, 443 S.E.2d 837, 839 (1994); Roylston v. Bank of America, *N.A.*, 290 Ga. App. 556, 660 S.E.2d 412 (2008).

[241] Atlanta Dwellings, Inc. v. Wright**,** 272 Ga. 231, 232, 527 S.E.2d 854, 856 (2000); Brown v. Freedman, 222 Ga. App. 213, 215, 474 S.E.2d 73, 75 (1996)(citing to Sears Mtg. Corp. v. Leeds Bldg. Products, 219 Ga. App. 349, 464 S.E.2d 907 (1995) for this general statement). Note, however, that the Georgia Supreme Court reversed the *Sears* decision on other grounds, namely, that the security deed in question gave notice to the purchaser and hence the holder of that security deed could foreclose. Leeds Bldg. Products, Inc. v. Sears Mortgage Corp., 267 Ga. 300, 477 S.E.2d 565 (1996)).

[242] Cummings v. Anderson *(In re* Cummings*)*, 173 B.R. 959, 962 (Bankr. N.D. Ga. 1994), *aff'd*, 112 F.3d 1172 (11th Cir. 1997) (table) (holding that the person conducting the sale obtained its assignment of the security deed after its assignor gave notice to the grantor-homeowner and advertised the sale and finding that the purported assignment contained merely an intent to assign rather than language of conveyance). *See also* Morgan, 795 F.Supp. 2d at 1377 (denying motion to dismiss wrongful foreclosure claim and a request for an injunction to stop the sale where the secured creditor was not the holder of the note).

a federal court, a homeowner may request an injunction to stop a foreclosure sale where the assignee of the security deed does not also hold the promissory note.[243]

In specific contexts, some cases hold that the sale will be treated as voidable, rather than void. For example, the foreclosure is voidable where the party conducting the sale purchases the property in contravention of the power of sale.[244] On the other hand, a foreclosure is void where the underlying debt obligation is tainted by usury.[245]

In an equitable action to cancel a security deed, the one who seeks equity must do equity.[246] Applying this principle, the Georgia Supreme Court has required the homeowner to pay off the promissory note.[247] Laches may bar an equitable action to set aside the sale.[248]

4. Effect of Defective Foreclosure on Bona Fide Purchasers

The general rule in an equitable action to void a foreclosure is that: "A bona fide purchaser for value without notice of an equity will not be interfered with by equity."[249]

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[243] Morgan, 795 F.Supp. 2d at 1376 (relying on Weems v. Coker, 70 Ga. 746 (1883)).

[244] *See, e.g.*, Fraser v. Rummele, 195 Ga. 839, 25 S.E.2d 662 (1943) (ruling that the sale deed was merely voidable and should be treated as valid until set aside in a proper proceeding). In this situation, the sale will be treated as a valid until set aside in a proper proceeding. Burgess v. Simmons, 207 Ga. 291, 61 S.E.2d 410 (Ga. 1950).

[245] Clyde v. Liberty Loan Corp., 249 Ga. 78, 287 S.E.2d 551 (1982) (voiding the foreclosure deed issued to the lender who purchased at the its own sale).

[246] Taylor, Bean & Whitaker Mortgage Corp. v. Brown, 276 Ga. 848, 583 S.E.2d 844 (Ga. 2003) (relying on GA. CODE ANN. § 23-1-10 (West 2011)).

[247] *Taylor* at 276 Ga. at 850, 583 S.E.2d at 846. But where the homeowner is seeking to void a sale that occurred due to the homeowner's default in mortgage loan payments, a court should require the homeowner to tender only the actual amount past due. *See* Alexander, *supra* note 230, at § 8:10(c).

[248] Lamas v. Citizens and Southern Nat. Bank, 241 Ga. 349, 350, 245 S.E.2d 301, 302 (1978).

[249] GA. CODE ANN. § 23-1-20 (West 2011). *See also* GA. CODE ANN. § 23-1-19 (West 2011) "(If one with notice sells to one without notice, the latter shall be protected. If one without notice sells to one with notice, the latter shall be protected, as otherwise a bona fide purchaser might be deprived of selling his property for full value"); Mathis v. Blanks, 212 Ga. 226, 91 S.E.2d 509 (1956) (applying a predecessor statute); Farris v. Nationsbanc Mortg. Corp., 268 Ga. 769, 770, 493 S.E.2d 143, 145 (1997) (affirming this principle).

Nonetheless, the Georgia Supreme Court has held that a BFP may not prevail when: 1) the grantee fraudulently obtains the deed being held by an escrow agent and conveys it to a BFP;[250] 2) the grantee's deed is forged and vests no title in the grantee or those holding under the grantee even though the purchaser paid value and had no notice the forgery;[251] or, 3) the purchaser at a foreclosure sale had actual or constructive notice of a defect.[252]

No Georgia appellate court has squarely addressed the rights of a BFP at a foreclosure sale where the foreclosing entity did not possess the authority to foreclose. Likewise, no Georgia court has considered whether the mortgagor can undo such a sale. Georgia does recognize the tort of wrongful foreclosure, a claim that provides for damages but not equitable relief.[253]

5. Ibanez Traction in Georgia

Based upon this understanding of Georgia law, the courts there may align themselves with *Ibanez* regarding three issues. First, the foreclosing party must be acting on behalf of the original grantee or an assignee that derives its rights from a written assignment before the sale. Georgia is stricter than Massachusetts because it also mandates recordation of the assignment prior to the sale. Moreover, both states are title

[250] Brown v. Christian, 276 Ga. 203, 576 S.E.2d 894 (Ga. 2003) (holding that the purchaser who filed an ejectment action to oust the grantor cannot prevail because the deed subject to the security deed was void).
[251] Aurora Loan Services, LLC. v. Veatch, 288 Ga. 808, 710 S.E.2d 744 (Ga. 2011) (ruling that whether the bona fide purchaser had notice of the forgery is irrelevant because the security deed held by the lender or any assignee was a nullity).
[252] MPP Inv., Inc. v. Cherokee Bank, 288 Ga. 558, 563-564, 707S.E.2d 485, 490 (2011) (finding the purchaser had actual and constructive notice of challenges to title; also ruling that failure to send notice of right to cure pursuant to the power of sale renders the foreclosure proceeding "invalid").
[253] Heritage Creek Dev. Corp. v. Colonial Bank, 268 Ga. App 369, 371, 601 S.E.2d 842, 844 (Ga. Ct. App. 2004).

theory states. In Georgia, this should mean that the security deed does not automatically follow the note.

Second, both Massachusetts and Georgia require strict compliance with the power of sale clause and with additional requirements set forth in law. Third, the *Ibanez* court reversed the sale. In Georgia, certain defects will void a sale even to a BFP. The serious impediment of lack of authority to proceed ought to rank among such defects. The potential for challenges to title of property held by purchasers and BFPs in Georgia could be significant if the foreclosing party does not possess the right to enforce the note and security deed at the relevant time.

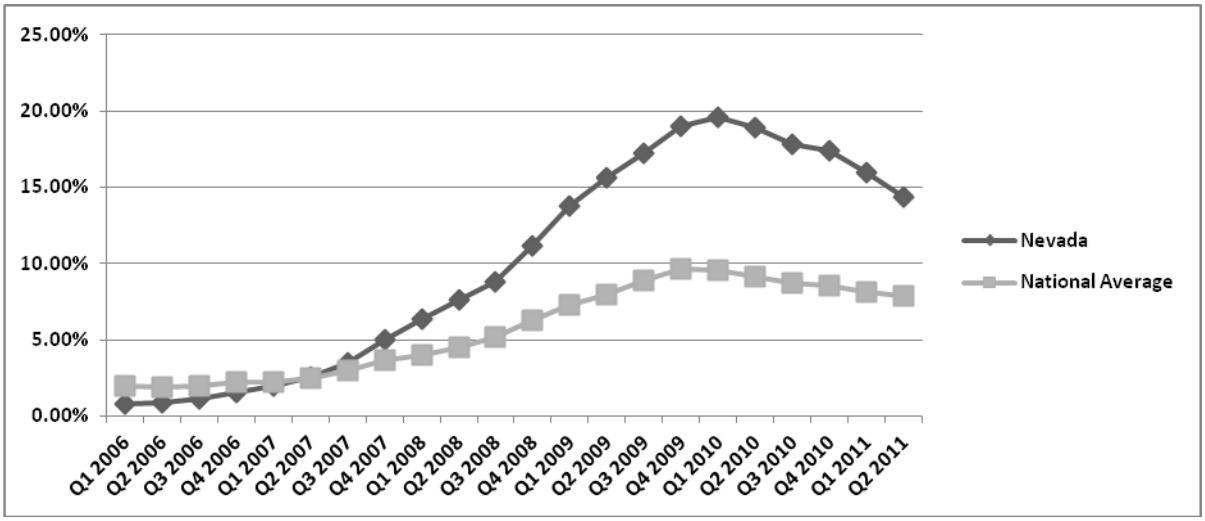
D. Nevada

1. Introduction

Nevada's seriously delinquent foreclosure rate has dramatically exceeded the national average since late 2006, as illustrated in Figure 5. As of the second quarter of 2011, 14.34% or 72,099 loans were seriously delinquent in Nevada.[254] Nevada's rate (14.34%) is second only to Florida's rate (18.68%) among *all* states. Nevada randed first among the non-judicial foreclosure states.

FIGURE 5
PERCENTAGE OF MORTGAGE LOANS SERIOUSLY DELINQUENT
NEVADA vs. NATIONAL
Q1 2006 – Q2 2011

[254] Mortgage Bankers Association, National Delinquency SurveyQ2 2011 at 4.



Source: Mortgage Bankers Association National Delinquency Survey

Nevada allows the use of mortgages or deeds of trust. However, lenders typically utilize deeds of trust because they permit non-judicial foreclosure.[255] The parties to the contract, the beneficiary (lender), the trustor (homeowner-borrower), and the trustee, play the same roles in Nevada as they do in Arizona and California. Nevada is a lien theory state.[256]

2. Authority to Foreclose

Under a deed of trust, the beneficiary, successor in interest of the beneficiary, or the trustee may foreclose.[257] An assignment of the deed of trust must be in writing.[258] The assignment need not be recorded although recordation operates "as constructive

[255] NEV. REV. STAT. § 107.080 (2010); Mary J. Drury, *et al.*, Foreclosure in Nevada: The Basics, 17-APR NEV. LAW 6 (2009). In contrast, real property secured by mortgages must be foreclosed upon judicially. NEV. REV. STAT. § 40.430 (2010).
[256] NEV. REV. STAT. § 40.050 (2010) (codifying this principle in relation to mortgages); NEV. REV. STAT. § 106.240 (applying this principal in the context of the extinguishment of liens created by deeds of trust).
[257] NEV. REV. STAT. § 107.080(2)(c),(d) (2010).
[258] NEV. REV. STAT. § 111.205(1) (2010).

notice of the contents thereof to all persons."[259] If the deed of trust so provides, the beneficiary may substitute the trustee but there is no statute that governs this process.[260]

In two recent decisions, the Nevada Supreme Court tackled the issue of authority to foreclose.[261] In the published *en banc* opinion, the court held that "[a]bsent a proper [written] assignment of a deed of trust, Wells Fargo lacks standing to puruse foreclose proceedings…"[262] Further, the court discussed the applicability of Article 3 of the Uniform Commercial Code to mortgage notes and described the methods to transfer them. It concluded that the assignee of the beneficiary must be entitled to enforce the loan note.[263]

In second opinion, the homeowners appealed the dismissal of their complaint in which one count alleged that the purported assignee of the beneficiary lacked the authority to foreclose on the note.[264] In the context of reversing the dismissal, the court noted that possessing only the deed of trust or an assignment does not create any right to enforce the underlying note. "To enforce a debt secured by a deed of trust and mortgage note, a person must be entitled to enforce the note pursuant to Article 3 of the Uniform

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[259] NEV. REV. STAT. §§ 106.210(1) (2010); 107.010.

[260] Foust v. Wells Fargo, N.A., No. 55520, 2011 WL 3298915 *2, n. 5 (Nev. July 29, 2011) (unpublished order)(observing that there is no state statute governing the substitution of the trustee and applying a provision in the deed of trust).

[261] *Foust*, 2011 WL 3298915; Leyva v. Nat'l Default Serv. Corp., __Nev.__, 255 P.3d 1275 (Nev. 2011) (en banc)

[262] *Leyva*, 255 P.3d at 1279. In this case, the homeowner appealed the denial of the homeowner's petition to sanction the purported assignee of the beneficiary due to its failure to produce required documents to s mediator, *i.e.*, assignments of the deed of trust and note. The mediation rules require their production "to ensure that whoever is foreclosing 'actually owns the note' and has authority to foreclose." *Id.*

[263] *Id.* at 1281. The precise issue was whether the party appearing at a mediation following the initiation of non-judicial foreclosure had demonstrated authority to mediate the note. *Id.* Nonetheless, the most reasonable inference from the court's ruling is that the beneficiary or its assignee must possess the authority to foreclose via a written assignment and via a properly transferred loan note.

[264] *Foust*, 2011 WL 3298915 *1. The plaintiffs filed the complaint following the issuance of the notice of default but before the sale.

Commercial Code."[265] While this latter opinion does not constitute precedent and cannot be cited as legal authority in Nevada, it provides insight into the likely ruling of the court on the issue of authority to foreclose in a subsequent published opinion.[266]

There appears to be no Nevada state court opinion holding that the deed of trust automatically follows the note, as in California.[267] Nonetheless, the state supreme court implied the opposite when it ruled that an assignment of a deed of trust must be in writing to comply with the state's statute of frauds.[268]

3. Effect of Defective Foreclosure

A court shall declare a sale void if: 1) the trustee or other person authorized to make the sale did not "substantially comply" with statutory provisions governing notice, recordation, and mediation; and 2) an action is commenced within ninety days after the date of the sale and a *lis pendens* is noted within thirty days after commencement of the case.[269] The Nevada state courts have not fleshed out what "substantially complies"

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[265] *Id.* at *2 (relying on the Restatement (Third) of Property: Mortgages § 5.4(c)(1997)).

[266] NEV. SUP. CT. RULE 123 (West 2011). Before *Leyva* was decided, some federal court opinions held, without discussion or citation to Nevada court opinions, that the lender-beneficiary, the servicer, and other parties need not produce the original note in order to foreclose. Rather, they simply cite to NEV. REV. STAT. § 107.080 (2010). *E.g.*, Urbina v. Homeview Lending Inc., 681 F. Supp. 2d 1254, 1257-1258 (D. Nev. 2009).

[267] In a recent decision, the Nevada Supreme Court refrained from expressing an opinion "concerning the effect on the mortgage of the note having been transferred or the reverse." *Leyva*, 255 P.3d at 1281, n. 7. Prior to the release of the *Leyva* and *Foust* decisions, at least one federal district judge noted that the Nevada court have not adopted the "mortgage-follows-the-note" theory. See Vega v. CTX Mortg. Co., LLC., 761 F.Supp.2d 1095, 1097 (D. Nev. 2011).

[268] *Leyva*, 255 P.3d at 1279 (applying NEV. REV. STAT. § 111.205(1)).

[269] NEV. REV. STAT. 107.080(5). The period to file is extended when proper notice is not provided to the grantor. NEV. REV. STAT. § 107.080(6). The Nevada Legislature amended this provision, effective October 1, 2011, to require that a court declare the sale void, if the plaintiff can prove the other statutory elements, *i.e.*, compliance was not substantial. 2011 Nevada Laws Ch. 81 (A.B. 284). In addition to the remedy of voiding the sale, the Legislature added a mandatory damage award for violations of subsections 2, 3, or 4 of § 107.080. NEV. REV. STAT. §107.080(7), effective October 1, 2011. Finally, the Legislature beefed up the criminal and civil consequences for the filing of a forged or groundless document or one which contains a material misstatement or false claim, or is otherwise invalid. NEV. REV. STAT. § 205.395, effective October

means in the context of voiding a foreclosure sale, at least not in published opinions. Where the issue is authority to foreclose, either the foreclosing party possesses that right or it does not. Arguably, then, "substantial compliance" in this context means fully possessing this right. In addition, the Nevada courts have not addressed whether a claim of lack of authority to foreclose is restricted to an action under section 107.080(5) since it does not involve a violation of the enumerated statutes.

A trustor-mortgagor may sue for the tort of wrongful foreclosure for damages.[270] In such a case, the Supreme Court required the trustor-mortgagor to show that she had not breached any condition under the deed of trust that could trigger a default and authorize the foreclosure in *Collins v. Union Fed. Sav. & Loan Ass'n*.[271] Although the rule seems harsh, the court created some latitude on the issue of whether the trustor-mortgagor's claims against the foreclosing party can offset an alleged delinquency. Nonetheless, federal district courts apply *Collins* literally and often without discussion.[272] Lower state court opinions interpreting and applying *Collins* are non-existent. The most likely reason is that trustor-mortgagor cases filed in state court are often removed to federal court.[273]

1, 2011. *See also* Shields v. First Magnus Fin. Corp., No. 3:10-cv-00641-RCJ-RAM, 2011 WL 1304734 *1 (D. Nev. Apr. 1, 2011) (refusing to dismiss cause of action under this statute in a case removed to federal court but dismissing the claims for declaratory relief and quiet tile as redundant).

[270] *See, e.g.*, Schrantz v. HSBC Bank N.A., No. 2:11-CV-699-RCJ-PAL, 2011WL 26327771 (D. Nev. July 5, 2011)(dismissing the plaintiff's wrongful foreclosure case because the homeowner was in default but refusing to dismiss her claim based on a defective foreclosure under Nev. Rev. Stat. § 107.080); DeMarco v.BAC Home Loans Servicing LP, No. 2:09-CV-02333-KJD-GWF, 2011 WL 2462209 (D. Nev. June 17, 2011) (distinguishing between the tort of wrongful foreclosure and an action under § 107.080) .

[271] Collins v. Union Fed. Sav. & Loan Ass'n, 99 Nev. 284, 304, 662 P.2d 610, 623 (Nev. 1983) (reversing dismissal and providing the plaintiff an opportunity to prove that he was not in default when the power of sale was exercised by the defendants because they charged interest in excess of the contractual rate).

[272] *E.g.*, Thomas v. Wachovia Mortgage, F.S.B., No. 2:10-cv-01819-ECR-GWF, 2011 WL 3159169 *4 (D. Nev. July 25, 2011). *But see* Pimentel v. Countrywide Home Loans, Inc., No. 2:10-cv-02125-KJD-LRL, 2011 WL 2619093, *2 (D. Nev. July 1, 2011) (suggesting that *Collins* allows a case to proceed if there is a dispute of fact about whether nonpayment was appropriate).

[273] Email from Geoffrey Giles, Attorney in Nevada (Nov. 1, 2011, 03:16 P.M. EST), on file with author.

4. Effect of Defective Foreclosure on Bona Fide Purchasers

"Every sale made under the provisions of [§ 107.080] and other sections of this chapter vests in the purchaser the title of grantor and any successors in interest without equity or the right of redemption."[274] Unlike other non-judicial foreclosure states, Nevada does not expressly create an absolute rule in favor of BFPs. As discussed immediately above, the Legislature granted the trustor-mortgagor the opportunity to challenge a completed sale. On the other, the Legislature opened the courthouse door for only a short period of time, thereby creating certainty for purchasers upon the expiration of a mere ninety days following the sale.[275]

5. Nevada's Pre-Sale Mediation Program

Nevada's Legislature created a Foreclosure Mediation Program for owner-occupied residential properties that are subject to foreclosure notices filed on or after July 1, 2009. "Its purpose is to address the foreclosure crisis head-on with the hope of keeping Nevada families in their homes."[276]

Upon notice that a homeowner has elected to participate in the program, lenders must participate in good faith and provide certain documentation to the mediator and

[274] NEV. REV. STAT. § 107.080(5).
[275] *Id.*; NEV. REV. STAT. § 107.080(6).
[276] *See* The Nevada Judiciary Foreclosure Mediation website: http://www.nevadajudiciary.us/index.php/about-foreclosure-mediation (last visited on August 3, 2011).

homeowner, including: the original or certified copy of the deed of trust; the mortgage note; and, each assignment of the deed of trust and mortgage note.[277]

The data released by the Nevada Judiciary shows that when the homeowner elects mediation, the program often has prevented foreclosures and kept homeowners in their homes, at least for some period of time. From September 14, 2009 through June 3, 2010 (approximately the first nine months of the program's operation), 4,212 mediations were held and of these, 3,767 did not proceed to foreclosure (89% of cases) because the mediator did not issue a certification for foreclosure. Of the 3,767 cases with no foreclosure certification, the parties reached an agreement in 61%; in the remainder, a certification for foreclosure was not issued because of non-compliance with rules or the case was withdrawn.[278] The data does not reflect whether the homes stay out of foreclosure temporarily or permanently and how often the foreclosures are restarted.

Nonetheless, the program has the potential of motivating all lenders and their assignees to get their documents in order before proceeding with residential foreclosures, regardless of whether the homeowner requests mediation. The possibility of having to document the authority to foreclose in a mediation process should induce lenders and assignees to put the time into meeting these requirements. Those that cannot legitimately present these documents may be less likely to foreclose. This is especially true after the

[277] Nev. Sup. Ct. Mediation R. 11, *available at:* http://www.nevadajudiciary.us/images/foreclosure/adkt435_amendedrules.pdf (last visited Feb. 19, 2012) (listing the documentation requirements); Pasillas v HSBC Bank USA, 255 P.3d 1281, 1284 (Nev. 2011) (stating that the parties must mediate in good faith).

[278] National Consumer Law Center, Recent Developments in Foreclosure Mediation at 24 (Jan. 2011), *available at* http://www.nclc.org/images/pdf/foreclosure_mortgage/mediation/rpt-mediation-2011.pdf (last visited on Aug. 3, 2011). RealtyTrac reports that 37,655 homes were sold through the foreclosure process in 2010, http://www.realtytrac.com/content/foreclosure-market-report/2010-year-end-and-q4-foreclosure-sales-report-6402 (last visited on Aug. 4, 2011).

Nevada Supreme Court's recent decision in which it required strict compliance with the mediation production of documents rule.[279]

6. Ibanez Traction in Nevada

Based upon this understanding of Nevada law, the courts there may align themselves with *Ibanez* on two issues. The first is whether the foreclosing party must be the original beneficiary or an assignee via a written assignment before the sale. Like Massachusetts, Nevada requires the assignment of the deed of trust to be written. Moreover, the Nevada Supreme Court has held that the assignee of the beneficiary lacks authority to foreclose absent a proper assignment of the deed of trust, without expressly relying upon *Ibanez*.[280] The fact that Nevada is a lien theory state and Massachusetts is a title theory state appears irrelevant.

The second is whether the failure to possess the authority to foreclose renders the sale void. These states differ on the issue of the type of compliance necessary to void a sale: Massachusetts requires strict compliance; whereas, Nevada requires only substantial compliance.[281] Nonetheless, lacking the right to foreclose should void the sale, in light of the *Leyva* decision.

Moreover, by statute, Nevada courts must void sales if a challenge relating to notice, recordation, and mediation requirements is filed within ninety days following the

[279] *Leyva*, 255 P.3d at 1278-79. A reviewing court may approve or reject mediator certifications permitting or denying the right to proceed to foreclosure and remand for consideration of sanctions for non-compliance. *E.g.*, *Pasillas*, 255 P.3d at 1286-87; *Leyva*, 255 P.3d at 1281.
[280] *Leyva*, 255 P.3d at 1279.
[281] *Ibanez*, 458 Mass 646-647, 941 N.E.2d 49-50. Interestingly, the Nevada Supreme Court recently applied a "strict compliance" standard to the mandates of the pre-foreclosure mediation program. *Leyva*, 255 P.3d 1275 (rejecting a "substantial compliance" standard).

sale. As previously noted, it is not clear whether this limited right applies to contests on the ground of lack of authority to foreclose or whether this issue can be raised at any time, subject to laches or another statute of limitations.

Finally, Nevada's mediation program should reduce the number of foreclosures that proceed where the foreclosing entity does not possess the requisite documentation evidencing its right to foreclose. Concerns about defective title of property in the hands of purchasers will, likewise, abate.

VIII. POTENTIAL CONSEQUENCES AND MORAL HAZARDS

A. Positive Consequences

The *Ibanez* and *Bevilacqua* rulings should trigger positive results for the legal and property title systems and homeowners for several reasons. First, the decisions foster diligent compliance with foreclosure requirements in states without readily available judicial oversight.[282] Typically, non-judicial foreclosure is a quicker, easier, and less costly method to repossess a borrower's home than accomplishing the same result through the judicial procedure.[283] In effect, non-judicial foreclosure is a form of self-help repossession of one of the most important assets a person can own--her home. The bottom line is that the borrower who mortgages her property can lose it without easy access to the courts.[284]

[282] *See* discussion in section VII, *supra*, related to the strict compliance standards applicable in Arizona, California, Georgia, and Massachusetts.
[283] See discussion in Section V, *supra.*
[284] See text accompanying notes 130-131.

Contrast this situation with that of tenants and of borrowers who owe unsecured debt. In the first scenario, the landlord normally must file a lawsuit in the appropriate court to terminate the tenancy based upon non-payment of the rent and seek an order of eviction.[285] Essentially, the landlord must prove its right to possession of the premises.[286] Likewise, in the second situation, the unsecured creditor must pursue collection through the judicial system if its borrower defaults on the debt and fails to repay the arrears.[287] Like the landlord, the creditor must prove its right to collect on the debt. Only after the court enters a judgment against the borrower may the creditor execute on the judgment by obtaining writs to attach the borrower's property to satisfy the judgment.[288]

The integrity of our legal system depends upon all parties following the rules. This interest is vital to all.[289] The non-judicial foreclosure rules favor the foreclosing party but that party should possess the authority to sell the home by following the state law governing the ownership and transfer of the notes and mortgages—just like landlords and unsecured creditors must prove their right to evict or to a money judgment. To

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[285] ROBERT S. SCHOSKINSKI, AMERICAN LAW OF LANDLORD AND TENANT §§ 6.5, at 400; 6:11, at 410-412 (Lawyer's Co-operative 1980 & West Supp. 2011) (noting that judicial eviction is required in a growing majority of states).

[286] *Id.* § 6:17, at 421.

[287] ELIZABETH WARREN & JAY LAWRENCE WESTERBROOK, THE LAW OF DEBTORS AND CREDITORS 33-34 (2009).

[288] *Id. See, e.g.*, Grupo Mexicano de Desarrollo v. Alliance Bond Fund, Inc., 527 U.S. 308 (1999) (reversing the issuance of an injunction prohibiting the debtor from transferring its assets before the creditor obtained a money judgment).

[289] In discussing the lawsuit that Delaware recently filed against MERS, Attorney General Biden stated: "A man or woman's home is not just his or her largest investment, it's their castle. Rules matter. A homeowner has the obligation to pay the mortgage on time, and lenders must follow the rules if they are seeking to take away someone's house through foreclosure." Press Release, Delaware Attorney General, Biden: Private National Mortgage Registry Violates Delaware Law (Oct. 27, 2011), http://attorneygeneral.delaware.gov/media/releases/2011/law10-27.pdf. In the context of discussing Nevada's lawsuit against Lender Processing Services for, *inter alia*, document execution fraud, the Attorney General, Catherine Mastro, stated: "If you are going to allow banks to skate around the integrity of the system,…what kind of justice is that?" Gretchen Morgenson, *From East and West, Foreclosure Horror Stories*, N.Y. TIMES, Jan. 8, 2012, at 1 Business. Moreover, as one federal judge recently put it: "It is clear…that [the homeowner] is substantially behind in her payments and appears unable to remediate her default. This, however, does not render her an outlaw, subject to having her home seized by whatever bank or loan servicer may first lay claim to it. She still has legal rights." *Culhane*, 2011 WL 5925525 *5.

permit otherwise opens the door to the abuses chronicled in the opening sections of this article.[290]

Second, the Massachusetts rulings support the public policy that only the party having the right to foreclose may do so and, thereby, reduce the possibility that homeowners will lose their homes to the wrong party. Foreclosing parties and their agents should carefully verify ownership of the notes and mortgages before commencing foreclosures or risk the consequences.[291] At least two outcomes should occur: 1) the integrity of the legal and property title recordation systems will be enhanced; and 2) the extra time it takes to verify will afford some homeowners the opportunity to find another solution, such as a loan modification or short sale.[292]

Finally, *Ibanez* and *Bevilacqua* open the door to homeowners to legitimately challenge defective sales and defend against the foreclosure, eviction, and the underlying debt, an opportunity that some homeowners may pursue.

B. Resulting Headaches

There are several challenges facing trustee banks and foreclosure sale purchasers due to the sloppy or fraudulent paperwork occurring in the securitization context. First,

[290] *See also Grupo Mexicano de Desarrollo*, 527 U.S. at 330 (raising the issue of abuse in the context of refusing to freeze assets in the hands of the debtor before first obtaining a judgment and *quoting* Wait, Fraudulent Conveyances § 73, at 110-111). *See also* Debra Pogrund Start, *Facing the Facts: An Empirical Study of the Fairness and Efficiency of Foreclosures and a Proposal for Reform,* 30 U. MICH. J. L. REFORM 639, 685 (1997) (commenting that the potential for abuse in non-judicial foreclosures is "particularly high" due to the speed at which they occur and the lack of court oversight).

[291] *See* GAO Report, *supra* note 44, at 38 (noting that the completed foreclosure rate has slowed due to foreclosure documentation missteps but stating that many foreclosures will be completed eventually); Paul McMorrow, *A new act in foreclosure circus*, BOSTON GLOBE, Jan. 14, 2011, 13, *available at* 2011 WLNR 822042.

[292] GAO Report, *supra* note 44, at 41 (noting that the additional time may also allow homeowners to obtain employment and to cure their arrearages but discussing that fees and interest continue to accrue, making it more difficult for homeowners to catch up).

clear title may be uncertain on foreclosed properties. Those who purchase at such sales, investors and non-investors alike, must concern themselves with questions such as: Do I really own this property? How do I research possible title defects? Will I be able to refinance or resell this property in the future?

Second, trustee banks cannot resell their REO properties until the title question for each is resolved, at least in Massachusetts[293] These banks must either re-foreclose, if they can obtain the proper paperwork, or obtain insurance to cover any title defects. A major title insurer, First American Financial Corporation, will write title insurance in limited circumstances in Massachusetts where there was no recorded title to the mortgage at the time of the sale.[294]

Delayed foreclosures and backlogged REO inventory can drag down communities. Homeowners may vacate their homes to find other housing when a foreclosure appears imminent. Increased vacancies create problems in communities, including crime, blight, and declining property values.[295] Local governments share in the pain due to the increased costs in policing and securing vacant homes. These outcomes

[293] Paul McMorrow reported in the Boston Globe that his random sample of 30 foreclosure deeds from Chelsea, one of the cities hit hardest by foreclosures, recorded since the beginning of 2006 revealed 10 cases in which paperwork on file with the Registry of Deeds "raised the sort of chain-of-custody concerns at the heart of the Ibanez decision." Paul McMorrow, *supra* note 300. *See also* Patricia Hanratty, "Impact of Faulty Loan Documentation on Borrowers and Communities," (presentation at *Foreclosure Fiasco: Documentation Challenges and Policy Solutions,* Suffolk University Law School Oct. 14, 2011) (on file with author) (observing that poor documentation and loan administration in combination with unethical and sometimes fraudulent originations, exacerbate the foreclosure crisis by creating thousands of clouded titles and by making the resale of foreclosed property more difficult and time-consuming).

[294] First American Bulletin Re The Ibanez Decision (on file with author). First American will insure title in a post-foreclosure transfer if the sale was valid in all other respects and there exists a valid assignment of the mortgage in favor of the foreclosing party executed prior to the date of the first publication of notice of sale, and the assignment is recorded after the sale; if there exists a valid assignment of the mortgage executed before the recording of the certificate of entry for in the case of a foreclosure by entry and three years have passed since the recording of the certificate; or if fifteen years have passed from the date of the recording of the foreclosure deed when the certificate of entry is recorded prior to the date of the mortgage assignment.

[295] GAO Report, *supra* note 44, at 42.

may negatively affect the national economy if foreclosure delays and title uncertainty stalls the recovery of the U.S. housing prices in the long run. [296]

How likely is title to foreclosed properties in serious jeopardy? As a practical matter, former homeowners are unlikely to challenge defects in the sales in great numbers because they simply do not have the resources to do so. Necessary resources include the money to hire attorneys, the money to become current on the mortgage loan if they are in default, a sufficiently large pool of knowledgeable attorneys to bring the cases, and the desire and energy to fight for a home in which the former homeowner no longer lives.

Even if the former homeowner can marshal these assets, the legal obstacles in state law are daunting. The five states highlighted in this article present some of these obstacles. For example, Nevada limits the filing of post-sale challenges to within ninety days following the sale. Arizona's statutory scheme appears to require challengers to file the day before any sale. Delivery of the foreclosure deed creates a presumption of compliance in favor of the purchaser related to some types of challenges in Arizona and California. Moreover, California requires the homeowner to tender the arrearage in an action to cancel the foreclosure deed or plead the conditions showing that tender is inequitable particularly where the sale is void.

Rather than attempting to navigate the legal system, former homeowners may request a review of their foreclosure by the Office of the Comptroller of the Currency and file a claim for damages.[297] The OCC created this procedure after conducting examinations of the largest mortgage servicers and uncovering significant paperwork

[296] *Id.*
[297] OFFICE OF THE COMPTROLLER OF THE CURRENCY, INTERIM STATUS REPORT: FORECLOSURE-RELATED CONSENT ORDERS 7-10 (Nov. 2011), *available at* http://www.occ.treas.gov/news-issuances/news-releases/2011/nr-occ-2011-139a.pdf (last visited 11/29/11).

problems related to foreclosures.[298] It is unclear how well this process will work for former homeowners because reviews will not be completed and public reports released until well after the filing deadline of April 30, 2012. The fact that the agency established this remedy is significant because it recognizes that not all foreclosed homeowners were in default and not all foreclosures were lawful.

Two other interventions, one at the federal level and one at the state level, and a major new settlement should lessen the likelihood of title problems by reducing the number of foreclosure sales. At the federal level, President Obama launched the federal Home Affordable Modification Program in 2009 as a part of a broad, comprehensive strategy to get the economy and the housing market back on track.[299] This program allows homeowners to modify their monthly payments. HAMP has assisted far fewer homeowners than intended.[300] Nonetheless, based on data obtained from the Department of Treasury, the program resulted in the following number of active permanent loan modifications in the five states highlighted in this article as of May 31, 2011: Arizona—29,439; California—152,500; Georgia—22,153; Massachusetts—15,920; Nevada—16, 263.[301] To the extent that the homeowners remain current on their payments under these modification agreements, title concerns in these states will be eased.

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[298] *See* note 27, *supra.*

[299] This information appears at the official website of the program--Makinghomeaffordable.gov. Click on "FAQS" and then on "Homeowner FAQ."

[300] *Compare* Press Release, Departments of Treasury and Housing and Urban Development, Obama Administration Releases September Housing Scorecard (Oct. 5, 2011), *available at* http://www.makinghomeaffordable.gov/news/latest/Pages/Obama-Administration-Releases-September-Housing-Scorecard.aspx (reporting that only 816,000 homeowners received permanent HAMP modifications compared to the 1.6 million HAMP modifications initiated since 2009) *with* Murray Jacobson, *Obama's Foreclosure Program Slammed Anew for Ineffectiveness*, PBS NEWSHOUR, March 2, 2011, http://www.pbs.org/newshour/rundown/2011/03/obamas-foreclosure-prevention-program-has-bullet-on-its-back.html (reporting that the Administration projected the program would prevent 3 to 4 million foreclosures).

[301] HAMP Trial Period Starts Report by Servicer and State (May 31, 2011) (on file with author)..

State and local governments and judiciaries have created about thirty pre-foreclosure mediation or conference programs throughout the country.[302] Some of these regimes, such as Nevada's, require the production of the note and mortgage and all assignments, indorsements, and related documents. If the party initiating the foreclosure can produce these documents at the front end of the process, post-sale title concerns should diminish.

After a protracted negotiation, the state Attorneys General and several federal agencies reached a landmark settlement with the nation's largest loan servicers, including major banks.[303] The agreement focuses upon robo-signing and other servicing abuses, including shoddy foreclosure-related documentation and deceptive behavior during loan modification negotiations with homeowners.[304] Specifically, the five banks must allocate a total of $17 billion in assistance to borrowers who have the intent and ability to stay in their homes while making reasonable payments on their mortgage loans. At least 60 percent of the $17 billion must be earmarked to reduce the principal balance of mortgage loans for borrowers who are in default or at risk of default on their loan payments. Principal reductions should assist homeowners in states like Florida, Arizona, Nevada and California, who are saddled with negative equity in their homes and have no realistic ability of refinancing or

[302] GEOFFREY WALSH, NATIONAL CONSUMER LAW CTR., STATE AND LOCAL FORECLOSURE MEDIATION PROGRAMS: CAN THEY SAVE HOMES? (Sept. 2009), *available at* http://www.nclc.org/images/pdf/foreclosure_mortgage/mediation/report-state-mediation-programs.pdf (analyzing the strengths and weakness of twenty-five of these programs; GEOFFREY WALSH, NATIONAL CONSUMER LAW CTR., STATE AND LOCAL FORECLOSURE MEDIATION PROGRAMS: UPDATES AND DEVELOPMENTS (Jan. 2010), *available at* http://www.nclc.org/images/pdf/foreclosure_mortgage/mediation/report-state-mediation-programs-update.pdf (discussing several additional mediation programs created in 2009, including Nevada's).

[303] Press Release, National Association of Attorneys General, State Attorneys General, Feds Reach $25 Billion Settlement with Five Largest Mortgage Servicers on Foreclosure Wrongs (Feb. 9, 2012), http://naag.org/state-attorneys-general-feds-reach-25-billion-settlement-with-five-largest-mortgage-servicers-on-foreclosure-wrongs.php (last visited Feb. 19, 2012). The five servicers are: Ally/GMAC, Bank of America, Citi, JPMorgan Chase, and Wells Fargo.

[304] Executive Summary of Multistate/Federal Settlement of Foreclosure Misconduct Claims, http://www.atg.wa.gov/uploadedFiles/Home/About_the_Office/Cases/National_Mortgage_Settlement/National_Settlement_Executive_Summary.pdf (last visited Feb. 19, 2012).

selling their homes. Principal reductions will result in lower payments and offer homeowners a fair opportunity to preserve their homes.[305] The banks must also offer to refinance the loans of homeowners who are not delinquent on their payments but who cannot refinance to lower rates because of negative equity.

C. The Moral Hazard

"Moral hazard" refers to the situation where a party is insulated from the consequences of its actions and has little or no incentive to behave differently.[306] Related to the subprime mortgage crisis, some criticized giving bailout money to large investment firms because their risky activities brought them to the brink of financial collapse.[307] In the context of defective foreclosures, others fear that so-called "deadbeat" homeowners might get a free lunch (home) due to legal technicalities. There are at least two responses to this concern.

First, wrongful foreclosures do occur to homeowners who are current on their payments as evidenced by the fact that the OCC set up a procedure to review such cases and compensate harmed former homeowners. The number of foreclosed homeowners who were not in default or who were wrongfully denied a loan modification is unclear, though news reports have described the havoc these homeowners are experiencing.[308]

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[305] *Id.* at 2.
[306] Frank Ahrens, *'Moral Hazard': Why Risk Is Good*, WASH. POST., Mar. 19, 2008, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2008/03/18/AR2008031802873.html.
[307] *Id.*
[308] *E.g.*, Chris Arnold, *After Bank Mistakes, Homeowners Pick Up Pieces*, NPR NEWS (Nov. 14, 2011)), *available at* http://www.npr.org/2011/11/14/142300563/after-banks-mistakes-homeowners-pick-up-pieces (describing the ordeal of Christina King and her family).

Second, actual cases where the courts granted borrowers a "free house" are unusual.[309] Professor Porter argues this is an "urban myth" which serves the banks' political agenda in two ways: by encouraging legislators to complain about the moral hazards of holding the foreclosing party to the law and by pitting homeowners who are paying on their mortgages against those who cannot.[310] In dissecting the "free house" claim, she notes that halting a foreclosure or reversing a defective sale does not equate to a free house for the homeowner because there is still a valid loan note and a mortgage encumbering the property. "The free house is political handwringing, not legal reality."[311]

[309] In one reported case, the legal issue that led to the free house was unrelated to a defective foreclosure sale . Adam Belz, *Iowa loophole voids mortgage, gives couple a 'free house*', DES MOINE REGISTER, Mar. 17, 2011, at A1, *available at* 2011 WLNR 5252424 (reporting that Iowa law resulted in a void mortgage where both spouses did not sign the mortgage and legislative efforts to make sure this does not happen again). A second case presented an extreme situation. Greg Cergol, *Homeowner Handed 'Free' House*, NBC New York (March 8, 2010), *available at* http://www.nbcnewyork.com/news/local/Homeowner-Handed-Free-House-93167629.html (reporting that a judge stripped the mortgage after a homeowner's ten-year ordeal involving the lender's refusal to accept her payments, the lender going out of business, and the disappearance of the account and supporting records and mortgage; ruling occurred in the context of a suit filed by the homeowner to clear title to which the defendants defaulted). Finally, where a trial court canceled the note and stripped the mortgage because the foreclosing lender engaged in "inequitable, unconscionable, vexatious and opprobrious" conduct in the context of a foreclosure settlement conference, the appellate court reversed on the grounds that the trial court lacked authority to order this drastic remedy. IndyMac Bank F.S.B. v. Yono-Horoski, 912 N.Y.S.2d 239 (N.Y. App. Div. 2010)(reversing the decision reported in Kieran Crowley, *et al., Judge blasts bad bank, erases 525K debt*, N.Y. Post, Nov. 29, 2009, *available at* http://www.nypost.com/p/news/local/judge_kos_mortgage_to_slap_bank_28ZS1oW8Y58z6gu1AQbWMI (quoting the trial judge). In one case in Florida where the court dismissed the foreclosure due to faulty paperwork, the bank's attorney stated: "I don't expect the banks to give them a free house. I expect the bank to re-file the case. Even if the foreclosure was invalid, I can file under a different equitable theory and still take the property." Suevon Lee, *Judge Rules Bank Failed to Prove Ownership of Couples Mortgage*, OCALA STAR-BANNER, Jan. 17, 2011, *available at* 2011 WLNR 1007311.

[310] Katie Porter, *The Free House Myth*, CREDIT SLIPS BLOG, (July 18, 2011, 4:22 A.M), http://www.creditslips.org/creditslips/2011/07/the-free-house-myth.html..

[311] *Id.* "Just because a party lacked standing or statutory authority does not mean that there is not some party out there that does have the authority to foreclose. Nor does a win on standing mean that there cannot be action taken to give the initial foreclosing party the authority they need…Unless other problems exist, there is still a valid note that obligates the homeowner to pay money due and the there is still a mortgage encumbering the house. The homeowner does not get a free house. Rather, the homeowner just doesn't lose her house today to foreclosure."

IX. CONCLUSION

This article spotlights one facet of the evolving foreclosure crisis that has received less attention than others: authority to foreclose in non-judicial foreclosure states and the momentous repercussions when this authority is lacking. The sloppiness and hubris of parties to the securitization deals created and, in some cases, covered up the documentation problems chronicled in this article. [312]

To assess the likelihood of resulting property title troubles. I compared Massachusetts foreclosure law to that of four other non-judicial foreclosure states and opined as to the potential applicability of *Ibanez* and *Bevilacqua* in those states. I conclude that *Ibanez* will have little effect in Arizona but should be influential in the other states, to varying degrees. As a result, property title trouble is likely in Georgia and Nevada, and to a lesser extent in California.

This methodology can be replicated with the law of other non-judicial foreclosure states. For that reason, the article provides a roadmap for academics, practitioners, the financial services industry, title insurers, and others to assess the extent to which title to properties purchased at foreclosure sales or from lenders' REO inventories might be defective in other states. It should be clear from this article, though, that the legal landscape is not static. Cases are percolating through the courts. My assessment of the status of the *Ibanez* and *Bevilacqua* issues in the states highlighted here is based upon a

[312] Judge Boyko recognized one form of this hubris when he stated: "Plaintiff's, 'Judge, you just don't understand how things work,' argument reveals a condescending mindset and quasi-monopolistic system where financial institutions have traditionally controlled, and still control, the foreclosure process….[U]nchallenged by underfinanced opponents, the institutions worry less about jurisdictional requirements and more about maximizing returns….The institutions seem to adopt the attitude that since they have been doing this for so long, unchallenged, this practice equates with legal compliance. Finally, put to the test, their weak legal arguments compel the Court to stop them at the gate." *In re* Foreclosure Cases, 2007 WL 3232430, n. 3 (N.D. Ohio Oct. 31, 2007).

snapshot of a moment in time. Moreover, courts are beginning to focus on the issue of whether the foreclosing party must possess the right to enforce the loan note, not just the mortgage. The Massachusetts Supreme Judicial Court will shed light on this subject when it releases a decision in the *Eaton* case in the near future. Nonetheless, this guide should be helpful to evaluate how legal developments fit into the current state of the law.

The decisions in *Ibanez* and *Bevilacqua* are not remarkable in the sense that the court applied well-established law to the facts before it and ruled in conformity with that law. Justice Cordy underscored this point in his concurrence in *Ibanez*: "[W]hat is surprising about these cases is not the statement of principles articulated by the court regarding title law and the law of foreclosure in Massachusetts, but rather the utter carelessness with which the plaintiff banks documented title to their assets."[313]

[313] *Ibanez*, 458 Mass. at 655; 941 N.E.2d at 55. Indeed, other courts, both state and federal, have ruled that notes and mortgages were not properly transferred through the securitization players, rendering the trustee impotent to foreclose at the time it took that action. See discussion in notes 17-19, *supra*. The *Ibanez* opinion appears to be one of the most well-known decisions, however. Peter Pitegoff & Laura Underkiller, American Constitution Society for Law and Policy, AN EVOLVING FORECLOSURE LANDSCAPE: THE *IBANEZ* CASE AND BEYOND 1 (Oct. 2011), *available at* http://www.acslaw.org/sites/default/files/Pitegoff_Underkuffler_-_An_Evolving_Foreclosure_Landscape.pdf (last visited 10/24/11).